

**Re: “Protecting and Promoting Music Creation for the 21<sup>st</sup> Century,” May 15, 2018:  
Questions for the Record**

Answer for Senator Klobuchar

**Q: As I mentioned in the hearing, the Justice Department is considering terminating the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) consent decrees, which govern royalty rates for the public performance of musical works. How would the termination of the ASCAP and BMI consent decrees, without a replacement mechanism in place, impact the stability of the music industry?**

**A:** Repealing the consent decrees without a replacement mechanism in place would upend the stability of the music licensing marketplace. As the Department of Justice noted in the closing of its most recent review, “In the decades since the ASCAP and BMI consent decrees were entered, industry participants have benefited from the unplanned, rapid and indemnified access to the vast repertoires of songs that each PRO’s blanket licenses make available.”<sup>1</sup> The ecosystem of licensees is vast and varied, with “hundreds of thousands of restaurants, radio stations, online services, television stations, performance venues, and countless other establishments” availing themselves of blanket licenses offered by ASCAP and BMI.<sup>2</sup> Were the consent decrees to be repealed, the very benefits to the mechanical licensing regime secured by the Music Modernization Act—efficient licensing, legal certainty, and compensation for copyright owners—would be thrown into jeopardy.

Many of the benefits that ASCAP and BMI provide to licensees and artists alike are due to the existence of the consent decrees. The non-exclusivity rule—a core functionality which allows artists the freedom to negotiate directly with licensees—is an external obligation imposed by the terms of the decrees.<sup>3</sup>

Blanket licenses in particular benefit licensees and artists by lowering transaction costs and allowing users “unplanned, rapid and indemnified access” to the PROs’ catalogues.<sup>4</sup> Small artists in particular benefit from inclusion in a blanket license, which ensures a higher rate of revenue than they may be able to obtain in direct negotiations. However, the Supreme Court has

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<sup>1</sup> Statement of the Department of Justice on the Closing of the Antitrust Division’s Review of the *ASCAP* and *BMI* Consent Decrees at 2 (August 4, 2016), available at <https://www.justice.gov/atr/file/882101/download> (“DOJ Review”).

<sup>2</sup> *Id.* at 5.

<sup>3</sup> *BMI* [Amended] Final Judgment at 2 (Nov. 18, 1994), available at <https://www.justice.gov/atr/case-document/file/489866/download>; *ASCAP* Second Amended Final Judgment [AFJ2] at 6 (Jun. 11, 2001), available at <https://www.justice.gov/atr/case-document/file/485966/download>.

<sup>4</sup> *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 20 (1979).

recognized that allowing PROs to set the price of their blanket licenses, without providing licensees with the outside recourse of a rate court, may constitute illegal price-fixing:

ASCAP cannot be accused of fixing prices because every applicant to ASCAP has a right under the consent decree to invoke the authority of the United States Court for the Southern District of New York to fix a reasonable fee whenever the applicant believes that the price proposed by ASCAP is unreasonable, and ASCAP has the burden of proving the price reasonable. In other words, **so long as ASCAP complies with the decree, it is not the price fixing authority.**<sup>5</sup>

The primary benefits that PROs provide to the music licensing marketplace flow directly from the structure of, and remedies provided by, the consent decrees. Eliminating the decrees would be not only unsupported by the existing Department of Justice review, but would be irresponsible as a matter of policy, and potentially damaging to the music licensing marketplace as a whole.

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<sup>5</sup> *K-91, Inc. v. Gershwin Pub. Corp.*, 372 F.2d 1, 4 (9th Cir. 1967). *See also* DOJ Review at 7 (“In light of these benefits [of blanket licensing], and recognizing the value of the consent decrees that restrained the ability of ASCAP and BMI to exercise their market power, the Court concluded that the PROs’ blanket licensing practices did not constitute per se illegal price fixing.”)

## Answers for Senator Blumenthal

**Q1: 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?**

**A:** It is highly unlikely that ASCAP and BMI could operate without violating antitrust laws, absent some form of regulatory oversight. As the DOJ noted in the conclusion of its recent review, “the consent decrees seek to prevent the anticompetitive exercise of market power while preserving the transformative benefits of blanket licensing.”<sup>6</sup>

This is due primarily to the unique nature of musical works as products. First, music is a high-volume product; most consumers interact with dozens, if not hundreds, of these works daily. Blanket licenses of the kind offered by PROs are hugely valuable to writers, publishers, and services alike, as they allow for legal certainty while also ensuring remuneration for the widest possible swath of artists.

