



The Audio Home Recording Act

Barbara Fox Kraut

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LEGISLATIVE UPDATES

The Audio Home Recording Act

Introduction

On August 1, 1991, Senator Dennis DeConcini (D-Ariz.), Chairman of the Senate Judiciary Subcommittee on Patents, Copyrights, and Trademarks, introduced the Audio Home Recording Act in the Senate.¹ The identical bill was presented in the House of Representatives on August 2, 1991 by Representative Jack Brooks (D-Texas).² The proposed legislation adds a new chapter to the Copyright Act (Title 17). The most significant provision of the bill explicitly prohibits infringement actions for home audio taping of copyrighted sound recordings; thus removing the legal cloud over home taping of sound recordings.³ Second, the Act mandates that all digital audio tape recorders imported for sale or manufactured in the United States for non-professional use be equipped with the Serial Copy Management System ("SCMS") to prevent the making of duplicates of first generation copies.⁴ Finally, the bill subjects the sale of digital audio tape ("DAT") recorders and media to a royalty charge to be distributed to the owners of the copyright in the musical work and the copyright in the sound recording.⁵

The Audio Home Recording Act of 1991 represents an historic compromise between audio hardware and music industries, marking the end of a ten year stalemate over the import of digital audio technology which threatens record companies and music copyright owners with an increase in home taping. The bill is a "win-win-win" solution. It benefits consumers, who finally will have access to new digital recording technologies, the music industry, which will receive compensation from the sale of digital audio recorders and tapes, and the audio hardware industries, which will be able to import digital audio recorders without fear of legal recourse.⁶

This update first will explore the background of the Audio Home Recording Act; specifically, the 10 year controversy surrounding digital audio technology and the congressional response to the problem. Next, the update will outline the substance of the bill. Finally, the conclusion will discuss the effect of

the bill on consumers, the audio hardware industry, and the music industry.

Background

The music industry has long voiced concern over the home taping of copyrighted sound recordings.⁷ Although the Supreme Court held in *Sony Corp. of America v. Universal City Studios* that home video taping of television broadcasts is not copyright infringement,⁸ the case left the legality of home audio taping unresolved. The most recent technological advance, digital audio tape recorders and media, which bring studio-quality recording ability into the consumer's home,⁹ has sparked much debate over the legality of home taping and worry about the effects of home taping on the pocketbooks of record companies and music copyright owners. Indeed, the music industry believes it loses over \$1 billion a year in sales because of home taping in the United States.¹⁰ If DAT recorders are sold to consumers without some protection against copying, the music industry fears its financial loss from home taping will increase significantly. Because of the fear, the music industry has successfully stalled the importation, manufacture, distribution, and sale of DAT recorders and media for nonprofessional use in the United States.

The music industry's early attempts to convince audio hardware manufacturers to voluntarily install copy preventing mechanisms in DAT recorders failed.¹¹ In addition, legislation proposed in 1987 to prohibit DAT recorders in the United States was not enacted.¹² In 1989, legislation was introduced proposing that all DAT recorders contain SCMS.¹³ However, witnesses at a hearing before the Senate Communications Subcommittee testified that the SCMS would not adequately protect copyright owners.¹⁴ In addition, the songwriters and publishers who testified advocated a royalty system to compensate for losses from home taping, and engineers maintained that the SCMS could be easily circumvented.¹⁵ As a result, the Digital Audio Tape Recorder Act of 1990 never gained the support needed to move through Congress.

The hurdle to United States importation and sale of DAT recorders seemed to be overcome when members of the audio hardware industry agreed to equip DAT recorders with the SCMS while members of the recording industry agreed not to further

oppose the importation, distribution, and sale of DAT recorders in the United States.¹⁶ Sony Corporation began sale in the United States of SCMS equipped DAT recorders in June of 1990.¹⁷

