Testimony of Meredith Rose
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Before the
U.S. Senate
Committee on the Judiciary

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

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Chairman Grassley, Ranking Member Feinstein, Members of the Committee, thank you for this opportunity to testify before you today about S. 2823, which bundles together a trio of bills addressing copyright in music: the Music Modernization Act, the CLASSICS Act, and the AMP Act. My name is Meredith Rose, and I am Policy Counsel at Public Knowledge, a non-profit consumer advocacy group that for nearly two decades has advocated for sensible, balanced copyright policy.

Public Knowledge is no stranger to issues of music copyright and intellectual property. We have been called to testify before Congress on numerous occasions on issues ranging from music licensing, to the ASCAP and BMI consent decrees, patent reform, as well as a wide range of other related matters. Our top priority in this domain is a vibrant, competitive, and, most of all, functional music marketplace that serves not only artists and consumers, but non-profit, educational, and preservation users as well. We do this by advocating for policies that promote marketplace competition, as well as for end-user protections that allow amateur and grassroots creativity to flourish, such as robust fair use and safe harbor protections. We have also worked on issues of particular importance to musicians, like strengthening termination rights and closing the terrestrial radio gap.

Because the bills before the Committee today deal with a wide range of stakeholders, legal issues, and equities, I would appreciate the opportunity to address them in turn.

I. The Music Modernization Act

Consumers are best served when the market that serves them is functional, competitive, and open. The Music Modernization Act (MMA) is a rare bill that would bring meaningful change to a broken system, and we applaud Senator Hatch, Representative Collins, and the bill's numerous cosponsors for their hard work in bringing it to fruition. The MMA's proposed rights information database would lower search costs for licensees; its blanket licensing would allow

for easier competitive entry into the market; and the creation of a licensing collective would provide systemic support for independent and unaffiliated songwriters to ensure that their equities are addressed. Taken together, these measures will not only provide consumers easier access to the music they love, but will reduce some of the current barriers to entry for startup and competitive delivery services.

We are concerned, however, with several provisions in the newly introduced version of the bill, Title I of which is substantively different from the original draft (S. 2334) in multiple respects. Of greatest concern is S. 2823's total repeal of the § 801(b) rate-setting standard. The § 801(b) standard, as we have previously noted,[1] is critical to balanced ratemaking. It directs Copyright Royalty Judges to consider not only market rates for songs, but the larger impact of those rates beyond the immediate commercial context. Judges are directed to consider the Copyright Act's fundamental goal of "maximiz[ing] the availability of creative works to the public," as well as the relative health of competition in the licensing market.[2] These considerations are more crucial than ever, as the marketplace for music delivery services is exceedingly concentrated, with a handful of deep-pocketed, dominant incumbents. The "willing buyer, willing seller" standard, by contrast, uses existing deals between incumbents as a benchmark for future entrants. This creates artificial barriers to entry, and insulates existing services from future competition.

Under current law, § 801(b) controls rates in two contexts: mechanical rates for musical works under § 115, and performance rates for sound recordings used by satellite services and preexisting subscription services under section § 114. In its original form, the Music Modernization Act (H.R. 4706 and S. 2334) moved the standard for § 115 rates to a "willing buyer, willing seller" standard, giving rise to concerns we noted in our initial letter on the matter.[3] However, the new version of the Music Modernization Act (as found in H.R. 5447 and S. 2823) changes the standard in both § 115 *and* § 114 rate-settings to a "willing buyer, willing seller" standard, thus further entrenching the dominance of standing players. We believe the Senate should address these issues transparently and openly, and urge the Senate to preserve the § 801(b) standard for both § 114 and § 115 rate-settings.

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[1] *See* Public Knowledge letter to Chairman Grassley, Ranking Member Feinstein, Chairman Goodlatte, and Ranking Member Nadler, *Re: Music Modernization Act (S. 2334 and H.R. 4706) and CLASSICS Act (S. 2393 and H.R. 3301)*, 2 (Mar. 7, 2018), *available at* https://www.publicknowledge.org/assets/uploads/documents/PK_Music_Modernization_Act_letter_3.7.18.pdf.

[2] *See* 17 U.S.C. § 801 (b).

[3] *See* Public Knowledge letter of Mar. 7, *supra* note 1, at 2.

II. The CLASSICS Act must balance equities of all members of the ecosystem for legacy sound recordings

A broad consensus exists among stakeholders--corporate, individual and nonprofit alike--that the lack of federal copyright protection for pre-1972 sound recordings represents a problem in need of a legislative solution. However, the agreement ends there. How to properly address these works, and fairly address the spectrum of rights and equities at issue, is a highly controversial and complex topic with no clear consensus. The Copyright Office, in its 2011 study on the issue, received over 75 comments totalling hundreds of pages.[4] The question of proper federal treatment for these works implicates some of the fundamental legislative and policy priorities underlying copyright protection, including scope; duration; limitations and exceptions; the role of libraries, archives, and other non-commercial users; fair use; and, critically, protections for artists.