Second, the consent decrees prevent holdup and holdout problems that are exacerbated by the practice of fractional licensing. The collaborative nature of creation and the practice of fractional licensing means that much, if not most, of the most valuable works are fractionally licensed among two or more PROs. This in turn means that any service which wants to license even a single work must typically seek out licenses from multiple PROs, “providing the hold-out owner substantial bargaining leverage to extract significant returns.”<sup>7</sup> While the terms of the consent decrees prevent ASCAP and BMI from engaging in holdup behavior, courts have noted that SESAC—which is not bound by a consent decree—does engage in this practice.<sup>8</sup>

Third, PROs provide substantial benefit for songwriters. It is impractical for artists to monitor for use of their work in every possible venue, and similarly impractical for most artists to take on the burden of directly negotiating with each potential licensee. However, the consent decrees require ASCAP and BMI to allow their member songwriters to license their works directly with licensees on a non-exclusive basis, allowing for songwriters to negotiate for higher rates if they so choose.<sup>9</sup>

Finally, the most economically critical function of these PROs—blanket licensing—may owe its very existence to the availability of a remedy under the standing consent decrees. Blanket licenses benefit both licensees and artists by lowering informational transaction costs and allowing users “unplanned, rapid and indemnified access” to the PRO’s catalogue.<sup>10</sup> Small artists in particular benefit from being included in a blanket license, which ensures a higher rate of

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<sup>6</sup> DOJ Review at 2.

<sup>7</sup> *Id.* at 15.

<sup>8</sup> *See, e.g., Meredith Corp. v. SESAC LLC*, 1 F. Supp. 3d 180, 196 (S.D.N.Y. 2014) (“The evidence would also comfortably sustain a finding that SESAC, once freed in 2008 from the duty to arbitrate its disputes with the stations, engaged in an overall anti-competitive course of conduct designed to eliminate meaningful competition to its blanket license.”).

<sup>9</sup> BMI [Amended] Final Judgment at 2, ASCAP AFJ2 at 6.

<sup>10</sup> 441 U.S. 1, 20.

revenue than they may be able to obtain in direct negotiations. However, the Supreme Court has recognized that allowing PROs to set the price of their blanket licenses, without the outside recourse of a rate court, likely constitutes a horizontal restraint of trade in violation of the Sherman Act.<sup>11</sup>

It is important to note that, even with judicial oversight, ASCAP and BMI have been found to engage in anticompetitive behavior. In 2013, a federal court found that BMI violated the terms of its consent decree by attempting to deny Pandora a license, noting that “BMI cannot combine with [music publishers] by holding in its repertory compositions that come with an invitation to a boycott attached.”<sup>12</sup> In a rate court dispute between ASCAP and Pandora, federal District Court Judge Denise Cote found that “the evidence at trial revealed troubling coordination between Sony, UMPG, and ASCAP, which implicates a core antitrust concern underlying [the ASCAP consent decree, as amended].”<sup>13</sup>

As Mr. Israelite noted at the hearing, it is true that two PROs currently operate without consent decrees. It is estimated that these two organizations—SESAC and GMR—control, combined, less than 3% of the current market for public performance.<sup>14</sup> Nevertheless, their behavior in the absence of federal oversight may be instructive.

SESAC has been repeatedly criticized by federal courts for behavior which potentially runs afoul of antitrust law. One federal judge noted that “the court can make a plausible inference that [SESAC] possesses monopoly power,” citing complaints of “exorbitant prices that are far greater than those charged by ASCAP and BMI,” as well as an increase in prices “from 8% to 20% each year since 2009 without any contemporaneous increase in the size or popularity of its repertory.”<sup>15</sup> Courts have also called SESAC a “monopolist,” and raised serious concerns about SESAC’s allegedly exclusionary practices, among them allegations of “selling [works] exclusively in the blanket license format, discouraging direct licensing by refusing to offer carve-out rights and obscuring the works in its repertory. . . . [thus] forcing radio stations to purchase the SESAC license even if they do not plan to perform the songs in SESAC’s repertory for fear that they may unwittingly air copyrighted content.”<sup>16</sup>

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<sup>11</sup> *K-91, Inc. v. Gershwin Pub. Corp.*, 372 F.2d 1, 4 (9th Cir. 1967) (“ASCAP cannot be accused of fixing prices because every applicant to ASCAP has a right under the consent decree to invoke the authority of the United States Court for the Southern District of New York to fix a reasonable fee whenever the applicant believes that the price proposed by ASCAP is unreasonable, and ASCAP has the burden of proving the price reasonable. In other words, **so long as ASCAP complies with the decree, it is not the price fixing authority**”) (emphasis added). See also DOJ Review at 7 (“In light of these benefits [of blanket licensing], and recognizing the value of the consent decrees that restrained the ability of ASCAP and BMI to exercise their market power, the Court concluded that the PROs’ blanket licensing practices did not constitute per se illegal price fixing.”).

