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H.R. 1551, The Music Modernization Act

Thanks to the hard work of both Judiciary Committee staffs, a formal conference to resolve the differences between H.R. 5447 and S. 2823 was unnecessary. On behalf of the Chairmen and Ranking Members of the House and Senate Judiciary Committees, I have posted to the House Judiciary Committee website this amended background and section by section that would have been included in the official Conference Report to H.R. 1551 had the bill been subject to a formal conference committee. The web address of this document is <https://judiciary.house.gov/wp-content/uploads/2018/04/Music-Modernization-Act.pdf>



Bob Goodlatte,
Chairman

I. BACKGROUND AND PURPOSE OF THE MUSIC MODERNIZATION ACT

A. BACKGROUND

The United States' copyright laws have helped make this nation the center of the music world. Copyright laws protect creators and artists, allowing them to thrive by granting them exclusive rights and protections to their works. However, the law has not kept pace with the music industry to reflect changes in consumer preferences and technological developments. The current statutory scheme applies inconsistent rules that place certain technologies at a disadvantage and result in inequitable compensation variances for music creators. These inconsistencies have drawn criticism that music copyright and licensing laws are too difficult to comply with and do not adequately reward the artists and professionals responsible for creating American music.

To address these issues, multiple bills were introduced in the Senate and House of Representatives. Songwriters, artists, publishers, producers, distributors, and other stakeholders involved in the creation and distribution of music collaborated with legislators in both the Senate and the House to find a path forward on music reform. Legislative options were discussed with copyright experts and the Copyright Office. Hearings and briefings were held on music licensing reform and multiple bills were introduced.

In the House, Mr. Goodlatte introduced H.R. 5447 while in the Senate, Mr. Hatch introduced S. 2823 which was identical to the text of H.R. 5447. Both bills contained three titles consisting of updated versions of three previously introduced bills:

- The Music Modernization Act, addressing Section 115 of Title 17 (Title I);
- The Compensating Legacy Artists for their Songs, Service, and Important Contributions to Society Act (CLASSICS Act), addressing pre-1972 works (Title II); and
- The Allocation for Music Producers Act (AMP Act), addressing royalty payments for certain creators (Title III).

The House passed H.R. 5447 by a vote of 415-0 on April 25, 2018, and the Senate passed an amended version of the legislation as H.R. 1551 by a voice vote on September 18, 2018. Both versions of the bill were scored by the Congressional Budget Office at a cost of \$47 million. To offset this cost, the House version of this legislation included an offset from the asset forfeiture fund which the Senate replaced with a one week extension of certain customs user fees from October 13, 2027 to October 20, 2027. This switch required the Senate to substitute the text of the original H.R. 1551, that originally created tax credits for advanced nuclear power generation, with an updated version of the Music Modernization Act in order to meet the requirements of the Origination Clause of the U.S. Constitution concerning revenue legislation.

B. PURPOSE

H.R. 1551 updates music copyright laws by creating a new compulsory blanket licensing system for mechanical works, updating the rate standards applicable to music licensing, modifying the rate setting process in the Southern District of New York, providing copyright royalties to pre-1972 artists, and ensuring that producers, mixers, and sound engineers are able to receive compensation for their creativity.

TITLE I – Music Licensing Modernization

The first title of H.R. 1551 is an amended version of the original version of the “Music Modernization Act” concerning Section 115 of Title 17.

17 U.S.C. 115(a) Availability and scope of compulsory license clause

Clause (ii) in subparagraph (A) of paragraph (1) creates a new method by which a digital music provider may obtain a compulsory license for a nondramatic musical work. Under the current Section 115, the musical work copyright owner has the right to authorize the first recording of her musical work, sometimes referred to as the “first use” right. Historically, the first use was cleared by the record label, which obtained the right to make a sound recording from the songwriter or her music publisher and distribute the phonorecords derived from that sound recording. A record label may continue to obtain a compulsory license under clause (i) when it is the first to record and distribute recordings of the musical work.

Clause (ii) applies in the situation in which a digital music provider is the first person to make and distribute digital phonorecord deliveries (DPDs) of a sound recording embodying a musical work (i.e., in cases for which clause (i) does not apply). In such instances, the digital music provider may obtain a compulsory license if it satisfies three criteria: (1) the first fixation of the musical work in a sound recording is made under the authority of the musical work copyright owner; (2) the sound recording copyright owner who first fixes such sound recording has the authority of the musical work copyright owner to make and distribute digital phonorecord deliveries of such musical work to the public in the United States; and (3) the sound recording copyright owner (or its authorized distributor) authorizes the digital music provider to make and distribute digital phonorecords of the sound recording to the public in the United States.

Under the current language of section 115(a)(1), a compulsory license is available to “any other person” after a sound recording embodying a musical work has been distributed to the public in the United States under the authority of the musical work copyright owner. The new language is intended to eliminate any ambiguity under existing law as to whether a digital music provider may obtain a compulsory license when the digital music provider is the first person to distribute digital phonorecord deliveries of such musical work. The new language makes clear that a digital music provider may obtain a compulsory license in those instances in which the digital music provider is the first person to make and distribute digital phonorecord deliveries of a sound recording embodying a musical work.

17 U.S.C. 115(b) Procedures to obtain a compulsory license

The amended section 115 provides two separate means of obtaining a compulsory mechanical license. Subsection (b)(1) maintains the ability to obtain a compulsory license to reproduce and distribute phonorecords other than DPDs on a work-by-work basis. This is the historical method by which record labels have obtained compulsory licenses.

A new subsection (b)(2) provides the blanket mechanical license for digital music providers to make and distribute DPDs. If the digital music provider is making and distributing the DPDs before the date the blanket license is available, which is defined in subsection (e)(15) as January 1 following the expiration of the 2 year period beginning on the date the legislation is enacted, then the digital music provider must file a notice of intent on the musical work copyright owner, if the identity and location of the musical work copyright owner is known. Unlike the current section 115,

however, under the legislation, in the event the musical work copyright owner is unknown, the digital music provider does not file a notice of intent on the Copyright Office. Instead, the digital music provider continues to search for the musical work copyright owner until the license availability date and, if the musical work copyright owner has not been located by such time, the digital music provider is required to turn over to the mechanical licensing collective any accrued royalties and reports of usage for such unmatched works pursuant to subsection (d)(10). If the digital music provider is making and distributing DPDs after the date the blanket license is available, then the digital music provider may obtain the blanket license by submitting a notice of license to the mechanical licensing collective as described in subsection (d)(2).

Subsection (b)(3) maintains the “pass-through” license for record labels to obtain and pass through mechanical license rights for individual permanent downloads. Under the Music Modernization Act, a record label will no longer be eligible to obtain and pass through a Section 115 license to a digital music provider to engage in activities related to interactive streams or limited downloads.

Subsection (b)(4)(A) maintains the current practice whereby record labels that fail to serve or file a notice of intent are foreclosed from the possibility of obtaining a compulsory license for that work. Subsection (b)(4)(B) provides penalties for a digital music provider for failing to file a notice of intent or notice of license. Again, this subsection distinguishes between activities that occur prior to the date of availability of the blanket license and activities that occur after. Before the date of availability of the blanket license, if the digital music provider fails to serve a notice of intent on the musical work copyright owner (as described in subsection (b)(2)), then the digital music provider is foreclosed from obtaining a compulsory license for use of that particular work under such subsection. After the date the blanket license is available, if the digital music provider fails to submit the notice of license on the mechanical licensing collective, then the digital music provider is foreclosed from obtaining a blanket license for 3 years.

17 U.S.C. 115(c) Royalty payable under compulsory license

The amendments to subsection (c) change the current rate-setting standard from that currently found at 801(b) to the “willing buyer / willing seller” standard now applicable to setting rates for the public performance of sound recordings by noninteractive webcasters under the section 114(d)(2) and section 112 statutory licenses. Consistent with the current 115 compulsory license, subsection (c)(2)(A) makes clear that voluntary licenses entered into between musical work copyright owners and digital music providers are given effect in lieu of the rates established for the blanket license.

