

Statement of Christopher Harrison  
Chief Executive Officer  
Digital Media Association (DiMA)

before the  
United States Senate  
Judiciary Committee

Hearing on  
“Protecting and Promoting Music Creation for the 21st Century”  
May 15, 2018

## I. Introduction

Thank you Chairman Grassley and Ranking Member Feinstein for inviting me to testify on the important topic of “Protecting and Promoting Music Creation for the 21st Century.” My name is Chris Harrison and I am the Chief Executive Officer of the Digital Media Association or DiMA. DiMA and its members, which include Amazon, Apple, Google, Microsoft, Napster, Pandora, Spotify, and YouTube, advocate for policies that promote innovation in digital content distribution.

DiMA thanks Senators Hatch, Whitehouse, Alexander, Coons, Chairman Grassley, and the other original cosponsors for introducing S. 2823, the Music Modernization Act or MMA. An identical bill recently passed out of the House on a unanimous 415 to 0 vote, a truly remarkable showing of bipartisan support for long-overdue music copyright reform.

While the MMA includes several notable changes, my comments focus on the reforms to Section 115 of the Copyright Act. Simply put, the current Section 115 license does not work for songwriters, music publishers, or digital music providers in the digital streaming age. The MMA, by creating a true blanket license and a new mechanical licensing collective, improves licensing efficiency and transparency and encourages digital music providers to invest more in creating compelling music experiences for consumers.

With the support and encouragement of Members of this Committee, along with Members of the House Judiciary Committee, digital music providers, music publishers and songwriters came together in a spirit of compromise and cooperation

to reform Section 115 for the benefit of consumers, creators and copyright owners. DiMA looks forward to continuing to work in this cooperative spirit with Members of this Committee and the entire Senate to move the MMA forward.

The music industry has been transformed by digital technology. While the earliest days of digital disruption were marred by music piracy and declining recorded music revenue, legitimate and licensed digital music providers such as the ones represented by DiMA invested in new digital technologies to bring a wide variety of innovative services that provide consumers with greater access, more choices, and better value. Today's consumers have lawful access to a virtually unlimited catalog of music accessible across a multitude of devices.

Digital music services give artists greater creative freedom, provide valuable information about how consumers engage with their music, facilitate direct communication with fans, and even sell tickets to upcoming concerts.

After nearly two decades of declining revenue, music streaming has saved the music industry. As detailed in DiMA's recent Streaming Forward report, a copy of which is attached to my written testimony, in 2017 digital music providers paid record labels, artists, music publishers, and songwriters approximately \$7 billion in royalties—accounting for nearly 80% of the total U.S. recorded music revenue. And since interactive streaming services entered the U.S. market, music piracy is down by 60%.

These successes, however, have occurred in spite of—not because of—the current Section 115 license, which does not meet the needs of the digital streaming

era. Antiquated procedures for utilizing the Section 115 license have forced digital music providers to curtail their catalog or risk copyright infringement litigation. Business uncertainty has reduced investments in new products and services and discouraged new market entrants. For music publishers and songwriters, the archaic process of issuing Section 115 licenses has frustrated the timely and transparent payment of royalties.

To solve these problems, the MMA establishes a new blanket license that will enable digital music providers to efficiently and transparently obtain the rights to reproduce and distribute musical works (so-called “mechanical” rights) that are necessary to operate an interactive or on-demand music service. The MMA ensures that mechanical royalties will flow more quickly and transparently to music publishers and songwriters. The MMA also establishes a much-needed, publicly-accessible database of music copyright ownership information to facilitate this efficiency and transparency. Ultimately, this legislation will promote greater investment in digital music services, improve consumer choice and access to music, create more opportunities for artists and songwriters to reach their audience, and result in more revenue for creators and copyright owners.

## II. History of Section 115

*There is no debate that section 115 needs to be reformed to ensure that the United States’ vibrant music industry can continue to flourish in the digital age.*<sup>1</sup>

---

<sup>1</sup> *Music Licensing Reform, Hearing before the Subcomm. On Intellectual Prop. of the S. Comm. on the Judiciary*, 109th Cong. 117–18 (2005) (statement of Marybeth Peters, Register of Copyrights).

