

**Questions Posed by  
Members of the Senate Judiciary Committee  
following its  
Hearing on S. 2823, the “Music Modernization Act”**

Questions for the Record:

**Sen. Hatch**

*1) Some critics of the Music Modernization Act have complained that it’s unfair to require digital music providers to pay the administrative assessment for the mechanical licensing collective. These critics claim that requiring digital music providers to bear the administrative costs of the collective is inconsistent with SoundExchange and other existing licensing entities for which copyright owners, not licensees, bear the administrative burden. You represent digital music providers. How do you respond to these criticisms?*

**DiMA Response**

Under the current Section 115 license digital music providers “pay” for the costs of administering the license by internalizing the costs of searching for, identifying, locating, and paying musical work copyright owners. Although these “payments” take the form of salaries for employees to manage internal royalties administration or hiring third-party vendors, digital music providers already bear the costs of administering the Section 115 license. The current 115 license, which obligates each digital music provider to conduct its own search for musical work copyright owners, results in waste in the form of redundant and duplicative administrative expenses for existing providers and a barrier to entry for new services. The Music Modernization Act’s mechanical licensing collective will centralize the search, identification, location, and payment of mechanical royalties to musical work copyright owners, which should reduce overall expenses and improve efficiencies.

While the MMA’s requirement that digital music providers pay for the operation of the mechanical licensing collective (“MLC”) is appropriate, digital music providers are not writing a “blank check” to copyright owners. It is the hope of digital music providers that the MLC will be subject to sufficient oversight to ensure that it operates in an efficient, fair and transparent manner, both with regard to its operational budget, as well as with regard to its liquidation of royalties to publishers. While the bill currently requires digital music providers to fund only the “reasonable costs” of operating the mechanical licensing collective, and provides some mechanisms to oversee the activities and expenditures of the collective (e.g., determination of the administrative assessment by the Copyright Royalty Judges and

an opportunity for regulatory rulemaking by the U.S. Copyright Office), additional transparency requirements through the rulemaking process are critical to preventing the black box model to which blanket license regimes are susceptible.

**Sen. Sasse**

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

**DiMA Response**

All of DiMA-member companies (e.g., non-interactive and interactive music services) currently pay royalties to record labels for the performance of sound recordings fixed prior to February 14, 1972. Therefore, DiMA does not anticipate that the cost to consumers of accessing online streaming services will increase as a result of Title II of S. 2823.

**Sen. Blumenthal**

***3) 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?***

**DiMA Response**

Without knowing how ASCAP or BMI might alter their current licensing practices, it is impossible to know if either would be able to operate in an unregulated manner without violating any antitrust laws. It may be instructive, however, to consider that in 1979 the Supreme Court found that ASCAP and BMI’s practice of offering only a blanket license was not a *per se* violation of the Sherman Act in part because of “the substantial restraints placed on ASCAP [and BMI] and its members by the consent decree[s]...” *Broad. Music, Inc. v. Columbia Broad.*, 441 U.S. 1, 24 (1979) (“*CBS*”). In concluding that the antitrust inquiry into ASCAP and BMI’s blanket licenses should be conducted under the “rule of reason,” the Court noted “It may not ultimately survive that attack, but that is not the issue before us today.” *Id.*, at 25. It may also be worth noting that Justice Stevens dissented in the *CBS* case,

stating his opinion that the ASCAP and BMI's practice of offering only blanket licenses violated the Sherman Act even under the "rule of reason" standard.

***4) 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?***

### **DiMA Response**

Any review of the decrees should follow the “traditional approach” and include a full investigation. The Tunney Act’s procedures for entering a consent judgment, which requires the federal district court to make a public interest determination (15 U.S.C. § 16(e)—(f)), offer a ready framework for how any modification or termination of the decrees should take place. By following such an approach, the Justice Department will be permitted to carefully examine the complex set of issues as well as the broad array of music licensees that would be affected as a result of potential changes to the current decrees.

In 2014, the Department began an extensive review of the ASCAP and BMI consent decrees. The Department solicited two-rounds of public comment and met with many stakeholders. At the conclusion of this fulsome two-year investigation, the Department concluded that the ASCAP and BMI consent decrees continue to serve the public interest and closed its investigation without seeking to modify or terminate the decrees.

