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Sincerely,

LAWTON CHILES,
Chairman, National Commission to Prevent Infant Mortality.

By Mr. HATCH (for himself and Mrs. FEINSTEIN):

S. 1421. A bill to amend title 17, United States Code, to provide an exclusive right to perform sound recordings publicly by means of digital transmissions; to the Committee on the Judiciary.

PERFORMANCE RIGHTS IN SOUND RECORDINGS ACT OF 1993

Mr. HATCH. Mr. President, I rise today, together with my distinguished colleague from California, Senator FEINSTEIN, to introduce the Performance Rights in Sound Recordings Act of 1993.

Despite that complicated title it is really a simple bill amending the Copyright Act to give those who create sound recordings the full copyright protections that current law gives to all other creators. Specifically, the bill provides that the copyright owners of sound recordings have the exclusive right to control all digital transmissions that may be made of their music.

Thus, like other copyright owners, such as film and video producers, those who create sound recordings will, on passage of this bill, be able to license the digital transmissions of their works or, should no acceptable license scheme be achievable, to prohibit such digital transmissions.

One common illustration of how this disparity in treatment operates in practice will demonstrate the irrationality of our current law: Many new recordings are released in video formats as well as in traditional audio only form. When the video is broadcast on television or cable, the composer of the music, the publisher of the music, the producer of the video, and the performer of the work are all entitled to a performance right royalty. However, when only the audio format is played on the radio—even though it may be identical to the video soundtrack—only the composer and publisher have performance rights that must be respected. The producer's and performer's interests are ignored.

It should be initially noted, Mr. President, that this bill does not impose new financial burdens on broadcasters or on any other broad class of users who traditionally perform sound recordings. Those users will instead continue to be subject only to those financial burdens that they voluntarily undertake. That is how the free market system works. This bill only levels the playing field by according to sound recording the same performance rights that all other works capable of performance have long enjoyed.

It should be remembered that sound recordings are not the only source of music available to broadcasters, nor is music programming the only format. Should those who are granted these new performance rights in the digital transmission of sound recordings be so unwise as to unfairly and unrealistically charge for licensing their works or to actually withhold their works from the public, then the detriment will fall principally on the very copyright owners that the law is designed to protect. All that this law does is to allow all parties to exercise their essential economic rights in a nondiscriminatory manner, a manner more closely resembling the free market system than current copyright law permits.

The basic issue raised by our bill is not new, Mr. President. The adoption of the Copyright Act of 1976 was the key event in the development of our current system of copyright. The importance of the performance right issue was recognized at that time though not ultimately addressed by the legislation. Congress did, however, request a study of the issue to be made by the Copyright Office, and that study, released in 1978, did conclude that a performance right in sound recordings was warranted. This was at a time, it should be noted, when few could have anticipated the widespread availability of digital technology and the possibility for flawless copying that is now plainly seen on the horizon.

A subsequent study of this issue was provided to the Subcommittee on Patents, Copyrights and Trademarks in October, 1991, in response to a joint request by Chairman DECONCINI and Representative HUGHES, chairman of the House Subcommittee on Intellectual Property. Their request was for an assessment of the effect of digital audio technology on copyright holders and their works. Again, the Copyright Office concluded that sound recordings should, for copyright purposes, be equated with other works protected by copyright. From this premise flows the inevitable conclusion that the producers and performers of sound recordings are entitled to a public performance right, just as are all other authors of works capable of performance. Thus, it should not be surprising that the Copyright Office recommended in 1991 that Congress enact legislation recognizing the performance right. Today's bill responds, at least in part, to that recommendation.

Currently, sales of recordings in record stores and other retail outlets represent virtually the only avenue for the recovery of the very substantial investment required to bring to life a sound recording. There are no royalties payable to the creators of the sound recording for the broadcast or other public performance of the work.

If the technological status quo could be maintained, it might well be that the current laws could be tolerated. But, we know that technological developments such as satellite and digital transmission of recordings make sound recordings vulnerable to exposure to a vast audience through the initial sale of only a potential handful of records. Since digital technology permits the making of virtually flawless copies of the original work transmitted, a potential depression of sales is clearly threatened, particularly when the copyright owner cannot control public performance of the work. And new technologies such as audio on demand and pay-per-listen will permit instant access to music, thus negating even the need to make a copy.

