101ST CONGRESS
2D SESSION

S. 2358

Entitled the "Digital Audio Tape Recorder Act of 1990."

IN THE SENATE OF THE UNITED STATES

MARCH 28 (legislative day, JANUARY 23), 1990

Mr. DECONCINI introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

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A BILL

Entitled the "Digital Audio Tape Recorder Act of 1990."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be referred to as the "Digital Audio Tape Recorder Act of 1990".

SEC. 2. FINDINGS.

(a) FINDINGS.—The Congress finds that—

(1) the Congress has been expressly granted the power under article 1, section 8, of the Constitution to promote the progress of science and the useful arts;

(2) representatives of the consumer electronics and recording industries have jointly studied possible

recommendations to governments about the functions of digital audio tape (hereinafter in this section referred to as "DAT") recorders;

(3) taking into account concerns raised in the worldwide music community regarding copyright protection, the industry representatives announced a worldwide agreement in 1989 to make joint recommendations to governments, including the United States Government, with respect to DAT technology;

(4) the industry representatives agreed to recommend for government implementation worldwide the serial copy management system (hereinafter in this section referred to as "SCMS"), a technical system for controlling so-called "serial" copying on DAT recorders;

(5) under SCMS, the circuitry which controls the functions of a DAT recorder will be programmed to read certain coding information accompanying the source material and, based on the particular combination of codes it reads, will not prevent unrestricted copying, will not prevent copying but label the copy with a code to restrict further digital-to-digital copying, or will disallow such copying;

(6) under SCMS, a DAT recorder will not be prevented from making first-generation digital-to-digital

copies of original copyright-protected prerecorded music and other material from compact discs, prerecorded DAT cassettes, digital broadcasts, and other digital sources entering through a digital input, but will be prevented from making second-generation digital-to-digital copies of the copies;

(7) under SCMS, in recognition of the fact that a DAT recorder at present will be unable to determine whether original prerecorded music or other material entering through an analog input has been coded for copyright protection, a DAT recorder will not be prevented from making first-generation and second-generation digital-to-digital copies of the source material, but will be prevented from making third-generation digital-to-digital copies of the second-generation copies;

(8). in the event that technological developments permit the circuitry of a DAT recorder to identify copyrighted material entering through an analog input, equivalent limitations on digital copies of copies should apply, but there will be no limitation on serial digital copying of analog material not coded for copyright protection;

(9) home taping on conventional analog tape recorders will not be subject to SCMS and thus will remain unaffected;

(10) the benefits of implementing SCMS for DAT recorders will be significant for consumers, the recording industry, the consumer electronics industry, and others in the United States;

(11) in furtherance of the realization of those benefits and to encourage other governments to act accordingly, this Act implements SCMS for DAT recorders and provides mechanisms for regulatory implementation of solutions with respect to future issues and technological developments;

(12) representatives of the consumer electronics and music industries are expected to discuss copyright issues resulting from new technologies, including recordable and erasable compact disc players, and to study possible approaches, and to make recommendations to governments, including the United States Government, for applying SCMS or another system with greater copying restrictions than SCMS to these new technologies;

(13) this Act does not address or affect the legality of private home copying under the copyright laws;

(14) the enactment of this Act shall not prejudice consideration of whether or not royalties should be levied for private home copying of copyrighted music; and

(15) the enactment of this Act will promote the progress of science and the useful arts by encouraging the development of new technologically advanced products while providing copyright-related protection for creators of artistic works.

SEC. 3. DIGITAL AUDIO TAPE RECORDERS AND PHONORECORDS.

(a) PROHIBITION ON MANUFACTURE OR DISTRIBUTION.—(1) No person shall manufacture or distribute any digital audio tape recorder or digital audio interface device which does not conform to the standards and specifications to implement the serial copy management system that are either—

(A) set forth in the technical reference document; or

(B) established under an order by the Secretary of Commerce under section 4(b)(1) or (2).

(2) If the Secretary of Commerce approves standards and specifications under section 4(b)(3), then no person shall manufacture or distribute any digital audio tape recorder or digital audio interface device which does not conform to such standards and specifications.

