



## **Music Modernization Act and CLASSICS Act**

EFF supports the goals of the Music Modernization Act (H.R. 4706 and S. 2334) to help songwriters and music publishers receive compensation when their songs are played on digital services, and to clear hurdles for new digital music businesses. However, we have serious concerns with the bill's text.

The bill concerns so-called "mechanical" licenses, meaning a license to reproduce and distribute musical works. It creates a new form of mechanical license that digital music services can use. But the proposed license covers "each individual delivery of a sound recording that results in a specifically identifiable reproduction," including some forms of music streaming that don't end with a copy being made on the user's device.

That definition is contrary to current law. Copyright law gives rightsholders several exclusive rights, including the right to reproduce, distribute, adapt, and perform a work to the public. For music, these rights may be held by different people and administered by different organizations. A stream that doesn't result in a copy may be a public performance, but it is not a reproduction that requires a mechanical license--just as playing a song on terrestrial radio does not require a mechanical license. Also, under the Second Circuit's *CSC v. Cartoon Network* decision, temporary buffer copies that aid in digital transmission are outside the copyright holder's control, and don't require a license at all.

The Music Modernization Act's text suggests that a stream is legally equivalent to a download. And it could be interpreted to mean that temporary buffer copies made as part of a transmission require a license, even where no permanent copy results. This would have serious repercussions for many everyday Internet uses, such as viewing and interacting with information stored on a server. The Supreme Court, in *ABC v. Aereo*, expressed deep concerns about interfering with the cloud computing economy by creating new copyright liability risks, and the Court's opinion in that case carefully avoids bringing purely private Internet transmissions within the exclusive rights.

Congress should take the same care with the Music Modernization Act by changing the definitions of "digital phonorecord delivery," "covered activity," and "interactive stream" to refer to the reproduction and distribution rights already defined by the courts, without creating or implying new definitions of those rights.

The second issue with the Music Modernization Act is that it implies that a license is required whenever copyrighted musical works are "made available by digital transmission." This is problematic because the exclusive rights of a copyright holder don't include merely making a work "available" for copying. The Copyright Act refers to actual copying and distribution.

The federal courts are deeply divided on whether merely offering or attempting to distribute a copyrighted work can be considered copyright infringement, even if no distribution actually takes place. The effect of defining “making available” as equivalent to distribution goes far beyond music licensing, and could upend the relationship between rightsholders and Internet users of all kinds. If Congress takes up this issue, it should do so with the input of all stakeholders, not as a side-effect of a complex bill that serves other goals.

In summary, the Music Modernization Act has significant flaws that should be fixed by amendment so that the bill can accomplish its purpose without threatening other uses of the Internet.

### **Congress Should Avoid Retroactively Enriching Artists For Past Creativity**

EFF opposes the CLASSICS Act (S. 2393 and H.R. 3301). These bills create a new exclusive right of public performance by digital transmission for sound recordings made before February 15, 1972, subject to certain exceptions. In all other respects, pre-1972 recordings would continue to be regulated by state laws rather than federal copyright. High courts in two key states, New York and Florida, have ruled that their state law does not provide a public performance right in sound recordings. The California Supreme Court is likely to follow.

EFF opposes the CLASSICS Act because the purpose of copyright, as stated in the Constitution, is to enrich the public by creating incentives for new creative work. Copyright is a bargain: authors and artists get exclusive rights for a limited time in return for enriching the public with their creativity. But creating new rights in recordings that are over 46 years old doesn't create any incentives, or encourage new music. Thus, it gives nothing to the public. In many cases, the benefit of the law will not flow to recording artists, but to record labels and heirs. If copyright is unmoored from its constitutional purpose, other rightsholder groups will seek backward-looking expansions of rights in their existing works.

Recognizing and celebrating the contributions of classic recording artists is a worthy goal, but creating new rights in pre-1972 recordings is unnecessary and sets a dangerous precedent.