17 U.S.C. § 115(d) Blanket license for digital uses, mechanical licensing collective, and digital licensee coordinator

The majority of Title I creates a new section 115(d) that establishes a blanket compulsory licensing system for qualified digital music providers. The Committee has regularly heard from various parties in the music industry that the existing music licensing system does not functionally work to meet the needs of the digital music economy where commercial services strive to have available to their customers as much music as possible. Song-by-song licensing negotiations increase the transaction costs to the extent that only a limited amount of music would be worth engaging in such licensing discussions, depriving artists of revenue for less popular works and encouraging piracy of such works by customers looking for such music.

The new mechanical licensing collective

The Board of Directors of the new collective is required to be composed of individuals matching specific criteria. The detailed requirements concerning the overall framework of the Board of Directors of the collective and its three committees, the criteria used to select individuals to serve on them, and the advance publication of their names and affiliations all highlight the importance of selecting the appropriate individuals. Service on the Board or its committees is not a reward for past actions, but is instead a serious responsibility that must not be underestimated. With the advance notification requirement, the Register is expected to allow the public to submit comments on whether the individuals and their affiliations meet the criteria specified in the legislation; make some effort of its own as it deems appropriate to verify that the individuals and their affiliations actually meet the criteria specified in the legislation; and allow the public to submit comments on whether they support such individuals being appointed for these positions. It has been agreed to by all parties that songwriters should be responsible for identifying and choosing representatives that faithfully reflect the entire songwriting community on the Board.

To ensure that the collective's officers are independent, individuals serving as officers of the collective may not, at the same time, also be an employee or agent of any member of the collective's Board of Directors or any entity represented by a member of the collective's Board of Directors.

Given their importance, the three committees established by the collective must operate in a transparent manner to the greatest extent possible in order to avoid unnecessary litigation as well as to gain the trust of the entire music community. Although it would be desirable that the committees reach unanimous decisions, that will not always be possible in which case a majority vote will control the outcome of a decision. It is expected that the Board of Directors will establish rules on how to resolve tie vote decisions. For the responsibilities described in subparagraphs (J) and (K) of paragraph (3), the collective is only liable to a party for its actions if the collective is grossly negligent in carrying out the policies and procedures adopted by the Board of Directors pursuant to section 115(d)(11)(D). Since the Register has broad regulatory authority under paragraph (12) of subsection (d), it is expected that such policies and procedures will be thoroughly reviewed by the Register to ensure the fair treatment of interested parties in such proceedings given the high bar in seeking redress.

Not later than 1 year after designation by the Register, the collective must establish and make public bylaws relating to the governance of the collective.

The Register is allowed to re-designate an entity to serve as the collective every 5 years after the initial designation. Although there is no guarantee of a continued designation by the collective, continuity in the collective would be beneficial to copyright owners so long as the entity previously chosen to be the collective has regularly demonstrated its efficient and fair administration of the collective in a manner that respects varying interests and concerns. In contrast, evidence of fraud, waste, or abuse, including the failure to follow the relevant regulations adopted by the Copyright Office, over the prior five years should raise serious concerns within the Copyright Office as to whether that same entity has the administrative capabilities necessary to perform the required functions of the collective. In such cases, where the record of fraud, waste, or abuse is clear, the Register should give serious consideration to the selection of a new entity even if not all criteria are met pursuant to section 115(d)(3)(B)(iii).

Reasonable cost shifting of the mechanical licensing collective

Digital music services and musical works copyright owners reached an agreement to transfer the reasonable costs of the new mechanical licensing collective to the licensees. The Committee supports a true free market for copyrighted works and, in the limited number of situations in which

a compulsory license exists, believes that the licensees benefit most from the reduction in transaction costs. The Committee rejects statements that copyright owners benefit from paying for the costs of collectives to administer compulsory licenses in lieu of a free market. Therefore, the legislation directs that licensees should bear the reasonable costs of establishing and operating the new mechanical licensing collective. This transfer of costs is not unlimited, however, since it is strongly cabined by the term “reasonable.”

The legislation directs the Copyright Royalty Judges to undertake a proceeding to determine the amount of an administrative assessment fee to be paid by blanket and significant nonblanket licensees for the reasonable costs of starting up and continuing to operate the new mechanical licensing collective. There are several other licensing collectives, such as SoundExchange, American Society of Composers, Authors and Publishers (ASCAP), and Broadcast Music Inc. (BMI), that the Copyright Royalty Judges should look to for comparison points, although their expenditures are simply comparison points. The Copyright Royalty Judges shall make their own determination(s) based upon the evidence provided to them about the appropriate administrative assessment for such reasonable costs that are identified with specificity.

It is expected that not all reasonable expenditures in the first years of the collective may be identifiable in advance, especially as they relate to startup costs, but that future reasonable costs are more likely to be able to be determined in advance with some certainty. When anticipated startup and operational costs are different than anticipated, the Copyright Royalty Judges are expected to use their best judgement as to what has or has not been a reasonable expenditure of the collective and use their authority to adjust the fee subject to prior under or over collection of fees for reasonable costs, as well as lesser or greater reasonable costs than anticipated.

The legislation is focused on the transfer of the collective’s reasonable startup and operating costs to blanket and nonblanket licensees. It is expected that the collective will only accrue reasonable costs and not expend unreasonable costs either on a one-off or continuing basis. It is not the responsibility of any other party other than the collective to ensure that it only expends reasonable amounts of funds for its activities. Although other parties such as the digital licensee coordinator may choose to notify the collective of any concerns of unreasonable spending, they do not have the legal burden to do so and do not waive their right to object to the Copyright Royalty Judges or a federal court of any unreasonable spending by not notifying them of it when suspected or discovered. Although the licensees are free to voluntarily pay some or all unreasonable costs of the collective if they so choose, the legislation does not require that and makes clear that all such unreasonable costs as determined by the Copyright Royalty Judges are not the responsibility of the licensees. Any such unreasonable costs, to the extent that they are accrued, should be borne by either the collective itself and/or the copyright owners that benefit from the collective. Nor should any unreasonable costs be offset by unmatched royalties or taken from artist revenue. The legislation requires that the collective pay out accrued royalties under a set schedule. With the exception of future adjustments to the administrative assessment, if so determined by the Copyright Royalty Judges, once the licensees meet the terms of the legislation in paying the applicable royalties with the administrative assessment and providing the accompanying usage data for the covered activities, their obligation ends for any additional payments for such usage. This includes any need to pay replacement royalties should the collective engage in waste, fraud, or abuse of such royalties. In the event that an employee of the collective engages in fraud by diverting royalty payments, it is not the responsibility of the licensee(s) to replace these stolen royalties.

Because of the importance to the music community that the collective begin operating as soon as possible, even before any administrative assessment fees are collected, the legislation includes provisions to allow voluntary contributions by digital music providers to the collective to

offset some or all of its startup and operational costs, as well as the adoption of voluntary agreements to determine the administrative assessment. Such contributions are to be voluntarily made and accounted for and, unless explicitly agreed to, shall not cover expenses deemed unreasonable by the Copyright Royalty Judges.

Oversight and accountability

The collective is expected to operate in a transparent and accountable manner. The legislation specifically requires that the collective shall ensure that its policies and practices are transparent and accountable. The collective must identify a point of contact for inquiries and complaints with timely redress. It must also establish an anti-comingling policy for funds.

Audit

To ensure that the collective does not engage in waste, fraud and abuse, the collective is required to submit to periodic audits to examine its operations and procedures. Beginning in the fourth full calendar year that begins after the initial designation of the collective by the Register, and in every fifth calendar year thereafter, the collective shall retain a qualified auditor to examine the collective's books, records and operations and prepare a report for the Board of Directors to be delivered no later than December 31 of the year in which the auditor is retained. The auditor's report shall address the implementation and efficacy of procedures of the collective's 1) receipt, handling and distribution of royalty funds, including any amounts held as unclaimed royalties; 2) efforts to guard against fraud, abuse, waste, and unreasonable use of funds; and 3) efforts to protect the confidentiality of financial, proprietary, and other sensitive information. The collective shall submit the report to the Register and make it available via the internet to the public.