<sup>12</sup> *BMI v. Pandora Media*, No. 13 CIV. 4037 LLS, 2013 WL 6697788, at \*5 (S.D.N.Y. Dec. 19, 2013).

<sup>13</sup> *In re Pandora Media, Inc.*, 6 F. Supp. 3d 317, 357 (S.D.N.Y. 2014), aff’d sub nom. *Pandora Media, Inc. v. Am. Soc. of Composers, Authors & Publishers*, 785 F.3d 73 (2d Cir. 2015).

<sup>14</sup> Ed Christman, “BMI, RMLC Lay Out Cases for What Radio Should Pay Songwriters,” *Billboard* (May 30, 2018), <https://www.billboard.com/articles/business/8458423/bmi-responds-rmlc-rate-court-filing-market-share-ascap>.

<sup>15</sup> *Radio Music License Comm., Inc. v. SESAC, Inc.*, 29 F. Supp. 3d 487, 500 (E.D. Pa. 2014).

<sup>16</sup> *Id.* at 501.

While it is certainly possible that ASCAP and BMI will refrain from the kinds of concerning behavior that has earned SESAC legal scrutiny, the basic economic incentives within the market—as well as existing behavior by unregulated players—means that Congress should view elimination of the consent decrees with a skeptical eye.

**Q2: What process should the DOJ utilize when considering whether to terminate or modify the BMI and ASCAP consent decrees and why?**

**A:** Due to the complexity and size of the music licensing market—as well as the outsize economic impact of potential disruption—we believe the DOJ should devise a process that allows for robust public input and extensive consultation with experts, musicians, business, legislators and consumers alike. Put simply, the stakes are too high to conduct a review in the dark.

Answers for Senator Grassley

**Q1. You stated that the CLASSICS Act would “actively prevent archives from preserving . . . [a phono]record and making it usefully available to members of future generations,” but doesn’t the preservation of the shellac album you presented only implicate the reproduction and possibly distribution rights, rather than the digital public performances contemplated by the CLASSICS Act? Given that the CLASSICS Act does not alter state reproduction or distribution rights, how does the bill bear on preservation and archival activities? Are archives and libraries declining to preserve pre-1972 sound recordings in records and other tangible formats due to the uncertainties of current state laws?**

**A:** It is true that many archives find the existing state law landscape confusing; moreover, the uncertain availability of federal exceptions and limitations (such as fair use) at the state level makes many archives reluctant to engage in digital preservation. For this reason, full federalization presents a sounder approach than CLASSICS, which not only does not provide meaningful safeguards for archival work (as its incorporation of section 108, which addresses only reproduction and distribution rights, is largely non-operative), but actively complicates preservation by creating a bifurcated system under which libraries need to navigate both federal *and* state laws.

While it is true that CLASSICS does not impact the ability of an archive to preserve a recording so long as the preservation copy is kept on the proverbial shelf, effective preservation requires works to be made meaningfully available to the public for research and study. In states where the public domain inheres before 2067—such as Colorado (56 years from creation)<sup>17</sup> and California (a public domain “cliff” at 2047)<sup>18</sup>—libraries may, under current law, perform these works publicly for their patrons on an intrastate basis before the 2067 date contemplated by CLASSICS. For the more than 40 million citizens of these states, CLASSICS deprives consumers, libraries, and archives of their ability to make these works available, and in doing so erects increased barriers to study and research.

**Q2. What would losing the consent decrees do to licensees’ ability to obtain necessary public performance licenses? On consumers’ ability to enjoy music? On songwriters’ ability to get paid efficiently?**

**A:** Repeal of the consent decrees would upend the music licensing market. The Department of Justice, in its recent review of the consent decrees, noted that “the industry has developed in the context of, and in reliance on, these consent decrees.”<sup>19</sup> Were the consent decrees to be repealed, the very benefits to the mechanical licensing regime that are secured by the Music Modernization Act—efficient licensing, legal certainty, and compensation for copyright owners—would be thrown into jeopardy.

