Statement of Garrett Levin
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Subcommittee on Courts, Intellectual Property, and the Internet
Hearing on: "Five Years Later – The Music Modernization Act"
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Chairman Issa, Ranking Member Johnson, and Members of the Committee, thank you for the opportunity to testify before you today at this important hearing examining the Music Modernization Act at five years.

My name is Garrett Levin and I am the President and CEO of the Digital Media Association, or DiMA. DiMA represents the world's leading audio streaming companies, whose innovations are the economic engine that have revitalized the music industry. DiMA and its members – Amazon, Apple Music, Feed.fm, Pandora, Spotify, and YouTube – advocate for policies that ensure that music fans have legal access to music anytime, anywhere they want it, and that artists and songwriters can connect with old fans and make new ones around the world.

Nashville is a fitting host for today's hearing, a city that reflects the modern music industry and that is home to the Mechanical Licensing Collective ("MLC") which we will be discussing at length. DiMA's members have strong relationships in this vitally important music city and just recently, we launched a brand-new report about the connection between streaming and country music here in town. I'm honored to be here testifying.

DiMA's members have revolutionized the music industry. In 2017, digital music providers paid the recorded music industry approximately $7 billion in royalties. By 2022, that number had nearly doubled to $13.3 billion. Streaming royalties comprise 84% of the recorded music market in the United States. And recently, streaming services reached an agreement with music publishers and songwriters to pay higher mechanical royalty rates while also increasing certainty in the system. Streaming services pay approximately 70% of revenues to rightsholders in the form of royalty payments, operating on the remaining 30%. These margins are lower than any other distribution model, but streaming services are doing more with less. They are providing tools and data for artists and songwriters; allowing fans to discover and rediscover music; constantly innovating; and providing access to the world's music at fans' fingertips.

I. The Music Modernization Act – Fixing a Broken System for <u>All</u> Stakeholders

Music licensing has always been complex. Streaming accelerated those challenges, particularly for licensing musical works created by songwriters and composers. Musical works are generally licensed by music publishers, and they are incorporated into the sound recordings that are commercially distributed on

streaming services. Because of outdated licensing frameworks, it was impossible for services to license the rights they needed in an efficient manner. And because of longstanding challenges in ensuring that accurate music publishing data is included with released sound recordings, significant volumes of royalties could not be processed and paid to the correct publishers and songwriters, despite the best efforts of streaming services.

At the time of the Music Modernization Act ("MMA"), there was widespread recognition that digital mechanical licensing—one of the suite of licenses that streaming services need to operate—was fundamentally broken, harming streaming services, music publishers, and songwriters alike and threatening the very foundation of the new music economy. Legislation was needed to solve this set of shared problems and bring licensing into the 21st century.

DiMA was at the center of the negotiation, drafting, and passage of the MMA, offering support from its earliest stages through it being signed into law nearly five years ago. At the time, streaming services, music publishers, and songwriters came together, compromised, and found solutions to the licensing challenges that had plagued this segment of the industry, for the mutual benefit of all three groups.

The Music Modernization Act accomplished that goal by making a number of important changes. It established a blanket license available for qualifying digital audio services, replacing the broken work-by-work system of the past. It provided for a single collective organization (with oversight from the Copyright Office and Congress) to administer that license by receiving extensive usage reporting from streaming services, matching sound recordings to musical works, and distributing royalties to copyright owners, replacing the patchwork of multiple service providers that existed previously.

Critically, the MMA also created a statutorily required authoritative database of musical works information populated with data from copyright owners—those closest to the data—incentivizing rights holders to register their works in a single database that would be used to facilitate their royalty payments from *all* digital services. Finally, the MMA provided a clear pathway for resolving all the old disputes that had stemmed from the historic challenges of matching, identification and payment, by creating a limitation on liability for potential past infringement for services that transferred their historic unmatched royalties and usage reporting to the MLC, so that the MLC could attempt to use its new database to match those works and pay those royalties.