Musical works database

The legislation mandates the creation of a new musical works database. For far too long, it has been difficult to identify the copyright owner of most copyrighted works, especially in the music industry where works are routinely commercialized before all of the rights have been cleared and documented. This has led to significant challenges in ensuring fair and timely payment to all creators even when the licensee can identify the proper individuals to pay. With millions of songs now available to subscribers worldwide, technology also has a role to play through digital fingerprinting of a sound recording. However, there is no reliable, public database to link sound recordings with their underlying musical works. Unmatched works routinely occur as a result of different spellings of artist names and song titles. Even differing punctuation in the name of a work has been enough to create unmatched works. There have been several attempts to create a unified music database, most notably the 2008 Global Repertoire Database project that brought together numerous music industry participants in an attempt to solve the music industry's data problem. Despite hopes that this effort would succeed where others had failed, this project too ended without success due to cost and data ownership issues. Music metadata has more often been seen as a competitive advantage for the party that controls the database, rather than as a resource for building an industry on. In an era in which Americans can buy millions of products via an app on their phone based upon the UPC code on the product, the failure of the music industry to develop and maintain a master database has led to significant litigation and underpaid royalties for decades. This situation must end so that all artists are paid for their creations and that so-called "black box" revenue is not a drain on the success of the entire industry.

The database that is required by this legislation will contain information such as the title of a work, its copyright owner(s) and shares thereof, contact information for the copyright owner(s),

International Standard Recordings Codes (ISRC) and International Standard Work Codes (ISWC), relevant information for the sound recordings a work is embodied in, and any other information that the Register of Copyrights may prescribe by regulation. Using standardized metadata such as ISRC and ISWC codes, is a major step forward in reducing the number of unmatched works. For example, the Register may at some point wish to consider after an appropriate rulemaking whether standardized identifiers for individuals would be appropriate, or even audio fingerprints. The Register shall use its judgement to determine what is an appropriate expansion of the required fields, but shall not adopt new fields that have not become reasonably accessible and used within the industry unless there is widespread support for the inclusion of such fields.

Given the importance of this database, the legislation makes clear that it shall be made available to the Copyright Office and the public without charge, with the exception of recovery of the marginal cost of providing access in bulk to the public. Individual lookups of works shall be free although the collective may implement reasonable steps to block efforts to bypass the marginal cost recovery for bulk access if it appears that one or more entities are attempting to download the database in bulk through repeated queries. However, there shall be no requirement that a database user must register or otherwise turn over personal information in order to obtain the free access required by the legislation. The collective is required under the legislation to routinely undertake its own efforts to identify the musical works embodied in particular sound recordings, as well as to identify and locate the copyright owners of such works so that they can update the database as appropriate. With only the exception of the efficient and accurate collection and distribution of royalties, such actions are the highest responsibility of the collective.

Records of the collective

Beyond the new database, the legislation requires that the collective's material records be kept for not less than 7 years after the date of creation or receipt, whichever occurs later. The records applicable to a particular copyright owner are to be accessible to that copyright owner or their representative. Beyond the seven-year limit, there are no such limitations that apply to the access of any record by the Copyright Office.

Annual report

Not later than June 30 of each year after the first license availability date, the mechanical licensing collective shall publicly release an annual report that sets forth information regarding the collective's operational and licensing practices; how royalties are collected and distributed; budgeting and expenditures; the collective's total costs for the preceding calendar year; the projected annual collective budget; aggregated royalty receipts and payments; expenses that are more than 10% of the annual collective budget; and the efforts of the collective to locate and identify copyright owners of unmatched musical works and shares of works. It is expected that the collective will create reports similar to that of other collectives, while recognizing that certain reported activities of other collectives, involving lobbying and marketing that this collective is prohibited from doing, will not be applicable.

Digital licensee coordinator

The legislation anticipates, but does not require, the designation of a digital licensee coordinator to coordinate the activities of the licensees. Similar to the collective, the choice of the coordinator is subject to a review by the Register of Copyrights every five years, has specified duties, and is prohibited from engaging in lobbying. The coordinator shall make reasonable, good-faith efforts to assist the collective in locating and identifying copyright owners of unmatched musical

works (and shares of such works) by encouraging digital music providers to publicize the existence of the collective and the ability of copyright owners to claim unclaimed accrued royalties, including by 1) posting contact information for the collective at reasonably prominent locations on digital music provider websites and applications, and 2) conducting in-person outreach with songwriters. Both the collective and the coordinator have the right to commence an action in federal court for specified damages, injunctive relief, attorneys' fees, costs, and other relief deemed appropriate by a federal court against a significant nonblanket licensee that fails to provide monthly usage reports or pay the required administrative fee. Any financial recovery shall be used to offset the costs of the collective's total costs.

Voluntary licenses

Although the primary focus of the legislation is the creation of a new compulsory blanket license, voluntary licenses remain in effect and are excluded from the blanket license and individual licenses. However, such voluntary licenses that rise to the threshold of a significant nonblanket license must meet the conditions imposed upon such licensees. Musical work copyright owners may designate the mechanical licensing collective to administer voluntary licenses only for reproduction and distribution rights in musical works for covered activities so long as the rates and terms of the voluntary license were negotiated individually between a musical work copyright owner and digital music provider. Musical work copyright owners may not require as a condition for entering into a direct license that the mechanical licensing collective administer a voluntary license. The collective may not provide administration services that include the right of public performance in musical works.

Transition to a blanket license

The legislation creates a transition period in order to move from the current work-by-work license to the new blanket license. After the date of enactment, a digital music provider will no longer be able to serve notices of intent on the Copyright Office for uses of musical works for which the musical work copyright owner cannot be identified or located. Notices of intent filed before the enactment date will no longer be effective. However, prior to the blanket license availability date a digital music provider is immune from copyright infringement liability for any use of any musical work for which the digital music provider was unable to identify or locate the musical work copyright owner so long as the digital music provider engages in good-faith, commercially reasonable efforts to identify and locate musical work copyright owners. The digital music provider is required to use one or more bulk electronic matching processes, and must continue using these processes, on a monthly basis for so long as the musical work copyright owner is unidentified.

If the musical work copyright owner is identified or located during this search process, then the digital music provider is required to report and pay that copyright owner any royalties owed. If the musical work copyright owner remains unidentified between the date of enactment and the date the blanket license is available, then the digital music provider is required to provide a cumulative usage report and accrued royalties to the mechanical licensing collective. There are no late fees associated with these accrued royalties.

When the blanket license becomes available, the blanket license will be substituted automatically for the compulsory licenses obtained pursuant to notices of intent, without any interruption in license authority. Because the new blanket license replaces the previous work-by-work compulsory license, the compulsory licenses obtained under notices of intent served on musical work copyright owners prior to the availability of the blanket license will no longer be valid. However, any voluntary license agreement between a digital music provider and a musical work

copyright owner continues to be effective and takes precedence over the blanket license until such license expires according to its own terms.

Obtaining a blanket license

After the blanket license availability date, digital music services interested in obtaining a blanket license shall provide advance notice to the mechanical licensing collective. The collective has 30 calendar days to reject such notice in writing, listing with specificity why such notice was rejected, either because it does not meet the requirements of the legislation or applicable regulations established by the Copyright Office or if the digital music service provider has had a blanket license terminated by the collective within the past three years. There is an additional 30-day cure period for a potential licensee. Should a provider believe that their notice was improperly rejected, they have the right to seek review in federal district court on a *de novo* basis. Once obtained, the license covers the making and distribution of server, intermediate, archival, and incidental reproductions of musical works that are reasonable and necessary.

Default and termination of a blanket license

Although it would be far preferable for every digital music provider that obtains a compulsory license to meet all of the terms of such license, there may be occasions when that will not be the case. The legislation anticipates the imposition of a late fee to be determined in advance by the Copyright Royalty Judges to address late payments. However, the legislation also recognizes that such late fees may not be enough to bring a provider back into compliance and therefore identifies the conditions upon which digital music providers shall be deemed in default of such compulsory licenses, and thus allow the collective to terminate such license automatically.

A provider that believes their blanket license was improperly terminated has the right to seek review in federal court on a *de novo* basis. However, the court should recognize that the conditions for determining default and permitting termination are quite specific. So long as those conditions are met, a court may not impose additional termination requirements or waive clear deadlines in an attempt to continue the blanket license. If a party wants to obtain and then maintain a blanket license, it must meet the stated terms specified in the statute. Efforts by the collective to participate in such proceedings, including its own reasonable attorneys' fees, are a reasonable expense of the collective. Since the digital music providers that benefit from the new licensing system are responsible for paying such reasonable costs, other digital music providers may wish to consider joining the case in opposition to a defaulting licensee under Rule 24 of the Federal Rules of Civil Procedure. However, a court could determine that the collective has attempted to impose new conditions beyond those permitted by the legislation. Should a court make such determination, the court has the authority to revoke such attempted termination and grant any other relief it determines to be appropriate. The Committee strongly encourages the court to make the Copyright Office aware of such determination since any financial cost to the collective that results from such relief or related litigation efforts shall not be considered a reasonable cost of the collective.

