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"Protecting and Promoting Music Creation for the 21st Century."

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Chairman Grassley, Ranking Member Feinstein and Members of the Senate Judiciary Committee, thank you for this opportunity to present testimony on the Music Modernization Act (MMA/S. 2823) and the importance of ensuring that copyright law protects and promotes music creation for songwriters and music publishers in the digital streaming age. The MMA is a necessary and long-overdue piece of legislation that vastly improves not only the process by which the copyrights of music publishers and songwriters are licensed, but more importantly the value of their songs and the royalties paid under those licenses.

I serve as President and CEO of the National Music Publishers' Association (NMPA). Founded in 1917, the National Music Publishers' Association (NMPA) is the trade association representing all American music publishers and their songwriting partners. Our mission is to protect, promote, and advance the interests of music's creators. NMPA is the voice of both small and large music publishers, who are either copyright owners and/or administrators of song catalogues that make significant contributions to our nation's economy and cultural identity. NMPA's goal is to protect its members' property rights on the legislative, litigation, and regulatory fronts. In this vein, NMPA continues to represent its members in negotiations to shape the future of the music industry by fostering a business environment that furthers both creative and financial success. NMPA is the most active and vocal proponent for the interests of music publishers and songwriters in the U.S., and as the voice of this constituency for over 13 years, I can say that the MMA is the best hope for both music creators and music streaming platforms to thrive in the digital age.

My testimony addresses the dynamics between music publishers and songwriters, why their livelihood is threatened by a failure of the law to keep pace with technology, and why this piece of legislation is so critical to their survival.

I. Music Publishers and the Musical Composition Copyright

A. The Role of a Music Publisher

Music publishers are songwriters' business partners, and they play a vital role in fostering and supporting a writer's career. Publishers discover new talent and put their time and resources into developing the next great songwriter. They sign writers to publishing deals, advancing money to cover living expenses, so these creators can focus on their craft full time. Music publishers also work industry connections with labels and artists to help songs get recorded and released, and they promote songs for multiple licensing opportunities, from movies and commercials to sheet music and lyric sites. Finally, publishers grant licenses, collect royalties, and protect and enforce copyrights on behalf of songwriters.

B. Two Separate Copyrights

There are two separate and distinct copyrights in music. The first copyright is for the underlying musical composition, the notes and lyrics, created by one or more songwriters, and which is either owned and/or represented by a music publisher. NMPA represents the copyright owners and administrators of the musical compositions. The second copyright is for a sound recording, a specific recorded version of a musical composition, which is often owned or represented by a record label.[1]

It all begins with a song. Without the notes and lyrics, there is no music to record. Songwriters are crucial to the creative process and the music business as a whole. Without their creativity and ingenuity, there is no song to fuel the rest of the music ecosystem, from sound recordings to the digital devices and digital platforms on which to access those recordings.

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[1] For more details on the musical composition and sound recording copyrights and music licensing generally, *see* U.S. Copyright Office, COPYRIGHT AND THE MUSIC MARKETPLACE (February 2015), https://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf.

II. Government in the Business of Music

Today's copyright laws dictate much of how musical compositions are licensed and valued. In fact, songwriters are the most heavily regulated of the creatives classes, with almost 75% of their income controlled by the government.[2] A music publisher's mechanical rights, or the right to copy and distribute musical compositions, are governed by Section 115 of the U.S. Copyright Act.[3] Section 115 creates a statutory compulsory license dating back to 1909 that allows users who comply with the statute to use musical works without asking the permission of the copyright owner. The public performance rights of songwriters and music publishers—or the right for songs to be played publicly in bars and restaurants, over broadcast and internet radio, or through digital music services—is inherently a free market right. It is not regulated by statute. However, because of cases of alleged anticompetitive conduct that took place more than 75 years ago, these rights are primarily regulated by and licensed through consent decrees imposed by the Department of Justice on the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music Inc. (BMI).

In the meantime, new digital technologies have dramatically transformed the way music is distributed and consumed by fans. Where consumers once listened to their favorite hits on records, cassettes or CDs, today digital streaming companies like Spotify, Pandora, Google, Apple and Amazon license and distribute over 30 million songs through their platforms that reach hundreds of millions of users throughout the world listening in cars, on computers and on cell phones. These companies have drastically changed the music economy, including how music is licensed from, and how royalties are paid to, music publishers and songwriters.

These dynamic changes have happened in the shadow of century old federal copyright laws and regulations. It has become clear that these outdated policies, which have not changed since the dawn of this digital era, have not stood the test of time and are not able to protect properly or promote music creation in the 21st century music economy.