Rather than engaging on the merits of these issues, the CLASSICS Act attempts to circumvent them, not by simplifying the current schema but by adding a new federal quasi-copyright onto the existing milieu of state and federal protections. Most problematic is the term of protection for this new, retroactive right, which would lock away pre-1972 recordings for a significantly longer time period than other types of works under copyright law. For example, a literary work that was published with notice in 1924 enjoys a term of protection for 95 years after the publication date.[5] In contrast, if the CLASSICS Act is enacted, a sound recording fixed or published during that same time period would be protected under federal law for a term of 143 years.[6]

Although fully harmonizing legacy sound recordings with the existing copyright regime remains the only comprehensive way to provide artists equity without further damaging other stakeholders, there are steps that the Committee can take to minimize the damage done under a CLASSICS framework. The most tangible and immediate of these is to limit the term of CLASSICS protection such that it expires 95 years after the date of fixation of the work. At such

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[4] *See* United State Copyright Office, *Federal Copyright Protection for Pre-1972 Sound Recordings*, 2 (Register of Copyrights, Dec. 2011) ("*2011 USCO Study*").

[5] This term is contingent on the copyright having been renewed. *See* Cornell University Library, Copyright Information Center, *Copyright Term and the Public Domain in the United States* (Last updated Jan. 10, 2018), https://copyright.cornell.edu/sites/default/files/2018-01/copyright_term_and_the_public_domain2018.pdf; *see also* United States Copyright Office, *Duration of Copyright*, https://www.copyright.gov/circs/circ15a.pdf.

[6] *Id.*

time, the work should be committed to the public domain; or, in the alternative, revert back to the state schema under which it is currently governed. This would ensure that no citizens *lose* rights under CLASSICS beyond those rights that would be lost under a full harmonization.

A. Congress must balance the interests of all affected actors, including the ability to preserve and access cultural heritage

By granting new economic rights to existing works, CLASSICS does not further the Constitutional purpose of copyright, namely "To promote the Progress of Science and useful Arts."[7] The grant of new federal rights to works which have been in existence for nearly fifty years by definition cannot incentivize the creation of new works.

CLASSICS is, at its core, a bill about promoting equity. Legacy artists are indisputably in need of relief. Many have been twice victimized: first by an industry notorious for its exploitative practices, many of which fell disproportionately on artists of color; and again by bad policy, designed by a Congress that did not bother to articulate its reasoning.[8]

Because this legislation is fundamentally an exercise in balancing equities, the question that this committee needs to address is: what are the appropriate trade-offs among various players? Providing monopoly control over specific uses of a work is fundamentally a zero-sum exercise; as rightsholders win, it becomes harder and more expensive for the public to access these works (if they are accessible at all). This is the fundamental trade-off at the heart of copyright law. Congress must consider the interests of *all* affected parties, including the pressing issue of preserving cultural heritage, and those who would lose the ability to freely use works that gained new rights under CLASSICS. Unfortunately, CLASSICS as it is currently written will actually *shrink* the usable public domain available to many Americans under state law, reducing access for not only consumers, but also for historians, researchers, and preservationists, without any attendant benefits. Those stakeholders—the ones charged with preserving our musical heritage and history—will be significantly worse off if this bill becomes law.

B. CLASSICS negatively impacts preservation efforts and diminishes the public domain for millions of Americans

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[7] U.S. Const. art. I, § 8, cl. 8.

[8] *See 2011 USCO Study* at 8, 14 ("Congress did not articulate grounds for leaving pre-1972 sound recordings outside the federal scheme and there is very little information as to why it did so . . . Why Congress decided to maintain two separate systems of protection for sound recordings is unclear.").

A robust public domain is foundational to the copyright system. Works in the public domain are critical to the ongoing process of creativity, preservation, and study.[9] Walt Disney built an empire on the back of public domain fairy tales; entire fields of study are built on analyzing popular communications of ages past. When Congress made the misguided decision to withhold existing sound recordings from the public domain until 2047 (later expanded to 2067), it not only deprived Americans of open access to these works, but created a system riddled with inconsistencies.

Take a real world example: the song "If You'll Come Back," which was published in 1924. While the underlying musical work -- *i.e.*, the music and lyrics or "sheet" music -- will enter the public domain beginning in 2020, the 1924 recording of that work will continue on in private hands for a whopping *forty-seven years* past the expiration of its underlying work. This coming January will see the first substantial commitment of works to the public domain in decades; but as books, musical works, and visual art enrich the public en masse, sound recordings will remain locked under glass.

While this problem is largely the byproduct of Congress' previous decisions, CLASSICS exacerbates the worst of its elements by raiding the public domain for millions of Americans, and compounding the preservation gap in our nation's audio history. To the extent that these harms can be ameliorated under a CLASSICS framework, Congress should do so by capping protection at 95 years after the work was fixed, with either a commitment to the public domain or a re-commitment to state law at the termination of CLASSICS protection.

