Testimony of

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"The Performance Rights Act and Platform Parity"
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Senator Feinstein, Senator Sessions, Chairman Leahy, and Members of the Committee, thank you for asking me to participate in today's hearing on an across-the-board public performance right for sound recordings, and on platform parity within the Section 114 statutory license. My name is Ralph Oman and I have taught copyright law at George Washington Law School for 16 years. Before my tenure at GW, I had the honor of serving as the Register of Copyrights of the United States for more than eight years. Before that assignment, I was the Chief Counsel of the Senate Subcommittee on Patents, Copyrights, and Trademarks. I am also the Chair of the Copyright Division of the ABA's Intellectual Property Law Section.

For me, today's hearing is déjà vu all over again. I have been involved in this issue since 1975, when my old boss, the Senate Minority Leader, Hugh Scott of Pennsylvania, supported a public performance right for performers and sound recordings and chaired a lively hearing that featured the sultry Julie London singing a cappella the Mickey Mouse Club theme song as a steamy love ballad. In fact, this issue reaches all the way back to the 1920s, when radio was in its infancy. The first performance rights legislation for sound recordings was introduced in 1926. Since that time, dozens of bills have been introduced to create this right, but none of them has made it across the finish line. In 1938, the ABA adopted its first resolution--the first of many--urging adoption of a public performance right for sound recordings.

Historically, one of the reasons that we have not enacted the public performance right for sound recordings has been the concerns of the songwriters, and the resulting unwillingness of Congress to pass a measure that could diminish their revenues. The songwriters, with good reason, were concerned that the broadcasters would try to evade any new obligation by simply dividing the royalties that the broadcasters currently pay to the songwriters for the public performance of the music, and giving one half to the songwriters and the other half to the performers and labels. Some of the broadcasters actually endorsed that idea, not recognizing that the two separate payments are intended for two distinct uses of two different copyrighted works. Happily, in the current draft of the bill, Chairman Leahy makes clear that the cut-the-baby-in-two approach will

not be permitted. The bill explicitly states that the new public performance right for sound recordings will not in any way adversely affect the royalties payable to the songwriters.

The fact that the NAB and the NABOB representatives are arguing so strongly against the measure indicates to me that they realize that they will not be able to simply divide the current royalty between the songwriters, on the one hand, and the performers and labels, on the other. So we are at least operating with a common understanding of the nature of the new right that Congress is about to create.

The songwriters have another legitimate concern--that the higher cost of recorded music will force some radio stations to dump their music formats and switch to talk radio, which would reduce the current income of the songwriters, and the potential income of the performers and labels. The accommodations made in the bill to assure low payments for a supermajority of the broadcasters in the country will help to address this concern and it should be noted that broadcasters do have to pay for talk programming -- unlike music today. Music is also by far the biggest draw for ad revenues. These factors, along with keeping the costs reasonable, ought to address this concern. No one has an interest in shutting down the broadcasters or limiting their programming options--not the songwriters, not the music publishers, not the performers, not the labels, not the Copyright Royalty Board, and certainly not Congress. All of them have an interest in keeping the over-the-air broadcasters strong and competitive. And that is very much in the public interest.

For more than 80 years, the arguments by broadcasters against this right have remained pretty much the same. They argue that by giving the sound recordings air time, they give the labels and the performers free publicity, which in turn leads to greater record and CD sales and a bigger box office for live concerts. But this broadcaster rationale is only superficially persuasive. It comes down to this: as a matter of property rights, men and women who create and own a copyrighted work should have the right to get paid by the people who use their work. That's the basic premise of copyright protection.

Nowhere else in copyright law - and nowhere in American jurisprudence generally - can one business take another's private property without permission or payment because the user concludes unilaterally that long term it would be good for the property owner's business, even if the owner, because of blindness or stupidity, doesn't think so. In our case, some broadcasters think that they are doing the performers and labels a favor by creating promotional value. Who is the best judge of that quid pro quo, the broadcasters or the creators? The broadcasters' exemption runs counter to all other rules of business, and it runs counter to our legal system.

Over the years, Cabinet Secretaries, Trade Representatives, many Members of Congress, and many Registers of Copyrights have argued that we have no legal or economic justification for this anomaly in our law. Certainly, radio broadcasts promote other types of programming--such as sporting events--but the broadcasters do not argue that they need not negotiate and pay for a license to broadcast baseball games because the broadcasts help build a team's following and sell tickets to the game. They negotiate licenses in the normal course of business. The same practice makes sense for their use of sound recordings.

