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THE DIGITAL AUDIO TAPE RECORDER ACT OF 1990

HON. ROBERT W. KASTENMEIER

OF WISCONSIN

IN THE HOUSE OF REPRESENTATIVES

Thursday, February 22, 1990

Mr. KASTENMEIER. Mr. Speaker, the Digital Audio Tape Recorder Act of 1990, which is being introduced today, has many significant implications for the copyright laws. The Judiciary Committee Subcommittee on Courts, Intellectual Property, and the Administration of Justice, which I chair, has jurisdiction over these laws. I speak here today to express my concern that because of the way the bill has been drafted, it will apparently not be referred to the Committee on the Judiciary for consideration of those copyright issues.

Copyright law represents a balance between the rights of creators and the interests of the public. This bill squarely and significantly implicates that balance, and in particular the issue of home-taping, which has been a controversial issue before my subcommittee for many years.

On the one hand, a digital audio tape [DAT] machine provides considerable benefits for consumers. It will enable them to make perfect copies of sound recordings that are in digital form. The Digital Audio Tape Recorder Act will, in certain important respects, limit the ability of consumers to use DAT machines to copy.

On the other hand, DAT technology poses serious concerns for holders of the copyrights in the underlying works. The recording industry has argued that consumers who are able to make perfect copies will no longer be interested in buying the underlying works from retail outlets; they will simply obtain them from other sources and copy them. The result will be a decrease in purchases, in financial rewards to creators, and in the ability of the copyright holders to financially support the creation of new works.

Hardware manufacturers have disputed this argument, contending that home-taping has stimulated the interest of music lovers, and has motivated them to buy more music than they otherwise would have. Studies commissioned by these parties have invariably contradicted each other. This situation led Senator DECONCINI, the chairman of the Senate Judiciary Subcommittee on Patents, Copyrights, and Trademarks, and me to request the Office of Technology Assessment to conduct its own study. That study, released last October, concluded that while the ultimate impact of home-taping on consumers and the affected industries is difficult to determine, the costs to the public of a ban might outweigh any offsetting losses to the music industry.

I am always concerned about the impact of new technology on the copyright laws, and about the availability of that technology to consumers. The Constitution authorizes the enactment of copyright laws that encourage the creative process by granting creators a limited monopoly. The ultimate goal is to promote "the progress of science and useful arts," and thereby ensure that the American public has access to these creative works. New technologies may enhance consumer access, or they may threaten to limit it. The Congress must review these innovations and, when necessary, must act to fulfill its constitutional mandate.

The proposed bill requires that a "serial copy management system" [SCMS] be incorporated into DAT machines. This system would permit consumers to make digital-to-digital first-generation copies of prerecorded music, but would prevent them from making digital-to-digital subsequent-generation copies of the copies. Certain exceptions are created, such as for noncopyrighted materials, and first and second-generation digital copying of analog material is permitted. Analog copying as a whole is not covered by the bill.

Last Congress, the recording industry supported legislation that would have required a copy-code scanner to be inserted into all digital audio tape machines imported into this country. The purpose of the scanner was to prevent taping of copyrighted music under certain circumstances. This was a controversial measure, with some opponents contending that the system would degrade the quality of the underlying music, would prevent taping when it should permit it, and would permit it when it should have precluded it. Senator DECONCINI and I requested the National Bureau of Standards to test the copy-code scanner; NBS concluded that these concerns were legitimate and that the system in fact suffered from these defects. I opposed the legislation, which died at the end of the 100th Congress.

Despite the failure of the copy-code scanner proposal, I strongly encouraged the parties, both proponents and opponents, to try to negotiate their differences. In Athens, Greece, last spring and summer, representatives of the software and hardware manufacturers gathered for extensive negotiations that resulted in this bill. For the first time that I can recall, they are united in their strong support for legislation on the issue of taping of sound recordings. They deserve praise for their efforts to negotiate a solution to what seemed an intractable problem.

Even so, the proposal is not without controversy. SCMS is a purely technical solution. It does not address the issue of royalties for the copying of copyrighted material. Music publishers and songwriters, therefore, strongly oppose it. They argue that a technical solution is insufficient to protect their rights, and that any proposal must include a provision for royalties. In addition, they argue that the SCMS system is inadequate because any losses from home-taping stem from the very first-generation taping that SCMS permits, and not from the subsequent generation taping that it limits.

My subcommittee has considered the debate over royalties for many years. It is, both intellectually and politically, a difficult issue, and supporters of the idea have to date not been successful in convincing the Congress of its merits. In particular, consumers who would have to pay those royalties have objected strenuously.

I do not know whether the political tenor on the issue of royalties has changed and therefore express no opinion about it. I certainly understand the arguments of the opponents of this legislation, and believe that they must be thoroughly aired in hearings before the Judiciary Committee, which has the experience and expertise to consider these issues.

In addition, I have my own questions about the specifics of the SCMS proposal. For example, as I have noted, I have always had concerns about technical limitations on new technologies, supporting full access by consumers to those innovations. In addition, the SCMS agreement is intended to be worldwide in scope. The Congress must therefore make sure that its actions are consistent with those of its counterparts elsewhere in the world. I am aware, however, that the proposal is not without strong dissenters in Europe, and that royalty proposals are gaining strength there. Third, the bill incorporates by reference a lengthy technical document, prepared by the parties supporting the legislation. It does not set forth all required conduct within the statute itself. This raises delegation of authority, notice, and technical drafting questions. Finally, the Congress should consider whether it

makes sense to enact legislation on a technology-by-technology basis, or whether a comprehensive approach to the issue of home-taping is more appropriate.

I also believe, however, that the parties to this agreement should be rewarded for their efforts. This proposal deserves consideration by the Congress. I have no doubt that the committee or committees that will receive referral will do an excellent job of considering the issues within their jurisdiction. I believe, however, that consideration of this bill is incomplete without a full and expert review of the copyright issues it raises.