

U.S. Senate Committee on the Judiciary
Hearing on “Protecting and Promoting Music Creation for the 21st Century”
May 15, 2018
Responses of Mitch Glazier, President, RIAA
to Senator Grassley’s Questions for the Record

1. Public Knowledge has voiced concerns about the term of protection going to 2067 and the lack of termination rights in the Music Modernization Act. Do you agree with these concerns? Please explain.

No. The Music Modernization Act does not affect or change the current term of protection for pre-1972 sound recordings and, therefore, also does not affect or change the termination provision of the Copyright Act.

In 1972, Congress created federal rights for post-1972 sound recordings prospectively, leaving all rights for sound recordings created before February 15, 1972 (“pre-1972 sound recordings”) to the states, where they enjoyed perpetual protection. In 1976, Congress replaced perpetual protection by the states with a term that places all pre-1972 sound recordings into the public domain on February 15, 2047. In 1998, this Committee and ultimately Congress enacted the Copyright Term Extension Act (CTEA), which set the current term for pre-1972 sound recordings as expiring on February 15, 2067.

In 2002, Professor Larry Lessig represented a plaintiff challenging the constitutionality of the CTEA in a Supreme Court case, *Eldred v. Ashcroft*. The Court ultimately upheld the current term of copyright, acknowledging the reasoning laid out in an *amicus* brief filed by Senator Hatch that the term was warranted to encourage the investment in and preservation of copyrighted works.

The constitutionality of the current term is therefore a settled issue, and the property rights and expectations granted by Congress in these works until February 15, 2067 are set. Public Knowledge is trying to use the Music Modernization Act as a vehicle to re-open this issue by misrepresenting that the CLASSICS title of the bill somehow extends or affects the term set by Congress in 1998 for these works. It does not. The term of protection for pre-1972 sound recordings will go to February 15, 2067 regardless of whether MMA becomes law.

The MMA is a consensus driven and common ground bill that focuses narrowly on solutions to music licensing problems to benefit both creators and users of works. Public Knowledge is advocating that it be amended to include a very controversial and divisive proposal: that the current term of copyright granted by Congress be cut, stripping away years of revenue and compensation from creators and owners. Their proposal has nothing to do with music licensing, nor does it fix any problems on which the MMA focuses. It is merely an opportunistic effort to repeal the law Congress passed in 1998 that was upheld by the Supreme Court.

Public Knowledge's proposal also divides the communities supporting the bill and generates vast opposition instead of uniting the parties to solve problems. Artist groups, unions, civil rights groups, property rights groups, professors, and record companies are among dozens of groups of people who support the MMA and oppose the amendment Public Knowledge is seeking.

In addition to destroying consensus and harming creators, Public Knowledge's proposal to cut the current term of protection is itself an unconstitutional *per se* taking of property that would violate the Fifth Amendment. Having established property rights until 2067, a direct act by the government to take that property prematurely for the "public benefit" is the definition of a *per se* taking. To do so, Congress would have to provide just compensation to creators and owners for the loss they would suffer as a result of the government action.

As to termination, these rights historically were granted in the context of an extension of term. For example, in 1976, when Congress changed the term of federal (not state) copyright from renewable terms of 28 years (56 years total) to life of the author plus 50 years (now 70 years after the CTEA), it resulted in years of new copyright term that were not expected when investments were made in those works. Congress created a "termination" provision to transfer back rights to original authors for a certain period of time at the end of the term to prevent an unexpected windfall to transferees of copyright that bargained for the old term.

The MMA, in contrast, contains no extension of term. The termination provision of the Copyright Act thus is not affected nor triggered by the MMA. In fact, the MMA was drafted to avoid these controversial issues to focus on bringing parties together in a manner that focused on consensus problem-solving for the music marketplace. Moreover, all major artist groups are on record opposing the addition of termination rights to the MMA.

