

STATEMENT OF JASON S. BERMAN  
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ASSOCIATION OF AMERICA

BEFORE THE  
SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS  
SENATE COMMITTEE ON THE JUDICIARY

S. 1623: THE AUDIO HOME RECORDING ACT OF 1991

October 29, 1991

Mr. Chairman and members of the Subcommittee, my name is Jason S. Berman, and I am the President of the Recording Industry Association of America. RIAA is the trade organization representing the interests of American record companies. Our member companies create, manufacture and distribute over 95 percent of the prerecorded music sold in the United States and nearly half of all sound recordings created worldwide.

I am pleased to have the opportunity to appear before you today with my colleagues on the subject of digital audio recording technology and to urge your support for S. 1623, The Audio Home Recording Act of 1991. As you already know or certainly will surmise from the witnesses seated here with me, Gary Shapiro of the Electronic Industries Association and Ed Murphy of the National Music Publishers Association, the bill reflects negotiation and compromise among constituencies who have not always been on the same side of the home taping issue.

I've always viewed our past feuds with a sense of irony because I don't know of two more interdependent industries than the consumer electronics and music industries. Without music, the consumer electronics industry's products would be no more than boxes of chips and circuits. Without their equipment, the public would

have no way to enjoy our music. That's what brings us here today -- our mutual interest in making sure that our customers can have access to music through the latest technologies.

THE HOME TAPING PROBLEM AND DIGITAL AUDIO RECORDING

Mr. Chairman, for many years, the music industry has been gravely concerned about what we believe to be the devastating impact of home taping on the economics of our industry. The harmful effects of home taping hit hardest those on the front lines of the music industry -- the musicians, producers, record retailers, songwriters, artists, music publishers and record companies -- whose livelihoods are directly dependent on sales of prerecorded music. The impact is acutely felt by record companies because record sales are virtually the companies' only source of income and because of the substantial investment they must make in each record without knowing in advance, of course, whether it will soar to the top of the charts or languish, unsold, in the retailers' racks or in our warehouses. As you know, Mr. Chairman, only 15 percent of all recordings released make back their costs, thus putting enormous pressure on the "hits" to subsidize new artist development. It is the hits, of course, that are most commonly taped.

It is our view that home taping presently displaces about one-third of the industry's sales. A 1989 report by the Office of Technology Assessment concluded that one billion musical pieces are copied every year in this country. Although there are many interpretations of the results of that study, even

caused by home taping calculate the possible lost revenues at nearly \$1 billion per year. By any measure, the problem is bad enough with existing analog tape recording technology. About five years ago, however, there emerged a new technology, digital audio tape ("DAT"), that threatened to exacerbate the home taping problem unless Congress acted.

DAT is, in essence, the tape version of compact disc ("CD") technology. It is the first wave of digital audio recording technology -- to be closely followed by digital compact cassettes ("DCC"), mini-disk technology ("MD") and recordable compact disc ("CD-R") machines and other formats that, quite possibly, haven't even been conceived of yet. All of these devices record and play digitally. The use of digital codes means that the musical sounds you hear when you play a digitally recorded work are remarkably pure and noise-free -- no static, no distortion.

The particular potential threat that digital audio recording technology poses from the music industry's perspective is that it permits digital-to-digital home copying -- the transfer of digital codes from a digital original such as a CD onto a digital audio tape. The result will be a new copy -- a perfect clone -- with the same brilliant sound quality as the original. And every subsequent copy of that copy, whether the first, the hundredth, or the thousandth, will be just as perfect as the prerecorded original.

This potential for making perfect clones from an original and for making exact copies of those perfect clones is unique to digital technology. In contrast, the sound quality of copies made on the analog audio

cassette recorders that most people have in their homes today quickly degrades from one generation to the next so that analog serial copying has a built-in quality limitation that discourages it.

Prior to the time we became aware of the imminence of DAT technology, the music industry had, for many years, been urging Congress to enact a royalty bill that would compensate for revenue losses due to home taping. The opposition of the consumer electronic manufacturers, at that point, proved formidable. We moved on to explore the possibility of technological solutions. We did not find any solution that could be implemented unilaterally by the music industry, so we turned to Congress for legislation that would require the consumer electronics manufacturers to place certain circuitry in their DAT machines. Once again, our efforts were stymied by a lack of consensus among the affected industries on the need to do something about the home taping problem.

By that time it had become clear that the issue had reached a stalemate: The debate over the legal status of home taping had introduced sufficient uncertainty into the marketplace to have discouraged consumer electronics manufacturers from bringing their new products to consumers. The impasse was keeping new technology out of the hands of consumers and some record companies indicated that they were reluctant to introduce their works in digital formats where these same machines could be used to destroy their market. Both sides began hearing from our friends in Congress urging us to attempt to work out a legislative solution cooperatively -- to suggest to Congress a compromise

that would address the legitimate concerns of the stakeholders -- and, most importantly, bring the benefits of these digital audio technologies to the public. Both sides realized the urgency of acting.

At that point, in 1988, representatives of the recording industry sat down to talk with representatives of the consumer electronics industry to see whether there was sufficient common ground between us to reach a mutually satisfactory solution. For more than a year, we talked through our respective concerns and our mutual interests. That process culminated in the so-called Athens Agreement in June of 1989 in which we and our one-time opponents agreed to work together for passage of legislation that would address the problem of digital serial copying on DAT and, importantly, to continue to talk about the problem of home taping and the challenges presented by future technologies as they evolved. This was the first step in a process of growing cooperation between the two industries.

Mr. Chairman, not everyone concurred that our agreement jointly to advance Serial Copy Management System ("SCMS") legislation, last year's S. 2358, represented substantial progress, but it was the right first step. Some, including our partners in the songwriting and music publishing community and a number of our friends in Congress, felt that the agreement did not go far enough, for two reasons: First, it addressed only DATs, rather than digital audio recording technology generically. Second, it did not provide for royalties.

