

May 14, 2018

To Chairman Grassley, Ranking Member Feinstein, and members of the Senate Judiciary Committee:

We, the undersigned, are 42 intellectual property scholars who study creativity, innovation, and copyright law and policy. We write to underscore our concern with S. 2393, the CLASSICS Act (“the Act”), a version of which recently passed the House of Representatives as part of the Music Modernization Act of 2018 (“MMA”). Considering the merits of the CLASSICS Act separately from the remainder of the MMA, the Act is deeply flawed. The Committee should reject it or, at a minimum, amend it to ensure that its provisions are in line with existing federal copyright law.

The Act does not serve the purposes of copyright law. Because it grants new federal protections only to works that were created long ago (ranging in age from 46 to 95 years), it does nothing to incentivize the creation of new works. Rather, it simply provides new rewards to existing copyright owners. As the Supreme Court has recognized, however, rewards to owners are a “secondary consideration” to the primary goal of “greater encouragement to the production of literary [or artistic] works . . . .”<sup>1</sup> The Act creates no such encouragement, but it does harm consumer welfare and the public interest in limited terms and limited scope of protection for creative works.

While some of us think that harmonizing the treatment of pre-1972 sound recordings with that of post-1972 sound recordings may be a desirable goal for other reasons, and some of us do not, we all agree that the CLASSICS Act, as written, does not in fact achieve that goal, and that its terms are themselves out of sync with other provisions of federal copyright law. The Act provides a federal copyright term for digital transmission of sound recordings that is significantly longer than copyright terms for later sound recordings and other types of works. Currently, sound recordings published on and after February 15, 1972 typically enjoy 95 years of protection. The Act would untether the copyright terms for pre-1972 sound recordings from that statutory regime. By fixing the end of the digital audio transmission copyright

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<sup>1</sup> *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (emphasizing that the constitutional underpinning for both copyright and patent law is the use of “personal gain” as a means to encourage creation and innovation, not as an end in itself).

term to the year 2067, all but the most recent pre-1972 sound recordings would gain more than 95 years of protection. Earlier recordings would receive far longer protection; in the most extreme case, sound recordings from 1923 would enjoy protection until 144 years after they were created, protecting works that are older than any other works protected by copyright anywhere.

There is a second way in which the CLASSICS Act term is out of sync with the rest of copyright law. Under the Act, the term of protection for the musical work underlying a pre-1972 sound recording would always expire before, and often long before, the term for the digital transmission of the sound recording. There is no justification for the Act's term extension or for the introduction of such a disparity with other copyright terms.

Finally, unlike previous copyright term extensions, the CLASSICS Act cannot be justified on the grounds that it is necessary to harmonize with foreign law. To the contrary, no other country gives a right to sound recordings as old as the ones this Act would protect. The Act's copyright protection for pre-1972 sound recordings is not harmonized with the law of the European Union, which provides protection for only 70 years after publication. Thus, the Act's term of anywhere from 95 to 144 years, depending on date of publication, will result in considerable inconsistency between the United States and the EU.

The Act also arbitrarily exempts pre-1972 sound recordings from almost all the statutory copyright limitations that apply to other types of works. In particular, neither 17 U.S.C. § 114, which deals with the scope of exclusive rights of sound recordings from 1972 onwards, nor § 110, which among other things allows certain performances for educational purposes, would apply to pre-1972 sound recordings.<sup>2</sup> Nor would other potentially relevant limitations, including those in § 112 and § 119.

Further, the Act creates new federal rights for the digital public performance of sound recordings that had either no protection or significantly less protection under state common law. The vast majority of states have not recognized a public performance right in sound recordings. Both New York and Florida

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<sup>2</sup> The version of the Act that passed the House also includes (appropriately in our view) the limitations of sections 110(1) and 110(2).

recently expressly rejected the existence of such a right, and the California Supreme Court will soon rule on the issue.<sup>3</sup> Even if the court finds a public performance right in California, such a right would expire in 2047, 20 years before the end of the 2067 term in the Act.<sup>4</sup> Thus, the Act would not simply federalize existing state rights; it would create new rights in many states and extend existing rights in other states well beyond what those states currently provide. Moreover, even in cases where some state common law rights have existed, the Act will increase the significance of such rights going forward by replacing whatever remedies were available at common law with much more powerful federal statutory damages.