Performance saving clause

Section (d)(13) contains two savings clauses intended to protect the licensing of the public performing right in musical works from interference by the mechanical compulsory license. The clauses clarify that subsection 115(d) applies solely to section 115 mechanical reproduction and distribution rights. Subsection (d)(13)(A) clarifies that the section 115 blanket license shall not extend to any other activity or right other than exclusive rights of reproduction and distribution of musical works with respect to covered activities. Subsection (d)(13)(B) clarifies that subsection (d)

does not extend to, limit or affect any musical work public performance works. This administration function can include a voluntary mechanical license that bundles the public performance of musical works when such licenses are entered into by the copyright owner directly with a digital transmission services. However, the mechanical license collective may not itself own, control, grant or be granted the public performance right in musical works. It is further intended that a performing rights society or other entity licensing the public performing right to musical works or administering voluntary licenses shall not be required to use information from the mechanical licensing collective's musical works database for the calculation or distribution of license fees or other payments for public performances of musical works licensed and/or administered by such performing rights society or entity.

Audit rights

The legislation contains two different audit rights, one for copyright owners due royalties from the collective and one for the collective due royalties from licensees. Both audit rights are subject to certain specified time limits and other requirements including the ability to choose alternative procedures if both parties agree. The key difference is that only the audit right for the collective contains a shifting of the cost of the audit to the digital music provider being audited if there was an underpayment of 10 percent or more. The reason for this difference is that the collective is assumed to be operating in its members' best interests while digital music services have no such underlying responsibility.

Significant nonblanket licensees

The legislation creates a category of licensees, identified as significant nonblanket licensees, who operate outside the blanket licensing context, but who are required to provide notice to the collective of their existence and to help pay for the operation of the new collective. Such licensees are subject to a cause of action in federal court brought by either the mechanical licensing collective or the digital licensee coordinator if they fail to make monthly usage reports or pay the administrative assessment fee. This fee is made applicable to such licensees because they are presumed to benefit from the new database and as a way to avoid parties attempting to avoid funding of the mechanical licensing collective by engaging in direct deals outside the blanket license. Two specific exceptions to the definition of a significant nonblanket licensee are incorporated in the definition of such licensee, one concerning certain free-to-the-user streams of less than 90 seconds and the other in regards to public broadcasting entities.

Royalty distribution of matched works

Usage reports from digital music services must include the number of digital phonorecord deliveries, specifying the number of limited downloads and interactive streams. Any reports should be consistent with then-current industry practices regarding how such limited downloads and interactive streams are tracked and reported. The digital music provider must also identify all musical work copyright owners with whom the digital music provider has an effective voluntary license and is not relying on the blanket license. Using this information, the collective is then required to collect and distribute royalties on a specific schedule set forth in the legislation. All copyright owners shall have their royalties distributed fairly and no copyright owner may receive special treatment as a result of their position on the Board, its committees, or for any other reason without a reasonable basis. For example, it may be required for the Board and its committees to focus on specific copyright owners for legitimate, specific reasons such as representing them in a bankruptcy proceeding that

not all copyright owners are part of. Absent such legitimate reasons, any such special treatment should be viewed by the Register and federal courts as waste, fraud, and abuse.

It is expected that over time one or more music services will file bankruptcy and the collective may represent its copyright owners in related court proceedings in order to recover as much of the royalties due as possible. The Board shall then distribute any lesser amounts of royalties collected through such bankruptcy proceedings to copyright owners using the best usage data available. Since a bankruptcy proceeding may conclude long after the relevant employees at the music service have long since departed, there may be discrepancies in the usage data that cannot be resolved. With a recorded vote, the Board shall determine how best to proceed with distribution(s) related to bankrupt music services. Although not required by the legislation, the collective may wish to consult with the Register for his or her opinion if a particular approach is reasonable in which case the Register shall provide a timely response.

Royalty distribution of unmatched works

It is expected that there will be some percentage of unmatched works that generate royalties that will decline over time as the collective's database becomes more robust and the music industry continues to recognize the importance of obtaining and sharing proper metadata in advance of the initial distribution of a work. Since the legislation permits the distribution of unclaimed royalties that were accrued on unmatched works for which the creators will not be paid, a significantly higher bar to such distributions is required compared to the more routine royalty distributions of matched works.

For unmatched works, the collective must wait for the prescribed holding period of three years before making such distribution. This is intended to give the collective time to actively search for the copyright owner. SoundExchange, a collective for royalties under Section 114 of the Copyright Act, has an admirable history of undertaking significant efforts to locate copyright owners who may not know they are due royalties. Despite their robust efforts, however, even SoundExchange distributes unmatched royalties after its detailed search efforts conclude. This legislation requires the new collective to undertake its own efforts to locate the copyright owner and update its database accordingly if so identified. If such efforts fail, then the unclaimed royalties oversight committee shall establish such policies identified in the legislation that the Committee believes are necessary to undertake a fair distribution of such unclaimed royalties. These policies include gathering of required information to make such distributions, 90 calendar days' advance public notice, and a requirement that at least 50 percent of such unclaimed royalties be credited or paid to the songwriter(s) represented by that copyright owner. It is the intent of Congress to ensure that songwriters receive their fair share of monies distributed to copyright owners under subsection (d)(3)(J), while at the same time respecting contractual relationships. To that end, payments and credits to songwriters shall be allocated in proportion to the reported usage of individual musical works by digital music providers during the relevant reporting periods. The 50% payment or credit to a songwriter referenced in subsection (d)(3)(J)(iv)(II) is intended to be treated as a floor, not a ceiling, and is not meant to override any applicable contractual arrangement providing for a higher payment or credit of such monies to a songwriter.

This process ensures that copyright owners and artists benefit. While there may be some copyright owners and/or artists who would prefer that such money be escrowed indefinitely until claimed, the simple way to avoid any distribution to other copyright owners and artists is to step forward and identify oneself and one's works to the collective, an exceedingly low bar to claiming one's royalties.

Public notice of unclaimed accrued royalties

The collective shall maintain a publicly accessible online facility with contact information for the collective that lists unmatched musical works (and shares of works), through which a copyright owner may assert an ownership claim with respect to such a work (and a share of such a work). The collective shall engage in diligent, good-faith efforts to publicize the collective and ability to claim unclaimed accrued royalties for unmatched musical works (and shares of such works), the procedures with respect to receiving accrued royalty payments, and information on accrued royalty transfers and pending distribution of unclaimed accrued royalties and accrued interest.

Termination of prior litigation

The legislation contains a key component that was necessary to bring the various parties together in an effort to reach common ground by limiting liability for digital music providers after January 1, 2018, so long as they undertake certain payment and matching obligations. Such agreement is welcomed since continued litigation generates unnecessary administrative costs, diverting royalties from artists. Congress routinely preempts such unnecessary litigation in other contexts and views the application here of such date as warranted. The imposition of detailed statutory requirements for obtaining such a limitation of liability ensure that more artist royalties will be paid than otherwise would be the case through continual litigation.

Copyright Office regulations

Pursuant to paragraph (12) of subsection (d), the Register is expected to promulgate the necessary regulations required by the legislation in a manner that balances the need to protect the public's interest with the need to let the new collective operate without over-regulation. The Copyright Office has the knowledge and expertise regarding music licensing through its past rulemakings and recent assistance to the Committee during the drafting of this legislation. Although the legislation provides specific criteria for the collective to operate, it is to be expected that situations will arise that were not contemplated by the legislation. The Office is expected to use its best judgement in determining the appropriate steps in those situations. The Register of Copyrights can also turn to another legislative branch agency, the Government Accountability Office, for assistance in determining if artists are being properly compensated for their works.