1. CLASSICS abrogates the public domain in states where it inheres before 2067

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[9] *See, e.g.*, David Bollier, *Why the Public Domain Matters, The Endangered Wellspring of Creativity, Commerce and Democracy*, 3 (New America Foundation & Public Knowledge, 2002), https://www.publicknowledge.org/pdf/why_the_public_domain_matters.pdf ("The public domain should not be regarded as a peripheral outland of science, education, communications and culture, known only as the shadowy obverse of intellectual property. It is the open, non-commercial semiotic space that is indispensable to our democratic society."); Jessica Litman, *The Public Domain*, 39 Emory L. J. 965, 968 (1990) ("The public domain should be understood not as the realm of material that is undeserving of protection, but as a device that permits the rest of the system to work by leaving the raw material of authorship available for authors to use."); *2011 USCO Study* at 125 ("A second structural element of federal copyright protection that is likely to encourage preservation and public access activities is the probability that if protection is federalized, some sound recordings will enter the public domain within the lifetime of today's practitioners.").

Legacy sound recordings are currently governed by state law, which carry their own attendant terms. In many instances, these terms expire before 2067. California, for example, has a public domain "cliff" in 2047, at which point state protection for these recordings expires.[10] At that time, all legacy sound recordings will enter the public domain for the purposes of California state law. The result is an intrastate public domain, under which residents of California -- who are estimated to number nearly 50 million by 2040[11] -- are free to use, reproduce, distribute, remix, and perform legacy sound recordings within the state's borders.

Under CLASSICS, however, these citizens and institutions would find their ability to meaningfully use legacy audio recordings deliberately hamstrung. CLASSICS would carve a proverbial chunk out the state's public domain, restricting intrastate activity for two full decades until 2067. To illustrate: July 17, 2054 will mark the 100th anniversary of Elvis' first live performance (at the Bon Air Club in Memphis, Tennessee). Under current law, a library in California could celebrate this tremendous milestone by streaming audio of the King's earliest recordings with Sun Records, made between 1953 and 1954, long before he gained national notoriety. Under the framework proposed by CLASSICS, libraries would be free to press and distribute copies of these seminal works--but not make them available for streaming.

CLASSICS would, simply put, plunder the public domain for millions of Californians, including four of the nation's twenty largest libraries with hundreds of thousands of sound recordings among them. Worse, it would do so without the balancing factor of a rolling commitment to the public domain, which would allow the public and nonprofit actors access to these works.

2. CLASSICS exacerbates the existing preservation gap

Historians tracing the genealogical roots of modern music are currently facing a crisis of preservation; many of the earliest recordings, such as those preserved in the Internet Archive's Great 78 project,[12] exist only on brittle, shellac 78 rpm records. These records require special

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[10] *See* CAL. CIV. CODE § 980(a)(2) ("The author of an original work of authorship consisting of a sound recording initially fixed prior to February 15, 1972, has an exclusive ownership therein until February 15, 2047, as against all persons except one who independently makes or duplicates another sound recording that does not directly or indirectly recapture the actual sounds fixed in such prior sound recording, but consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate the sounds contained in the prior sound recording.").

[11] *See* Public Policy Institute of California, *California's Future: Population* (PPIC, Jan. 2016), http://www.ppic.org/content/pubs/report/R_116HJ3R.pdf.

[12] *See generally* Internet Archive, *The Great 78 Project*, http://great78.archive.org/.

equipment to play, and the overwhelming majority of the works contained on these records were never made available in any subsequent medium. Enormous swaths of our nation's musical history, from yodeling and hillbilly music (the predecessor to modern country), to Hawai'ian native music, to scratchy recordings of early 20th century musical theatre, exist only in these deteriorating discs, made from beetle resin and largely left to decay in library basements.

Rightsholders have been largely uninterested in meaningful, systematic preservation of these works in usable formats. The Library of Congress' National Jukebox project—often touted as the recording industry's "answer" to preservation concerns—consists of low-fidelity streams of a limited selection of recordings. Libraries, archives, and historians, despite being best positioned to usher these works into the digital age, have had their activities chilled by a chaotic patchwork of law that discourages all but the most determined archivists from attempting to fill this preservation void. Groups like the Association for Recorded Sound Collections, which focus exclusively on challenges facing sound recording archivists and scholars, have called repeatedly called upon policymakers to rationalize the public domain so that they can perform the important work of preserving these invaluable, otherwise-lost works without the cloud of legal uncertainty that current law provides.[13]

By adding a new federal right on top of the existing schema—rather than simplifying and harmonizing these works within an existing framework—CLASSICS compounds the confusion and uncertainty that keeps meaningful preservation efforts at bay.

[13] *See 2011 USCO Study* at 85 ("'The regularization of the law, the certainty of the law, the bright lines that the law would bring us,' said the ARSC, 'outweigh whatever negatives.'").