



House  
Legislative  
Analysis  
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## UNAUTHORIZED RECORDINGS

Senate Bill 388 (Substitute H-1)  
First Analysis (2-3-94)

Sponsor: Senator John F. Kelly  
Senate Committee: Judiciary  
House Committee Judiciary

### ***THE APPARENT PROBLEM:***

Today's modern recording technology facilitates the quick and inexpensive high-volume dubbing of both video tapes and sound recordings. This enhanced ability reportedly has resulted in the extensive growth of sound and video piracy by unscrupulous wholesale and retail dealers who then sell and/or rent bootleg tapes to consumers. This results in great expense to recording manufacturers and professionals and legitimate dealers, in the form of lost profits, sales, and rental fees. Although federal copyright laws prohibit this illicit activity, many claim that federal enforcement efforts are insufficient because the federal laws target only higher-volume bootleggers, do not cover live performances, and do not apply to recordings initially made before the federal law's effective date. In addition, while the increasing problem of pirating retailers may affect the business of a legitimate operator, local-level bootlegging of video and sound recordings apparently is not often a high priority for federal investigators, who tend to focus more on large-scale distributors. To combat more effectively the proliferation of commercial activity in unauthorized recordings, some people feel that state law should prohibit recording piracy and require that the manufacturer's name and address be affixed to recordings.

### ***THE CONTENT OF THE BILL:***

The bill would create a new public act to prohibit the unauthorized duplication of video and audio recordings, prohibit unauthorized recording of a live performance, and prohibit trade in proscribed recordings. Violation of the bill would be punished according to the number of recordings involved and whether the defendant had any prior offenses. Any contraband recordings discovered would be confiscated and destroyed under court order, and, following a conviction under the bill, all contraband recordings plus all equipment involved in making the recordings on which the conviction was based

would be destroyed. The bill would not apply to recordings made for personal use where no compensation was involved, or to recordings that were part of the public domain. The bill would take effect June 1, 1994. Additional details follow.

Prohibitions. The bill would forbid a person from directly or indirectly doing any of the following:

\*\* transferring a live performance onto a recording without the consent of the owner for commercial advantage or private financial gain.

\*\* transferring the sounds on a recording onto another recording without the consent of the owner for commercial advantage or private financial gain. However, this prohibition would not apply to sound recordings initially fixed after February 15, 1972, or to a person engaged in radio or television broadcasting or cablecasting who transfers or causes to be transferred sounds intended for or in connection with a broadcast or cable transmission or related use.

\*\* selling, renting, distributing, or transporting (or possessing for any of these purposes) a recording with knowledge that it was manufactured in violation of the bill.

\*\* selling, renting, distributing, or transporting (or possessing for any of these purposes) a recording with knowledge that it violated the bill's labeling requirement.

Labeling requirement. Each recording sold, rented, or distributed would have to bear the "true name and address" of its manufacturer.

Penalties. A violation involving fewer than seven video recordings or fewer than 100 sound recordings during a 180-day period would be a misdemeanor punishable by imprisonment for up to one year, a

fine of up to \$25,000, or both. A subsequent offense or one involving seven or more video recordings or 100 or more sound recordings during a 180-day period would be a felony punishable by up to five years in prison, a fine of up to \$250,000 or both.

### ***HOUSE COMMITTEE ACTION:***

The House Judiciary Committee adopted a substitute bill that differed from the Senate version in providing for an effective date and in exempting recordings made for personal use and recordings that are part of the public domain, among other respects.