The Public Knowledge proposals destroy consensus, suggest radical changes, and divide interests. They ignore that the MMA contemplates the same type of payment for pre-1972 sound recordings as is made for post-1972 sound recordings under the Section 114 compulsory license—a 50/50 split with direct payment to artists from SoundExchange, and that introducing termination or term provisions into Title II of this bill would slow—if not prevent altogether—the payment to deserving artists and copyright owners, for whom time is of the essence. Public Knowledge's concerns are not germane to the MMA and ought not slow down any further the compensation owed to some of our most talented artists for their invaluable contributions to our society.

2. As a representative of artists who, in the section 114 sound recording license context, receive royalties under both the policy-based rate setting standard and the market-based willing-buyer/willing-seller standard, can you speak to your members' experiences under each?

Our members' experiences under willing buyer/willing seller have been far more favorable than under the "policy-based" Section 801(b) standard, which produces below-market rates that

skew the marketplace for music. The history behind these rate standards elucidates the reasons it is time to abandon the 801(b) rate standard for both songwriters and artists in both statutory licenses, and why both must be done together.

Before 1995, only the reproduction and distribution of sound recordings were protected rights under federal law. In 1995, Congress passed the Digital Performance Right in Sound Recordings Act, which for the first time added rights protecting the digital performance of sound recordings. Congress's stated purpose in doing so was to "protect the livelihood" of artists, record companies and other creators of sound recordings as new digital technologies set the stage for music fans to listen to music (performance) as an alternative to purchasing it (distribution). At that time, Congress also created a compulsory license as an "efficient mechanism" for noninteractive subscription services, defaulting to the 801(b) standard that was already in existing statute for musical works (compositions).

In 1998, when it expanded the compulsory license to include Internet radio, Congress evaluated the appropriate rate standard for sound recordings and chose a new rate standard—willing buyer/willing seller—based on the experience of the first rate proceeding for sound recordings under 801(b). Rates for Music Choice and others had been set without regard to sound recording marketplace rates, and Congress decided that the rate standard should reflect marketplace benchmarks.

Music Choice and SiriusXM balked at the new market-based rate standard, claimed they were relying on 801(b) to build their businesses, and requested a "grandfather" provision that would continue to apply the below-market rate standard to them, while later competitors in the marketplace would have to pay under the willing buyer/willing seller standard. Twenty years later, they are making the same arguments while they dominate the market and cannot be undercut by their competition. Clearly, they have built their businesses by now, and all other services (numbering more than 3000) currently operate under willing buyer/willing seller.

The willing buyer/willing seller rate standard, while not perfect, is a vast improvement over the 801(b) test because it requires Copyright Royalty Judges to examine agreements in the actual sound recording marketplace. On the other hand, the 801(b) standard has a lamentable history of depriving sound recording creators of fair market value and forcing those creators to subsidize for-profit music services. In the very first satellite radio rate proceeding, for example, the judges concluded under 801(b) that a market rate would be 13%, yet set the rate at 6%, rising to 8% over the term. The judges replicated this exercise in the second proceeding, again setting the rate substantially below the market rate. This decade of below-market rates for satellite radio alone cost creators more than \$1 billion. Meanwhile, Sirius has grown into an economic powerhouse generating more than \$5 billion a year in revenue—on the backs of sound recording creators.

The 801(b) standard also gives legacy services a significant advantage over their non-grandfathered competitors. For example, Music Choice is the chief beneficiary of the 801(b) standard in the so-called "cable radio" market—*i.e.*, music-only stations offered on residential

cable and satellite television services. SoundExchange recently argued that the Music Choice rates should at least be the same as those of the non-grandfathered participants in the cable radio market. The judges disagreed and, applying the 801(b) standard, held that Music Choice's rates should remain a fraction of the market rate that would otherwise prevail. But this lower rate will only further enshrine Music Choice's dominance over this part of the market, meaning artists and labels are hurt twice: first when Music Choice pays a below-market rate, and again when competitors who would pay a fair rate are squeezed out.

The adverse impact of below-market rates cannot be overstated. As anticipated by Congress in 1995, the market for sound recordings today is driven by performance-based services rather than sales of recorded music. Since these performances often compete for the attention and time of music consumers, they must be monetized sufficiently to ensure, as Congress recognized in 1995, that the creation of sound recordings is not "discouraged, ultimately denying the public some of the potential benefits of new digital transmission technologies." The 801(b) rate standard remains an obstacle to a long-lasting, vibrant marketplace for sound recordings.