Yet, on July 9, 1990, a class action suit was filed by a group of songwriters and publishers in the U.S. District Court for the Southern District of New York against Sony Corporation and its U.S. affiliates.¹⁸ The class of 40,000 copyright owners, fronted by lyricist Sammy Cahn, claimed that Sony Corporation was contributorily infringing copyrights since “the only plausible, overwhelmingly predominant use for DAT recorders is for infringing taping activities.”¹⁹ The plaintiffs sought an injunction on the further importation and sale of DAT recorders in the United States. This suit was settled, however, on July 11, 1991 when the Electronics Industries Association, the Recording Industry Association of America, and the Copyright Coalition of the National Music Publishers Association announced that they had reached a compromise agreement ending their long dispute.²⁰ The compromise agreement is reflected in the Audio Home Recording Act of 1991.²¹

Substance of the Legislation

The Audio Home Recording Act of 1991 would add a new chapter 10 to the Copyright Act. It consists of four subchapters: (A) Definitions, Prohibition of Certain Infringement Actions, and Rules of Construction; (B) Royalty Payments; (C) The Serial Copy Management System; and (D) Remedies.²² The most significant provisions in these subchapters will be discussed.

A. Definitions

Section 1001 of the Audio Home Recording Act lists definitions of relevant words contained in the Act. The most significant parts of section 1001 are the definitions of “digital audio interface device,” “digital audio recording device,” and “digital audio recording medium.” In each of these definitions the Act states that it is a machine or material object “now known or later developed.”²³ This means that the Act will apply not only to digital audio devices in current use, but to those which may be invented in the future. Therefore, the Act will not have to be amended each time there is a technological advancement in the area of digital audio devices.

Another significant aspect of these definitions is what they exclude. The definitions of “digital audio interface device” and “digital audio recording device” explicitly exclude professional models.²⁴ A “digital audio recording medium” does not include an object that consumers use to make copies of

audiovisual works, nonmusical literary works, computer programs, or databases.²⁵ Therefore, the Audio Home Recording Act only applies to digital audio recorders or items used nonprofessionally to record audio works.

B. Prohibitions On Certain Infringement Actions

Section 1002(a) of the Audio Home Recording Act prohibits an infringement action to be brought based on the “manufacture, importation, or distribution of a digital audio recording device or analog audio recording medium” if it is not for direct or indirect commercial advantage.²⁶ For example, “the copying of a phonorecord by a consumer for private, noncommercial use is not for direct or indirect commercial advantage, and is therefore not actionable.”²⁷

Therefore, this section puts to rest the question of whether home audio taping for private use is copyright infringement by specifically prohibiting infringement actions based on private home taping. In addition, section 1002(1) protects manufacturers, importers, and distributors of DAT recorders from suits claiming copyright infringement for contributing to home taping with DAT machines.

C. Royalty Payments

Subchapter B of the Act involves royalty payments and lists specific notice, accounting, and payment procedures which importers, manufacturers, and distributors of DAT devices must follow. Section 1011(a) prohibits a person from importing, manufacturing, or selling any DAT device in the United States unless the person complies with the royalty procedures specified in subchapter B.²⁸

Generally, any importer or distributor of DAT devices must file a notice and a quarterly and annual statement of account with the Register of Copyrights.²⁹ The statements of account are reviewed by independent certified public accountants and may be reviewed independently by interested copyright parties.³⁰

Section 1012 enumerates the method of calculating the royalties. For each DAT device imported into and distributed in the United States or manufactured and distributed in the United States, the royalty is 2% of the transfer price.³¹ Moreover, the royalty maximum is \$8 per device, but if it is a physically integrated unit with more than one DAT device, the royalty maximum is \$12 per unit.³² The royalty maximum may be increased during the sixth year after the Act goes into effect upon petition to the Copyright Tribunal.³³ For each DAT medium imported into and distributed in the

United States or manufactured and distributed in the United States, the royalty is 3% of the transfer price.³⁴

All royalty payments are deposited with the Register of Copyrights, which, after deducting expenses, deposits the money with the United States Treasury.³⁵ The royalty payments are then distributed to any interested copyright party whose musical work or sound recording has been embodied in phonorecords and distributed to the public.³⁶