But, Mr. President, even if this economic argument were not persuasive, fairness and responsible copyright policy nonetheless dictate the recognition of the rights embodied in today's bill. As the Copyright Office has noted, "Even if the widespread dissemination by satellite and digital means does not depress sales of records, the authors and copyright owners of sound recordings are unfairly deprived by existing law of their fair share of the market for performance of their works." (Report on Copyright Implications of Digital Audio Transmission Services, Oct. 1991, pp. 156-157).

Mr. President, the bill that Senator FEINSTEIN and I are introducing today is about fairness, plain and simple. Unless Congress is prepared to create a hierarchy of artists based on a theory of rewarding some forms of creativity but not others, it must maintain a strict policy of nondiscrimination among artists. This should be true whether we are tempted to discriminate among artists based on the content of their creations, based on the nature of the works created, or based on the medium in which the works are made available to the public. As an eminent German authority on authors' rights has noted, governments that discriminate among artists place at liberty the rights of all artists everywhere.

For too long, American law has tolerated an irrational discrimination against the creators of sound recordings. Every other copyrighted work that is capable of performance—including plays, operas, ballets, films, and pantomimes—is entitled to the performance right. It is denied only for sound recordings.

It is frankly difficult, Mr. President, to understand the historical failure to accord to the creators of sound recordings the rights seen as fundamental to other creators. I acknowledge that in other nations some have advanced the theory that copyright protection should not extend to sound recordings. This theory is based on the view that the act of embodying a musical work on a disc or tape is more an act of technical recordation than a creative enterprise. But, this has not been the American view, nor the view of most nations

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with advanced copyright systems. Since 1971, Congress has clearly recognized sound recordings as works entitled to copyright on an equal basis with all other works.

Thus, the joint authors of sound recordings—those who produce them and those who perform on them—must be seen as authors fully entitled to those rights of reproduction, distribution, adaptation, and public performance that all other authors enjoy. It is, I believe, no longer possible to deny the true creative work of the producers of sound recordings. While few are so well known as their stage and film counterparts, there are significant exceptions. In the field of operatic recording alone, one could cite legendary figures such as Walter Legge, Richard Mohr, or John Culshaw. As the New Grove Dictionary of Opera states with reference to the latter's landmark Wagner recordings of the 1950's, "Mr. Culshaw's great achievement was to develop the concept of opera recording as an art form distinct from live performance." (Vol. I, p. 1026; Macmillan Press, 1992). The events referred to occurred over 30 years ago, yet American law still fails fully to recognize the sound recording as an art form entitled to the full range of copyright protections enjoyed by live performances.

Similarly, the unique creative input of the performing artist as a joint author cannot be casually discounted as a proper subject of copyright protection. It has been said that the recording industry was almost single-handedly launched by the public demand for one performer's renditions of works largely in the public domain. Indeed, Enrico Caruso's recordings from the early years of this century are almost all still in print today. To take a more contemporary example, it could be noted that Willie Nelson authored a country music standard when he composed "Crazy," a song he has also recorded. But, Patsy Cline made the song a classic, by her inimitable performance of it.

It should be carefully noted, Mr. President, that today's bill is, frankly, compromise legislation. It does not seek to create a full performance right in sound recordings, a right that would extend to the more common analog mode of recording. Also, the digital right that the bill does create is limited to digital transmissions. Other public performances of digital recordings are still exempted from the public performance right that the bill would create.

I believe that these major limitations on the rights that we seek to create today will limit as mush as possible the dislocations and alterations of prevailing contractual arrangements in the music and broadcasting industries. I am sure I speak for Senator FEINSTEIN as well when I say that we are open to the consideration of additional means of ensuring that this bill does not have unintended consequences for other copyright owners, be they songwriters, music publishers, broadcasters, or others.

Mr. President, while today's bill is landmark legislation, it should also be noted that the bill only proposes to give the creators of sound recordings something approaching the minimum rights that more than 60 countries already give their creators. In so doing, the legislation should also have extremely beneficial consequences in the international sphere by strengthening America's bargaining position as it continues to campaign for strong levels of protection for all forms of intellectual property and by allowing American copyright owners to access foreign royalty pools that currently deny distributions of performance royalties to American creators due to the lack of a reciprocal right in the United States.

The absence of a performance right has long hindered efforts of U.S. trade negotiators as they work to address matters such as the Uruguay Round of the General Agreement on Tariffs and Trade [GATT] and the current efforts of the World Intellectual Property Organization to develop a new instrument to settle the rights of producers and performers of sound recordings. In each instance, U.S. negotiators are faced with the argument from our trading partners that the United States cannot expect other countries to provide increased protection when U.S. law is itself inadequate.