3. Would RIAA support more specific language to address the potential double dip concerns regarding pre-1972 music settlements?

Yes. In fact, such language was prepared for the final draft of the MMA (H.R. 5447) but was inadvertently left out of the version that passed the House on April 25th. The RIAA has no objection to reinserting that language into the final bill.

4. For musical works, the Music Modernization Act provides that unidentified funds will be held for three years, and then distributed to the musical work copyright owners by market share. How does this compare to the way unidentified funds are distributed under the section 114 statutory license for sound recordings? Can you speak to your members' experiences with unidentified funds under section 114?

I referred this question to SoundExchange to explain the manner in which it distributes unidentified funds under the section 114 statutory license. Below is the response from Colin Rushing, General Counsel to SoundExchange:

"Unidentified funds"—or royalties that cannot be matched and distributed to specific payees—is an issue that every collective management organization faces. The issue is only compounded in the digital ecosystem, in which services are playing tens of millions of recordings billions of times per month. Under long-established and accepted policy and practice, artists and labels have three years from the date that royalties from a particular licensee payment are first distributed to "claim" funds from SoundExchange. In practice, artists and labels register with SoundExchange and provide information identifying the repertoire for which they should be paid. For the vast majority of current sound recording usage, such repertoire is identified to SoundExchange (claimed) at about the time of commercial release. SoundExchange has created

extensive internal procedures and practices to associate reported usage with claimed repertoire, and also invests substantially in outreach to find and register artists and labels who may be entitled to royalties when reported usage cannot be associated with claimed repertoire. For the small sliver of royalties where those efforts are not successful, after the claim period, the original claims to the royalties are extinguished and SoundExchange uses the funds to offset its administrative expenses. Because artists and copyright owners pay SoundExchange's administrative costs on a current basis, in practice, this offset results in a refund to artists and copyright owners of a portion of the administrative costs they paid in the past, in an amount based on their pro rata share of Section 114 royalties during the applicable period. In other words, when we release unclaimed funds they are distributed to our artist and label payees as a "refund" of a portion of SoundExchange's administrative fee for that given year.

In our experience, our approach to the release of unclaimed funds has enjoyed broad support in the industry. SoundExchange has a strong and well-deserved reputation for transparency, accuracy, and efficiency. This is very much the result of the fact that we were created by and for the industry. Our board is composed of representatives of artists, unions, major and independent record labels, and record industry trade associations.

The mechanism for distributing unclaimed funds in the Music Modernization Act appears to be similar to that used by SoundExchange for the Section 114 license, in that the basic process involves paying any residual unclaimed funds to statutory payees on a pro-rata basis after a three-year claim period. There is one important difference, though, in that it would not make sense to characterize the mechanism in the MMA as a means of offsetting the administrative costs of the collective. This is for a simple reason: In the Section 114 license, SoundExchange's administrative expenses are deducted from the royalty stream—that is, they are paid out of the general Section 114 royalties. In the proposed Section 115 blanket license, by contrast, the administrative costs of the collective are paid by the *licensees*—including direct licensees. As a result, the publishers who are the recipients of the 115 royalties do not incur administrative costs to offset or refund. As a practical matter, though, the method of calculating the amount of each licensors' share of the unclaimed funds is similar to that used by SoundExchange, in that it is based on the amount that the publisher payees receive under the Section 115 system.

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1. How will Title II of S. 2823 affect access to and cost of music for consumers?

The CLASSICS Act, Title II of S. 2823, will improve access to music, should have no impact on the cost of music for consumers and will ensure creators of sound recordings recorded before February 15, 1972 (“pre-1972 sound recordings”) receive compensation for their work during the term granted to them by Congress.