All of those features clearly represent Congress's recognition that it was critical for the new system to provide solutions to the problems of the past for all stakeholders. The legislative history of the MMA makes clear that key stakeholders, as well as Members of Congress, viewed the legislation as a grand compromise, meant to improve the system for all. It was a fact stated repeatedly in Committee work on the bill and in Floor statements.

For example, then-Congressman Doug Collins, one of the lead sponsors of the bill, stated in a press release that "Passage of the Music Modernization Act was the product of years of negotiations and stakeholders — from Congress to songwriters to digital services — who came together to make the system better for the music industry as a whole …"[1]

Another lead sponsor, then-Senator Lamar Alexander, stated on behalf of then-Chairman Grassley, "The Music Modernization Act will really help songwriters, artists, publishers, producers, distributors, and other music industry stakeholders. This bill is the product, said Senator Grassley, of long and hard negotiations and compromise."[2]

DiMA continues to support the goals and objectives of the MMA, and we believe that, on a fundamental level, the law is working. Members of this Committee explicitly established many of the most critical features in the law, such as the blanket license itself and the centralized, public, authoritative database. That is not to say that this new system is without challenges As the MMA approaches its fifth anniversary as a law, it is appropriate and necessary to evaluate how it is operating and to what extent it is meeting Congress's goal of fixing a broken system for songwriters, music publishers, and streaming services alike.

II. My Role and Perspective on the MMA and MLC

I started at DiMA in March of 2019, and over the past 4 plus years, I have been deeply involved in virtually every facet of the implementation and operation of the MMA's blanket mechanical license. In testifying today, I bring a perspective shaped by my extensive experience, including:

- The formation of the digital licensee coordinator ("DLC"), the representative of digital music providers under the MMA;
- The Copyright Office's initial designation of both the MLC and the DLC;
- Appointment to and service on the MLC Board of Directors as the non-voting representative of the licensees;
- Negotiation and settlement of the initial agreement to fund the MLC;
- Active participation in nearly a dozen rulemakings and related regulatory proceedings at the U.S. Copyright Office to establish the full scope of requirements under the law, starting in early 2019 and continuing to the present day;
- The formal launch of the blanket license (or "license availability date") on January 1, 2021 and the transition to the blanket license system, as well as

[1] *Rep. Collins (R-Ga) - Press Release*

[2] https://www.c-span.org/video/?c4750195/senate-passed-orrin-g-hatch-music-modernization-act

the transfer of hundreds of millions of dollars in previously unmatched royalties from the services to the MLC;

- Over two years of operation under the blanket license;
- Most recently, a second voluntary agreement regarding the MLC's budget, providing for a significant increase in the funding that the licensees will be providing to the MLC over the coming years; and
- In the middle of all of that, last year, I also had a lead role in negotiating and executing the landmark rate settlement of the most recent Copyright Royalty Board proceeding that established the rates and terms for the MMA's blanket license.

I have had a front row seat to the incredible work that has been undertaken by a wide range of stakeholders, including dozens of music services that rely on the blanket mechanical license, to turn the MMA from many, many words in a statute into operational reality.

III. The MLC—Successes and Challenges

The MLC sits at the heart of the MMA's blanket mechanical license system. It maintains the database of musical works information, it receives monthly usage reporting and royalty payments from digital music services, it matches the reported sound recordings to the registered musical works to find the right publishers, and it pays the applicable royalties to those publishers (who in turn pay songwriters their share). Moreover, the MLC is charged with making information publicly available and using its database to attempt to match and pay out historical royalties that could not previously be matched and paid under the prior system. These core tasks provide multi-faceted benefits to all three key stakeholder groups.

The MLC has had a significant job to do since the MMA became law, and success was not in any measure guaranteed. An already short timeline to transition to the blanket license became more challenging with the onset of the Covid-19 pandemic, and regulatory and statutory questions arose throughout the process that required creative solutions and, sometimes, Copyright Office intervention. Throughout that initial period the MLC, publishers, and services worked diligently, with services undertaking the work of engineering new reporting workflows and critically, providing the MLC the funding it requested to begin its operations.