Copyright Office Activities

The legislation requires the Register to engage in public outreach and educational activities. The legislation also requires the Register, after soliciting and reviewing comments and relevant information from music industry stakeholders, to submit a report to the Judiciary Committees of the Senate and House recommending best practices that the collective may implement in order to identify and locate musical work copyright owners with unclaimed accrued royalties held by the collective, to encourage musical work copyright owners to claim their royalties, and to reduce the incidence of unclaimed royalties. The collective shall carefully consider and give substantial weight to the Register's recommendations when establishing procedures relative to these issues.

Uniform rate standards

Section 103(a) of the legislation creates a uniform willing buyer, willing seller rate standard in section 114(f). This fair standard for sound recordings ensures that copyright owners are appropriately compensated for their works using a standard that most approximates the rates that would have been negotiated in a free market. It has long been a goal of the Committee to move

towards such a standard and move beyond earlier unfair standards, such as the now unnecessary discount for so-called “pre-existing services.” There is no current justification for such 40-year old discounts that harm copyright owners as well as competitors of such pre-existing services. It is also in the interest of facilitating greater competition in these areas that such discounts are eliminated. Whatever justification for the discounts has long since vanished.

Section 103(a) of the legislation repeals section 114(i), to address the longstanding concern that songwriters have not been adequately compensated for their contributions and section 114(i) prevents songwriters from introducing potentially relevant evidence in rate court proceedings. Section 103(c) creates a specific exception for taking into account license fees payable for the public performance of sound recordings under section 106(6) related to certain transmissions by broadcasters although these new definitions are not to be given effect in interpreting other provisions in Title 17. In addition, the repeal shall not be taken into account in proceedings to determine royalties for sound recordings and has no impact upon the past precedents of such proceedings. Furthermore, as used in this section of the legislation, the term “digital audio transmission” is intended to incorporate the definition of that term found in section 114(j)(5). Therefore, as used in this section, the term “digital audio transmission” does not include the transmission of any audiovisual work. Section 103(i) extends the terms and rates originally determined for the two remaining preexisting services (SiriusXM and MusicChoice) through December 31, 2022 to December 31, 2027 instead.

Consent decree rate proceedings

Section 104 of the legislation modifies the selection of rate court judges and related proceedings for performing rights societies subject to a consent decree, currently ASCAP and BMI. In lieu of the current system, the district court shall use a random process, commonly known as the wheel, to determine which judge shall hear rate setting cases involving a performing rights society’s license fees. However, the original judge(s) who oversee(s) the interpretation of the consent decree(s) shall not be permitted to oversee any rate proceedings. Under the present situation, this would mean that the two judges who oversee the ASCAP and the BMI consent decrees would not hear any rate proceedings involving either performing rights society. This change is not a reflection upon any past actions by the Southern District of New York – rather, it is believed that rate decisions should be assigned on a random basis to judges not involved in the underlying consent decree cases.

Consent decree review

In April 2018, the Antitrust Division of the Department of Justice announced its intention to review over 1300 “legacy” consent decrees, including those governing ASCAP and BMI. Collectively, ASCAP and BMI license over 90 percent of musical works to licensees that publicly perform music, including restaurants, retail stores, bars, radio and television broadcasters, and digital music services.

Since the 1940s, ASCAP and BMI have been subject to consent decrees with the U.S. Department of Justice to address antitrust concerns arising from an entity collectively licensing works from competitors and offering them at a single price. As a result, the ASCAP and BMI consent decrees have fundamentally shaped the marketplace for licensing public performance rights in musical works for nearly 80 years and entire industries have developed around them. In 2016, the Department of Justice concluded a multi-year review of these decrees, determined that they still serve the public interest, and declined to modify the decrees.

There is serious concern that terminating the ASCAP and BMI decrees without a clear alternative framework in place would result in serious disruption in the marketplace, harming

creators, copyright owners, licensees, and consumers. In fact, sections of the legislation assume the continued existence of the decrees and alter the rate-setting system established by the decrees, including what evidence may be submitted in a rate dispute and how judges will be assigned to such disputes.

The legislation will improve how music is licensed and how songwriters, recording artists, record producers, engineers and copyright owners are paid. Enacting the legislation only to see the Department of Justice move forward with seeking termination of the decrees without a workable alternative framework could displace the legislation's improvements to the marketplace with new questions and uncertainties for songwriters, copyright owners, licensees and consumers.

Given these ongoing concerns, section 105 of the legislation creates a formal role for Congress during any review by the Department of Justice of a consent decree with a performing rights society, such as ASCAP or BMI. During any review of such a decree, the Department of Justice shall provide upon request timely briefings to any Member of the Senate and House Judiciary Committees regarding the status of such review. The Department of Justice shall also share with such Members detailed and timely information and pertinent documents related to the review, subject to confidentiality and rules of agency deliberative process.

Additionally, section 105 of the legislation requires the Department of Justice to notify Members of the Senate and House Judiciary Committees before filing a motion to terminate, including a motion to terminate after a specified period of time, also referred to as "sunsetting", any consent decree with a performing rights society and provide information regarding the impact of the proposed termination on the market for licensing the public performance for musical works should the motion be granted.

The Department of Justice is required to submit such notification in writing to the Chairmen and Ranking Members of the Senate and House Judiciary Committees not later than 90 days prior to filing such motion. This notification shall include a written report setting forth an explanation of the process used by the Department of Justice to review the decree, a summary of the public comments received by the Department of Justice during its review, and any other information requested by Congress.

This section applies only to the Department of Justice's review of and potential motion to terminate consent decrees governing performing rights societies. Nothing in this section broadly impacts the Department of Justice's independent authority to seek whatever modifications to a consent decree, including termination, it determines are within the public interest. Moreover, nothing in this section changes the process a district court would use to review a motion to modify or terminate a consent decree between the United States and a performing rights society.

*TITLE II – Compensating Legacy Artists for Their Songs,
Service, and Important Contributions to Society*

The second title of H.R. 1551 is a significantly amended version of the “Compensating Legacy Artists for their Songs, Service, and Important Contributions to Society”, or the “CLASSICS Act.” Originally focused only on digital performances, this rewritten provision generally preempts state law rights with respect to protection of sound recordings fixed before February 15, 1972 (referred to as “pre-1972” recordings), since most such protection is being replaced with *sui generis* protection under federal law in the new Section 1401 of title 17 using a transition period. Section 1401 does not provide protection for nonsubscription broadcast transmissions of pre-1972 recordings, however, since the new federal right recognizes the exemption contained in Section 114(d)(1)(A) of Title 17. As a result, state law will not be affected one way or the other as it applies to such over-the-air broadcasts, and state law preemption retains the same status it had the day before enactment of the CLASSICS Protection and Access Act. If state protection is deemed to apply, it will expire at the same time federal protection expires under the CLASSICS Protection and Access Act.

A new chapter 14 in title 17 establishes a new form of federal intellectual property right in pre-1972 sound recordings, granting the owners of such sound recordings the exclusive right to their use, subject to limitations and exceptions contained in this new chapter. This new chapter creates substantial parity between pre-1972 recordings and other sound recordings (referred to as “post-1972” recordings), ensuring that recordings fixed before and after the arbitrary date of February 15, 1972 will receive similar treatment under federal law.

This new form of protection is not technically copyright protection, so provisions of the other chapters of title 17 apply to this new right only to the extent specifically indicated in chapter 14. For example, formalities such as the copyright notice, deposit and registration provisions of chapter 4 do not apply to this new *sui generis* right but rather are replaced with different processes and provisions more applicable to pre-1972 recordings. Pre-1972 recordings have existed and been commercially exploited for many decades without compliance with such formalities, and it would not be feasible to apply those formalities now.

TITLE III – Allocation for Music Producers

The third title of H.R. 1551 is a modified version of the “Allocation for Music Producers,” or the “AMP Act.” Currently, the provisions included in this title would only impact the one collective designated by the Copyright Royalty Judges to distribute royalties under section 114(f), SoundExchange. SoundExchange has gained widespread industry support with its efforts to efficiently distribute webcasting royalties to copyright owners and artists that proactively identify themselves as due such royalties or, in the absence of such identification, can be identified through the efforts of SoundExchange. It is hoped that the culture of transparency that SoundExchange has brought to the music industry will be duplicated elsewhere, including in the new mechanical licensing collective established by the first title of this legislation.