D. The Serial Copy Management System

Section 1021(a) prohibits the "importation, manufacture, and distribution of any digital audio recording device or any digital audio interfact device that does not conform to the standards and specifications to implement the Serial Copy Management System that are set forth in the technical reference document."³⁷ In other words, no nonprofessional DAT device can be made, imported, or sold in the United States which does not contain the Serial Copy Management System. In addition, section 1021(b) prohibits anyone from making or importing a device to bypass the Serial Copy Management System.³⁸

E. Remedies

Subchapter D of the Audio Home Recording Act provides civil remedies, statutory damages, or binding arbitration for violations of the Act. Under section 1031(a), copyright parties and DAT manufacturers harmed by a violation of the Act or the United States Attorney General may bring a civil action in a district court.³⁹ The court may issue a preliminary or permanent injunction, award damages or costs, and grant any reasonable equitable relief.⁴⁰ When "the nonprevailing party has not proceeded in good faith" the nonprevailing party may have to pay reasonable attorney fees to the prevailing party.⁴¹

When the defendant has violated section 1011 by not paying or paying too few royalties, the defendant must pay the royalties due plus interest.⁴² Moreover, the court must award statutory damages in an amount that the court deems just.⁴³ When the defendant has acted wilfully, statutory damages will be increased by a specified amount.⁴⁴

When the defendant has violated section 1021 by importing, manufacturing, or distributing a DAT device without the Serial Copy Management System or by attempting to bypass the System, the defendant must pay actual and statutory damages.⁴⁵ In the case of a wilfull violation, the defendant may have to pay not more than \$5,000,000 of additional damages.⁴⁶ On the other hand, if the

court finds that the defendant acted innocently, the court may reduce the total amount of damages.⁴⁷ Finally, the court may order the remedial modification of destruction of any DAT devices that do not comply with section 1021 and are in the defendant's custody or control.⁴⁸

Additionally, under section 1032(a), if there is a dispute between a copyright party and a manufacturing party, it may be resolved by binding arbitration if the parties mutually agree.

Although the Act provides for varied and extensive remedies, section 1031(e) limits civil actions and remedies. Section 1031(e)(1) states that "no more than one action shall be brought against any party and no more than one award of statutory damages . . . shall be permitted" for a violation of section 1011 involving the same DAT device or for a violation of section 1021 involving DAT devices from the same model.⁴⁹ Parties are permitted to intervene in an action within 30 days of publication of notice of the suit in the Federal Register.⁵⁰ Each complaining party may recover actual damages for a violation of the Serial Copy Management System. However, if more than one party elects to recover actual damages those damages will be limited to a single award of the defendant's profits.⁵¹

Conclusion

The Audio Home Recording Act will enable the audio hardware industry to import, manufacture, and distribute DAT recorders and tape without the threat of legal recourse. It will also compensate copyright owners, through a royalty system, for the home taping that will undoubtedly take place with the DAT recorders. Most significantly, it will give United States consumers access to current and future DAT technology and allow private home taping. □

Barbara Fox Kraut

1. S. 1623, 102nd Cong., 1st Sess. (Aug. 1, 1991).
2. H.R. 3204, 102nd Cong., 1st Sess. (Aug. 2, 1991).
3. S. 1623 & H.R. 3204, Subchapter A, § 1002(a).
4. *Id.* at Subchapter C, § 1021.
5. *Id.* at Subchapter B, § 1011.
6. 137 Cong. Rec. 11,845-11,846 (daily ed. Aug. 1, 1991)(statement of Sen. DeConcini); *See also, Witnesses Hail Compromise Bill on Audio Home Taping, DAT Royalties*, BNA DAILY REP. FOR EXECUTIVES, Oct. 30, 1991, at A-9 (hereinafter *Witnesses Hail Compromise Bill*)(reporting on testimony before the Senate Judiciary Subcommittee on Patents, Copyrights and Trademarks).
7. Comment, *Digital Audio Tape: New Fuel Stokes the Smoldering Home Taping Fire*, 37 UCLA L. REV. 733, 734 (1990). Ever since the Sound Recording Act of 1971 was passed providing copyright protection to sound recordings for the first time, home taping has been an issue. *Id.*