The historical business model for distributing recorded music was relatively simple and straightforward. Record companies sold physical products (e.g., vinyl records, cassette tapes and compact discs) to distributors and retailers (e.g., Tower Records), who, in turn, resold the records to consumers. In the physical world, distributors and retailers did not need to obtain copyright licenses to sell records because record companies cleared all those rights themselves. In the digital world, where record retailers such as Tower Records have been replaced by digital music providers such as Amazon, Apple, Google, Napster, Pandora, Spotify and many others, digital music providers are tasked with licensing *all* of the copyrights in the music they distribute—often tens of millions of tracks. Among those rights, digital music providers are required to obtain the right to reproduce and distribute copies (referred to in the Copyright Act as “phonorecords”<sup>2</sup>) of the musical works embodied in the sound recordings their customers access via interactive streams and limited downloads. Digital music providers may obtain these rights through the compulsory license found in Section 115. Unfortunately, the Section 115 compulsory license is designed for the physical—not the digital—world and is badly broken. As a result, digital music providers either reduce the size of the catalog they offer to consumers or risk copyright infringement litigation and exposure to statutory damages, which makes both copyright owners and consumers worse off.

---

<sup>2</sup> The Copyright Act defines “phonorecords” as “material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”

*a. Origin of the Section 115 Compulsory License*

The Section 115 compulsory license was created in response to an earlier technological change: piano rolls. By the late 1800s, new technologies—phonographs, graphophones and player pianos—allowed for musical works to be “performed” by “mechanical means” using various types of playback devices, thereby obviating the need to have live musicians perform in real time for the public to enjoy music.<sup>3</sup> In the 1909 Copyright Act, Congress recognized copyright owners’ exclusive right to make and distribute “phonorecords” of musical works, which, due to the happenstance surrounding the recognition of such right, has since been known as the “mechanical” right. At the time, Congress was also concerned about the possibility of a monopoly in piano rolls, which would have significantly increased costs or reduced output. To balance the exclusive rights of copyright owners with the encouragement of public access to copyrighted works, Congress created a compulsory license for mechanical reproductions—the first compulsory license in U.S. copyright law.

The Section 115 license remained unchanged until the Copyright Act of 1976, which amended the license in several ways. The 1976 Act mandated that the person wishing to obtain the compulsory license had to serve a notice of intent on the musical work copyright owner.<sup>4</sup> In addition, the 1976 Act created a new

---

<sup>3</sup> H.R. Rep. No. 2222, 60<sup>th</sup> Congress, 2d Session (1909).

<sup>4</sup> The 1909 Copyright Act required the musical work copyright owner to file a notice of use with the Copyright Office. (“[I]t shall be the duty of the copyright owner, if he uses the musical composition himself for the manufacture of parts of instruments serving to reproduce mechanically the work, or licenses others to do so, to file a notice thereof ... in the copyright office...”).

independent agency, the Copyright Royalty Tribunal, to establish the royalty rate for the Section 115 license. The Section 115 license was updated again in 1995 when the Digital Performance Right in Sound Recordings Act made clear that the Section 115 license covered digitally-distributed phonorecords of musical works.<sup>5</sup>

Notwithstanding the 1976 and 1995 reforms, Section 115 has remained largely unchanged for over a century, while consumers have gone from listening to tinny player pianos to accessing any song anywhere at any time in high-quality digital formats. The MMA brings the Section 115 license from the analog world of piano rolls to the digital world of interactive streaming.

*b. Problematic Features of the Current Section 115 Compulsory License*

1. Work-by-Work Licensing

A key distinguishing feature of the current Section 115 license is that the license may only be obtained on a work-by-work basis. Although the Section 115 license covers all musical works, it conveys the rights to such works only on an individual basis pursuant to an individual notice of intent. In 1909, when the

---

<sup>5</sup> The DPSRA defines digital phonorecord deliveries (DPD) as

“...each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein. A digital phonorecord delivery does not result from a real-time, non-interactive subscription transmission of a sound recording where no reproduction of the sound recording or the musical work embodied therein is made from the inception of the transmission through to its receipt by the transmission recipient in order to make the sound recording audible.”

