



# The Music Modernization Act: Extending Copyright Protection to Pre-1972 Sound Recordings

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*UPDATE: On October 11, 2018, President Trump [signed the Orrin G. Hatch-Bob Goodlatte Music Modernization Act \(H.R. 1551\) \(the MMA\)](#) into law. The final bill reflects [a compromise](#) reached in the Senate regarding Title II of the bill, which was formerly called the Compensating Legacy Artists for their Songs, Service, & Important Contributions to Society Act (the CLASSICS Act).*

*As discussed in the Sidebar below, the CLASSICS Act would have granted limited federal copyright protection for digital public performances of sound recordings made before February 15, 1972. Until the MMA, federal copyright law did not cover pre-1972 sound recordings. As originally designed, the CLASSICS Act would have granted a blanket copyright term to these older sound recordings, with the new federal protection lasting until February 15, 2067, regardless of when the recording was created. However, this proposed term attracted [some criticism](#) concerning its potential impact on the public domain.*

*As enacted into law, Title II of the MMA, now called the [Classics Protection and Access Act](#), extends copyright protection to pre-1972 sound recordings on essentially the same terms as post-1972 sound recordings. Specifically, anyone who engages in “covered activity” with respect to a pre-1972 sound recording [is liable](#) “to the same extent as an infringer of copyright.” “Covered activity” is [defined](#) to include any activity that “the copyright owner of a sound recording would have the exclusive right to do or authorize . . . if the sound recording were fixed on or after February 15, 1972.” Equivalent state law copyright protections for pre-1972 sound recordings are [generally preempted](#), which is a broader preemption provision than [those](#) contained in the earlier CLASSICS Act.*

*Under the MMA, instead of a blanket term lasting until 2067, federal protection for pre-1972 sound recordings will expire 95 years after the date of their first publication, with an additional number of years added to the term depending on when the sound recording was first published. For pre-1923 recordings, this [“transition period”](#) is three years; recordings published between 1923 and 1946 get five additional years; and recordings from 1947–1956 get 15 additional years. Protection for recordings published between 1957 and February 15, 1972, as in the earlier version of the CLASSICS Act, will not expire until 2067. The new law also contains an [“orphan works”](#) provision that permits [certain noncommercial uses](#)*

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*of pre-1972 sound recordings when the user cannot determine whether the recording is being commercially exploited despite a “good faith, reasonable search” for the rights holder.*

*The other two main provisions of the MMA remained largely the same. Title I of the law, the Musical Works Modernization Act, creates a blanket compulsory license for certain digital music services to make and distribute musical works online, to be administered by a newly created nonprofit Mechanical Licensing Collective (MLC). These changes are intended to streamline and modernize how copyright royalties are determined and paid when musical works are streamed or distributed online. (One significant change in the final amendments limits the licensing activities of the MLC to administering the new blanket license.) Title III, the Allocation for Music Producers Act, permits royalty payments to music producers and sound engineers under certain circumstances. More detail on how these provisions will impact music licensing is available in [this CRS report](#).*

*The original post on the CLASSICS Act, from August 1, 2018, is reproduced below.*

Should performing artists of older musical works be entitled to compensation on terms similar to musicians working today? With the Senate Judiciary Committee having recently ordered the Music Modernization Act (MMA) ([S. 2823](#)) to be reported—the House unanimously passed a version of the MMA in April ([H.R. 5447](#))—the full Senate may soon consider that question.

Much of the MMA focuses on updating the process for how—and how much—songwriters and performers are paid when their works are played through online digital music services. These proposed changes recognize that online streaming and other digital music services, such as Pandora and Spotify, now represent [more than half](#) of U.S. music industry revenues. To make paying royalties to copyright holders more efficient, the MMA would permit online music services to obtain a blanket compulsory license to reproduce and distribute musical works, and would change how royalty rates are set for certain digital music services. The bill would also establish a non-profit “Mechanical Licensing Collective” to administer the new license and create a database of musical works so that those interested in using a piece of music can more easily identify the work’s copyright holders. (For a fuller discussion of how these provisions would impact music licensing, see [this CRS Report](#).)