### **Sen. Grassley**

***5) What types of systems need to be built out to support the mechanical licensing collective (MLC)? Are there current entities in the marketplace that the MLC could use to assist in getting the new system up and running?***

### **DiMA Response**

The mechanical licensing collective is tasked with searching for, identifying, and locating the copyright owners of musical works, and for reporting and paying on the usage of their musical works by music services . These tasks require a cross

functional team of copyright researchers (to oversee the creation and maintenance of a rights ownership database and facilitate ownership conflict resolution), information technologists trained in the idiosyncrasies of music publishing (to normalize and warehouse data, to design algorithms that match sound recording data to musical work data, and to create and maintain automated accounting and payment systems), royalty services coordinators (to engage in quality assurance of automated processes and to provide customer support to music services and publishers engaging with the platform), and legal staff (to oversee the legal compliance of the collective, including compliance with Section 115, its implementing accounting regulations, and other relevant tax and privacy laws). Because there are companies that offer services to fulfill each of these functions, digital music providers envision the mechanical licensing collective as a lean organizational structure with limited staff focused largely on vendor management. Because there is a significant range in the sophistication of vendors that offer these services, it is important that the MLC offer an open and transparent RFP process.

***6) How will the revised compulsory license system contemplated in the Music Modernization Act encourage new market entrants competing as music streaming services? In what ways will the shift to a blanket licensing system foster a more innovative and competitive marketplace for streaming platforms?***

#### **DiMA Response**

The current work-by-work Section 115 license often forces a digital music provider to choose between risking copyright infringement litigation or limiting the catalog of music it offers to consumers. Because the MMA's blanket license reduces infringement risk, promotes efficiency and establishes business certainty, the MMA will encourage new services to enter the market and enable all services—existing and new—to offer a complete catalog. When all digital music providers can offer a full catalog, services will have to compete along other dimensions, including new features and functions. The result will be more innovation and consumer adoption, which in turn will also benefit creators. However, that is not to say the new licensing structure is perfect. Certain DiMA members remain concerned that the new reporting and payment obligations required of “Significant Nonblanket Licenses” could produce unintended consequences, particularly with respect to new market entrants offering non-standard music delivery platforms, or music service providers who elect to rely entirely on direct licensing and do not utilize Sec. 115 for licensing.

***7) At the hearing, there was some discussion of the consent decrees that govern ASCAP and BMI and their role in shaping the public performance***

*licensing marketplace. Based on public comments and events, it appears that the Justice Department Antitrust Division is taking another look at these decrees, possibly with the intention of terminating them. Given the complexity of the music licensing marketplace, there is concern that such action could cause serious disruption and increase uncertainty in the music marketplace. If the Justice Department moves to terminate the ASCAP and BMI consent decrees, what would the impact be on licensees' ability to obtain necessary public performance licenses? What would the impact be on consumers' ability to enjoy music across the broad range of services, platforms, and venues that currently play music, What would be the impact on songwriters' ability to get paid efficiently when their songs are played?*

### **DiMA's Response**

The ASCAP and BMI consent decrees are a vital means by which licensees, including digital music providers, license musical work performance rights and no viable alternative currently exists to enable the thousands (or potentially millions) of individual licenses into which a provider would need to enter to offer an interactive music service. Without the consent decrees and the access to federal rate courts to mitigate their obvious market power, ASCAP and BMI, whose repertoires are Cournot compliments and not substitutes, can use their monopoly power to extract supra-competitive prices from licensees.

There is no authoritative database of musical work copyright ownership that would enable a licensee to know from whom it requires a license to perform a particular work, which makes licensing live performances problematic. Nor is there an authoritative database that matches music works to the sound recording in which they are embedded, which makes licensing the performance of recorded music all but impossible. Most licensees require a large catalog of music; digital music providers offer catalogs in the tens of millions of tracks.

The licensing of musical work performance rights is further complicated by the common industry practice of music publishers licensing only the share of the work it owns of controls. Unlike sound recording copyright rights, which are almost always owned by a single record label, musical work copyright rights are routinely jointly owned. While the default rule under the Copyright Act is that each joint owner controls an undivided pro-rata share of the work, the common industry practice in music publishing is for the musical work copyright owner to license only its share in the work. This means that a licensee must obtain a license from multiple copyright owners before it can perform a single work. This practice exacerbates that hold-up power of musical work copyright owners, each of which can demand above-market prices under threat of either depriving a licensee of a significant catalog or statutory damages for copyright infringement.

If the ASCAP and BMI consent decrees are terminated without a viable licensing alternative already in place, many licensees, such as restaurants and retailers, will simply stop playing music immediately. Other licensees will be forced to significantly scale back the amount of music they perform. Artists who don't write all of the music they perform may be forced to cancel tours. The result will be a dramatic decrease in music consumed and, by logical extension, royalties generated for songwriters. The reduced royalties that are generated will get lost in an impossibly opaque system into which songwriters will have no visibility and limited influence.