Because a musical work copyright owner may control *both* the right to perform publicly and to reproduce a work, the DPD definition makes clear that a DPD is created when a reproduction has been made and distributed, regardless of whether a public performance has occurred.

license was developed, and in 1976, when it was modified, licensees (i.e., record labels) typically licensed only a handful of works at one time (e.g., to release an album). Today, however, digital music services require tens of millions of licenses simultaneously, as they compete—against each other and against online pirate websites—to offer consumers the most comprehensive music selection possible.<sup>6</sup> To fix this problem, the MMA creates a true blanket license covering all musical works protected by copyright and available upon the filing of a single notice of license, which promotes licensing efficiencies and reduces transaction costs for both digital music providers and musical work copyright owners. The MMA’s new blanket license will enable digital music providers to offer a complete catalog of music to consumers without risk of copyright infringement, which will increase music consumption, generate additional royalties, and expand the number of artists and songwriters whose music will be performed.

## 2. Notices of Intent

To avail itself of the Section 115 license, a digital music provider must notify the musical work copyright owner of its intent to reproduce and distribute the work pursuant to a process referred to as a notice of intent or NOI. Because there is no authoritative database of musical work copyright ownership information, all too frequently information identifying the musical work copyright owner is not readily

---

<sup>6</sup> See, e.g., Skyler Mitchell, Reforming Section 115: Escape from the Byzantine World of Mechanical Licensing, 24 *Cardozo Arts & Entertainment* 1239, 1256 (“With complicated notice and reporting procedures leading to prohibitive transactional costs and delays, and a lack of clarity regarding which activities require which licenses inciting frustration and uncertainty, § 115 has hindered online music providers in their attempts to successfully combat piracy.”)



available when needed by the digital music provider. This is particularly true for new releases, where musical work authorship and ownership may not be known for many months. Everyone—digital music providers, record labels and artists, music publishers and songwriters, and consumers—shares an interest of getting new releases widely distributed to start generating royalties, but a lack of information may keep new releases from being distributed by digital music providers for fear of copyright infringement litigation and the specter of statutory damages.

When authorship or ownership information is unavailable, Section 115 allows a digital music provider to serve an “address unknown” NOI on the Copyright Office, sometimes referred to as a CNOI. Historically, filing a CNOI with the Copyright Office was burdensome and expensive for the digital music provider. For example, the Copyright Office required CNOIs to be filed in paper form. A digital music provider was required to pay a \$75 filing fee for each CNOI, along with \$2 per work. In April 2016, however, the Copyright Office began accepting CNOIs filed electronically at only \$0.10 per work. As the burden and cost of serving CNOIs decreased—and the risk of copyright infringement increased—digital music providers began filing more CNOIs as a way to limit exposure to potential litigation.

It is tremendously inefficient and redundant for each individual digital music providers to search independently for the same musical work copyright owners of the same musical works embodied in the same sound recordings. The MMA does away with the antiquated work-by-work NOI process for digital music providers and replaces it with a blanket license that may be obtained simply by filing a single

notice of license. The MMA also creates a new mechanical licensing collective, which issues the blanket license to digital music providers, to act as a central clearinghouse to collect and distribute mechanical royalties. By consolidating the search functions for all digital music providers, the mechanical licensing collective significantly improves licensing efficiencies and eliminates waste from the system.

*c. Setting the Rate for the Mechanical License*

When Congress created the compulsory mechanical license in 1909, it fixed the royalty rate by statute. This license rate remained unchanged until the copyright law revision in 1976, when Congress determined that the rate should be subject to periodic adjustment. To relieve Congress of the difficult rate-setting task, the 1976 Copyright Act created the Copyright Royalty Tribunal, an independent agency consisting of five, and later three, full-time Commissioners charged with setting mechanical rates. In 1993 Congress passed the Copyright Royalty Tribunal Reform Act, which replaced these full-time Commissioners with *ad hoc* Copyright Arbitration Royalty Panels. In 2004 Congress passed the Copyright Royalty and Distribution Reform Act, which created the Copyright Royalty Board, overseen by three full-time Copyright Royalty Judges. This rate setting process remains in place today.