One provision of the MMA is of a somewhat different character. Title II of the MMA, known as the Compensating Legacy Artists for their Songs, Services, and Important Contributions to Society Act (the CLASSICS Act)—which is also a separate bill ([H.R. 3301](#))—would retroactively grant federal copyright protection to digital public performances of sound recordings made between January 1, 1923 and February 15, 1972. The CLASSICS Act would thus create new federal rights in certain musical recordings, as opposed to simply changing how those rights are administered. This Sidebar examines some of the potential legal implications of the CLASSICS Act.

## **Musical Compositions and Sound Recordings: Different Rights, Different Royalties**

At a general level, copyright provides authors of original creative works (such as books, music, maps, and fine art) a set of exclusive property-like rights in their creations. Primary among these rights are the exclusive rights to reproduce and distribute the work, that is, to prevent others from making copies of it and/or selling it without permission. Depending on the nature of the work, copyright may grant authors additional rights, such as the right of public performance, which precludes others from playing a work in a non-private setting, such as in a concert hall or over the radio.

There are typically [two different](#) copyrights in a musical recording: one for the underlying composition, and another for the recording itself. The former, which is referred to as a copyright in a musical work, covers the composer of the music and the writer of lyrics. The second, called a copyright in a sound

recording, covers the work of the performers and/or producers of a particular recording. Historically, American law has treated copyright in musical works differently from sound recordings.

Congress has provided copyright protections to composers and songwriters [since 1831](#). This copyright generally grants songwriters the [exclusive right](#) to reproduce, distribute, and publicly perform their musical compositions. Subject to a number of limitations, the law thus precludes others from copying and/or publicly performing a piece of music without permission from the copyright holder of the musical work.

The law was slower in creating copyright protections for those who perform music, as opposed to composing it. In 1971, Congress [established](#) a limited federal copyright in sound recordings created after February 15, 1972, providing creators of sound recordings an exclusive right of reproduction. Notably, however, the federal copyright in sound recordings lacked any exclusive right of public performance. In practice, this means that radio stations, restaurants, and cafes need only pay the songwriter (and not the performer or record label) when they play a particular musical recording.

In 1995, Congress [granted](#) a limited performance right in sound recordings, but only to public performances by “means of a digital audio transmission.” After this change, digital radio stations and streaming services were generally required to pay royalties to performers for post-1972 sound recordings. However, others, such as terrestrial radio and cafes, still need only pay the songwriter, and pre-1972 sound recordings lacked any federal copyright protection at all.

As a result of this history, whether a performing artist has a right to receive royalties depends on when the sound recording was made and the particular use that is made of it. For sound recordings made before February 15, 1972, there is no federal copyright protection; rights exist only pursuant to state law. Notably, however, not all states recognize a common law copyright in sound recordings. Following litigation by the members of the 1960s rock group the Turtles against Sirius XM and Pandora, both [New York](#) and [Florida](#) have declined to recognize an exclusive right of public performance in pre-1972 sound recordings as a matter of state law. The Supreme Court of California [is set](#) to decide the issue soon.

For post-1972 sound recordings, there is a limited federal copyright, but the public performance right extends only to digital audio transmissions. In contrast, songwriters have a right to be compensated for most public performances, analog or digital, before and after 1972 (presuming the work is not in the public domain).

## The CLASSICS Act Debate: Economic Justice versus Constitutional Values

The CLASSICS Act would change this structure, treating so-called “legacy artists” who recorded music between 1923 and 1972 more similarly to artists who made sound recordings after 1972. In particular, [the bill](#) would create a new right of digital public performance for all sound recordings made from January 1, 1923 through February 15, 1972—effectively giving pre-1972 recordings similar treatment to post-1972 recordings, at least when the works are streamed or played online. The CLASSICS Act would also [preempt](#) claims of state law copyright for digital audio transmissions of pre-1972 sound recordings.