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[2] NMPA obtains U.S. revenue figures each calendar year from its music publisher members. For 2016, NMPA member publishers reported that 54% of their revenue was generated from performance rights and 19% from mechanical rights (the remainder was generated from synchronization, lyric and other rights). *See* https://www.billboard.com/articles/business/7833018/david-israelite-pharrell-williams-martin-bandier-steve-boom-yoko-ono-kick.

[3] 17 U.S.C. §115.

A. The Licensing of Mechanical Royalties (Section 115)

As explained above, Section 115 of the 1909 Copyright Act created a compulsory license for mechanical rights which addressed the licensing of player piano rolls. It was meant to regulate deals between music publishers and player piano companies. While player piano rolls disappeared long ago, songwriters and publishers remain subject to and bound by this outdated statutory system.

1. 801(b) Rate Setting Standard

Today, mechanical royalty rates are established every five years by the Copyright Royalty Board (CRB), a three-judge panel appointed by the Library of Congress. First set at the initial price of 2 cents per reproduction of a song in 1909, the mechanical rate today should be closer to 50 cents per song if adjusted for inflation. Remarkably more than 100 years later, the current rate is only 9.1 cents per song. Since 2009, royalty rates for interactive streaming have been set by the CRB as a percentage of each digital service's revenue ranging from 10.5% to 12%., subject to certain minimum royalty floors, minus any royalties paid by the service for the public performance of those works.[4] The royalty rates for interactive streaming, calculated based on the number of plays a song has on a digital service, have historically resulted in unsustainably low royalty payments to songwriters and publishers, which trail fair behind the royalties paid to recording artists and labels. Even the most successful writers, such as Pharrell Williams who wrote and recorded the song "Happy," have been paid only a few thousand dollars for hundreds of millions of streams on services such as Spotify or Pandora.[5] And although the most recent CRB trial resulted in an increase in digital interactive streaming rates for the period 2018-2022, the royalties paid to publishers and songwriters for interactive streaming still do not reflect the product of free market negotiations.

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[4] 37 C.F.R. §385, Subparts B & C.

[5] There have been many songwriters and artists who have written about the low royalty payments received from streaming platforms. *see*, https://www.newyorker.com/business/currency/will-streaming-music-kill-songwriting; *see also*, http://www.businessinsider.com/pharrell-made-only-2700-in-songwriter-royalties-from-43-million-plays-of-happy-on-pandora-2014-12; *see also*, https://www.bet.com/music/2017/10/06/rodney-jerkins-justin-bieber-royalities.html; *see also*, https://www.wired.com/2014/11/aloe-blacc-pay-songwriters/.

A key factor contributing to the low mechanical royalties paid to songwriters is due to current law, which directs the CRB to apply an antiquated four factor standard when setting mechanical rates, which depresses rates below the level that would be negotiated in the open market. This standard – known as an 801(b) standard – requires the CRB to ensure "[the] copyright user a fair income under existing economic conditions," and to "minimize any disruptive impact on the structure of the industries involved...."[6] In other words, the CRB sets royalty rates using a balance test based on what potential licensees can pay without disruption to their businesses, and therefore, not what a free market negotiation would produce. In addition, the rates produced under 801(b) act as a ceiling, so publishers and songwriters often cannot negotiate higher rates through direct licenses. Ultimately, this antiquated system disproportionally weighs the needs of the licensee over that of the copyright owner.

2. The Section 115 Rateless NOI Problem

Under Section 115, a digital service licensee seeking to stream music must identify the copyright owners of every song and send an individual notice of intent to license (NOI) to each copyright owner for every song. While this licensing process may have made sense in the age of piano rolls, records or CDs, where a small handful of songs were licensed by record companies, it has become a difficult task for digital streaming services that license millions of songs for their streaming platforms. The fact that there is no public, centralized database to check song ownership or contact information compounds this problem. Streaming services are therefore not able to identify and properly license each song that is played on their platform or each copyright owner of those songs, which often have multiple writers and music publishers attached to each work.

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[6] 17 U.S.C. §801(b) currently requires the CRB to determine royalty rates "calculated to achieve the following objectives:
(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"

The resulting dilemma has led digital services to use, and abuse, a decades old provision within Section 115 that permits a licensee to file a mechanical NOI with the Copyright Office where the copyright owner of a song cannot be identified in Copyright Office records. A Copyright Office NOI is royalty-free, meaning digital services who file these NOIs are not required to pay royalties for any use of songs on their platform under the Copyright Office license. And even once a copyright owner identifies themselves to the licensee, they are only permitted to receive royalties for future (and not retroactive) plays of their song. To date, the inability to identify copyright owners of songs and the fear of statutory damages liability for the unlicensed use of those songs has led digital companies like Google, Amazon, and Spotify to file over 60 million NOIs on the Copyright Office[7] and songwriters and publishers to lose millions of dollars in royalties each year.