Section 801(b) instructs the Copyright Royalty Judges to establish “reasonable rates and terms” for a variety of compulsory license types available

under the Copyright Act, including the license under Section 115.<sup>7</sup> The MMA changes the rate-setting standard to the so-called “willing seller, willing buyer” (WS-WB) standard found in Section 114. Under the WS-WB standard, the Copyright Royalty Board is tasked with determining the rate that would obtain in a workably competitive market. Copyright owners have argued that the Section 801(b) standard results in licensees paying below-market rates.<sup>8</sup> While it remains to be seen whether adoption of the WS-WB standard will result in higher royalty rates, digital music providers agreed to this change in the rate-setting standard as part of the overall reform of Section 115.<sup>9</sup>

#### *d. Copyright Infringement Litigation*

As noted above, the growth of legitimate digital music streaming services has caused a precipitous decline in online music piracy. By offering compelling listening

---

<sup>7</sup> The four policy factors the Copyright Royalty Judges are to consider when determining royalty rates are:

- (A) To maximize the availability of creative works to the public.
- (B) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.
- (C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.
- (D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.”

<sup>8</sup> Ed Christman, “Copyright Royalty Board Raises Rate for SiriusXM, Lowers It for Music Choice,” *Billboard* (December 15, 2017) (<https://www.billboard.com/articles/business/8070762/sirius-xm-copyright-royalty-board-crb-rate-increase>).

<sup>9</sup> For example, in the recent Copyright Royalty Board decision in *Phonorecords III* the Copyright Royalty Judges used the Section 801(b) factors to *increase* above the market value the rate digital music providers pay under Section 115. See Initial Determination, In re Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (*Phonorecords III*), Copyright Royalty Judges (March 19, 2018).

experiences to consumers across multiple price-points, including advertising-supported, free-to-the-listener services and discounted subscriptions for students and families, digital music providers have all but eliminated the incentive for consumers to pirate music.

One unintended consequence of the work-by-work process for licensing musical works under Section 115 has been a recent explosion of copyright infringement litigation.<sup>10</sup> Digital music providers that were unable to identify and locate the relevant music publisher accrued the royalties owed to such unidentified publisher while continuing to search. Digital music providers accrued royalties even though the Copyright Act provides that a copyright owner is not entitled to receive any mechanical royalties generated prior to that copyright owner's information being found in the public records of the Copyright Office.<sup>11</sup> Certain music publishers, however, questioned whether some digital music providers had complied fully with the formalities of the NOI process. For example, in December, 2017, Wixen Music Publishing, who represents songwriters such as Tom Petty and Neil Young, sued Spotify seeking a staggering \$1.6 billion in statutory damages, far

---

<sup>10</sup> Eriq Gardner, "Spotify Hit With Two Lawsuits Claiming 'Staggering' Copyright Infringement," *Hollywood Reporter* (July 18, 2017, 2:20 PM) (<http://www.hollywoodreporter.com/thr-esq/spotify-hit-two-lawsuits-claiming-staggering-copyright-infringement-1021771>).

<sup>11</sup> Section 115(c)(1) states, "To be entitled to receive royalties under a compulsory license, the copyright owner must be identified in the registration or other public records of the Copyright Office. The owner is entitled to royalties for phonorecords made and distributed after being so identified, but is not entitled to recover for any phonorecords previously made and distributed."

more than the royalties the copyright owners earned on the service.<sup>12</sup> As one journalist summed up the litigation over mechanical licenses:

Legally speaking, the lawsuit isn't about whether Spotify is supposed to pay "10.5% of revenue minus PRO payments" and whether it was willing to do so. It's about whether it sent along a piece of paper to a songwriter's last known address letting them know that they were going [to] get paid. And because they supposedly didn't, Wixen is asking for \$150,000 in statutory damages per song. That's an expensive piece of missing paper...<sup>13</sup>

Other digital music providers have also been sued for alleged failure to properly serve notices of intent.<sup>14</sup>

For digital music providers that follow the MMA's requirements, the MMA ends these lawsuits and creates a pathway for digital music providers to pay unmatched royalties to the appropriate music publishers. By eliminating infringement risks, the MMA will encourage more investment in digital music services, which will increase music consumption and lead to more royalties for music publishers and songwriters.

### III. The Music Modernization Act's Solutions

The MMA creates a blanket licensing system with collective

---

<sup>12</sup> Jon Blistein, "Tom Petty, Neil Young Publisher Sues Spotify for \$1.6 Billion," Rolling Stone (Jan. 2, 2018) (<https://www.rollingstone.com/music/news/tom-petty-neil-young-publisher-sues-spotify-for-16-billion-w514859>).