Supporters of the CLASSICS Act assert that the proposed change would end the disparate treatment of pre-1972 sound recordings. In particular, [proponents](#) argue that the legislation would bring greater parity between performing artists and songwriters by requiring digital music services to compensate performers of pre-1972 and post-1972 recordings in the same way, thereby harmonizing the law and replacing a patchwork of uneven state law protections with a consistent federal regime. The House Report ([H.R. Rep. No. 115-651](#)) also highlights examples of older performers, such as Dionne Warwick, who do not earn royalties from their pre-1972 recordings, and are increasingly unable to generate income from their work in other ways, such as touring.

On the other hand, opponents of the legislation argue that creating new federal protection for pre-1972 sound recordings is “[misguided](#).” Their primary objection relies on the constitutional basis for intellectual property, which justifies copyright as an economic incentive for creators to make new works, thereby “[promot\[ing\] the Progress of Science](#),” that is, of [knowledge and learning](#). Because the CLASSICS Act would retroactively grant copyright protection to works that have already been created, opponents claim that there is no logical way that it could encourage their creation. On this view, the CLASSICS Act is in tension with the general rationale for copyright.

While the opponents’ argument may have traction as a matter of public policy, as a matter of constitutional law it would appear to be foreclosed by the Supreme Court’s 2012 ruling in [Golan v. Holder](#). *Golan* held that “restoring” copyright protection to certain foreign works that were previously in the public domain in the United States violated neither the Constitution’s [Copyright Clause](#) nor the [First Amendment](#). Notably, unlike the law at issue in *Golan*, the CLASSICS Act is not explicitly motivated by a desire to harmonize American copyright law with international norms, and the bill generally would provide weaker protections to “reliance parties” (i.e., those using the work that was formerly unprotected by copyright). However, the Court’s analysis in *Golan* suggests that neither distinction is of dispositive constitutional significance: *Golan*’s reasoning hinged on a determination that providing incentives for new works was [not the sole means](#) that Congress could employ to promote the diffusion of knowledge, noting that Congress has granted copyright protections to preexisting works [in the past](#).

[Critics](#) of the CLASSICS Act also object to how the new federal right is structured. In particular, the bill grants a blanket term to all pre-1972 sound recordings, providing that the copyright shall not expire until February 15, 2067—regardless of when the recording was created. For very early sound recordings, this would create a copyright that will not expire [until 144 years](#) after the work was created, in the extreme case of a recording made in 1923. (Of course, because older sound recordings are unprotected under federal law at present, the effective term of federal protection would be less than 50 years.)

Under [current law](#), musical works and post-1972 sound recordings generally have a copyright term lasting 95 years from the date of publication or 120 years from the date of creation, whichever is sooner. The CLASSICS Act’s blanket term would therefore potentially introduce a new disparity between the duration of the copyright in a sound recording and the underlying musical work, creating situations where the musical work is in the public domain but the sound recording remains copyrighted.

Several legislators have introduced alternatives to the CLASSICS Act. For example, the Accessibility for Curators, Creators, Educators, Scholars, and Society to Recordings Act (the ACCESS to Recordings Act) ([S. 2933](#)) would extend federal copyright to pre-1972 sound recordings on the same terms as post-1972 sound recordings, preempting state law protections, and affording a term of either 95 years after publication or 120 years after creation, whichever expires first. Because this bill could potentially replace vested state law rights with federal rights of shorter duration, questions may be [raised](#) about whether the bill comports with the Fifth Amendment’s [Takings Clause](#). (The CLASSICS Act largely avoids this concern through the longer term it provides to pre-1972 sound recordings, as federal law already [preempts](#) state law protection of such recordings effective as of February 15, 2067.) In the Senate Judiciary Committee, Senator Ben Sasse has proposed [an amendment](#) to the MMA that would strike the CLASSICS Act from the bill. It remains to be seen what approach, if any, will garner enough support to become law.

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