INSTITUTE FOR INTELLECTUAL PROPERTY & SOCIAL JUSTICE

"ADVANCING IDEAS ENCOURAGING ENTERPRISE PROTECTING PEOPLE"

March 14, 2018

The Honorable Chuck Grassley
Chairman
U.S. Senate Committee on the Judiciary
Hart Senate Office Building 135
Washington, DC 20510

The Honorable Dianne Feinstein
Ranking Member
U.S. Senate Committee on the Judiciary
Hart Senate Office Building 331
Washington, DC 20510

The Honorable Bob Goodlatte
Chairman
U.S. House of Representatives Committee on the Judiciary
Rayburn House Office Building 2240
Washington, DC 20515

The Honorable Jerrold Nadler
Ranking Member
U.S. House of Representatives Committee on the Judiciary
Rayburn House Office Building 2109
Washington, DC 20515

Re: The CLASSICS Act (S. 2393 and H.R. 3301) and the Music Modernization Act (S. 2334 and H.R. 4706)

Dear Chairman Grassley, Ranking Member Feinstein, Chairman Goodlatte, and Ranking Member Nadler:

For more than a century, arcane and adhesive business practices, arising in part through gaps in and manipulations of music copyright, have perpetuated pernicious traditions of artist exploitation in the music recording and distribution industry.[1] Indeed, the economic victimization

[1] *See e.g.* Jeff Carter, *Strictly Business: A Historical Narrative and Commentary on Rock and Roll Business Practices*, 78 TENN. L. REV. 213 (2010); Tuneen E. Chisolm, *Whose Song is That? Searching for Equity and Inspiration for Music Vocalists under the Copyright Act*, 19 YALE J. L. & TECH. 274, 305–20 (2017).

of African American music artists often evokes recollection of some of the darkest chapters of social injustice in American history.[2]

The CLASSICS Act, S. 2393 and H.R. 3301, and the Music Modernization Act, S. 2334 and H.R. 3301, collectively present various proposals which can mitigate some of the past and ongoing inequities and inefficiencies in music licensing, subject however to a critical caveat: the Institute for Intellectual Property and Social Justice[3] urges that the CLASSICS Act should not be passed unless it is amended to include a mechanism for copyright transfer termination rights. Unless a copyright transfer termination mechanism is included within the Act, legacy artists will lose their only meaningful opportunity to gain the right to renegotiate music deals which by and large are best described as a blemish on our nation's history. A bill entitled the "Compensating Legacy Artists for their Songs, Service, and Important Contributions to Society Act" should not require legacy artists to forego a measure of delayed economic justice, as the price by which to obtain their share of the performance revenues generated in the contemporary music marketplace.

The CLASSICS Act (S. 2393 and H.R. 3301): Mitigating a Legacy of Economic Injustice

The inescapable history of the American music recording industry is that the era of its birth and development is coterminous with the epoch of Jim Crow and other legal and institutionalized injustice in our nation. Mere decades ago, freedom of contract was all but a myth for most African Americans and many other marginalized members of our society. When one is effectively bereft of all legal rights, denied education and often even the bare necessities of food and shelter, the exchange of a hot meal and pocket money as "compensation" for your creative labors can hardly be considered a meeting of minds, but is simply the proverbial "offer you can't refuse".[4]

It was within this socio-legal milieu that most pre-'72 sound recording contracts and license agreements were executed. As currently proposed, the CLASSICS Act would extend copyright digital performance rights to pre- '72 sound recordings, but makes no provision for applying copyright transfer termination rights to these works. To adopt today legislation that guarantees digital performance revenues for the record label parties to these one-sided deals,

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[2] *See e.g.* Billie Holiday – *Strange Fruit*, https://www.youtube.com/watch?v=Web007rzSOI; https://en.wikipedia.org/wiki/Strange_Fruit

[3] The Institute for Intellectual Property and Social Justice ("IIPSJ") was established to address the social justice implications of intellectual property law and policy, both domestically and globally, by pursuing the law's social obligations of equitable access, inclusion, and empowerment. IIPSJ's work ranges broadly, and includes the scholarly examination of intellectual property law from the social justice perspective; advocacy for social justice-cognizant interpretation and implementation of intellectual property protection; efforts to increase the diversity of the intellectual property legal bar; and programs to empower historically and currently disadvantaged and marginalized communities through the development, protection, and use of intellectual property.