In 1998, when Congress determined that the term of property rights for pre-1972 sound recordings would extend until February 15, 2067, it found that providing the additional protection “would increase the availability of artistic works by enhancing the incentive for investments in distribution and preservation.” Brief of Sen. Orrin G. Hatch as Amicus Curiae In Support Of Respondent, *Eldred v. Ashcroft*, 2002 U.S. S. Ct. Briefs LEXIS 403 (Aug. 5, 2002); H. R. Rep. No. 105-452, p. 4 (1998) (CTEA’s term extension “provides copyright owners generally with the incentive to restore older works and further disseminate them to the public”). Congress’s conclusion—that users would be better served where works remained under protection rather than being thrown into the public domain—also was upheld by the United States Supreme Court in *Eldred v. Ashcroft*, 537 U.S. 186, 207 (2003).

CLASSICS does not extend, nor does it affect, the term of copyright for pre-1972 sound recordings, but the same reasoning applies. Clarity regarding the scope of protections for pre-1972 sound recordings will produce similar incentives among owners of those rights to preserve and disseminate those works to the public.

As to the cost of music for consumers, the payment of fair market royalties for pre-1972 sound recordings should not have any discernible effect. Thousands of digital radio services already pay fair market value for pre-1972 sound recordings, whether as a result of a principled interpretation of the existing compulsory license regime, direct negotiations with rights-holders, or litigation. These royalties should already be a part of the services’ budgets and confirming their legal obligation to pay them should not increase the price for end-users.

It is not a reasonable business practice for a digital radio service to rely on the use of goods without paying for them. Further, the business certainty and lack of liability provided in CLASSICS should produce economic benefits for services. For a company like SiriusXM, which has reported record growth and profits over the past several years, there is no reason to anticipate any increased costs to consumers.

Finally, it is worth noting that the accessibility to the public of pre-1972 sound recordings already is greater than ever, whether for free on YouTube, with a subscription to Spotify or Amazon, on the radio, through the Library of Congress's free National Jukebox, or elsewhere. There is no support for the proposition that prematurely throwing these works into the public domain would make public access any easier or less expensive. In fact, the opposite is more likely. Less investment in distributing these works to consumers, especially given free to the consumer platforms, is likely to reduce rather than increase access.

The federal government's authority to establish copyright law stems from the text of Article I, Section 8 of the Constitution, which states: "The Congress shall have Power... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

2. Is it your view that Congress is only authorized to create intellectual property protections to the extent that such protections incentivize the creation of protected works?

No. The foundation and history of copyright "flatly refutes any notion that copyright law is a matter of legislative grace intended solely to serve utilitarian ends. The Copyright Clause of the U.S. Constitution was inspired by a long intellectual tradition—extending back to the very origins of printing and publishing—in which legislators, jurists, scholars, and commentators recognized authors' inherent property rights in the fruits of their own labor." Paul Clement, Viet Dinh & Jeffrey Harris, "The Constitutional and Historical Foundations of Copyright Protection," Center for Individual Freedom, 2012, p. 6. Copyright is not granted by Congress—it is an inherent property right owned by each creator born of his or her genius and labor. The Constitution delegates to Congress the power to "secure" an interest in one's inherent property for a limited time through exclusivity.

American and English copyright law evolved from common law principles influenced by philosopher John Locke. Under Locke's view, "[o]ur handiwork becomes our property because our hands—and the energy, consciousness, and control that fuel their labor—are our property." *Id.* at 5. That is, "a person rightly claims ownership in her works to the extent that her labor resulted in their existence." *Id.* at 6. So Congress is not only authorized to establish copyright protections to incentivize the creation of new works, but also to allow creators of prior and existing works to benefit from the "fruits of their labor."

The Supreme Court likewise has confirmed Congress's authority to provide additional intellectual property protections to rights-holders for existing works, and not merely to incentivize new works. In *Eldred v. Ashcroft*, a case challenging the constitutionality of the Copyright Term Extension Act of 1998 (CTEA)—the law that established the current term for pre-1972 sound recordings as expiring February 15, 2067—the Supreme Court was asked to opine on the purpose of copyright and whether the Constitution permitted Congress to extend copyright term even if, in their view, the additional term would not incentivize the creation of new works. 537 U.S. 186 (2003). Those challenging the law, led by Professor Larry Lessig (who

currently is recycling the same arguments against the CLASSICS portion of the MMA), argued that extending copyright term did not promote progress, and that Congress therefore was not acting within its Constitutional mandate. The Court rejected those arguments, upholding the CTEA.

