

March 7, 2018

The Honorable Chuck Grassley
Chairman
U.S. Senate Committee on the Judiciary
Hart Senate Office Building 135
Washington, DC 20510

The Honorable Dianne Feinstein
Ranking Member
U.S. Senate Committee on the Judiciary
Hart Senate Office Building 331
Washington, DC 20510

The Honorable Bob Goodlatte
Chairman
U.S. House of Representatives Committee on the Judiciary
Rayburn House Office Building 2240
Washington, DC 20515

The Honorable Jerrold Nadler
Ranking Member
U.S. House of Representatives Committee on the Judiciary
Rayburn House Office Building 2109
Washington, DC 20515

Re: Music Modernization Act (S. 2334 and H.R. 4706) and CLASSICS Act (S. 2393 and H.R. 3301)

Dear Chairman Grassley, Ranking Member Feinstein, Chairman Goodlatte, and Ranking Member Nadler:

Consumers benefit from competition. Music licensing reform should promote a robust, dynamic marketplace in all aspects of the music industry, from creation to distribution, by lowering barriers to entry for new and innovative services. The law should preserve and promote the public interest in a competitive marketplace, and not pick winners and losers by favoring certain types of music services over others.

Because the Music Modernization Act, S. 2334 and H.R. 4706, succeeds at many of these aims, Public Knowledge is generally supportive, with a few recommended adjustments. We have long recognized the dysfunctional state of the music licensing marketplace, and roundly applaud the measures these bills take to fix it. Consumers unquestionably benefit from a robust music licensing marketplace with low transaction costs. The creation of a blanket license and mechanical licensing collective will provide much-needed certainty to music delivery services, while the bill's proposed licensing information database will allow for potential licensees both large and small to locate and negotiate directly with rights holders. These measures will not only provide consumers easier access to the music they love, but will allow small-scale and individual licensees to locate, license, and use the songs they need without having to hire a team of lawyers and other intermediaries. Artists and consumers alike benefit from a "flattened" ecosystem which allows them to connect directly, and this bill chips away at the mountain currently erected, by law and business practice, between them.

While MMA would represent broad positive change, we also feel that certain of the bill's provisions could create negative knock-on effects, and that these issues should be addressed before the bill is marked up. Specifically, sections of the MMA remove the one remaining consumer-interest safeguard in rate-setting; unfairly pick winners and losers among different delivery mechanisms; and decrease consumer confidence in the fairness of royalty distribution. However, we are confident that all of these issues can be addressed with simple fixes.

Preserving Public Interest Through the § 801(b) Standard

Under current law, Copyright Royalty Judges follow the standards set out in 17 USC § 801(b) when setting rates for mechanical rights. Section 801(b) directs CRJs to consider, among other things, the Copyright Act's policy goals of "maximiz[ing] the availability of creative works to the public," as well as the competitive (or non-competitive) state of the licensing market. The bills seek to replace this with a "willing buyer, willing seller" standard which lacks this consumer-protection and market-responsive imperative.

Practically, this "willing buyer, willing standard" seller reflects rates paid currently in the marketplace. However, the current marketplace is excessively concentrated, with only one or two services operating under any given delivery model, and only a handful of services total occupying the space. Using the rates paid by these existing major players as the "floor" for future entrants creates artificial barriers to entry. In other words, this bill says to entrepreneurs, "if you can't pay what Amazon can afford to pay, find a new line of work." Any final version of this bill should preserve § 801(b) as a backstop to promote both the public interest and a competitive marketplace.

Section 114(i)

We are also concerned about the proposal to selectively repeal § 114(i) for digital services, while allowing it to remain for broadcasters. 17 USC § 114(i) prohibits CRJs from considering royalties paid for sound recordings while setting rates for mechanical licenses.

First, the argument that publishers have advanced for both of these provisions--repealing § 114(i) and moving away from the § 801(b) standard--is that these provisions stand in the way of achieving equitable rates for songwriters. This is demonstrably false; in January, the Copyright Royalty Board raised mechanical rates by nearly 50%,¹ in a move heralded by National Music Publishers Association President David Israelite as “the best mechanical rate scenario for songwriters in U.S. history.”² This was achieved under a regime structured by *both* § 801(b) and § 114(i).

Second, there is no consensus among stakeholders as to what the effect of repealing § 114 would be on rates. Songwriters and publishers appear to believe that removing the provision would cause rates to jump, so as to more closely resemble the higher rates services pay for sound recording licenses. Services, on the other hand, appear to believe that judges, when presented with evidence of how much services are already paying for sound recording rights, would actually *lower* mechanical rates in response. Given these diametrically opposed predictions, Congress should look more directly at the potential impacts of repealing this section before taking final action.