In order to pay certain creators, such as producers, mixers, and sound engineers, who were not by statute receiving royalties under section 114, SoundExchange has had a policy since 2004 of honoring “letters of direction” to pay these creators a portion of the featured performer’s royalties. According to information supplied by SoundExchange, approximately 2,000 active letters of direction are on file with them generating royalties for these creators, although more such letters of direction that do not have any royalty payments due are on file with them. SoundExchange has received only a limited number of letter of direction submissions that do not meet its conditions for execution and has worked with the interested parties to ensure proper execution of them once corrected by the creators.

It is expected that SoundExchange will continue to implement such policies in a transparent and efficient manner, and to the extent that any other distribution collective designated in the future by the Copyright Royalty Judges for the distribution of receipts from the licensing of transmissions in accordance with section 114(f), also do so. Nothing in section 114(g)(5) requires that SoundExchange modify any of its current policies in place for letters of direction for recordings fixed on or after November 1, 1995. Section 114(g)(5) simply makes the provision of the letter of direction system a statutory requirement while giving SoundExchange, and any future designated distribution collective, the discretion necessary to operate such a system. The effective date of section 114(g)(5)(B) is set as January 1, 2020, by Section 303 of the legislation to correspond both to the need for SoundExchange to update its internal systems and the alignment with the beginning of a calendar tax year.

Although Section 302(a) creates a brief statutory framework for a SoundExchange system already in operation, section 302(b) creates a more detailed statutory framework for a letter of direction system for works fixed before November 1, 1995, which was the date of enactment of P.L. 104–39, the Digital Performance Right in Sound Recordings Act of 1995. Prior to this date, producers, mixers, and sound engineers would not have contemplated or predicted the payment of digital royalties in their contracts with an artist. The legislation identifies the manner in which a letter of direction for two percent of total royalties can be submitted for such works; what additional efforts the collective and qualifying person must make over a four-month period to notify the featured performers in advance of any royalty distribution to one or more producers, mixers, or sound engineers; and the process for objecting to such letters of direction. After a valid letter of direction for a specific work goes into effect, the payout of total royalties through SoundExchange or another collective designated in the future for such distributions would be allocated as follows:

- 50 percent of the receipts shall be paid to the copyright owner of the exclusive right under section 106(6) to publicly perform a sound recording by means of a digital audio transmission.
- 2.5 percent of the receipts shall be deposited in an escrow account managed by an independent administrator jointly appointed by copyright owners of sound recordings and the American Federation of Musicians (or any successor entity) to be distributed to nonfeatured musicians (whether or not members of the American Federation of Musicians) who have performed on sound recordings.
- 2.5 percent of the receipts shall be deposited in an escrow account managed by an independent administrator jointly appointed by copyright owners of sound recordings and the American Federation of Television and Radio Artists (or any successor entity) to be distributed to nonfeatured vocalists (whether or not members of the American Federation of Television and Radio Artists) who have performed on sound recordings.
- 43 percent of the receipts shall be paid, on a per sound recording basis, to the recording artist or artists featured on such sound recording (or the persons conveying rights in the artists' performance in the sound recordings).
- 2 percent of the receipts shall be paid, on a per sound recording basis, to those eligible for payment(s) identified in section 114(g)(6)(B).

Similar to section 114(g)(5)(B), section 303 of the legislation delays the effective date of the new section 114(g)(6)(E) to January 1, 2020, to accommodate the need for SoundExchange to update its internal systems and align with the beginning of a calendar tax year.

Section 302(c) makes several technical and conforming amendments to section 114(g) that should have no operative impact upon any entity or independent administrator operating currently or in the future.

TITLE IV - SEVERABILITY CLAUSE

Section 401 adds a severability clause to the legislation.

II. SECTION-BY-SECTION SUMMARY OF THE BILL

TITLE I. MUSICAL LICENSING MODERNIZATION

Section 101. Short Title.

Section 101 sets forth the short title of Title I as the “Musical Works Modernization Act.”

Sec. 102. Blanket License for Digital Uses and Mechanical Licensing Collective.

Section 102 comprises the vast majority of the overall legislation.

The first part of Section 102 updates existing 17 U.S.C. § 115 (a)–(c), partly to accommodate the new provisions added by 115(d).

Subsection 115(a) is amended to clarify what requirements for obtaining a compulsory license exist for digital music providers, and it specifies when a person may seek a license for the duplication of a sound recording.

Subsection 115(b) is amended by removing the ability of persons seeking to make digital phonorecord deliveries to file a notice of intent with the Copyright Office and instead requiring such notice to be filed with the copyright owner. In the event that a party does not file such notice for non-digital phonorecord deliveries, that party is permanently ineligible for the compulsory licenses, although they may obtain voluntary licenses from the copyright owner(s). In the case of digital phonorecord deliveries, the failure to obtain a license forecloses the ability of a party to obtain such license for three years.

Subsection 115(c) is amended to account for the new blanket licensing system created by the new legislation in 115(d).

The latter part of section 102 strikes the existing subsection 115(d) of Title 17 that currently contains only one definition and replaces it with a significantly expanded subsection to create a new compulsory blanket licensing system as follows:

Paragraph 1 of the new subsection 115(d) defines the scope of the new compulsory license and how it interacts with other existing licenses, such as a voluntary license. By obtaining and complying with the terms of such license, a digital music provider is not subject to an infringement action under paragraphs (1) and (3) of section 106.

Paragraph 2 sets forth the availability of the blanket license, including related Copyright Office regulations, its effective date, and dispute resolution in federal district court.

Paragraph 3 creates the framework of the new mechanical licensing collective created by the legislation beginning with subparagraph A that identifies the requirement for a new “mechanical licensing collective” that shall meet specified minimum criteria including being: 1) a nonprofit single entity, 2) endorsed by and enjoying support from the majority of musical works copyright owners as measured over the preceding three years, 3) able to demonstrate that it has or will have prior to the license availability date the necessary capabilities to perform the required functions, and

4) designated by the Register of Copyrights, with the approval of the Librarian of Congress pursuant to section 702.

Subparagraph B sets forth the initial process for designation of the collective by the Register as well as periodic opportunities every five years for re-designation. The Register is authorized to choose a closest alternate designation in case every condition set forth in subparagraph (A) is not met. However, before an initial designation is made, all members of the Board of Directors and the various committees, along with contact information for the collective, are required to be identified with their affiliations so that interested parties can submit comments to the Register on whether the parties meet the requirements set forth in subparagraph (D) of the bill. This requirement is not waivable by the Register and is not subject to the alternate designation language.

Subparagraph C identifies the authorities and functions of the collective along with three specific provisions: the ability of the collective to administer voluntary licenses, a restriction on negotiating or granting licenses for public performance rights, and a restriction on lobbying.

Subparagraph D sets forth the governance of the collective. The collective's Board of Directors will consist of 14 voting members and 3 nonvoting members, and will establish bylaws that will be available to the public. The Board of Directors will meet no less than twice a year. The Board of Directors will establish an operations advisory committee, an unclaimed royalties oversight committee, and a dispute resolution committee. The collective is also required to produce a public annual report, in addition to an independent officers requirement providing that individuals serving as officers of the collective may not, at the same time, also be an employee or agent of any member of the Board of Directors or any entity represented by a member of the Board of Directors. Since the Board of Directors and committee member requirements along with the annual report are statutory in nature, these requirements are not waivable by the Register or subject to modification by the Board of Directors. The subparagraph also requires the collective to ensure that its policies and practices are transparent and accountable, identify a point of contact for inquiries and complaints, and establish an anti-comingling policy. Finally the subparagraph requires that an audit be conducted, beginning in the fourth full calendar year after the initial designation of the collective by the Register and in every fifth year thereafter, to examine the implementation and efficacy of the collective's procedures on royalty funds, how well the collective guards against fraud, abuse, waste, and the unreasonable use of funds, and how it protects the confidentiality of financial, proprietary and other sensitive information. The audit will be made available to the Register and the public.

Subparagraph E explains in detail the fields in the new musical works database that the collective is required to create based upon information provided to them by digital music services and under what conditions the information is made available to others, including the public. The required information in the database depends upon whether a work is considered matched or unmatched. To the extent that information is missing, musical works copyright owners with works in the database are required to undertake commercially reasonable efforts to deliver the names of the sound recording in which their works are embodied. The database ought also to be accessible.

