

**Responses to Questions for the Record from Senator Orrin G. Hatch**  
**U.S. Senate Committee on the Judiciary**  
**Hearing on “Protecting and Promoting Music Creation for the 21<sup>st</sup> Century”**  
**May 15, 2018**  
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Thank you, Senator Hatch, for asking these important questions about the Music Modernization Act (“MMA”) and allowing me an opportunity to provide responses for the record.

1. **Question: As you know, the Music Modernization Act tasks the mechanical licensing collective, or MLC, with administering the blanket license for digital works. Under the Act, the MLC will have the ability to reject a notice of license or terminate a license for noncompliance, as well as to initiate legal proceedings against a licensee who has failed to live up to the terms of the license. In what ways do these authorities differ from the current authority licensees have under the existing section 115 statutory license? In what ways are they the same?**

**ANSWER:** The MMA creates a mechanical licensing collective, or MLC, whose administrative, operational and enforcement authorities parallel the statutory authorities and duties that today are the responsibility of private actors—copyright owners and digital licensees—under Section 115 of the Copyright Act. Although Section 115 is a statutory compulsory license, the functions of managing ownership and royalty data, collecting and distributing royalties, rejecting or terminating noncompliant licensees, and enforcing statutory rights and obligations in court are currently performed by private actors. As further explained below, under the MMA, the authority and responsibility for these administrative and enforcement functions will continue to reside with private actors, including digital licensees, copyright owners, and the MLC, a nongovernment entity. To the extent there is a difference in the scope of authority between today’s Section 115 and the MMA, it is generally to *limit* the authority of the MLC vis-à-vis digital licensees and provide additional legal and procedural safeguards to licensees and prospective licensees.

A. Ability to Reject or Terminate a License

Today, the ability of a copyright owner to reject or terminate a license where a licensee is not compliant with the requirements of Section 115 is clear and unambiguous. First, Section 115(b) places clear requirements upon licensees by stating that “[a]ny person who wishes to obtain a compulsory license under this section shall, before or within thirty days after making, and before distributing any phonorecords of the work, serve notice of intention to do so on the copyright owner” and “[f]ailure to serve or file the notice required ... forecloses the possibility of a compulsory license.” 17 U.S.C. § 115(b)(1)-(2). This means that under current law, any licensee that does not comply with the statutory requirements for obtaining a compulsory license permanently loses the right to procure a license for that work under Section 115.

Second, under the existing statute, when a licensee has a valid license but fails to comply with statutory payment and reporting requirements, “the owner may give written notice to the licensee that, unless the default is remedied within thirty days from the date of the notice, the compulsory license will be automatically terminated.” *Id.* § 115(c)(6). Thus, in the case of either a failed attempt to obtain a compulsory license or termination of such a license, absent a negotiated license, the reproduction and distribution of a musical work are “actionable as acts of infringement.” *Id.* § 115(b)(2), (c)(6). Moreover, there is no specific provision allowing a licensee to challenge the rejection or termination of a license for noncompliance.

The MMA preserves the same rights afforded today to a copyright owner to reject a deficient license request or terminate a license for noncompliance, but permits the MLC to perform these functions as a centralized administrator on behalf of the copyright owner. *See* S. 2823, at 26:12-27:14. The role of the MLC is, however, circumscribed in this respect. The relevant provisions of the MMA permit the MLC to reject a notice of license (“NOL”) only where that NOL does not meet the specific requirements listed in the statute. *Id.* at 26:12-27:2. Further, the MLC can only terminate a license where there is a clear default as specified in the statute. *Id.* at 71:6-72:11. As with rejection, the MLC cannot act unless the licensee violates a specific condition set forth in the statute. *Id.* at 69:24-72:11. The MLC has no discretion to impose additional criteria for rejection or termination of a license.

At the same time, the MMA affords *greater protections* to licensees than today to both cure NOL deficiencies and challenge NOL rejections and terminations by the MLC. For instance, under the MMA, where the MLC rejects an NOL for failure to meet the statutory requirements, the licensee is given 30 days to cure the deficiency from the time it receives the notice of rejection from the MLC. *Id.* at 27:3-14. Similarly, licensees are provided a 60-day cure period (instead of the currently applicable 30-day period) to avoid termination of an NOL. *Id.* at 71:12-20. Finally, in the case of either a rejection or termination of a license, the licensee is provided with an express right to challenge the MLC’s determination in federal court—a remedy not specifically granted in Section 115 today. *Id.* at 27:15-23, 72:17-73:2.