Further, as Professor Barblan of George Mason University's Scalia Law School recently observed, the CLASSICS Act does indeed incentivize the creation of new works. "By preventing digital platforms from selling access to pre-1972 sound recordings without paying anything to the artists who recorded those songs, CLASSICS will demonstrate to all artists that Congress is capable of correcting injustices that result from unpredictable changes in technology. As a result, CLASSICS will give artists more confidence that the fruits of their creative labors won't be wrongfully expropriated in the future, and that if new technology makes it possible to unfairly exploit their works without compensating them, there is at least a chance that Congress will change the law to correct the injustice. This confidence will spur more artists to use their time and money (not to mention their hearts and souls) to create new works." Matthew Barblan, "Despite Professors' Misleading Rhetoric, CLASSICS is a Big Win for Everyone," May 29, 2018, available at <https://cpip.gmu.edu/2018/05/29/despite-professors-misleading-rhetoric-classics-is-a-big-win-for-everyone/>.

Interestingly, in opposing term extension for works already receiving federal protection, those who challenged the CTEA (who now oppose CLASSICS) recognized that "exchange of a state or common law right for a new federal right plainly 'promoted Progress.' Uncertainty about any property right, but especially an intellectual property right, inhibits the use and development of that property. Clarifying such uncertainty, by effecting a transition between two legal regimes, would advance the aim of the Copyright Clause." Reply Brief for the Petitioners, *Eldred v. Ashcroft*, 2002 U.S. S. Ct. Briefs LEXIS 523 (Sept. 4, 2002), at *15. These parties acknowledged that the effect of CLASSICS—to migrate a contested state right to a new federal protection—is appropriate and Constitutional, and promotes the progress of science. Although they now insist that CLASSICS does nothing to promote progress and is merely a "gift" to older artists, they previously acknowledged that the very benefits conferred by CLASSICS to users fall directly within Congress's constitutional ambit.

3. How does Title II of S. 2823 "promote[s] the Progress of Science and the useful Arts" given that it is impossible in 2018 to incentivize the creation of recordings from before February 15, 1972?

CLASSICS would incentivize the creation of new works by removing ambiguity in digital performance rights. It indicates to creators that they can benefit from their works and that the government will stand by its promise to protect their creative property during the term it granted. CLASSICS would signal to creators, old and new, that Congress takes seriously the full scope of its commitment.

Imagine if benefits were promised to induce someone to accept a job, and then after the job was accepted, the employer reduced the benefits because they were no longer necessary to incentivize the person to take the job. Not only would that be vastly unfair and break the promise to the talented recruit, it would send a signal to all other potential applicants that they will not receive what was promised, and the number of applicants would be diminished accordingly. That is what Public Knowledge is proposing – that Congress not keep the promise of the term granted to property owners in 1998, and instead that it reduce the benefit because they have “already taken the job.” It is an argument that is economically out of sync with the purpose of copyright, and is morally bereft.

In his written testimony before this Committee, Mr. Robinson described the purpose of Title II of S. 2823 as correcting a “quirk in the law” that has created a “loophole.”

4. Do you agree with his characterization of the current state of the law?

I agree with Mr. Robinson’s sentiment. Although every other copyrightable work is completely governed by federal law, the Copyright Act distinguishes between sound recordings made on or after February 15, 1972 (“post-1972 sound recordings”), and those made before that date (“pre-1972 sound recordings”), which are reserved for state protection. Some digital services have taken advantage of this distinction, which Mr. Robinson referred to as a “quirk in the law,” to game the system.