Subparagraph F requires the collective to maintain publicly accessible lists of blanket and significant nonblanket licensees.

Subparagraph G sets forth how royalties are collected and then distributed along with efforts to collect royalties from bankrupt licensees.

Subparagraph H clarifies that any unmatched royalties shall be held by the collective for at least three years after they were first accrued and must be kept in an interest bearing account.

Subparagraph I sets forth the claiming process for works that are originally deemed unmatched. The collective is required to undertake a process to publicize the existence of a searchable database. Once a work is claimed, the royalties and accrued interest for such work shall be paid out and the musical works database shall be updated for future matching.

Subparagraph J determines how unclaimed royalties are distributed on a market share basis after the holding period specified in subparagraph H. The unclaimed royalties oversight committee shall establish policies and procedures for such distributions subject to the approval of the Board of Directors of the collective. The collective shall maintain a publicly accessible online facility with contact information listing unmatched musical works (and shares of works), through which a copyright owner may assert an ownership claim with respect to such a work (and share of such work), and engage in good faith efforts to publicize the existence of the collective and ability to claim unclaimed royalties, the procedures by which copyright owners may receive royalties, and information on transfers of accrued royalties and pending unclaimed royalties. The collective shall also participate in music industry conferences and events to publicize these matters. Unclaimed royalties are to be distributed based upon market share data that is confidentially provided to the collective by copyright owners. Ninety calendar days notice is required for such distributions and songwriters must be credited at least 50 percent of the royalty paid to their publisher.

Subparagraph K sets forth the functions of the dispute resolution committee concerning ownership disputes among musical works copyright owners. Pursuant to subparagraph (D) the collective is only liable for gross negligence in these functions. It will hold disputed funds in accordance with subparagraph (H)(ii). However, a copyright owner has the ultimate right to seek redress in a federal district court pursuant to paragraph (10)(E).

Subparagraph L sets forth the verification and audit process for copyright owners to audit the collective, although parties may agree on alternate procedures.

Subparagraph M concerns the ability of copyright owners and their agents to access the records of the collective subject to confidentiality agreements prescribed by the Register.

Paragraph 4 specifies the terms and conditions for a blanket license.

Subparagraph A identifies the data that must be reported to the collective by a digital music provider along with its royalty payments not later than 45 calendar days after the end of a monthly reporting period. The Register shall specify information technology requirements of such reports along with the maintenance of the records of use.

Subparagraph B requires digital music providers to engage in good-faith, commercially reasonable efforts to obtain information from sound recording copyright owners for use by the collective, including in its database.

Subparagraph C requires digital music providers and significant nonblanket licensees to pay the administrative assessment established under paragraph (7)(D).

Subparagraph D sets forth the verification and audit process for the collective to audit the digital music providers, although the parties may agree on alternate procedures.

Subparagraph E identifies the conditions by which a digital music provider may be considered in default and the consequences of such default. A digital music provider may seek review of such default on a de novo basis in a federal district court of competent jurisdiction.

Paragraph 5 identifies the role of the digital licensee coordinator, its initial designation and potential redesignation, as well as its authorities and functions. Like the collective, the coordinator is prohibited from lobbying. However, unlike as would be the case with the collective, it is possible for the new blanket licensing system to proceed in the event a digital licensee coordinator cannot be chosen. The coordinator is authorized to perform a number of functions, including assisting the mechanical licensing collective in publicizing the existence of the collective and the ability of copyright owners to claim royalties for unmatched musical works.

Paragraph 6 sets forth the requirements for significant nonblanket licensees as defined in subsection (e)(31), including reporting requirements and payment of the administrative assessment. Should a significant nonblanket licensee fail to pay the assessment or submit the required reports, either is actionable in a federal district court for damages up to three times the amount of the unpaid assessment, injunctive relief, costs, and attorneys' fees.

Paragraph 7 details the funding of the new collective by the digital music providers and significant nonblanket licensees through a combination of voluntary contributions and an administrative assessment determined by the Copyright Royalty Judges in a separate proceeding. The fee shall be determined on either a percentage of royalties basis or other usage-based formula with a minimum amount due that covers the reasonable costs of the collective. Timelines for the adoption of the initial and future administrative assessments are established in this paragraph along with granting the Copyright Royalty Judges continuing authority to amend their decisions.

Paragraph 8 provides guidance to the Copyright Royalty Judges as to how interim rates should be established as well as the new late fee for nonpayment of royalties to the collective under the blanket license. Neither the mechanical licensing collective nor the digital licensee coordinator may participate in such rate setting activities except to provide information to other parties in the proceeding.

Paragraph 9 identifies the process to transfer the existing licensing system to the blanket system. Existing compulsory licenses will automatically become blanket licenses on the license availability date and existing voluntary licenses will continue unchanged until they expire or parties agree to amend or discontinue them. Immediately after enactment of the legislation, the Copyright Office shall discontinue accepting notices of intention with regards to works that would be covered by the new blanket license. However, prior to the license availability date, liability is waived if a valid notice was filed prior to the enactment date.

Paragraph 10 provides for a limitation on liability for prior unlicensed uses that have occurred after January 1, 2018, so long as digital music providers engage in at least monthly good-faith efforts to locate copyright owners and pay their royalties prior to the license availability date. Not later than 45 days after the blanket license is available, any non-matched royalties must be turned over to the collective, along with as much information about usage and ownership information as possible. Late fees and infringement causes of action are also limited subject to these conditions. Two savings clauses are included to clarify that nothing in this paragraph limits or alters any existing right of action and that any aggrieved party may seek an action in federal district court if there is an issue that is not adequately resolved by the Board.

Paragraph 11 details the legal protections for various licensing activities, including antitrust exemptions and common agent exemptions. The collective is not liable for good-faith activities under a gross negligence standard, but none of its activities are immune from suit in federal district court. Due to the distribution of unclaimed royalties to other copyright owners, state laws on abandoned property are preempted.

Paragraph 12 gives the Register authority to conduct proceedings and adopt any necessary regulations as necessary or appropriate with the exception of the administrative assessment that is to be determined by the Copyright Royalty Judges. Among the regulations required to be established are those necessary to govern business confidentiality. All such regulations are subject to judicial review.

Paragraph 13 contains two savings clauses for limiting the scope of the blanket license and making clear that rights of public performance are not affected.

A new subsection 115(e) is created that contains 36 new definitions.

Section 102(b) amends the existing 801(b) standard such that the administrative assessment will henceforth be determined under the provisions created by this legislation, rather than the procedures of existing law.

Section 102(c) sets the effective date of certain new provisions.

Section 102(d) directs the Copyright Royalty Judges to update their regulations within nine months to be consistent with the legislation.

Section 102(e) requires the Register to engage in public outreach and educational activities.

Section 102(f) requires the Register to submit to the Senate and House Judiciary Committees a report recommending best practices for the collective to implement regarding identification and location of musical work copyright owners, claims of royalties, and reduction of unclaimed royalties.

Sec. 103. Amendments to Section 114.

Section 103 creates a uniform willing buyer, willing seller rate standard by amending 17 U.S.C. § 114(f), repealing 17 U.S.C. § 114(i), and modifying 801(b), while ensuring that certain transmissions by a broadcaster shall not take into account license fees for public performances of sound recordings under 17 U.S.C. § 106(6). The discounted “pre-existing services” rate standard established in 1976 is removed in order to equalize the rate setting process for all licensees. For pre-

existing services (PSS), the rates and terms finally determined in the pending SDARS III rate proceeding are to apply through December 31, 2027. For satellite and digital audio radio services (SDARS) the rates and terms to be applied through December 31, 2027 are the ones set forth in the Copyright Royalty Judges' initial determination in SDARS III (dated December 14, 2017). Because the rate to be applied is the one in the initial determination, the pending rehearing is moot, because it can have no effect. However, the existing rates for the two preexisting services are maintained until December 31, 2027. Further, it is clarified that the repeal of 114(i) shall not be taken into account for the setting of rates for sound recordings under section 112(e) or 114(f). A series of additional technical and conforming amendments rearranges several other provisions in response to these changes.

Sec. 104. Random Assignment of Rate Court Proceedings.