#### B. Enforcement of Rights and Obligations

It is a fundamental right under copyright law, including Section 115, that a copyright owner can enforce his or her rights when a licensee uses a musical work without a valid license or fails to comply with license requirements. Section 115 is unambiguous that the reproduction and distribution of musical works without a valid negotiated or statutory license are “actionable as acts of infringement under section 501 and fully subject to the remedies provided by sections 502 through 506” of the Copyright Act. *See* 17 U.S.C. § 115(b)(2), (c)(6). Under Section 115, then, the copyright owner of a musical work that is used without license authority or without proper reporting or payment is entitled to take legal action against the unauthorized or noncompliant user in order to enforce the rights and obligations provided under Section 115 and the Copyright Act.

The MMA would grant the MLC analogous authority to “[e]ngage in legal and other efforts to enforce the rights and obligations under this subsection, including by filing bankruptcy

proofs of claims” on behalf of copyright owners. S. 2823, at 33:15-21; *see also id.* at 80:5-81:2. Since the MLC is responsible for receiving, enforcing, and terminating NOLs—in effect stepping into the shoes of the copyright owner for these statutory functions—it makes sense that the MLC would be similarly empowered to enforce the rights and obligations of the licenses it is administering.<sup>1</sup>

In conclusion, the authority granted to the MLC under the MMA to administer and enforce blanket licenses on behalf of copyright owners parallels the administrative and enforcement capabilities that are already afforded copyright owners under Section 115 today. These essential functions, which include the ability to reject a deficient notice of license or terminate a license for noncompliance, as well as to initiate legal proceedings against a licensee who has failed to live up to the terms of the license, have merely been transferred from many individual copyright owners to a single collective administrator acting on their behalf. Even so, the MMA provides greater statutory protections and procedural rights to licensees in cases of rejection or termination than exist under the current provisions of Section 115. The ability of the MLC to ensure licensee compliance on behalf of the copyright owners it serves is a necessary and logical counterpart of a centralized licensing system under which digital licensees will no longer be required to seek millions of song-specific licenses from individual copyright owners.

**2. QUESTION: What sort of due process protections does the recently introduced Senate package bill put into place to ensure that the rights of both licensees and licensors under the blanket license are adequately protected?**

**ANSWER:** The concept of due process embodies society's most basic notions of legal fairness. Title I of the MMA, the Musical Works Modernization Act (MWMA), contains many provisions that embrace due process and protect both licensors and licensees under Section 115, ensuring fair procedures and legal recourse and remedies for all parties. As set forth in more detail below, the statute clearly provides all parties with fairness in process, transparency of information, the right to participate in administrative proceedings and appeal judicial determinations and the ability to bring federal claims to protect rights and challenge decisions. These due process protections are equally applicable to licensors and licensees under the statute. In fact, the protections provided in the MMA far surpass the due process protections found within the current Section 115 statute.<sup>2</sup>

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<sup>1</sup> It should be noted, however, that the authority granted to the MLC to enforce rights and obligations under Section 115(d) does not “alter, limit or negate any other right or remedy that may be available to any party at law or in equity.” S. 2823 at 81:8-15.

<sup>2</sup> I must note here the irony of addressing questions regarding whether proper due process protections have been included in a 100-year old statute that establishes a compulsory license and deprives songwriters and music publishers of substantive due process protections and control over the licensing and administration of their own intellectual property.

#### A. The Right of Federal Remedy

Perhaps the most important due process protections found in Title I of the MMA are federal remedies granted to both copyright owner licensors and digital service licensees who seek to uphold or challenge an obligation or right under the statute. The statute makes explicit the right and ability of “any person to pursue an action in Federal court against the mechanical licensing collective or any other person based upon a claim arising under this title or other applicable law.” *See* S. 2823, at 110:19-22. The recourse to federal courts afforded to licensees and licensors does not end at that provision, however. Savings clauses throughout the statute preserve and make clear for both licensors and licensees that, except where explicit, the legislation shall not be construed to “alter, limit, or negate any right or remedy” currently afforded to a party. *Id.* at 107:10-15<sup>3</sup> The MMA retains a copyright owner’s authority to enforce rights and obligations under the statute, including the protection of their copyrights through federal litigation.<sup>4</sup>

New due process protections are also extended to licensees through the ability to seek judicial or administrative review of certain determinations of the MLC. By example, the MLC has the authority to reject or terminate a notice of license where specific statutory requirements are met. Where the MLC takes such action, however, the licensee is provided with an express right to challenge the MLC’s determination in federal court—a remedy not specifically granted in Section 115 today. *Id.* at 27:15-23, 72:17-73:2.