And beginning on January 1, 2021, hundreds of millions of dollars of unmatched royalties were transferred, dozens of services began submitting monthly reports with more data than had ever been reported, and the MLC began matching sound recordings to musical works and paying mechanical royalties to publishers, in large part based on the influx of data provided by publishers to the database. This shared success should be commended.

Credit should be given to Kris Ahrend and his team, who I have seen firsthand devote untold hours to building the MLC. I also want to acknowledge the dedicated

members of the MLC Board, including my colleague testifying today, Mike Molinar, who have played a crucial role to date.

The MMA sets out the makeup of the MLC Board, and Congress decided that the voting membership should comprise 10 publishers, 4 self-published songwriters, and three non-voting seats. It has been my privilege to serve on the Board for nearly my entire time at DiMA, as the non-voting representative of the digital services. The Board's statutory composition does not alter the actual purpose of the MLC, and the Board members are there to govern this quasi-governmental agency through the use of their industry expertise. This is clear from both the legislative history and the Presidential signing statement, which designates the voting Board members as inferior officers of the United States appointed by the Librarian of Congress. Moreover, the statute provides for a robust set of MLC committees for operations, dispute resolution, and unclaimed royalties, all of which are intended to advise the MLC and feature broader representation.

While we mark the MLC's successes, today's hearing is an important opportunity for this Committee to understand and evaluate challenges that have arisen since the MMA's passage. Congress should continue to exercise oversight of this new system to ensure that all facets are operating consistent with the MMA.

In its best form, the MLC should serve as the level seat of a three-legged stool, administering the blanket license system in an effort to balance the interests of three sets of stakeholders—songwriters, publishers, and streaming services—that are not always aligned. The MLC can and should be a neutral administrator and best-in-class back-office service provider that processes massive amounts of data, provides a one-stop authoritative shop for rightsholders to register their works, matches more works than previously possible, and effectively and efficiently pays out hundreds of millions of dollars in royalties to publishers every year.

The potential power that the MLC wields over the music streaming market is massive, particularly its ability to terminate a service's blanket license in the event of a material breach. Such termination would be an effective commercial death sentence for an interactive streaming service in the United States, and that power (or even the threat of using that power) must therefore be wielded in extremely rare and expressly prescribed situations. Within the proper scope of the MLC's enforcement authority, it should police misuses of the Section 115 blanket license in a manner that is nondiscriminatory, independent, neutral as between permissible readings of the statute, and efficient.

Today's hearing is an important step in the oversight necessary to achieve that goal, and I want to draw attention to two areas of concern for DiMA's members, the MLC's approach to regulatory and statutory interpretation and the MLC's budget.

a. Regulatory & Statutory Interpretations

Because of the newness of the system, and the extremely complicated nature of music licensing law, the Music Modernization Act intentionally gave the Copyright Office significant regulatory authority to promulgate necessary regulations and

provide guidance to the MLC to ensure that the law would operate as intended once applied in a commercial setting. Over the past four-plus years, the dedicated staff of the Copyright Office has conducted more than a dozen rulemakings and played an essential part in implementing the law.

As can be expected when complicated statutory and regulatory frameworks impact commercial issues, different stakeholders may have different interpretations of the MMA and its implementing regulations or Copyright Royalty Board regulations. This has unsurprisingly been the case with the MMA. In these instances, it is important that the MLC acts as intended – as an administrator – rather than as an arbiter or advocate on behalf of any one party. In the first year of the MLC's operations in particular, the MLC did a commendable job of working bilaterally with services to ensure they successfully transitioned to the new system.

Unfortunately, on broadly applicable interpretations of the statute and regulations, we have seen several instances where the MLC has acted more as arbiter or advocate on behalf of just one leg of the stool – namely, the music publishers. While DiMA may disagree with the publishers or songwriters on certain regulatory and statutory interpretations, it is their prerogative to voice their perspective, as it is the services' to voice ours. The issue arises when the MLC consistently takes substantively identical positions to any one party.