Furthermore, in many countries that do provide performance rights for sound recordings, there is often a refusal to share any collected royalties with American artists and record companies for the public performance of their recordings in those foreign countries. This is based on the argument that these rights should be recognized only on a reciprocal basis. For so long as foreign artists receive no royalties for the public performance of their works in the United States, American artists will continue to receive no royalties for the performance of American works in those foreign countries that insist on reciprocity.

The royalty pools we are talking about here, Mr. President, are in fact, considerable. The Recording Industry Association of America has estimated that in 1992 American recording artists and musicians were excluded from royalty pools that distributed performance royalties in excess of $120 million. It is likely that this figure has increased in recent years and will continue to grow.

The insistence of certain foreign nations on reciprocity of rights as a condition to the receipt of performance royalties is inconsistent with the fundamental obligation of those nations to provide national treatment under the Berne Convention on the Protection of Literacy and Artistic Property or under the Rome Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations. It is nonetheless an economic fact of life that seriously disadvantages American producers and performers and therefore must be dealt with. If passed, the Performance Rights in Sound Recordings Act should provide Americans who are entitled to royalties from foreign performances the right to recover those funds. Thus, the direct economic benefits to be derived from the legislation are considerable.

Before concluding, Mr. President, I would like to express my personal gratitude to the U.S. Copyright Office, its head, Ralph Oman, and its professional staff for their contributions over many years in raising the visibility of this issue and in educating all of us who follow copyright issues as to the subtleties of this complex area of the law. The leadership shown by the Copyright Office on this issue should be a model for all government agencies on how they can best serve the Congress in the development of legislation in specialized and complex areas of the law.

I would also like to thank my colleague from California, Senator FEINSTEIN, for joining me in introducing this important legislation and for drawing our attention to the significant economic consequences involved. I look forward to a detailed investigation of the subjects addressed by the bill.

Also, credit for leadership on this issue should be paid to Representative BILL HUGHES, chairman of the Subcommittee on Intellectual Property and Judicial Administration, who, together with Representative HOWARD BERMAN, has previously introduced similar legislation in the House of Representatives. I look forward to working with each of them as we attempt to secure passage of this important measure.

Mrs. FEINSTEIN. Mr. President, I rise today, along with the distinguished ranking member of the Judiciary Committee, Senator HATCH of Utah, to introduce the Performance Rights in Sound Recordings Act of 1993. The bill will—for the first time—grant full copyright protection to the owners of sound recordings so that they may control and legitimately profit from the digital transmission of their music.

More than 60 countries around the globe extend similar rights to producers and their artists, and have for many years. The extension of that right to American artists and companies is hardly a radical or unexamined concept. Indeed, the U.S. Copyright Office has recommended since 1978 that a performance right in sound recordings be granted in all public performances, not just digital transmissions, and recently reiterated the urgency of the need for such reform created by the advent of digital audio technology. It's time to heed this expert call.

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•Before pursuing this issue further, I want to thank Senator HATCH for suggesting that he and I collaborate in redressing what, for many years, has been an imbalance in the level of copyright protection afforded to parties in the music industry. I commend him for his concern, and look forward very much to collaborating with him, as well as with Chairman DECONCINI, on this and other intellectual property legislation in this Congress.

I also want to thank my colleagues in the other Chamber, Representative BILL HUGHES, chairman of the House Judiciary Committee's Intellectual Property Subcommittee, and Representative HOWARD BERMAN, my good friend from California, for their leadership in introducing an almost identical bill in the House of Representatives just a few weeks ago.

This bill is about equity, economics, and the need to expedite resolution of a complex issue. Without it, the owners of sound recordings will continue to be the only class of copyright holders without the full panoply of rights conveyed under long-standing copyright law. That inequity will not be corrected unless and until this legislation is passed.

Specifically, copyright owners of every other type of copyrighted work—movies, books, magazines, advertising, and artwork, for example—enjoy the exclusive right to authorize the public performance of their copyrighted work. Sound recordings, and the artists and companies that make them, however, have no such performance right.

Technical though it may be, this is more than an academic distinction. For decades artists and recording companies have had no ability to control, or profit from, the performance of their product—sound recordings.

When a song is played on the radio or, as is increasingly the case, over a new digital audio cable service, the artist who sings the song, the musicians and backup singers, and the record company whose investment made the recording possible have no legal right to control or to receive compensation for this public performance of their work. In that sense, they are treated very differently from songwriters and music publishers, who do receive compensation each and every time that the very same song is performed publicly over the radio.