Today, as in years past, broadcasters are claiming an inability to afford to pay any royalty to the performers, no matter how small. I do not mean to minimize the impact of a new performance right on broadcasters. Certainly, all businesses would prefer to get the products they use for free by claiming their particular use provides an indirect benefit to the maker of the product. But that rationale cannot excuse the failure to compensate the owner for the use of his or her property - especially when you are using it to make a profit for yourself. In addition, the bipartisan performance rights legislation introduced in this Congress bends over backwards to provide unprecedented accommodations to the broadcasters, including low flat fees for most broadcasters, some as low as one half of one percent of a broadcaster's revenue, with a delay in the effective date to allow broadcasters relief during these hard economic times, and long phase-in to give them the chance to ease slowly into their new partnership with performers.

In 1923, broadcasters refused to pay songwriters for the use of their compositions, just as they refuse to pay performers today, citing the now familiar "promotional value" argument. They lost that argument in court because the songs they used were protected under the Copyright Act. Today, the broadcasters do pay the songwriters, and rightly so. The promotional value argument rings just as hollow for recordings today as it did for musical compositions in the 1920s.

Promotional value cannot justify free use. Instead, it should be a factor in determining the appropriate royalty, just as it is in market negotiations for other content that radio stations use, and as it is in the statutory licenses for other platforms, such as Internet radio. A broadcast performance right will finally put over-the-air broadcasters on the same level playing field as satellite, cable and Internet radio. All four should pay a reasonable royalty for the use of sound recordings, and the parties will take promotional value into consideration. This solution will establish the parity we need to ensure a competitive and robust marketplace for the distribution of music, and give consumers a rich menu of services from which to choose.

True parity also requires equal footing when it comes to figuring out how the rates for these different platforms should be determined. Today, due to a patchwork of provisions in the Section 114 license, we have a system of disparate rate standards among radio platforms. This is unnecessary, confusing, and unfair. Of course, different platforms reflect different business models and may wind up paying different rates, but the standard used to derive those rates should be constant and reflect the fair market value for the use of those works.

It is important to consider the goals of setting a royalty rate. Under normal circumstances in the marketplace, a user of property would negotiate terms of use with the owner and pay the market price. If the user provides promotional benefits, the parties would negotiate a price that takes that benefit into account. The Section 114 statutory license that governs satellite, cable and internet radio (and would be extended to cover over-the-air radio under the bill being considered today), was developed for the benefit of the users, the performers and labels, and, ultimately, the public. Instead of negotiating with individual copyright owners in the marketplace, the user would invoke the Section 114 license and save on transaction costs and pass on those savings to the public. In that way, music would be more broadly available.

But the statutory license was never intended to provide music at below market rates. The best rate standard for all radio platforms is the "Fair Market Value" standard proposed by Senator Feinstein in the PERFORM Act. Under the bill, the parties are encouraged to negotiate a royalty

privately (which is always the preferred solution). If they fail to reach agreement, the Copyright Royalty Board steps in and does its best to estimate "Fair Market Value" by looking at marketplace evidence. Copyright owners and performers deserve nothing less for their works - especially when they have no choice but to allow their use. Because of the statutory license, they cannot just say "No" and walk away from the bargaining table, and that makes the negotiation a bit one-sided from the outset.

I understand that you, Senator Feinstein, and Senator Graham asked the stakeholders to get together and formulate a new rate standard. That effort led to a compromise provision adopted by the House Judiciary Committee in H.R. 848. That standard is a modification of the standard used today for satellite and cable radio. While this language is not ideal, it is a reasonable compromise that I would urge the Committee to incorporate into the Senate bill.

One last point, if I may. This lack of a public performance right for sound recordings is a huge international embarrassment for the United States, and it costs us millions of dollars a year in lost revenues in foreign markets. I would urge you to consult with the U.S. Trade Representative as to the many advantages that would flow to the United States if we joined the almost unanimous international consensus in granting a public performance right for performers and sound recordings.

Congress has worked on the issue of performance rights for over-the-air broadcasts for many years. Finally, after decades of reflection and debate, we recognize the importance of balance in the allocation of rights among users and creators. The Performance Rights Act recognizes and protects the rights of creators, treats the broadcasters fairly and sympathetically, helps us meet our international obligations, and promotes the public interest. I would urge its early adoption.