### ***FISCAL IMPLICATIONS:***

With regard to the Senate version of the bill, the Senate Fiscal Agency said that the bill would have an indeterminate impact on state and local government. The new penalties proposed in the bill could increase incarceration costs for the state and local units of government depending on the number of convictions for violating the bill's provisions. There are currently no data available that would indicate how many individuals might be convicted under the bill. (6-14-93)

### ***ARGUMENTS:***

#### ***For:***

Recording piracy used to involve the low-volume, high-cost dubbing of a few sound recordings. Using new technology, however, thousands of illegal sound and video recordings can be made in just a short time at relatively low cost. As a result, recording piracy practices have grown dramatically. In 1992, in Michigan alone, the Motion Picture Association of American (MPAA) reportedly investigated at least 89 video rental and sales outlets for complaints of bootlegged tapes. Reputable retailers throughout Michigan, as well as their customers, are being hurt by unfair and illegal trade in pirated recordings. Since the enforcement of federal laws prohibiting recording piracy tends to focus on large-scale, wholesale distributors of bootlegged tapes who operate over widespread areas, small-time offenders, such as local video renters, reportedly have been plying their trade unaffected by federal prohibitions. Although these types of illicit operations in effect rob legitimate dealers of business, steal profits from manufacturers, and gouge consumers by offering low-quality substitutes,

investigations of them often are not given a high priority by already overburdened federal prosecutors.

By specifying in state law that recording piracy practices were forbidden, the bill would give state and local law enforcement officials the tools necessary to prosecute bootleggers in state courts, rather than relying on enforcement of copyright laws by federal officials. Also, the bill would allow for broader enforcement than the federal prohibitions because it would apply specifically to low-volume piracy, live performances, and sound recordings initially fixed before February 15, 1972, the effective date of the federal prohibition concerning sound recordings.

#### ***For:***

The MPAA, the Video Software Dealers Association (VSDA), and the Recording Industry Association of America (RIAA) formed a coalition in response to the growing problem of recording piracy and the lack of enforcement of federal anti-piracy laws. This coalition has advocated "true name" legislation on the state level, and at least 22 states now have such laws. The coalition continues its lobbying efforts in other states and supports legislation in Michigan. By requiring manufacturers to place their true name and address on their recordings, the bill would force recording bootleggers to 1) identify themselves, thereby complying with the labeling law; 2) place no manufacturer name or address on the package, thereby violating the proposed "true name" statute; or 3) place the name and address of the manufacturer of the original recording on the pirated copy, which also would violate the bill. In addition, selling, renting, distributing, or transporting a recording that violated the labeling requirement, with knowledge that the recording was not properly labeled, would be a violation of the bill.

#### ***Against:***

Although the bill seems to apply to recordings made before the effective date of the federal prohibitions, by specifying that the prohibition against the unauthorized copying of sound recordings would not apply to recordings initially fixed after February 15, 1972, it would prevent prosecution in state courts for the unauthorized copying of sound recordings made after that date. Prosecutions for this type of offense still would have to rely on federal enforcement efforts.

***Response:***

While the post-1972 exemption would apply to the unauthorized copying of some recordings, prosecution in state courts still could be pursued under the bill for trafficking in those recordings or for failure to label them with the manufacturer's true name and address.

***Against:***

Although an "owner" (i.e., the person who owned the sounds fixed in a master recording or the person who owned the rights to record or authorize the recording of a live performance) whose work was the subject of an alleged violation of the bill would have a cause of action for actual and punitive damages, the bill does not address the losses sustained by a legitimate recordings dealer or by consumers. Reputable dealers can lose out on large amounts of business to dealers who handle pirated recordings, and consumers who unknowingly rent or buy bootlegged recordings may suffer damages in the form of low-quality merchandise. The bill should provide for the recovery of damages suffered by recording dealers and consumers.

***Against:***

The bill would establish new crimes and criminal penalties in Michigan law at a time when court dockets are overflowing and the state is facing chronic shortages of prison and jail space. Rather than address the video piracy problem with state criminal sanctions, the matter should be left to federal authorities, at least until enactment of comprehensive sentencing guidelines legislation that would guarantee a coherent and consistent system of punishment.

***POSITIONS:***

The Recording Industry Association of America supports the bill. (2-1-94)

The Video Software Dealers Association supports the bill. (2-2-94)

The Michigan Retailers Association supports the concept of the bill. (2-1-94)

The Michigan Council on Crime and Delinquency opposes the creation of any new crimes until a comprehensive and consistent system of sentencing guidelines is enacted. (2-2-94)