(b) PROHIBITION ON CIRCUMVENTION OF SERIAL COPY MANAGEMENT SYSTEM.—No person shall manufacture or distribute any device, or offer or perform any service,

the primary purpose or effect of which is to avoid, bypass, remove, deactivate, or otherwise circumvent any program or circuit which implements, in whole or in part, the serial copy management system in a digital audio tape recorder or digital audio interface device.

(c) EXCEPTION FOR PROFESSIONAL MODELS.—(1) Notwithstanding subsections (a) and (b), the requirements of those subsections shall not apply to a professional model digital audio tape recorder. For purposes of this Act, the term "professional model digital audio tape recorder" means a digital audio tape recorder—

(A) which is capable of sending a digital audio interface signal in which the channel status block flag is set as a "professional" interface, in accordance with the standards and specifications set forth in the technical reference document or established under an order issued by the Secretary of Commerce under section 4;

(B) which is clearly, prominently, and permanently marked with the letter "P" or the word "professional" on the outside of its packaging, and in all advertising, promotional, and descriptive literature, with respect to the recorder, that is available or provided to persons other than the manufacturer, its employees, or its agents; and

(C) which is designed, manufactured, marketed, and intended for use by recording professionals, in the ordinary course of a lawful business.

(2) The capability in a digital audio tape recorder described in paragraph (1)(A), or the marking of a digital audio tape recorder described in paragraph (1)(B), shall not create any presumption that the recorder is a professional model digital audio tape recorder.

(3) In determining whether a digital audio tape recorder meets the requirements of paragraph (1)(C), factors to be considered shall include—

(A) whether it has features used by recording professionals in the course of a lawful business, including features such as—

(i) a data collection and reporting system of error codes during recording and playback;

(ii) a record and reproduce format providing "read after write" and "read after read";

(iii) a time code reader and generator conforming to the standards set by the Society of Motion Picture and Television Engineers for such readers and generators; and

(iv) a professional input/output interface, both digital and analog, conforming to standards

set by audio engineering organizations for connectors, signaling formats, levels, and impedances;

except that the presence or absence of features referred to in this subparagraph shall not create any presumption as to whether or not a digital audio tape recorder is a professional model digital audio tape recorder;

(B) the nature of the promotional materials used to market the digital audio tape recorder;

(C) the media used for the dissemination of the promotional materials, including the intended audience;

(D) the distribution channels and retail outlets through which the recorder is disseminated;

(E) the manufacturer's price for the recorder as compared with the manufacturer's price for digital audio tape recorders implementing the serial copying management system;

(F) the relative quantity of manufacture of the recorder as compared to the size of the manufacturer's market for professional digital audio tape recorders;

(G) the occupations of the purchasers of the recorder; and

(H) the uses to which the recorder is put.

(d) ENCODING OF INFORMATION ON PHONORECORDS.—(1) No person shall encode a phonorecord of a sound recording with inaccurate information relating to the catego-

ry code, copyright status, or generation status of the source material so as to improperly affect the operation of the serial copy management system.

(2) Nothing in this Act requires any person engaged in the manufacture or assembly of phonorecords to encode any such phonorecord with respect to its copyright status.

(e) INFORMATION TO ACCOMPANY TRANSMISSION IN DIGITAL FORMAT.—Any person who transmits or otherwise communicates to the public any sound recording in digital format shall not be required under this Act to transmit or otherwise communicate the information relating to the copyright status of the sound recording; except that any such person who does transmit or otherwise communicate such copyright status information shall transmit or communicate such information accurately.

(f) DEFINITION.—For purposes of this section, the term "manufacture or distribute" means to manufacture, assemble, sell, resell, lease, or distribute in commerce, or to offer for sale, resale, lease, or distribution in commerce.

SEC. 4. SERIAL COPY MANAGEMENT SYSTEM.

(a) PUBLICATION OF TECHNICAL REFERENCE DOCUMENT.—Within 10 days after the date of the enactment of this Act, the Register of Copyrights shall cause the technical reference document to be published in the Federal Register.