Finally, all interested parties – including the MLC, Digital Licensee Coordinator (DLC), copyright owners, digital music providers and significant non-blanket licensees (SNLs) – are permitted to participate in administrative proceedings brought before the Copyright Royalty Board (CRB) to set the assessment fee that funds the MLC’s operations. (*Id.* at p. 87) And further, determination of the administrative assessment by the CRB’s three judge panel is appealable to the Court of Appeals for the District of Columbia. (*Id.* at 92.)

#### B. Fairness of Process and Transparency of Information

The concepts of due process throughout Title I of MMA extend beyond legal remedies to the operations and internal procedures of the mechanical licensing collective. These procedures are designed to prevent unfair, incorrect or arbitrary decisions through protections that include requirements of notice to affected parties, transparent data, policies and processes, and opportunities for public comment and conflict resolution. Again, these protections go well beyond the protections currently provided to any party under Section 115.

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<sup>3</sup> *See also Id.* at 55:20-25, 81:8-15.

<sup>4</sup> This right is modified for a limited, specified period to allow for the transition under the MMA from a per-work to a blanket license system. During this transition period, a licensee’s statutory liability is limited only where that licensee fully complies with statutory requirements to identify and pay copyright owners for use of their musical works.

### 1. Designation of the MLC

The procedural protections provided to licensors and licensees begin with the process by which the MLC is designated. The designation, which is made by the Register of Copyrights, can only be made after a public notice and comment period through which the Register must “solicit information to assist in identifying the appropriate entity to serve” as the MLC. *See* S. 2823, at 29:11-23. Once an entity is designated, the Register must publish notice in the Federal Register setting forth the identity and contact information of the MLC. *Id.* at 30:1-5.<sup>5</sup> Every five years, the Register must review the designation to ensure the MLC has been upholding its statutory responsibilities and functions. During this periodic review, the Register must once again engage in a public notice and comment period before determining whether to re-designate the MLC or designate a new entity. *Id.* at 30:7-31:15. A similar notice, public comment and review process must also be undertaken by the Register prior to designation and re-designation of the MLC. *Id.* at 74:1-75:14.

### 2. Representation in the MLC

The MMA further guarantees participation by copyright owners in the operations and decision-making of the MLC through board and committee representation. This includes procedures to resolve ownership conflicts and disputes among copyright owners. Title I will establish a committee –with equal representation of music publishers and songwriters – tasked with resolving disputes and creating a process that must “include a mechanism to hold disputed funds ... pending resolution of the dispute.” *Id.* at 4-19. Moreover, although the committee can resolve disputes, the statute preserves for copyright owners and songwriters “all legal and equitable rights and remedies available to them concerning ownership of, and entitlement to royalties for, a musical work.” *Id.* at 55:20-25.

### 3. Claiming and Distribution of Unmatched Works

Some of the most significant operational due process protections provided under Title I relate to the procedures by which the MLC must identify, hold and distribute unmatched royalties to copyright owners. Today, under Section 115, the onus falls on a copyright owner to make themselves known in the records of the Copyright Office. If a copyright owner has not registered with the Copyright Office for a specific musical work, a licensee can serve a license for that work on the Copyright Office, and the copyright owner loses the right to be paid any royalties for uses of the work. 17 U.S.C. 115(b)(1). The MMA corrects this egregious due process failure by eliminating “rateless” Copyright Office licenses, requiring full payment of royalties for every use of a musical work, and creating a fair, transparent and public process for the identification of ownership and distribution of royalties.

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<sup>5</sup> In designating an MLC, the Register must comply with statutory requirements, including a qualification that the MLC “is endorsed by and enjoys substantial support from musical work copyright owners that together represent the greatest percentage of the licensor market.” *Id.* at 28:12-18. However, the MMA provides the Register with flexibility to designate an entity that “most nearly fulfills such qualifications” where there is no entity that can fulfill all qualifications. *Id.* at 31:16-24.