<sup>13</sup> Sarah Jeong, "A \$1.6 billion Spotify Lawsuit Is Based on a Law Made for Player Pianos," The Verge (Mar. 14, 2018) (<https://www.theverge.com/2018/3/14/17117160/spotify-mechanical-license-copyright-wixen-explainer>).

<sup>14</sup> Robert Levine, "Apple Hit With Class Action Lawsuit Over Unpaid Independent Artist Royalties," Billboard (Dec. 18, 2017) (<https://www.billboard.com/articles/news/8070967/apple-class-action-lawsuit-unpaid-independent-artist-royalties>); Robert Levine, "Rhapsody Hit With Class-Action Suit Over Royalties," Billboard (Mar. 8, 2016) (<https://www.billboard.com/articles/business/6906773/rhapsody-class-action-suit-royalties-david-lowery>);

administration, which will increase public consumption of licensed music, increase royalties paid out to rights holders, and promote licensing efficiencies. The MMA creates a mechanical licensing collective, a non-profit entity responsible for issuing blanket mechanical licenses to digital music providers. The mechanical licensing collective will collect royalties from digital music providers, match those royalties to the appropriate music publishers and songwriters, and distribute those royalties on a timely and transparent basis. Importantly, unlike other collectives that recover their operating expenses out of the royalties they administer, digital music providers have agreed to pay for the reasonable costs of establishing, maintaining, and operating the mechanical licensing collective.

The digital music providers are not, however, writing a blank check to the mechanical licensing collective. The MMA provides that digital music providers are obligated to pay only “reasonable” costs. The MMA gives the Copyright Royalty Board oversight power and creates a mechanism for digital music providers to challenge proposed costs of the mechanical licensing collective. Digital music providers have a non-voting seat on the board of directors of the mechanical licensing collective and have visibility into the proposed budget and costs of the collective.

Digital music providers submit one application to the MLC that covers all music available on the service—a true blanket license. The MMA allows for privately negotiated licenses between providers and publishers as well, in place

of coverage by the blanket license. A digital music provider that believes its license was rejected or terminated unfairly by the mechanical licensing collective may petition a federal district court for redress.

Digital music providers submit monthly usage reports to the mechanical licensing collective. These reports include information regarding the sound recordings the provider transmitted to consumers, including the name of the sound recording and the featured artist. Where the digital music provider also receives additional information from the sound recording copyright owner, such as the identity of the musical work copyright owner, songwriter, or standard identifiers such as International Standard Recording Code or International Standard Work Code, the report shall also include that information. Digital music providers are not, however, required to match the sound recording to the embodied musical work or reconcile conflicting rights ownership information. That responsibility falls on the mechanical licensing collective.

The MLC distributes royalties to music publishers based on the digital music providers' usage reports and copyright ownership information the MLC collects from a variety of sources, including digital music providers and music publishers. Music publishers then pay their songwriters based on their individual songwriting agreements.

The collective will increase transparency for both digital music services, music publishers and songwriters. Most significantly, the MMA calls for the mechanical licensing collective to establish and maintain a publicly-accessible

database of music copyright ownership information. The mechanical licensing collective enables music publishers to claim ownership in a particular song, resolve ownership disputes among music publishers, and establishes a system that equitably distributes royalties that remain unclaimed for more than three years. In addition, the mechanical licensing collective is subject to transparency and accountability requirements, including maintenance of electronic records and audit procedures that ensure songwriters are being properly compensated.

Finally, the MMA gives the Register of Copyrights broad authority to promulgate necessary regulations, providing an important oversight mechanism to ensure the mechanical licensing collective operates transparently and fairly to all stakeholders.

#### IV. Conclusion

By reducing uncertainty and increasing efficiency, the MMA will result in greater consumer choice in the on-demand music streaming space, as new entrants will be able to launch a service with lower barriers to entry. The blanket license will also empower existing on-demand streaming services to expand the catalogs made available to consumers to lawfully access the music they love. Additional innovative distribution channels, together with broader selection within each service, will result in greater compensation to music publishers and songwriters. Thank you again to the Committee for inviting me to testify today. DiMA looks forward to working with you to see the MMA signed into law this year.