(b) ORDERS OF SECRETARY OF COMMERCE.—The Secretary of Commerce, upon petition by an interested party and after consultation with the Register of Copyrights, may issue an order to implement the serial copy management system set forth in the technical reference document as follows:

(1) The Secretary may issue such order for the purpose of permitting in commerce devices that do not conform to all of the standards and specifications set forth in the technical reference document, if the Secretary determines that such devices possess the same functional characteristics with respect to regulation of serial copying as, and are compatible with the prevailing method for implementation of, the serial copy management system set forth in the technical reference document.

(2) The Secretary may issue such order for the purpose of permitting in commerce devices that do not conform to all of the standards and specifications set forth in the technical reference document, if the Secretary determines that the standards and specifications relating generally to digital audio tape recorders and digital audio interface devices have been or are being revised or otherwise amended or modified such that the standards and specifications set forth in the technical reference document are not or would no longer be ap-

plicable, and that such devices conform to such new standards and specifications and possess the same functional characteristics with respect to regulation of serial copying as the serial copy management system set forth in the technical reference document.

(3) The Secretary may issue such order for the purpose of approving standards and specifications for a technical method implementing in a digital audio tape recorder the same functional characteristics as the serial copy management system so as to regulate serial copying of source material in the analog format in an equivalent manner as source material in the digital format.

SEC. 5. REMEDIES.

(a) CIVIL ACTIONS.—Any aggrieved person or the Attorney General of the United States may bring a civil action in an appropriate United States district court against any person for a violation of section 3.

(b) POWERS OF THE COURT.—In an action brought under subsection (a), the court—

(1) consistent with the limitation set forth in subsection (e), may grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain violations of section 3;

(2) shall award damages under subsection (c);

(3) shall direct the recovery of full costs, including awarding reasonable attorney's fees, by an aggrieved person, other than the United States, who prevails; and

(4) may grant such other equitable relief as it may deem reasonable.

(c) DAMAGES.—(1) An aggrieved person shall be entitled to recover damages for violations of section 3, which shall be computed, at the election of the aggrieved person at any time before final judgment is rendered, in accordance with one of the following, but in no event shall the judgment exceed a total of $1,000,000:

(A) The aggrieved person may recover the actual damages suffered by him or her as a result of the violation and any profits of the violator that are attributable to the violation which are not taken into account in computing the actual damages. In determining the violator's profits, the aggrieved person is required to prove only the violator's gross revenue, and the violator is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the violation.

(B) The aggrieved person may recover an award of statutory damages for each violation of subsection (a) or (b) of section 3 in the sum of not less than

$1,000 nor more than $10,000 per device involved in such violation or per device on which a service prohibited by section 3(b) has been performed, as the court considers just.

(C) The aggrieved person may recover an award of statutory damages for each violation of subsection (d) of section 3 in the sum of not less than $10 nor more than $100 per phonorecord involved in such violation, as the court considers just.

(D) The aggrieved person may recover an award of statutory damages for each transmission or communication that violates subsection (e) of section 3, in the sum of not less than $10,000 nor more than $100,000, as the court considers just.

(2) In addition to making an award of damages under paragraph (1), in any case in which the court finds that a violation of section 3 was committed willfully and for purposes of direct or indirect commercial advantage or private financial gain, the court in its discretion may increase the award of damages, whether actual or statutory, by an additional amount of not more than $5,000,000.

(3) In any case in which the court finds that the violator was not aware and had no reason to believe that his or her acts constituted a violation of section 3, the court in its dis-

cretion may reduce the total award of damages to a sum of not less than $250.

(d) IMPOUNDING OF ARTICLES.—At any time while an action under this section is pending, the court may order the impounding, on such terms as it may deem reasonable, of any device or phonorecord that is in the custody or control of the alleged violator and that the court has reasonable cause to believe does not comply with, or was involved in a violation of, section 3.