Moreover, for a truly competitive marketplace to exist, there must be equal treatment of delivery services, *regardless* of the technology used. Allowing broadcasters to keep the predictability and protections of § 114(i), while denying those same protections to digital entrants, amounts to nothing more than Congress picking winners and losers, favoring legacy business models and well-capitalized incumbents over new entry. If § 114(i) is to be repealed, it should be repealed across the board to preserve equity and technological neutrality.

Ensuring Consumer Confidence by Giving Independent Songwriters an Equal Voice

Consumers want their money to reach artists, not intermediaries, and to do so in the least circuitous way possible. However, under this bill, publishers exercise substantial majority control over the governing board of the new PRO. The interests of publishers and artists, although they often overlap, are not universally aligned, and incumbent publishers’ outsize influence over the mechanisms of the new collective casts doubt on its ability to fairly and impartially ensure that

¹ Rates and Terms for the Use of Nondramatic Musical Works in the Making and Distributing of Physical and Digital Phonorecords, __ Fed. Reg. __ (proposed Jan. 26, 2018) (to be codified at 37 C.F.R. pt. 385), *available at* <https://www.crb.gov/rate/16-CRB-0003-PR/attachment-a-part-385-regs.pdf>.

² Ed Christman, “NMPA Claims Victory: CRB Raises Payout Rate from Music Subscription Services” (Jan. 27, 2018), *Billboard*, <https://www.billboard.com/articles/news/8096590/copyright-royalty-board-crb-nmpa-spotify-apple-music-streaming-services>.

funds reach independent songwriters. An even split between publishers and songwriters would ensure a more balanced power dynamic and provide greater consumer confidence.

We urge to sponsors to address the concerns raised above so that consumers may enjoy a more competitive music delivery marketplace, and so that future markets may best realize the potential benefits that this bill could provide.

The CLASSICS Act (S. 2393 and H.R. 3301)

While Public Knowledge generally supports MMA with modest adjustments, we have more significant reservations about the approach to pre-1972 sound recordings taken by the CLASSICS Act (S. 2393 and H.R. 3301).

First, the language proposed by this bill would apply coverage terms of up to *two centuries* to sound recordings that have already fallen into the public domain by any reasonable calculation.³ In its 2011 study on pre-1972 sound recordings, the Copyright Office called a flat 2067 end date “excessive,”⁴ noting that “only a fraction [of pre-72 sound recordings] have economic value.”⁵ In particular, the Office singled out the absurdity of granting this kind of protection to works published before 1923:

While a handful of pre-1923 works may still have some commercial value, that in and of itself does not justify maintaining copyright protection for another half century. The fact is that *all other works published before 1923 have entered the public domain*. The Office sees no reason to create an anomaly by offering continued protection of such sound recordings until 2067.⁶

In addition to the incongruity of two-century-long terms for archival recordings, a flat 2067 end date would chill existing preservation initiatives, such as the Internet Archive’s Great 78 project.⁷ The Copyright Office recognized the importance of archival and preservation efforts, citing “a significant public benefit to mak[ing] [historical works] widely available for study and research.”⁸

³ See Letter to Chairman Issa and Ranking Member Nadler, Library Copyright Alliance (Aug. 9, 2017), available at <http://www.librarycopyrightalliance.org/storage/documents/Classics-Act-Letter.pdf>.

⁴ “Federal Copyright Protection for Pre-1972 Sound Recordings: A Report of the Register of Copyrights,” U.S. Copyright Office (Dec. 2011) (hereinafter “Pre-72 Study”) at 164, available at <https://www.copyright.gov/docs/sound/pre-72-report.pdf>.

⁵ Id. at 162.

⁶ Id. at 164 (emphasis added).

⁷ Great78, <https://great78.archive.org/>.

⁸ Id. at 162.

Second, to truly equalize legacy artists with their modern counterparts, Congress should not stop at a “right to be paid.” Instead, it should ensure that legal and equity protections, such as termination rights, are made available and accessible to pre-72 artists.

Most critically, the fact remains that the appropriate treatment for pre-72 sound recordings is a complex topic with no clear solution. Public Knowledge agrees with the findings of the U.S. Copyright Office, which, after years of study, concluded that full federalization is the best and most effective solution to resolving the copyright status of pre-72 sound recordings.⁹ While these bills contain a “right to be paid” and a handful of protections, they do not address the legal underpinnings of the current situation, making the proposed “solution” a less-than fully adequate band aid. Congress should seek to tackle the *cause* of the coverage gap, and not its symptoms, and should do so while fielding input from all affected parties.

Sincerely,

Meredith Rose
Policy Counsel
Public Knowledge

Cc: Members of the Senate Committee on the Judiciary

Cc: Members of the House of Representatives Committee on the Judiciary

⁹ Pre-72 Study, *supra* note 4.