In those circumstances where fundamental disagreements arise between stakeholders about interpretations of the law or regulations, the MLC's role can and should be to seek clarification from the Copyright Office consistent with the Office's broad authority under the MMA, rather than seek to unilaterally impose an interpretation, especially one that favors some stakeholders over others. To do otherwise is contrary to Congressional intent and produces bad results that distort the necessary balance of the statutory licensing regime, particularly considering the MLC's inherent statutory powers over all stakeholders.

The MLC should consistently seek to focus its efforts squarely on its core statutory functions on behalf of all three implicated stakeholder groups and allow those parties to advocate for resolution of statutory or regulatory disputes with the Copyright Office or, as a last resort, through the courts. This is particularly true given the unique funding structure of the MLC, which requires the licensees to pay for the reasonable costs of the MLC's operations and has led to the absurd circumstance that the services are paying for both their own advocacy costs and the MLC's costs in advancing arguments indistinguishable from the music publishers. Moreover, it limits the ability of services to challenge MLC interpretations because of the prospect of continuing to pay the costs of both sides of the dispute. That was not the intention of the MMA.

The MLC *can* (and should) sit in the middle of the partnership between services, publishers, and songwriters and ensure the full benefits of the MMA are realized. But to fully do so, it must act and be seen to act independently and from the middle.

i. *Late Fees for Estimated Payments*

One current example relates to late fees and when they should apply. This is the subject of an ongoing proceeding at the Copyright Office and relates to estimates that services must make when submitting monthly royalty payments. The specific royalties that the MLC collects are based on a complicated formula that depends on amounts that the services pay for other royalties, specifically, the royalties they pay to record labels for sound recording rights and to PROs for public performance rights in musical works.

Those latter categories of royalties, which are part of commercial agreements the terms of which the services cannot unilaterally dictate, are often not precisely known and in some cases are literally unknowable at the time of monthly reporting to the MLC for a variety of reasons, including that they might be on different payment schedules, that they might be subject to renegotiation and are therefore interim rates that will be adjusted, and that they might be subject to minimum annual payments that are not triggered until the end of a year. All of these have been features of the streaming rate formula for well over a decade, as well as precursor rate structures that predate streaming. The reasons for these estimates and adjustments are well understood by both services and rightsholders.

The need to estimate royalties existed before the Music Modernization Act and continues to exist after it. Industry practice has long been to make an initial estimated payment, and, when all the information is available, to adjust the payments as needed and the statute and regulations have accommodated that practice. Late fees have <u>never</u> been required on these adjustments.

The Copyright Office issued interim regulations in 2020 reflecting this long-standing industry practice and the Copyright Office's own principle that licensees should make adequate payments but not overpayments. As the MLC began to operate and collect royalties and receive annual adjustments, it became clear that there was a disagreement about whether and how late fees might apply to estimated payments and subsequent adjustments. The Copyright Office recognized this disagreement existed and issued a Notice of Inquiry to examine the issue.

The music publishers have submitted comments to the Copyright Office seeking to overturn historic practice and the clear intention of the regulations. We disagree with their interpretation of the statute, but their action is not the primary issue. Rather, we are concerned that the MLC submitted substantively similar comments to the Copyright Office, taking the same position as the NMPA. Moreover, the MLC did this using the same attorneys that the NMPA uses for CRB ratesetting proceedings (and often for copyright infringement litigation) and advancing arguments about the regulations that are indistinguishable from arguments made by the NMPA in the most recent ratesetting, but not included in the final regulations. This bizarre scenario, in which the services are paying for the MLC to hire the same lawyers who litigated the ratesetting proceeding against them and

resurrect arguments that did not carry the day in that proceeding, could not have been intended by the MMA.

ii. *Treatment of Pre-MMA Liquidation Agreements*

Another example related to the treatment of certain agreements regarding historic royalties and that were executed before the MMA's passage. Prior to the MMA, the lack of authoritative and centralized musical works ownership data led to significant challenges finding and paying the proper copyright owners.[3] Services therefore accrued royalties that they were prepared to pay but could not do so because the recipients could not be identified.