The current state of the law is the result of the piecemeal application of rights over the course of the last century. Sound recordings did not enjoy federal protection until 1972, and then only prospectively and only for the rights of reproduction and distribution. The 1976 Copyright Act maintained this distinction and established that pre-1972 sound recordings would retain their state law protections until February 15, 2047 (later extended to 2067 under the Copyright Term Extension Act of 1998). In 1995, Congress finally granted sound recordings a limited digital performance right, which included a blanket licensing system allowing any non-interactive digital music service to use all of the millions of sound recordings in exchange for paying a statutory license fee. The blanket license was clearly intended to require services to pay for all the songs they perform, otherwise it would not operate efficiently as a “blanket” and would require breaking out the reporting of and performance of recordings.

Unfortunately, some services operating under the benefit of this blanket government license have taken the position that pre-1972 sound recordings can be used without any compensation. They argue that, technically, the blanket license does not cover use of pre-1972 sound recordings since it is a creature of federal law and pre-1972 recordings are entitled to protection under state laws. They then deny that digital performances of these sound recordings are protected under state laws, even if reproductions and distributions of those same recordings are protected, because the state laws that protect pre-1972 sound recordings were drafted before digital performances could be made. They employ a handful of flawed arguments to arrive at their desired conclusion (including incorrectly claiming that there is, in fact, no state law for digital and other performances), but the end result is the same: they are

using these works without compensation during the term of copyright—something Congress never intended.

Title II of S. 2823 (the CLASSICS Act) resolves this “quirk in the law,” and remedies any ambiguity caused by misreading and misapplication of state law. It ensures that services pay for their widespread use of the world’s most iconic recordings, that copyright is respected, that creators are protected during the term promised them, and that the blanket license works as it should. It also assures users access, applies the standard exceptions and limitations, and ensures rights clarity, business certainty, lack of liability for services, and licensing efficiency. Finally, it prevents litigation.

5. Do you agree with the assertion that Congress’s 1971 choice to federalize recordings copyright protection only from February 15, 1972 onward while leaving the choice of whether to protect preexisting works to the states and limiting the length of state copyright protection represents a deliberate decision to offer more protections prospectively than retrospectively? Would you agree with such a choice?

Congress’s 1971 prospective federalization of sound recordings did not limit the length of state copyright protections for preexisting works. Under that Act, and prior to it, pre-1972 sound recordings enjoyed state protection indefinitely. State works could be protected in perpetuity. The distinction between pre- and post-1972 sound recordings was not a matter of which offered more protections. The only rights considered for federal protection going forward were the rights of reproduction and distribution, which already had strong and perpetual rights in the states. Performance rights were not being considered for federal protection (and none were granted until 1995.) If anything, the Federal protections going forward could be considered weaker than state laws that continued to apply to works created up to that point, because the exceptions and limitations that would apply under federal law may or may not apply in different states and the new federal term was for a limited time.

The term of protection for pre-1972 sound recordings was not limited until the Copyright Act of 1976. In doing so, Congress sought to reconcile the constitutional mandate of a “limited time” with state law protection that was in perpetuity. By selecting 2047 as the end-date for all pre-1972 sound recording protection by the states, Congress imposed a “sliding scale” to take account of the fact that these works had an indefinite term up to that point. In order to diminish the risk of a taking under the Due Process Clause, older works, where there was more reliance on an indefinite term, would receive a longer term, whereas newer works would receive a shorter term. The newest works would receive 75 years of protection to match the federal term for corporate works (changed to 95 years—and 2067—with the Copyright Term Extension Act in 1998). Congress pegged the term to the date upon which sound recordings first received federal protection (February 15, 1972), choosing not to apply the pre-existing state protection to the term calculation. It would not only be inappropriate for Congress to now override that determination and end the term before the established date of 2067, as some parties have sought; it would represent an unconstitutional taking of property. In any

event, the existing term must be viewed in the context of and related to the previous perpetual term that existed for these works.

6. By giving works from the year 1923 protection under federal law for a term of 144 years while maintaining the term of 95 years in ordinary circumstances for works from February 15, 1972 onward, would Title II of S. 2823 result in a more or less fair system for copyright owners than under current law?