B. Public Performance Royalties

Under U.S. Copyright law, songwriters and music publishers also receive royalties for public performances of their songs. Due to the large number of music creators and music users in the ecosystem, songwriters and publishers cannot effectively monitor and license all public performances of their songs. Instead, it has historically been more efficient and to the benefit of both rights-holders and music users for the public performance of songs to be licensed collectively through performing rights organizations (PROs) such as ASCAP and BMI. Songwriters and music publishers affiliate with a PRO, which grants blanket licenses, and collects performance royalties on their behalf. In today's market, there are four PROs: ASCAP, BMI, SESAC and Global Music Rights (GMR). However, because of antitrust cases brought against ASCAP and BMI by the Department of Justice in 1941, the performance rights ASCAP and BMI represent on behalf of songwriters and music publishers are not negotiated in a vibrant, free market, but are instead licensed in the highly-regulated shadow cast by government-imposed consent decrees. These consent decrees were last amended prior to the digital music age in 2001 and 1994, respectively.

[7] *See* Copyright Office website, https://www.copyright.gov/licensing/115/noi-submissions.php.

While public performances are not subject to a statutory licensing scheme, the ASCAP and BMI consent decrees place upon the PROs, and by extension the songwriters and music publishers those PROs represent, an onerous government regulatory system. This system requires ASCAP and BMI to grant an automatic license to users, upon request and before any fees are negotiated.

When ASCAP or BMI cannot agree on performance royalties with respective licensees, each PRO sets its rates before its own single-appointed rate court judge, who decides that PRO's royalty rate disputes for every type of licensee. As a result, the rate is decided by the same two judges in perpetuity, and the PROs do not have the benefit, like other federal litigants, to have a new judge consider the evidence and possibly set new royalty rates for each case. Moreover, it is only after a long and costly proceeding that the federal judge sets a royalty rate to be paid by the user. This often allows licensees to perform the works of songwriters without paying a penny, for months and even years, as both parties negotiate on a fee or wait for the start and completion of a rate court proceeding.

More importantly, the ASCAP and BMI rate court judges are restricted by statute from considering royalty rates being paid to record labels for the same digital public performance rights when setting the rates for songwriters and music publishers.[8] Historically, the rate court decisions have resulted in below market royalties for songwriters and music publishers when their songs are publicly performed by digital streaming services. According to ASCAP's calculations, on average, it takes 1 million streams across top streaming platforms for a songwriter to earn $170. [9] While streaming has increased the use of music in more places and on more devices than ever, songwriters and music publishers have not been able to capitalize on this growth and have not seen the same rate of return for their creative labor.

[8] 17 U.S.C. §114(i).

[9] *See*, http://dailycaller.com/2017/04/20/what-songwriters-need-from-congress/#ixzz4fAoFbyMA

III. Music Modernization Act (S. 2823)

Following a comprehensive review of music licensing in 2015, the Copyright Office acknowledged the outdated and deficient state of federal copyright law and stated that "the time is ripe to question the existing paradigm for the licensing of musical works and sound recordings and consider meaningful change."[10] NMPA strongly believes that songwriters and music publishers unfairly suffer under an onerous federal statutory and regulatory system that inhibits for them the free market activities and negotiations afforded to and enjoyed by other intellectual property owners of recorded music, movies, video games, magazines, books and television shows. In a perfect world, songwriters and publishers would have a similar ability to operate and do business in a free market.

Absent that perfect world, however, the MMA represents a transformative and collaborative legislative effort that makes meaningful changes and important updates to the music marketplace and benefits all who participate in that marketplace, including music publishers and songwriters.

At its core, the legislation is a grand compromise by publishers, songwriters, PROs, record labels, artists, broadcasters and digital music services, and represents the most ambitious reforms of music licensing in a generation. Importantly, Title I of the legislation works to correct many of the outdated and antiquated provisions of U.S. copyright laws that today impede the proper functioning of mechanical and public performance rights of songwriters and music publishers.