(e) LIMITATION REGARDING PROFESSIONAL MODELS.—Unless a court finds that the labeling and distribution of a digital audio tape recorder as a professional model by a manufacturer, given the factors set forth in subsection (c) of section 3, were without a reasonable basis or not in good faith, the court shall not grant a temporary or preliminary injunction against the distribution of such devices by the manufacturer.

(f) REMEDIAL MODIFICATION AND DESTRUCTION OF ARTICLES.—As part of a final judgment or decree finding a violation of section 3, the court shall order the remedial modification, if possible, or the destruction of any device or phonorecord that does not comply with, or was involved in a violation of, section 3 that is in the custody or control of the violator or that has been impounded under subsection (d) of this section.

(g) DEFINITION.—For purposes of this section, the term "device" does not include a phonorecord.

SEC. 6. DEFINITIONS.

(a) IN GENERAL.—As used in this Act—

(1) the term "aggrieved person" means—

(A) any person engaged in the manufacture or assembly of any digital audio tape recorder or any phonorecord;

(B) any person who is a copyright owner of any work embodied in a phonorecord; and

(C) any association, representative, or agent of any person described in subparagraph (A) or (B);

(2) the term "commerce" means commerce between or among any of the States, or between any of the States and any foreign nation;

(3) the term "digital audio interface device" means any machine or device, whether or not developed as of the date of the enactment of this Act, and whether or not included with or as part of some other device, that supplies a digital audio signal through a "non-professional interface", as the term "non-professional interface" is used in the Digital Audio Interface Standard in part I of the technical reference document

or in an order of the Secretary of Commerce under section 4(b) (1) or (2);

(4) the term "digital audio tape recorder" means any device, whether or not developed as of the date of the enactment of this Act, and whether or not included with or as a part of some other device, that is intended or marketed for the primary purpose of making a sound recording in a digital format on magnetic tape;

(5) the term "interested party" means any person engaged in the manufacture or assembly of any digital audio tape recorder or any phonorecord, or any association, representative, or agent of such person;

(6) the term "person" includes "anyone" as that term is used in section 501(a) of title 17, United States Code;

(7) the term "serial copy management system" means the system for regulating serial copying by digital audio tape recorders that is set forth in the technical reference document or in an order of the Secretary of Commerce under section 4;

(8) the term "State" means any of the several States, the District of Columbia, and any commonwealth, territory, or possession of the United States;

(9) the term "technical reference document" means the document entitled "Technical Reference

Document for Digital Audio Tape Recorder Act of 1990", as such document appears under the proceedings of the Senate in the Congressional Record for March 28, 1990; and

(10) the terms "analog format", "copyright status", "category code", "generation status", and "source material" mean those terms as they are used in the technical reference document.

(b) COPYRIGHT DEFINITIONS.—Except as otherwise provided, all terms used in this Act shall have the same meanings as those terms are given in title 17, United States Code.

SEC. 7. EFFECT ON OTHER LAW.

This Act does not affect any right or remedy, or any limitation on such right or remedy, held by or available to any person under title 17, United States Code. Nothing in this Act creates or affords any greater or lesser rights with respect to private home copying of a copyrighted work than any rights afforded under title 17, United States Code.

SEC. 8. AMENDMENT TO TITLE 17, UNITED STATES CODE.

(a) IN GENERAL.—Chapter 5 of title 17, United States Code, is amended by adding at the end the following:

"**§ 511. Effect of Digital Audio Tape Recorder Act of 1990**

"The Digital Audio Tape Recorder Act of 1990 does not affect any right or remedy, or any limitation on such right

or remedy, held by or available to any person under this title. Nothing in the Digital Audio Tape Recorder Act of 1990 creates or affords any greater or lesser rights with respect to private home copying of a copyrighted work than any rights afforded under this title.".

(b) CONFORMING AMENDMENT.—The table of sections at the beginning of chapter 5 of title 17, United States Code, is amended by adding at the end the following:

"511. Effect of Digital Audio Tape Recorder Act of 1990.".

SEC. 9. EFFECTIVE DATE.

This Act shall take effect on the date of the enactment of this Act, but shall not apply to any device or phonorecord manufactured or assembled before such date.

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