It became clear, particularly as the new DCC technology was revealed during consideration of that

legislation, that a step-by-step approach to legislation was not practical for the marketplace or for Congress. So we joined hands with our colleagues in the music industry and sat down once again with our new friends in the consumer electronics industry. As you can see today, that exercise was successful.

The bill that you are considering today establishes a royalty system that will help offset financial losses due to home taping. The royalties will be distributed through the Copyright Office and the Copyright Royalty Tribunal to the various constituencies affected by home taping including the artists, songwriters and backup musicians and vocalists, record companies and music publishers.

The royalty is a modest one: two percent of the wholesale price or customs value of nonprofessional digital audio recording equipment (with a cap generally of \$8 per unit and a floor of \$1 per unit) and three percent of the wholesale price or customs value of blank digital audio recording media, such as digital audio tape. Analog recording devices and analog tape would not be affected by the royalty.

The bill also requires nonprofessional digital audio recording equipment to contain Serial Copy Management System ("SCMS") circuitry that would prevent the making of second and subsequent generation digital copies of copyrighted music -- no digital copies of digital copies. We need the SCMS provision because the royalties provided for in the bill will not even approach what we believe to be our actual financial losses -- and, of course, would do nothing to prohibit

industry. SCMS defuses this most uniquely dangerous threat posed by digital audio recording devices.

THE BENEFITS FLOWING FROM THE COMPROMISE

Mr. Chairman, enactment of this legislation will benefit all of the affected constituencies. Others will speak today about how the bill will affect their own industries. I will confine most of my remarks to the benefits that we see accruing to the music industry, but first, a few words about the benefits to the music industry's customers -- consumers in general -- are in order.

S. 1623 will eliminate the legal uncertainty about home audio taping that has clouded the marketplace. The bill will bar copyright infringement lawsuits for both analog and digital audio home recording by consumers, and for the sale of audio recording equipment by manufacturers and importers. It thus will allow consumer electronics manufacturers to introduce new audio technology into the market without fear of infringement lawsuits, and it will help encourage the creation and production of new music by providing creators and copyright owners of prerecorded music modest compensation for the digital audio copying of their music.

In short, the legislation will facilitate access by consumers to new generations of digital audio technologies and music. It ends the impasse between the music industry and the consumer electronics industry. A compromise is in everybody's interest, most especially the consumer interest.

The American music industry stands to benefit in numerous ways from passage of this legislation.

First and foremost, S. 1623 acknowledges the seriousness of the home taping issue and addresses it in a comprehensive way. The royalty combined with the SCMS approach goes right to the heart of the two basic problems -- loss of revenues and digital cloning. The royalty system will not completely offset losses due to home taping, but it helps.

Further, S. 1623 is a "generic" solution in that it applies across the board to all digital audio recording technologies. Congress will not be in the position after enacting this bill, as it might have been with prior bills, of having to enact subsequent bills for new forms of digital audio technologies.

Moreover, enactment of this legislation will ratify the whole process of negotiation and compromise that Congress encouraged us to undertake. Our common support of this bill is a major accomplishment, one which would not have occurred without your support and leadership, Mr. Chairman.

#### THE BROAD SUPPORT FOR S. 1623

I want to emphasize, Mr. Chairman, the broad support enjoyed by S. 1623. It is supported by the organizations represented on this panel and by many others including the National Consumers League, the Home Recording Rights Coalition, the American Federation of Musicians, the American Federation of Television and Radio Artists, the National Association of Recording Merchandisers, which represents the retailers, and the Department of Professional Employees of the AFL-CIO. A

complete list of music industry organizations and others that support the legislation is attached to this statement. The bill also enjoys bipartisan support among your colleagues, Mr. Chairman, as does its companion measure in the other chamber. A summary of the proposed legislation is also attached.

CONCLUSION: THE NEED FOR ENACTMENT

Congress has, in S. 1623, a unique opportunity to protect our musical heritage -- and our musical future -- by preserving creative incentives within the framework of new technologies.

Enactment of S. 1623 will bring U.S. law into line with that of over a dozen other countries such as France, Germany and Australia, where prerecorded music is a major consumer product, and where royalty systems are already in place. As the world's leading producer of prerecorded music, it is fitting that the U.S. join the ranks of those countries affording such protection to prerecorded music. Indeed, the principle of national treatment embodied in this bill will enhance U.S. efforts to share in the collected royalties from overseas home copying pools.

For all of these reasons, we urge your support for S. 1623.

Thank you, Mr. Chairman and members of the Subcommittee. I would be happy to answer any questions you may have.

**Coalition members as of October 28, 1991**

*The following groups have pledged their support of S. 1623, The Audio Home Recording Act of 1991*

Dept. of Professional Employees-AFL-CIO  
American Federation of Musicians  
American Federation Television and Radio Artists  
American Society of Composers, Authors and Publishers  
Broadcast Music, Inc.  
Car Audio Specialists Association  
Consumer Recording Rights Committee  
Electronic Industries Association  
Home Recording Rights Coalition  
International Society of Certified Electronics Technicians  
National Association of Independent Record Distributors  
& Manufacturers  
National Academy of Recording Arts & Sciences  
National Association of Retail Dealers of America  
National Association of Recording Merchandisers  
National Academy of Songwriters  
National Consumers League  
National Electronic Sales & Services Dealers Association  
National Music Council  
National Music Publishers Association  
National Retail Federation  
Nashville Songwriters Association International  
Professional Audio Retailers Association  
Recording Industry Association of America  
SESAC  
Songwriters Guild of America