As passed in the House and introduced last Thursday, May 11, in the Senate, the MMA (S. 2823) contains three Titles: The Musical Works Modernization Act (MWMA); The Compensating Legacy Artists for their Songs, Service, and Important Contributions to Society (CLASSICS) Act; and the Allocation for Music Producers (AMP) Act. While we fully support the priorities of labels, artist and producers, my testimony will focus on Title I, which reforms Section 115 of the Copyright Act and the ASCAP and BMI consent decrees to provide much needed relief to songwriters and publishers.

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[10] COPYRIGHT AND THE MUSIC MARKETPLACE at 1.

A. Title I: Musical Works Modernization Act (MWMA)

Since 2006, when music publishers, songwriters and digital services first attempted to pass legislation to modify and update copyright laws, these parties have understood that the 1909 statutory system under Section 115 and the 1941 consent decrees were not sufficient to address the new world of digital interactive streaming and music distribution. It took eleven years, multiple copyright litigations and settlements and a failure to pay millions in royalties for all parties to sit down and finally address these problems.

What resulted is the most significant consensus and compromise copyright legislation in years. At the heart of the legislation was a fundamental compromise: establish a more efficient mechanical blanket licensing system for digital streaming services in exchange for the creation of transparent licensing collective (the "collective") governed by copyright owners but paid for entirely by digital companies, enabling songwriters and publishers to receive 100% of their mechanical royalties.

Today, millions in royalties never find their way to songwriter and publisher pockets due to the failure of digital service to find those copyright owners and the filing of Copyright Office rateless NOIs. The MWMA eliminates the filing of Copyright Office NOIs and establishes a blanket license under which services must pay all owed royalties for mechanical uses to the newly created collective. Additionally, the legislation creates a public, fully transparent database of ownership information and an ownership portal that will allow copyright owners to identify and rightfully claim their songs.

Today, music publishers generally control mechanical rights with songwriters taking a limited role in the administration of those rights. The MWMA, for the first time, gives songwriters a critical seat at the mechanical table through representation on the collective's board of directors and standing committees. It also requires that songwriters receive at least fifty percent of the unclaimed and unmatched royalties distributed by the collective.

Today, the CRB must consider a four-part balancing test when setting mechanical royalty rates in Section 115 rate proceedings. The MWMA eliminates the 801(b) rate-setting standard and requires the CRB to use a willing seller/willing buyer standard when setting mechanical royalty rates. This new standard will enable the CRB to determine rates that are

closely aligned with what would be negotiated in a free market and is line with the Copyright Office's belief, "that all music users should operate under a common standard, and that standard should aim to achieve market rates to the greatest extent possible."[11]

Further, the legislation addresses important revisions to the ASCAP and BMI consent decrees. The MWMA repeals Section 114(i), so that ASCAP and BMI will finally have the ability to put forth evidence of sound recording royalty rates for digital streaming performances to try and achieve fairer performance royalties for songwriters and music publishers. The MMA also improves performance licensing by allowing PROs to have rotating judges, which will give each rate court trial fresh eyes for determining the most appropriate royalty rates.

These critical updates will fundamentally reform how mechanical and public performance rights of music publishers and songwriters are licensed in the future and how royalties are determined and paid for the use of a song. With these necessary legislative revisions, both songwriters and music publishers and the digital services that license their creative works are confident in their ability to thrive in the new age of digital music distribution. That is why the MMA has been endorsed by over twenty major music organizations and the major digital and broadcast associations and companies.

IV. Conclusion

Songwriters are often the least visible creators, but create the single indivisible seed that allows the industry to flourish: the song. Yet, as the digital music economy and interactive streaming continue to grow, songwriters and their music publisher partners are struggling to grow with them. This is in large part because songwriters and music publishers are the most regulated small businesses in America. Until the introduction of the MMA, the federal copyright law and federal government regulation –through severely outdated systems, laws and decrees—restricted the ability of music publishers and songwriters to thrive and succeed in the digital era. Congress must update and improve the statutory and regulatory processes and rate standards under which songwriters and music publishers are paid. This is exactly what the MMA accomplishes.

[11] COPYRIGHT AND THE MUSIC MARKETPLACE at 172.

The MMA represents months of unprecedented compromise and negotiation with music publishers, digital music services, record labels, broadcasters and virtually every songwriter group in the country to improve our music economy – compromise that may never be replicated.

Chairman Grassley, Ranking Member Feinstein and Members of the Committee, the NMPA, our hundreds of music publisher members, our thousands of songwriter partners and I thank you for your interest in these very important issues and we look forward to working with this Committee to accomplish this critical goal and ensure that the MMA becomes law.