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<sup>17</sup> Colo. Rev. Stat. § 18-4-601 (“For the purposes of this part 6, no common law copyright shall exist for a period longer than fifty-six years after an original copyright accrues to an owner”).

<sup>18</sup> Cal. Civ. Code § 980(a)(2).

<sup>19</sup> DOJ Review at 22.

Additionally, the PRO functions upon which users and alike most rely are direct outgrowths of the consent decree itself. For example, the non-exclusivity rule, which allows artists to negotiate directly with licensees if they choose, is an external obligation imposed by the consent decrees.<sup>20</sup> Blanket licenses benefit both licensees and artists by lowering informational transaction costs and allowing users “unplanned, rapid and indemnified access” to the PRO’s catalogue.<sup>21</sup> Small artists in particular benefit from being included in a blanket license, which ensures a higher rate of revenue than they may be able to obtain in direct negotiations. However, the Supreme Court has recognized that allowing PROs to set the price of their blanket licenses, without the outside recourse of a rate court, constitutes illegal price-fixing:

ASCAP cannot be accused of fixing prices because every applicant to ASCAP has a right under the consent decree to invoke the authority of the United States Court for the Southern District of New York to fix a reasonable fee whenever the applicant believes that the price proposed by ASCAP is unreasonable, and ASCAP has the burden of proving the price reasonable. In other words, **so long as ASCAP complies with the decree, it is not the price fixing authority.**<sup>22</sup>

The primary benefits that songwriters, consumers, and services enjoy from PROs are attributable to the consent decrees and the remedies they provide. Eliminating the decrees would be not only unsupported by the existing Department of Justice review, but would be irresponsible as a matter of policy, and potentially damaging to the music licensing marketplace as a whole.

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<sup>20</sup> Consent Decree at 2. available at <https://www.justice.gov/atr/case-document/file/489866/download>

<sup>21</sup> 441 U.S. 1, 20.

<sup>22</sup> 372 F.2d 1, 4 (9th Cir. 1967). See also DOJ Review at 7 (“In light of these benefits [of blanket licensing], and recognizing the value of the consent decrees that restrained the ability of ASCAP and BMI to exercise their market power, the Court concluded that the PROs’ blanket licensing practices did not constitute per se illegal price fixing.”).

## Answers for Senator Sasse

### **Q1: How will Title II of S. 2823 affect access to and cost of music for consumers?**

**A:** Title II of S. 2823 (previously known as CLASSICS) will increase entry costs for new services, without the attendant benefits to the public that full harmonization would provide. Other proposals for harmonization of pre-72 recordings, such as those put forward in the Copyright Office’s 2011 report, would guarantee that sound recordings without substantial commercial value—a category that encompasses the *overwhelming* majority of recordings—enter the public domain after the expiration of a term equivalent to that given to other works under copyright law (e.g., 95 years from publication). These proposals would allow archivists, upon expiration of the relevant copyrights, to make available for free on the internet this vast array of cultural works, whereupon the public could enjoy and use them however they pleased, without government interference. The CLASSICS Act, by contrast, would guarantee that every single recording made between 1923 and 1972—commercially valuable or not, available to the public or not—would be locked away until 2067. This staggering cultural deadweight loss is simply unjustifiable. Additionally, the CLASSICS framework will sharply curtail the rights of over 40 million citizens in states such as California<sup>23</sup> and Colorado,<sup>24</sup> where the intrastate public domain inheres before 2067, without any corresponding trade-off for public access.

The most substantial costs of a CLASSICS framework are not those that occur immediately, but those that will inhere decades from now. Under CLASSICS, a music historian in the year 2055 will face substantial legal hurdles to studying recordings from as early as 1923. While it may seem like a small matter today, Congress’ decision to omit a rolling “backstop” for CLASSICS protection erects hurdles to historians and archivists of our *grandchildren’s* generation.

### **Q2: 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?**

**A:** As a general matter, we agree that Congress’ power to grant limited monopolies for creative works is premised on incentivizing the creation of new works. The Constitutional authority derives from the need “[t]o 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.”<sup>25</sup>

Copyright is an extremely powerful tool; it fundamentally restricts the ways in which consumers can interact with the creative works that surround them in their daily lives. In our modern environment, the average consumer interacts (knowingly and unknowingly) with hundreds, and potentially thousands of copyrighted works on a daily basis, from music heard in the doctor’s waiting room, to the software on their smartphone. The outsize role of copyright in the daily

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<sup>23</sup> Cal. Civ. Code § 980(a)(2) (setting a public domain “cliff” at 2047).