More specifically, the MMA provides that the MLC shall engage in specific actions to ensure fair opportunity for copyright owners to identify unmatched musical works and receive the royalties due for uses of that work. Once the MLC is unable to identify and pay a copyright owner, it must within six months provide public notice of the existence of the unmatched works and a transparent process for copyright owners to identify themselves and claim their works.<sup>6</sup> See S. 2823 at 49:20-50:5. The claiming period must last at least three years, or the statute of limitations period to file a claim for copyright infringement under federal copyright law.<sup>7</sup> After the three-year claim period has passed, the MLC must again provide public advance notice before distributing any remaining unmatched royalties using an equitable market share methodology to copyright owners. *Id.* at 53:11-54:4.

In conclusion, Title I of the MMA provides innumerable provisions that safeguard rights of both licensees and licensors under the new blanket license and confirm all parties are adequately protected. These due process protections ensure that all parties are fairly represented, legally protected, and subject to equitable and transparent policies and procedures. The protections granted to licensors and licenses are a substantial and important improvement to insufficient processes found today in Section 115.

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<sup>6</sup> These requirements work in parallel with the provision requirement the development of a transparent, publicly accessible database of musical works and ownership information that must be maintained by the MLC. *Id.* at 40-41.

<sup>7</sup> Copyright infringement has a three-year statute of limitations indicating that “No civil action shall be maintained under the [Act] unless it is commenced within three years after the claim accrued.” 17 U.S.C. §507(b)

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Thank you, Senator Blumenthal, for asking these important questions about the ASCAP and BMI consent decrees, and allowing me an opportunity to provide responses for the record.

1. **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?**

In light of the Supreme Court’s ruling in *BMI v. CBS*, 441 U.S. 1 (1979), it is well-settled that the collective licensing practices of ASCAP and BMI are not “*per se*” violations of the Sherman Act; that is, the ASCAP and BMI blanket licenses cannot be presumed to impose unlawful harm to competition under the antitrust laws. Therefore, whether ASCAP and BMI could operate in an unregulated manner without violating antitrust laws would depend on analysis under the more flexible “rule of reason” standard. *BMI v. CBS*, 441 U.S. at 24.

Rule of reason inquiries require exhaustive study of a challenged practice’s effects on competition in a relevant market, commonly including economic analysis. Although we have not engaged in the type of rigorous analysis that a rule of reason case would involve, we believe that ASCAP and BMI would stand a strong chance of withstanding rule of reason scrutiny in light of (i) the well-established procompetitive effects of the ASCAP and BMI blanket licenses, and (ii) the fact that changes to the music industry over the past 10-20 years have rendered obsolete many of the original justifications for the consent decrees.

Any rule of reason analysis must take into consideration both the procompetitive and anticompetitive effects of a challenged practice. With respect to the former, there is no serious dispute

that the ASCAP and BMI blanket licenses serve important procompetitive ends. ASCAP, BMI, and other performing rights organizations expand the market for lawful musical performances, reducing transaction costs for both copyright owners and music users. Without aggregation of public performance rights or collective licensing, many copyright owners would have no serious prospect of licensing their works, and many users would have no realistic way to lawfully play music. The Supreme Court recognized the procompetitive benefits of the blanket licenses in *BMI v. CBS*, stating that “[a] middleman with a blanket license was an obvious necessity if the thousands of individual negotiations, a virtual impossibility, were to be avoided.” 441 U.S. at 20.

With respect to the anticompetitive effects of blanket licensing, it bears emphasis that the music industry has changed drastically in recent years, rendering obsolete many of the arguments that justified the original imposition of the ASCAP and BMI consent decrees in 1941. At that time, the radio broadcast industry – comprising the primary market for public performance licensees – was in its infancy, and broadcasters were believed to be small and lacking in bargaining power or the ability to negotiate directly with more powerful songwriters and music publishers. These considerations drove the DOJ to sue ASCAP and BMI and ultimately justified the decrees that are still in place today.

