

Written Statement of Josh Kear
at the
United States Senate
Committee on the Judiciary
Hearing on
"Protecting and Promoting Music Creation for the 21st Century"
May 15, 2018

Chairman Grassley, Ranking Member Feinstein and Members of the Committee:

My name is Josh Kear, and I am a songwriter and a member of ASCAP. Thank you for this opportunity to present testimony as a voice for the professional songwriting community – both present and future songwriters -- in support of the Music Modernization Act, or MMA.

I realize most of you have no idea who I am. My name has never been displayed in flashing lights or plastered across a billboard. But I am a part of a special group of men and women who work in the shadows of the spotlight to create the music you listen to on your morning commute or enjoy in your favorite bar or restaurant.

I wrote my first song about an unrequited crush I had on a girl in my high school English class and I knew then I had found my calling. My first publishing deal came at the age of 21 and over the course of my twenty-two-year career I've written thousands of songs—most of which will go unheard. I was a ten-year overnight success culminating in my first number one hit — Carrie Underwood's "Before He Cheats," which coincidentally also brought me my first Grammy. Following on the heels of that was Lady Antebellum's "Need You Now," my second number one hit and second and third Grammy awards. I've been incredibly fortunate to write other chart-topping songs for artists like Tim McGraw, Taylor Swift and Dierks Bentley, among others.

While I love creating music, it is not a hobby, it is my job. I go into an office every day

the same as everyone else and I write song after song in hopes they will be successful because writing just one or two hit songs these days doesn't guarantee you'll always be able to pay the rent or feed your family.

That's because songwriters are some of the most heavily regulated small business owners in the country. I say "small business owners" because while we work with publishers, songwriters are actually self-employed. And yet, the government effectively sets the rates for three-quarters of the income that we receive.

It is important to differentiate songwriters from the recording artists that perform our songs. Unlike the artists who record our songs, we make no revenue off of concert tours, t-shirt sales or endorsement deals. Instead, we make money off of royalties when our songs are publicly performed. It used to be a songwriter could make a decent income from sales of albums or CDs, but those, and the income derived from them, are relics of the past. People don't buy music anymore; they stream it. And that means the money songwriters make off of public performance royalties, which includes streaming, is our livelihood.

While streaming has certainly increased the reach of our music, our work is now valued less—we're talking fractions of pennies on the dollar. This is because the government-regulated marketplace has suppressed the rates paid by digital music services for the public performance right to stream songs, and the royalties from these services are shockingly low.

This is why songwriters are asking for your help in Washington.

As songwriters, we depend on collective licensing of our works to survive. Especially now, in the digital age, our music is available everywhere, all the time. There is no way we could license or track the millions of performances of our music across the entire

country in the hundreds of thousands of bars, clubs, restaurants, radio stations, television uses and through every streaming service. Our performing rights organizations – such as ASCAP and BMI -- which both operate as not-for-profits, are able to do that for us efficiently and at a low cost. So, we need them to be able to work for us with laws that make sense for the way music lovers listen to our music today.

My songwriting colleagues have been to many of your offices over the years, sharing our struggles with the consent decrees and the below-market rates we receive for the performances of our music. We have also shared various ideas for reform that would bring our outdated laws into the digital age. I am so happy we finally have some momentum on some of those issues with the Music Modernization Act.

I want to thank Chairman Grassley, Senators Hatch, Alexander and Whitehouse and all of you who have co-sponsored this important bill. The Music Modernization Act includes a number of key provisions that will help music creators like me have a fair chance at getting a fair deal for the use of our work. I know other witnesses will address many of these provisions in depth. That is why I would like to focus specifically on two provisions that could directly help songwriters in a meaningful way.

The first is rate court reform: this legislation would change ASCAP and BMI rate court procedures to make the rate-setting process for performance rights consistent with other federal litigation by randomly assigning a federal judge to take a new and objective look at the evidence in each case. Not only does this ensure that each case is reviewed with a fresh set of eyes, it also makes it more likely that rates will be set based only on the evidence presented in that specific case, rather than being influenced by a judge's conclusions in a prior rate-setting case.

The one-judge system we have today does not suit the needs of the digital age when there are new industries with new uses for music continuously popping up. Instead, we

need a system that provides better opportunities for performance rates to be adjusted to market conditions as they evolve.

The second is repealing Section 114(i) of the Copyright Act so that a judge could consider all relevant evidence when determining songwriter compensation for rates from digital streaming services— including what record labels and artists make for the exact same performance. In a free market, labels and artists can earn up to 8 times more than songwriters and publishers for the exact same streams.

The removal of this provision is neutral to the extent that the rate courts will have full discretion as to whether and how sound recording rates are relevant, and judges will be able to more fairly evaluate the entire economic landscape, without being shackled by this archaic rule that has outlived its purpose with regard to digital streaming services.

Through these two provisions, the MMA will enable judges representing a variety of perspectives to consider a broader set of relevant evidence when determining rates songwriters earn from the use of their music. For years, we've watched as the ASCAP and BMI rate courts have curbed free-market forces and subsequently suppressed our rates. These changes will enable songwriters to earn compensation for our music that better reflects its value to the people who listen to it.

While this legislation will not solve all of our challenges, it will make significant improvements for songwriters on the whole. The bill eliminates the bulk "NOI" or Notice of Intent loophole which has allowed streaming companies to hold onto significant dollars that they should be paying out to songwriters and publishers. It also changes the mechanical licensing rate standard to a "Willing-Buyer, Willing-Seller" model that reflects rates negotiated in a free market. This will dramatically improve fairness for songwriters in terms of how their work is valued and helps us get fair mechanical royalties from the massive interactive streaming companies who rely on our work but

who currently pay a below-market rate. The present standard of evidence to set my mechanical royalty rates was established by Congress in 1909 for player piano rolls.

Now that we've dug into the details, I want to take a step back and remind everyone here why all of this matters. Our songs have led our country to be THE world leader in popular music, with American music moving hearts and minds across the globe. But our work as songwriters will continue to be undervalued until the government gives us more flexibility to negotiate and updates our laws.

And while songwriters wait for this untenable situation to be resolved – we write. We write unspeakable truth. We write whimsical fiction. We write three minute screenplays and four minute novels. We take the unbearable silence and fill it with the sound of existence. The fears and dreams of childhood are our verses. Our chorus is the adolescent howl of teenage years yielding to the self-assurance and resolve of adulthood. The march of time and the wisdom of age become our solo and our bridge. And when it's all done it will come to a sudden stop. Song over - no side B. There will be only the echoes of our lives fading as the next heartbeats begin.

We go to work. We roll up our sleeves. We clock in, strum a guitar, press down piano keys, click the letters on a keyboard. And we write. We write for ourselves. For our friends. For our families. For complete strangers. For the very soul of the country God left in our care. And with your judicious assistance we will continue to write the soundtrack of all of our lives.

The Music Modernization Act represents an historic coming together of a large array of stakeholders, and with the inclusion of the Classics and Amp Acts, the MMA is a truly comprehensive bill. Reaching agreements between songwriters, music publishers, performing rights societies, record labels, recording artists, streaming companies and

broadcasters is a colossal task. But, our communities have achieved precisely such a compromise.

With the Music Modernization Act's recent passage in the House, we need to build on that momentum. On behalf of American songwriters, I ask the Senate Committee on the Judiciary to swiftly adopt this historic legislation. The time is now and songwriters, both present and future, depend on it.

Mr. Chairman, thank you for the opportunity to address this committee in support of the Music Modernization Act and for your interest in these issues that are so important to the songwriting community.