Unfortunately, this question has a false premise. Title II of S. 2823 (the CLASSICS Act) would not, in fact, give works from the year 1923 protection under federal law for a term of 144 years. Assuming the bill went into law next year, works covered under CLASSICS would receive only 48 years of protection under federal law (2019-2067) and, thus, would actually receive 47 years less federal protection than the “95 years in ordinary circumstances” for post-1972 sound recordings.

In any case, whether CLASSICS is enacted into law or not, the 2067 end date for protection of pre-1972 sound recordings remains the same. Given that fact, it is clear that the bill will result in a fairer system for pre-1972 sound recordings for both owners and users because it will result in rights clarity and fair compensation for owners and creators, and important limitations and exceptions for users. In addition, digital services and others who use these works will be provided with a blanket compulsory license.

It would be unfair to deny artists and owners enjoyment of the full term they were granted, promised, and expected for their sound recordings, and to take from them years of protection—and compensation—to which they are entitled. Any proposal that cuts off protection for these works before February 15, 2067 would rob artists of their pay, jeopardize their security, and present a taking of property. See Barblan, above; Donald Verrilli letter to Sens. Grassley and Feinstein, May 1, 2018, citing *Boyle v. United States*, 200 F.3d 1369, 1374 (Fed. Cir. 2000), *Roth v. Pritkin*, 710 F.2d 934, 940 (2d Cir. 1983), *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 295-96 (1981), *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1987); Terry Hart, “No, the CLASSICS Act is not a ‘term extension’,” May 7, 2018, available at <http://www.copenhype.com/2018/05/no-the-classics-act-is-not-a-term-extension/>; Terry Hart, “Does the ACCESS to Recordings Act violate the Constitution’s Takings Clause?” May 30, 2018, available at <http://www.copenhype.com/2018/05/does-the-access-to-recordings-act-violate-the-constitutions-takings-clause/>, citing *Horne v Department of Agriculture*, 576 US ____ [at pg 5] (2015).

Forty-two intellectual property professors recently wrote to this Committee with concerns about the CLASSICS Act, a version of which constitutes Title II of S. 2823. One portion of their letter states:

The Act . . . arbitrarily exempts pre-1972 sound recordings from almost all the statutory copyright limitations that apply to other types of works. In particular,

neither 17 U.S.C. § 114, which deals with the scope of exclusive rights of sound recordings from 1972 onwards, nor § 110, which among other things allows certain performances for educational purposes, would apply to pre-1972 sound recordings. The version of the Act that passed the House also includes (appropriately in our view) the limitations of sections 110(1) and 110(2). Nor would other potentially relevant limitations, including those in § 112 and § 119. . . . [The Act] will have harmful effects on the public. For example, any existing work that includes pre-1972 sound recordings, including audio documentaries, podcasts, etc., could no longer be transmitted to listeners without, in most cases, first securing new permissions from the owners of the copyright in each sound recording. This would be a difficult and burdensome challenge since most works were funded and created with an expectation of the necessary rights that would now be disrupted. The Act's retroactive protection will thus hamper access to works containing older sound recordings in a manner similar to how other copyright clearance impediments greatly limited the public's ability to view the landmark civil-rights documentary *Eyes on the Prize* for many years after its initial release. . . . [T]he Act's restriction of limitations on the exclusive rights of a copyright owner to sections 107 and 108 in § 1401(e)(1) should be amended to include all existing statutory limitations, by substituting in the words 'The limitations on the exclusive rights of a copyright owner described in sections 107 through 122, inclusive shall apply'

7. Do you agree with these criticisms? Why or why not?

No. The statements made in the letter are inaccurate and misleading. First, section 110 appears on page 139 of the MMA (S. 2823) and would apply to pre-1972 sound recordings under CLASSICS. Similarly, the bill clearly affords those operating under the section 114 compulsory license the ability to include pre-72 recordings. To declare that "neither" of these sections "would apply to pre-1972 sound recordings" is patently false. The application of these limitations is clear in both the bill passed by the House and introduced in the Senate. It is puzzling as to why these professors would make this claim, sine a cursory review of the bill indicates their clear application.