This retroactive protection and unreasonably lengthy term will have harmful effects on the public. For example, any existing work that includes pre-1972 sound recordings, including audio documentaries, podcasts, etc., could no longer be transmitted to listeners without, in most cases, first securing new permissions from the owners of the copyright in each sound recording. This would be a difficult and burdensome challenge since most works were funded and created with an expectation of the necessary rights that would now be disrupted. The Act's retroactive protection will thus hamper access to works containing older sound recordings in a manner similar to how other copyright clearance impediments greatly limited the public's ability to view the landmark civil-rights documentary *Eyes on the Prize* for many years after its initial release.

Because the Act does nothing to further the fundamental purpose of copyright and will result in both inconsistent copyright provisions and an excessively long period of protection, it should be rejected in its current form. However, if consideration of the Act does move forward, we urge the Committee to adopt at least two amendments that are critical to reducing its negative impacts and to better integrating it with existing federal copyright law. First, the Act's copyright term end date of February 15, 2067 should be amended to provide that sound recordings created between January 1, 1923 and February 15, 1972

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<sup>3</sup> See *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 229 So. 3d 305, 321 (Fla. 2017); *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 28 N.Y.3d 583, 610 (2016). See generally *Flo & Eddie, Inc. v. Pandora Media, Inc.*, No. S240649, 2017 Cal. LEXIS 3691 (Cal. May 17, 2017).

<sup>4</sup> Cal. Civ. Code § 980(a)(2) (Deering 2018) (The “author of . . . a sound recording initially fixed prior to February 15, 1972, has an exclusive ownership therein until February 15, 2047 . . .”).

enjoy the same term as more-recently published sound recordings, which generally expire 95 years after creation. Second, the Act’s restriction of limitations on the exclusive rights of a copyright owner to sections 107 and 108 in § 1401(e)(1) should be amended to include all existing statutory limitations, by substituting in the words “The limitations on the exclusive rights of a copyright owner described in sections 107 through 122, inclusive shall apply . . . .” These amendments would simplify the protections given to pre-1972 sound recordings and align them with those given to newer sound recordings and other works.

Respectfully,<sup>5</sup>

Melissa B. Alexander  
University of Wyoming College of Law

John R. Allison  
McCombs School of Business at The University of Texas at Austin

BJ Ard  
University of Arizona James E. Rogers College of Law

Derek E. Bambauer  
University of Arizona James E. Rogers College of Law

Mark Bartholomew  
University at Buffalo School of Law

Robert Brauneis  
George Washington University Law School

Michael Carrier  
Rutgers Law School

Michael W. Carroll  
American University Washington College of Law

Ralph D. Clifford  
University of Massachusetts School of Law

Thomas Cotter  
University of Minnesota Law School

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<sup>5</sup> This letter presents the views of the individual signers. Institutions are listed for identification purposes only.

Brian Frye  
University of Kentucky College of Law

Kristelia A. Garcia  
Colorado University Law School

Shubha Ghosh  
Syracuse University College of Law

Jim Gibson  
University of Richmond School of Law

Eric Goldman  
Santa Clara University School of Law

Paul J. Heald  
University of Illinois College of Law

Stacey Lantagne  
The University of Mississippi School of Law

Mark A. Lemley  
Stanford Law School

Lawrence Lessig  
Harvard Law School

David Levine  
Elon University School of Law

Yvette J. Liebesman  
Saint Louis University School of Law

Jessica Litman  
University of Michigan Law School

Lydia P. Loren  
Lewis & Clark Law School

Brian Love  
Santa Clara University School of Law

Glynn Lunney  
Texas A&M University School of Law

Mark McKenna  
Notre Dame Law School

Mike Mireles  
University of the Pacific, McGeorge School of Law

Ira S. Nathenson  
St. Thomas University School of Law

Tyler T. Ochoa  
Santa Clara University School of Law

Aaron Perzanowski  
Case Western Reserve University School of Law

Jorge Roig  
Touro Law Center

Matthew Sag  
Loyola University Chicago School of Law

Zahr Said  
University of Washington School of Law

Pamela Samuelson  
UC Berkeley School of Law

Sharon Sandeen  
Mitchell Hamline School of Law

Jason Schultz  
New York University School of Law

Lea B. Shaver  
Indiana University McKinney School of Law

Jessica Silbey  
Northeastern University School of Law

Kevin L. Smith  
University of Kansas School of Law

Katherine J. Strandburg  
New York University School of Law

Rebecca Tushnet  
Harvard Law School

Alfred C. Yen  
Boston College Law School

cc: Members of the Senate Committee on the Judiciary