

Senator Grassley's Written Questions for Judiciary Committee Hearing, Protecting and Promoting Music Creation for the 21st Century

Questions for Josh Kear, Songwriter/NSAI

1. What are your thoughts about the mechanical licensing collective structure in the Music Modernization Act? Will independent publisher and songwriter interests be adequately represented? Do you believe that the composition of the Board accurately reflects the division of royalties between songwriters and publishers in the mechanical licensing marketplace? Is distributing unclaimed royalties based on market share fair to independent publishers and independent songwriters?

RESPONSE: I'm a strong supporter of this bill as drafted, because it incorporates several provisions that will have a demonstrably positive effect on songwriters:

- **By reforming the rate court system to randomly assign judges to judicial proceedings arising from royalty disputes, songwriters and the groups that represent them will receive the same fair treatment as any other party to a lawsuit would.**
- **The repeal of section 114(i) of the Copyright Act ensures that these judges will be able to consider all relevant market information when setting royalty rates, helping ensure songwriters' work receives closer to the fair-market value it deserves.**
- **The bill confirms that songwriters are due a mechanical royalty when their songs are played on interactive streaming services, removing any previous debate about that fact.**
- **Further, by closing the mass NOI loophole and providing a blanket license for mechanical rights, songwriters will have more confidence that they'll actually receive these due mechanical royalties when digital services use their works.**
- **And, the bill also changes the standard by which these mechanical rates are set. Using a willing-buyer/willing-seller model helps ensure songwriters' work receives closer to the fair-market value it deserves in this context as well.**

I do recognize that some of my fellow songwriters have concerns, and I certainly respect their opinions. The bill isn't perfect, and if we had drafted it in a vacuum, there certainly are other provisions we would have added. But at the end of the day, the Music Modernization Act is a product of hard-fought compromises. And we can't let the perfect be the enemy of the good in this context.

2. Do you believe that the oversight and accountability requirements in the Music Modernization Act are adequate, or do you think they can be improved?

RESPONSE: I recognize that some of my colleagues have raised issues with some of these provisions, and again, I respect their viewpoints. It's important to remember that, over the long effort it took to develop this legislation, songwriter groups like Nashville Songwriters Association International and Songwriters of North of America were part of the process. The bottom line is this bill is a massive step forward for people in my industry.

Senate Judiciary Committee

Hearing on Protecting and Promoting Music Creation in the 21st Century

Questions for the Record for All Panelists.

Submitted by Senator Richard Blumenthal

May 22, 2018

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?

RESPONSE: As a songwriter, I’m no expert on consent decrees or antitrust law. However, I do believe that the music industry these groups operate in has changed dramatically in the last decade – and transformed completely since these consent decrees were first put in place in the middle of the 20th century. It is important that the decrees fully take these industry-wide changes into account. Indeed, the last amendment to the Decrees occurred 17 years ago, before the creation of the iPod and the advent of digital music services like Spotify and Pandora. Certainly, competition in the market has increased significantly since then; there are more performing rights societies that I can choose to be a part of and that platforms can license from. Also, digital music services and music publishers have entered into a large number of direct licenses. This radically different landscape is a large part of why the provisions of the Music Modernization Act, which would reform the rate court system that is part and parcel of these consent decrees, is such a needed improvement.

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?

RESPONSE: Again, as a songwriter by trade, I am hesitant to suggest particular regulatory processes. My focus remains on encouraging our elected representatives to pass the MMA.

Senator Orrin G. Hatch
Questions for the Record
U.S. Senate Committee on the Judiciary
Hearing: “Protecting and Promoting Music Creation for the 21st Century”
May 15, 2018

Question for Mr. Kear

1. The repeal of section 114(i)'s prohibition on considering sound recording performance royalties when setting musical composition performance royalties is a highly technical issue that can be a bit difficult for a non-expert to parse. Can you explain what this issue is about and why repealing this prohibition is important?

RESPONSE: Though the rate court system that these prohibitions apply to is inherently not a free-market process, songwriters – like all creators – deserve a royalty that matches, as closely as possible, the compensation they would receive in a free market. The best way to replicate a free-market royalty is to use all available information – including sound recording performance royalties that are negotiated in the free market – to determine how what songwriters would receive in an unencumbered negotiation.

Unfortunately, the current 114(i) prohibition bars judges from making these considerations. This, in part, has led to a bizarre disparity between what services pay for their right to transmit sound recordings and what they pay for the right to transmit the underlying musical composition – a disparity that leaves songwriters undercompensated. Through the Music Modernization Act's repeal of section 114(i), judges will have the best chance to determine a royalty that accurately reflects a fair market value for songwriters.

This change is particularly important in the context of the MMA's additional provision that will randomly assign district court judges to these complicated cases. The new judges examining these issues are likely to benefit from this new influx of relevant information on which to base their judgments.