Yet the music industry in 2018 bears little resemblance to the 1941 world. In 2017, online streaming accounted for 65 percent of total music industry revenues, or \$5.7 billion, up from \$1.8 billion in 2014.<sup>1</sup> Today’s paradigmatic public performance licensee is not a small business or independent analog broadcaster that lacks the resources or bargaining power to strike deals in a free market with ASCAP, BMI, another PRO, or music publishers. Rather, today’s archetype licensees are companies like Apple, Google, and Amazon, which distribute most music consumed today and have significant market power vis-à-vis music’s creators and PROs. Although the current state-of-affairs could not have been foreseen in 1941, these large digital services have the right to use the ASCAP and BMI consent decrees to further their own financial and competitive interests, even though, under the Copyright Act, the right of public performance may theoretically be licensed in a free market. Digital distributors, like all other public performance licensees (restaurants, bars, concert venues, etc.), alone can decide when to directly negotiate a performance license with publishers, and when to abandon direct negotiations and license through ASCAP or BMI. If they are unable to negotiate an ASCAP or BMI license at a price they deem favorable, they can force ASCAP or BMI into rate court proceedings, draining the resources of music

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<sup>1</sup> Recording Industry Association of America, *News and Notes on 2017 RIAA Revenue Statistics*, available at <https://www.riaa.com/wp-content/uploads/2018/03/RIAA-Year-End-2017-News-and-Notes.pdf>.



publishers and songwriters to obtain better deal terms, and use music – without paying for it – while such proceedings are pending.

It is no stretch to say that the consent decrees were not written with digital music distributors in mind, and that the drastic shift in market power as between music’s creators and its licensees means that certain risks of anticompetitive harm that justified the consent decrees in 1941 are not present in 2018.

Even if ASCAP and BMI’s licensing practices could not withstand rule of reason scrutiny – that is, even to the extent one believes that the decrees should not be terminated wholesale – the DOJ should at least take steps to ensure that the decrees reflect the music marketplace *today*, not the market in 1941, when the decrees were first put in place, or 1994, when BMI’s decree was last amended, or 2001, when ASCAP’s decree was last amended. Assume, for example, that in 2018, the DOJ brought a wholly new enforcement action against ASCAP and BMI challenging blanket licensing practices. Given the drastic changes that have occurred in the music marketplace, even if the DOJ prevailed in that lawsuit, it is doubtful, at best, that the DOJ could obtain a judgment that is on all fours with the World War II-era consent decrees to which ASCAP and BMI are now subject.

This is relevant because, as the DOJ has long recognized, consent decrees and other antitrust judgments should be narrowly tailored to “(1) stop . . . illegal practice[s] . . . , (2) prevent their renewal, and (3) restore competition to the state that would have existed had the violation not occurred.”<sup>2</sup> Judgments that go beyond these legitimate enforcement aims – whether because of changed marketplace dynamics or for other reasons – are commonly viewed as competition-distorting regulations. Indeed, the DOJ itself recognizes that perpetual consent decrees are presumptively contrary to the public interest and that the Antitrust Division is an enforcement agency, not a regulatory one. The Antitrust Division’s consent decrees have for almost 40 years included “sunset” provisions providing for automatic termination after a set period, typically 10 years, thus reducing the risk that judgments will outlive their enforcement aims. But the ASCAP and BMI decrees are perpetual, meaning that no matter how drastic the changes to the industry, there is no guarantee that they will ever be amended. This is unjust and unfair to ASCAP, BMI, and music’s creators, and the DOJ should at least commit to regular review of the ASCAP and BMI decrees to ensure that they align with the current marketplace.

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<sup>2</sup> *Antitrust Division Manual*, Department of Justice, at IV-50 (5th Ed. 2017) (“Division Manual”).

**2. 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?**

NMPA takes no position with respect to whether the DOJ should employ the traditional approach or the expedited approach. The Division Manual states that the expedited approach is appropriate “for qualifying legacy decrees,” and the traditional path is appropriate “for decrees with sunset provisions and when the Division believes a legacy decree should not receive expedited review.” The ASCAP and BMI decrees are legacy decrees, and the Division should decide between the traditional approach and the expedited approach in the manner suggested by the Division Manual.

Whichever approach is chosen by DOJ, NMPA believes that, if the DOJ decides to terminate the ASCAP and BMI decrees, termination should be preceded by an extended period of advance notice so as to minimize disruptions to the industry. Industry parties – including music publishers, performing rights organizations, and licensees – have long operated their businesses under the assumption that the consent decrees would continue to exist. NMPA hopes that any decision by the DOJ to terminate the decrees would include a transition period enabling stakeholders to make the necessary adjustments to their businesses.