Section 104 creates an updated system to randomly assign ASCAP and BMI rate court cases to judges of the Southern District of New York other than the two judges who oversee the consent decrees. These two judges will no longer hear rate court proceedings.

Sec. 105. Performing Rights Society Consent Decrees.

Section 105 requires the Department of Justice to provide timely briefings upon request of any Member of the Senate and House Judiciary Committees regarding the status of any review of a consent decree with a performing rights society, such as ASCAP or BMI. The Department of Justice shall also share with such Members detailed and timely information and pertinent documents related to the review, subject to rules of confidentiality and agency deliberative process. Before filing a motion to terminate a consent decree between the United States and a performing rights society, the Department of Justice is required to notify such Members and provide them with information regarding the impact of the proposed termination on the market for licensing the public performance of musical works should the motion be granted. The notification will be provided in writing to the Chairmen and Ranking Members of the Senate and House Judiciary Committees not later than 90 days prior to the filing of the motion, and will include an explanation of the process used to review the decree, a summary of the public comments, and any other information requested by Congress. This section only applies to consent decrees between the United States and a performing rights society.

Sec. 106. Effective Date.

Section 106 provides that Title I and the amendments made by this Title shall take effect on the date of enactment of this Act.

*TITLE II. COMPENSATING LEGACY ARTISTS FOR THEIR
SONGS, SERVICE, AND IMPORTANT CONTRIBUTIONS TO SOCIETY ACT*

Section 201. Short Title.

Section 201 designates the short title of this Title of the bill as the “Compensating Legacy Artists for Their Songs, Service, and Important Contributions to Society Act” or the “CLASSICS Act.”

Sec. 202. Unauthorized Digital Performance of pre-1972 Sound Recordings.

Section 202 modifies the existing preemption provision in 17 U.S.C. 301(c) and amends Title 17 by adding a new Chapter 14 concerning pre-1972 works titled “Chapter 14—Unauthorized Digital Performance of Pre-1972 Sound Recordings” as follows:

Subsection (a)(1) establishes the basic protections and prohibitions of use for pre-1972 recordings. This provision incorporates and applies to pre-1972 recordings all the protections provided to copyrighted works. Violations of those rights with respect to pre-1972 recordings are actionable by the rights owner in a civil action in federal district court just like post-1971 recordings that are subject to regular federal copyright protection and are subject to the same remedies. However, because registration of pre-1972 recordings decades after their creation would not be practicable, registration is not required before commencing an action for violation of a section 106 right with respect to a pre-1972 recording or to qualify for statutory damages. Instead, a filing with the copyright office tailored to pre-72 recordings is required for statutory damages under subsection (f).

Subsection (a)(2) provides that pre-1972 recordings will enter the public domain on a rolling basis at the end of the year 95 years after their publication, regardless of fixation date, following a further transitional period of protection. Because many published pre-1972 recordings will be protected for a shorter period under federal law as a result of this legislation than they would have been protected under state law absent this legislation, it is appropriate to provide an additional period of federal protection beyond the basic 95-year period, and to diminish the risk that due process rights would be violated by taking property without just compensation.

Subsection (a)(3) is intended to make the protections of chapter 14 enforceable against State entities to the maximum extent constitutionally permissible.

Subsection (b) subjects the newly created federal right for pre-1972 recordings to the same statutory license regime that currently applies to certain public performances and ephemeral reproductions of other sound recordings under sections 114 and 112(e). To avoid liability for a violation of subsection (a), a music service making qualifying public performances of pre-1972 recordings by means of digital audio transmissions, or making qualifying ephemeral copies to facilitate such transmissions, must comply with all the same statutory license requirements as in the case of other recordings, including filing a notice of use, providing timely statements of account and reports of use, and timely paying statutory royalties calculated in the same manner as

for other recordings. This parity in treatment reflects that there is no economic or legal reason to treat pre-1972 sound recordings differently than post-1971 recordings.

Subsection (c) creates a process for requesting from rights owners, at their sole discretion, permission to engage in noncommercial uses of pre-1972 sound recordings that are not otherwise commercially exploited. Because all pre-1972 recordings are at least 46 years old, and some date back well more than a century, this process is provided primarily to enable use of older recordings where it may not be clear to a user how to contact the rights owner to ask for permission. Subsection (c) applies only to noncommercial uses. For this purpose, the concept of noncommercial use should be understood in the same way as under other provisions of title 17, such as section 107, and includes uses such as teaching, scholarship and research.

To determine whether a pre-1972 recording is being commercially exploited by or under the authority of the copyright owner, it is important that a user seeking to rely on subsection (c) make a robust search, including user-generated services and other services available in the market at the time of the search, before requesting permission through a Copyright Office filing. The Copyright Office is also to specify rules for a user seeking to rely on subsection (c) to request permission through a Copyright Office filing. Civil penalties are provided for the unlikely event of bad faith conduct by users or by persons purporting to be rights owners when they know they are not. For this purpose, a specific definition is provided for the term “knowing.”

Subsection (d) guarantees that in a situation where a record company and digital music service reach a direct deal with one another requiring payment of royalties for transmissions by a service that qualifies for the statutory license, performing artists will get paid the same 50% share of performance royalties they would otherwise receive under the statutory license regime. That guarantee is also made in the case of license agreements reached before enactment during calendar year 2018, and in the case of pre-1972 settlements reached with Sirius XM Satellite Radio, going back to 2015. However, in the case of pre-enactment agreements, the rights owner is permitted to deduct, before calculating the 50% artist share, its outside legal expenses and payments for third-party claims (whether settled or adjudicated) that the rights owner has in its discretion chosen to incur in order to enforce its rights. Payments previously made to artists under settlement agreements before enactment are also to be credited.

Subsection (e) preempts claims under state law arising from digital audio transmissions or reproductions of pre-1972 sound recordings made before enactment under certain circumstances.

Subsection (f) ensures that various “safe harbors” and other copyright defenses such as “fair use” and provisions from the Digital Millennium Copyright Act apply to this new federal right for pre-1972 recordings. It also provides that section 108(h), authorizing certain uses by libraries and archives, will go into effect upon enactment, and that rights holders must file certain information regarding their sound recordings with the Copyright Office to be eligible for statutory damages for violations of a rights holder’s rights in such recordings.

Subsection (g) is similar to the previous section, indicating that this new federal right should be considered an “intellectual property” right for the purpose of the exception contained in section 230 of the Communications Decency Act.

Subsections (h)–(k) address a number of discrete issues, ranging from the treatment of ephemeral recordings to the definition of “rights owner.” Concerning the latter point, rights under chapter 14 vest on the day of enactment in the person who owned the exclusive state law right to reproduce a pre-1972 sound recording immediately before enactment. The reference to the state law reproduction right is because that is the right most clearly recognized under state law protecting pre-1972 recordings. It is expected that it will usually be clear who that person is, because commercial pre-1972 recordings will have been exploited for many years, typically without any dispute as to who the rights owner is. After enactment, rights under chapter 14 are transferrable and licensable in the same manner as copyrights in post-1971 recordings.

TITLE III. ALLOCATION FOR MUSIC PRODUCERS ACT

Section 301. Short Title.

Section 301 designates the short title of this section of the bill as the “Allocation for Music Producers Act” or the “AMP Act.”

Sec. 302. Payment of Statutory Performance Royalties.

Section 302(a) codifies an existing practice of SoundExchange to accept letters of direction in order to pay producers, sound engineers, and mixers a portion of the webcasting royalties that it collects. Section 302(b) expands this program to cover new royalties for pre-1995 works that will be received by SoundExchange due to enactment of Title II. The new program requires, in the absence of a letter of direction, at least four months’ notice to a copyright owner with no objections from the copyright owner before a set percentage of royalties (2% of all webcasting royalties from a particular work) is then paid to producers, sound engineers, and mixers. The preemption of state escheatment and abandoned property laws is expanded to cover SoundExchange, or its successor, in addition to independent administrators.

Sec. 303. Effective Date.

Section 303 sets the effective date of all three Titles of the bill as the date of enactment with the exception of certain changes to 114(g) made in Title III.

TITLE IV. SEVERABILITY CLAUSE

Section 401. Severability.

Section 401 adds a severability clause for any provision of the Act or amendment made by the Act that is found unconstitutional.