Digital technology, however, has created a real need to correct that disparity in copyright law and, thus, for this legislation. Compact discs so faithfully reproduce original recordings that the sound quality from an ordinary radio now surpasses that of far more expensive stereo equipment marketed just a few years ago. Impressive as that is, the real revolution has come in the kind of signal that the consumer can now listen to at home. Ordinary—or analog—radio signals are waves and, as such, they vary in strength and break down over distance. That breakdown diminishes sound quality. The same technology that has given us CD's, however, now allows perfect reproductions of music to be digitized—turned into computer dots and dashes—that can be sent by satellite or over cable TV wires around the globe, and reassembled into concert hall-quality music in our homes.

The bottom line is that digital transmission technology could—and may well—make music recorded on compact disc as obsolete as CD's made the 45's and LP's that we and our children grew up with. That would be a tolerable evolution of the marketplace if artists and record companies were compensated for the use of their sound recordings by the new digital transmission services and by broadcasters who eventually switch over to digital radio. Right now, however, because of skewed copyright law, that's not the way the market works.

New subscription digital audio services are operating in cities, towns, and rural communities across the country. For a modest monthly fee, they deliver multiple channels of CD-quality music to customers in their homes—primarily through subscribers' cable TV wiring. As the market is now configured, these companies need merely go to a local record store, buy a single copy of a compact disc, and transmit it for a fee to tens of thousands—potentially millions—of subscribers. Just two companies already provide such service to more than 200,000 people.

The artists who made the music, and the companies that underwrote its production and promotion, don't see dime of the revenue realized by the digital programmer. And, without a right of public performance in digital sound recordings, they won't. That's just not fair.

Before concluding, I'd like to emphasize three points concerning this legislation.

First, as the text and our remarks make clear, Senator HATCH and I have no intention in this bill of changing copyright law with respect to the kind of transmission of sound recordings that we have all grown up with. So-called analog transmissions by broadcasters—even of CD's—categorically will not be affected by this bill.

Second, this legislation is not cast in stone. It is our express intention in introducing it to encourage all of the industries and individuals who will help shape our digital entertainment future to come forward, sit down together and—using this legislation as a base—remedy the imbalance in current law that the bill narrowly seeks to correct. Just as compromise was achieved by the industry in 1990 when the challenge of how to adapt to digital audio tape and recording devices was before us, so we expect compromise to be promptly attempted and achieved here. Senator HATCH and I will work closely with Senator DECONCINI to schedule hearings on the bill and to assure that, as ultimately considered by the Senate, it represents a fair and meaningful step forward for all concerned.

Third, and finally, it is not our intention that new copyright revenues for artists and recording companies reduce current royalties paid to parties—like music publishers and songwriters—who already possess performance rights in sound recordings of all kinds.

In an effort to assure that no governmental or judicial agency will assume otherwise, the Performance Rights in Sound Recordings Act of 1993—while otherwise identical to the H.R. 2576—contains a new section 3 intended to protect the existing rights. It does this in two ways: First, by exempting analog broadcasting—currently the primary source of public performance royalties for songwriters and music publishers; and second, by explicitly stating that royalties paid to sound recording copyright owners should not be taken into account in setting music performance royalty rates.

I am aware, however, that performing rights societies also are concerned that, if this legislation is adopted, the exclusive right granted to artists and recording companies could dilute or otherwise interfere with similar rights long held by songwriters and music publishers. While the bill introduced today does not address this issue, I look forward to determining in the course of hearings to be held on this legislation whether additional statutory protection for current rights holders is required. Such hearings, of course, also will provide an opportunity for all other relevant issues to be aired.

We are standing at the cusp of an exciting digital era. Technological advance, however, must not come at the expense of American creators of intellectual property. This country's artists, musicians and businesses that bring them to us are truly among our greatest cultural assets. This bill recognizes the important contributions that they make and provides protection for their creative works, both at home and abroad.

I am, once again, very pleased to be working with Senator HATCH—and look forward to working with the music community and other interested parties—to prospectively redress a long-standing imbalance in current copyright law. Both equity and economics demand that we do so in this Congress.

By Mr. BINGAMAN (for himself and Mr. DOMENICI):

S. 1422. A bill to confer jurisdiction on the U.S. Claims Court with respect to land claims of Pueblo of Isleta Indian Tribe; to the Committee on the Judiciary.

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