CLASSICS also allows services to take advantage of section 112 in the same way as section 114. It is also puzzling as to why the professors object to section 119 not applying to pre-72 sound recordings. Section 119 is a television distant signal license for satellite video services, and has no application to the digital performance of sound recordings. Perhaps the professors have confused the cable and satellite television programming licenses for video programming with the sound recording and musical work compulsory licenses in the Copyright Act. Many times, those who do not operate under, nor deal with, the implementation of the licenses do not understand their particular uses and applications. Using a recording in an audiovisual work generally requires a reproduction license (often called a synchronization right). The professors could be mixing up or perhaps do not understand performance-only uses versus those that

include a reproduction. Reproduction rights are not affected by CLASSICS. Those rights are clear state rights, along with distribution rights, that remain with the states under this bill.

In addition, all fair use, library, archive, educational and liability limitations also apply under CLASSICS to digital performances of pre-72 works.

With respect to claims that CLASSICS “will have harmful effects on the public,” the professors seem to suggest that CLASSICS creates an obligation where one doesn’t already exist. But, currently, at least one state (California) provides a statutory right that would require permission to perform these works, and others likely provide it under common law (or could amend their existing laws to provide such protection). Moreover, if users are looking to include pre-1972 sound recordings in other works (as in the mentioned *Eyes on the Prize*), every state has a reproduction and/or distribution right that would require that permission be obtained. CLASSICS, in sum, does not create new and burdensome requirements for permission to use pre-1972 sound recordings, as the letter indicates, and it certainly does not provide “retroactive protection.”

If the pre-1972 sound recording is included in an “existing work,” as the letter contemplates, then surely the users have already obtained permission from the sound recording rights owner under state law. If so, then the use is not “without the consent of the rights owner,” and does not violate the rights afforded under CLASSICS.

Of course, the authors of the letter conveniently overlook the beneficial “effects on the public” under CLASSICS. By providing a blanket compulsory license for non-interactive streaming, the bill enables digital transmitters an efficient, convenient, legally certain way to use any pre-1972 sound recording without the voluntary license currently required under state law. And, again, the services would gain the benefit of statutory fair use, limitations to rights, and safe harbors that they do not currently enjoy.

8. Would you oppose the insertion of their suggested language?

While we support the insertion of relevant limitation language into CLASSICS, such as sections 107, 108, and 110, we would not support the insertion of the extraneous language proposed by the signatories of the letter. Legislative drafting favors efficiency. As stated, many of the sections 107 through 122 are irrelevant to the works and uses in question and would actually create confusion. The inclusion of such provisions would perplexingly offer federal limitations to rights not afforded under federal law, and improperly attempt to vitiate the rights and limitations granted to the states.

We have been happy to work with others seeking to apply relevant limitations (as we did with sections 107, 108, and 110 before the introduction of the MMA), but it would be nonsensical to add the extraneous language applying the inapposite sections requested by the letter.

U.S. Senate Committee on the Judiciary
Hearing on “Protecting and Promoting Music Creation for the 21st Century”
May 15, 2018
Responses of Mitch Glazier, President, RIAA
to Senator Blumenthal’s Questions for the Record

As you know, Assistant Attorney General Makan Delrahim—the head of the Department of Justice’s (DOJ) Antitrust Division—is considering terminating the ASCAP and BMI consent decrees. For many decades, these consent decrees have governed how the largest performance rights organizations, ASCAP and BMI, operate within the music industry.

- **If the DOJ were to terminate the consent decrees governing ASCAP and BMI, would these organizations be able to operate in an unregulated manner without violating any antitrust laws?**

The Recording Industry Association of America (RIAA) does not have a position on this question at this time.

Within its Antitrust Division Manual, the DOJ identified two separate paths to modify or terminate a consent decree— (1) an “expedited path;” and (2) a “traditional approach” that allows for discovery and a full investigation. U.S. Dep’t of Justice, Antitrust Div., *Antitrust Division Manual* III-148 (5th ed. 2018).

- **What process should the DOJ utilize when considering whether to terminate or modify the BMI and ASCAP consent decrees and why?**

The Recording Industry Association of America (RIAA) does not have a position on this question at this time.