<sup>24</sup> Colo. Rev. Stat. § 18-4-601 (“For the purposes of this part 6, no common law copyright shall exist for a period longer than fifty-six years after an original copyright accrues to an owner”).

<sup>25</sup> Article I section 8 cl 8



lives of consumers should give lawmakers pause, and Congress should look skeptically on any attempt to secure copyright for reasons beyond the explicit Constitutional incentive motive.

However, we do recognize and share other stakeholders' concerns regarding the inequities that arise from the unusual status of pre-1972 recordings. Put simply, the best response to this equity gap is to simplify and harmonize the law by bringing these works fully under the umbrella of copyright. Fully harmonizing these works into the existing framework would provide a complete spectrum of protection for artists and ensure revenue for labels, all while creating clarity and certainty for non-commercial users and preservation efforts. These users often cannot afford the specialized legal counsel needed to navigate the web of confusing state and federal coverage, and full harmonization would allow them much needed clarity to move forward in preserving our nation's cultural heritage.

In other words, Congress could achieve the goal of the CLASSICS Act—extending valuable federal protection to pre-72 artists—while also making many recordings more readily available to the public, and thereby fulfilling copyright's Constitutional purpose. These are the dual aims of other harmonization proposals, such as the Copyright Office's 2011 recommendation.

**Q3: How does Title II of S. 2823 “promote[s] the Progress of Science and the useful Arts” given that is impossible in 2018 to incentivize the creation of recordings from before February 15, 1972?**

**A:** Put simply, it does not. As noted above, the CLASSICS framework does not fit within the Constitutional incentive rationale, as it neither incentivizes the creation of new works, nor meaningfully increases public access to existing works. Moreover, its approach to solving the inequity of the current system is not to streamline copyright to bring more works under its auspices, but instead to stack a new federal right on top of the existing confusion. Congress should look skeptically upon any solution which proposes to solve a “patchwork” by adding yet another patch.

However, as noted above, we share the concerns of other panelists regarding compensation for legacy artists. We believe that they should be fully compensated to the same extent as their modern peers—but that such compensation should be achieved under a sensible, balanced policy that solves the underlying problem, rather than wending past it.

**Q4 & 5: Do you agree with his characterization of the current state of the law [as “a quirk in the law” that has created a “loophole”]? Do you agree with the assertion that Congress' 1971 choice to federalize recordings copyright protection only from February 15, 1972 onward while leaving the choice of whether to protect pre-existing 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?**

**A:** While it is difficult to know for sure why Congress decided only to offer prospective protection to pre-1972 recordings—the Copyright Office, in its 2011 study, noted that the

legislative record is largely silent on Congress' reasoning—it is clear that the bifurcated system no longer works in the digital age. In 1972 as today, state law generally protected reproduction and distribution. In an age before digital streaming, these were largely intrastate activities; the few interstate activities involving sound recordings were unprotected by copyright (such as terrestrial radio airplay) or negotiated large-scale distribution (such as television play).

However, digital streaming made interstate performance a more common activity, and the creation of the federal digital performance right meant that post-1972 recordings enjoyed a kind of protection that their legacy counterparts did not. This gap between state and federal coverage has only grown with the increase in popularity of major streaming services. The resulting uncertainty has made the current dual-coverage model unsustainable for artists, services, consumers, and non-commercial users.

**Q6: 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?**

**A:** While it would certainly result in greater revenue for copyright holders, it would not result in a fairer system for the copyright ecosystem as a whole. The benefits of the CLASSICS framework flow solely to rightsholders, while increasing uncertainty and costs for users and preservationists. These added burdens and uncertainties are particularly unfair in comparison to the more sensible, holistic approach represented by full harmonization, under which all parties—artists, rightsholders, users, preservationists, and the public at large—would be better off than under the status quo. Moreover, if CLASSICS is enacted, it is almost certain that Congress will decline to further harmonize these works. If Congress wishes to truly fix this problem, it must do so now.

**Q7 & Q8: Do you agree with these criticisms [in the letter submitted by 42 law and intellectual property professors]? Why or why not? Would you oppose the insertion of their suggested language?**

**A:** We agree with the criticisms enumerated in the letter. To the extent that Congress wishes to “patch” the law in lieu of fixing it, they should strive to make the new federal “CLASSICS right” track as closely to existing federal rights as possible. The suggestions provided in the letter would create a right that more fully emulates the federal protections granted post-72 works, and we support including the proposed language.