[4] *See* Jeff Carter, *supra* at 228–29 ("Almost without exception, the blues pioneers came from the hardscrabble existence known to millions of black sharecroppers during the first half of the twentieth century. Indeed, the grandfather of rock and roll…Muddy Waters, literally stepped off a tractor in Stovall, Mississippi, packed a bag and his guitar, and caught a ride to Chicago to seek a better life. By 'better,' one must remember that… 'better' meant anything that did not involve farming cotton twelve hours a day, six days a week, in ninety-eight degree weather.")

without also affording copyright transfer termination rights to legacy artists, is to grandfather past injustice in to the modern music licensing infrastructure and undermine the progressive aspirations for its future. Moreover, it is patently obvious that this is the only practical opportunity to obtain transfer termination protections for legacy artists in connection with pre-'72 recordings – once the record labels have secured the legal right to pre-'72 digital performance revenues they will have no incentive even to consider the question of transfer termination rights in connection with such works.[5]

The Music Modernization Act: Towards Equitable Compensation for Creators

The Music Modernization Act ("MMA") contains a number of proposals which can enhance the revenues that artists derive from the distribution and performance of their works. Since its inception, the Section 115 compulsory mechanical license has exacerbated the inferior bargaining position of artists in relation to music distributors, in that it deprives artists of the ability to set the commercial terms upon which their works may be reproduced. The MMA proposes the interjection of a willing buyer/willing seller standard and other "market cognizant" mechanisms in to the Section 115 rate calculation process. Such measures are likely to engender license rates that more accurately reflect the true commercial value of artists' works, and thereby mitigate the impact of the restrictions that Section 115 imposes upon artists' ability to bargain freely with music licensees.

In addition to proposing improvements to Section 115 mechanical license rate determination, the MMA further provides for the creation of a blanket license for digital interactive streaming and downloads, together with the establishment of a Mechanical Licensing Collective ("MLC"), which would be tasked with (i) issuing and administering blanket digital licenses, and (ii) compiling a public database of music copyright ownership information. Currently, the lack of any authoritative resource for identifying music rights holders curtails music licensing opportunities and impedes the prompt payment of artist royalties. The establishment of the MLC and concomitant promulgation of the blanket digital license and rights ownership database will not only facilitate digital music licensing in general, but these mechanisms could also foster the development of artist bargaining collectives to negotiate directly with licensees, and thus reduce artist dependence upon music publishers and others to represent their interests.[6]

Finally, the MMA proposes the limited repeal of Section 114(i) in order to allow certain market evidence to be considered in digital license rate determinations. The MMA proposal does not extend, however, to rate calculations affecting terrestrial broadcasters. Consistent with the considerations raised herein regarding amelioration of the Section 115 rate calculation process,

[5] Due to the fact that until only recently, artist termination rights have remained effectively inchoate, there is little hard data on how artists have actually utilized these rights to their benefit. However, limited but growing anecdotal evidence suggests that artists typically do not use termination rights to fully rescind their past record deals, but merely to negotiate for compensation that better reflects the past and prospective revenues generated by their work.

[6] In this same regard, the governing configuration of the MLC should be structured so as to ensure that independent songwriters enjoy authority equal to that of publishers, in as much as the interests of songwriters and publishers are not always identical.

IIPSJ believes that any repeal of Section 114 should be fashioned so as to allow for the broader systemic and technologically neutral application of market information. The ongoing evolution of the digital market place should continue as an integral aspect of a commercial music ecosystem which favors greater benefits to artists, and in support of these goals, terrestrial broadcasters should be required to engage upon the same commercial playing field as digital delivery services.

Equity, Dignity, and Respect for America's Legacy Artists

Correcting past injustice and present day systemic inefficiencies in the music industry is a complex problem. However, the CLASSICS Act and the Music Modernization Act collectively represent a positive step toward meeting this challenge. Public Knowledge, one of the nation's leading advocates for the public interest in intellectual property law and policy, has observed that subject to proper adjustment, pertinent provisions in the Music Modernization Act can initiate systemic redress for "the dysfunctional state of the music licensing marketplace". Public Knowledge has also raised important concerns in connection with the CLASSICS Act, most notably advocating for full federalization as the "best and most effective solution" for addressing the complicated legal status of pre- '72 sound recordings. IIPSJ joins in Public Knowledge's general perspectives and reservations regarding these bills. Moreover, we understand that Representative Zoe Lofgren is planning to offer an amendment that would cure some of the inequity created by the lack of termination rights in pre- '72 sound recordings and IIPSJ would welcome the introduction of such an amendment. The time for a legal and business music regime that is fair to artist is long overdue; properly amended, the CLASSICS Act and the Music Modernization Act can help to usher in new traditions of economic parity and respect for the rights and dignities of legacy artists.

Respectfully,
Lateef Mtima,
Director,
Institute for Intellectual Property &
Social Justice