Recognizing this problem, several services entered into voluntary agreements with the NMPA to compensate publishers and their affiliated songwriters when the works could not otherwise be matched. These agreements featured claiming portals that allowed publishers to review and identify unmatched works for payment and then also receive unmatched royalties after a period in exchange for releasing any claims to further compensation. These agreements ultimately became the template for the structure of the MMA.

But the agreements also led to a dispute regarding the MMA's requirement for services to transfer their unclaimed historic royalties to the MLC in order to receive the limitation on liability for past failures to pay that money out under the previously broken system.

Despite the fact that the publishers who participated in the liquidation agreements had released claims for any additional royalties from the relevant time period and had distributed money to their songwriters consistent with their private agreements, the MLC took the position that services should double pay those very same royalties to the MLC and potentially receive it back if publishers sent in letters of direction directing the MLC to do so.

The MLC's wholly inefficient and overly complicated proposal prevented the parties from negotiating a workable solution and the Copyright Office had to intervene under its regulatory authority. The Copyright Office agreed with the services, and the issue was resolved through regulations, but not before significant time and resources were needlessly expended—and again, the MLC's expenses were shouldered by the services, in addition to their own expenses.

[3] The creation under the MMA of the centralized, authoritative database of musical works information coupled with more extensive reporting from services has allowed for significant improvements on this issue. Music publishers now have one, authoritative location to register their works for the payment of mechanical streaming royalties in the United States. And the data shows that millions of works have been newly registered since the MLC launched its database, leading to improved matching and payments. The database alone does not solve for all of the data challenges, including delayed identification of writing splits, but DiMA and its members are committed to continuing to work toward cross-industry solutions to the shared metadata challenges.

iii. *Treatment of Public Domain Works*

The royalty formula used to calculate and pay mechanical royalties is highly complex. One of the MLC's statutory duties is to confirm services' royalty obligations based on the formula and the services' reporting. The result of the MLC's calculations is a "per-work" distribution of a service's overall royalty payments that is paid to copyrighted non-dramatic musical works.

In undertaking these calculations, the MLC has adopted an interpretation related to the treatment of public domain musical works, those that are not protected by copyright, that charges the services royalties for those works, and then allocates those royalties among the works that are protected by copyright. The services believe that this position is inconsistent with the rate regulations set by the CRB. The services have raised these concerns to the MLC, but the MLC has shown no willingness to alter its approach and services lack ways to seek recourse.

This approach by the MLC has an outsized effect on services that rely heavily on public domain works, such as classical music specialty services. Moreover, the MLC's approach to public domain works may also result in unintended outcomes in other scenarios involving works that might sit outside the statutory license, such as solely AI-generated music.

iv. Statutory Termination Rights

The MLC has also acted as an extension of the publishers on matters that impact songwriters. The treatment of statutory termination rights is one example. This issue does not directly impact DiMA members, except insofar as it affects the songwriters who are ultimately the ones who create the works that services perform. Here, the Copyright Office implementing regulations noted that the MLC should simply operationalize instructions from the relevant copyright owners, rather than adopt a position on what the law should be.[4] The Office has indicated that the 2020 rule was adopted out of shared concerns by the Office and many groups representing songwriter interests that the MLC's initial proposal would adversely affect songwriter interests.[5] Nonetheless, the MLC subsequently adopted a policy that was clearly tilted in the publishers' favor, essentially allowing a publisher to continue to collect blanket license royalties even after a songwriter has terminated their grant of rights to that publisher. This issue is the subject of an ongoing Copyright Office rulemaking, but notably in its October 2022 Notice of Proposed Rulemaking, the Copyright Office said that "the MLC's termination dispute policy is inconsistent with the law."[6]

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[4] 85 Fed. Reg. 58114, 58133-58135, *available at* https://www.govinfo.gov/content/pkg/FR-2020-09-17/pdf/2020-20077.pdf.
[5] 87 Fed. Reg. 64405, 64406 *available at* https://www.govinfo.gov/content/pkg/FR-2022-10-25/pdf/2022-23204.pdf.
[6] 87 Fed. Reg. 64405, 64411 *available at* https://www.govinfo.gov/content/pkg/FR-2022-10-25/pdf/2022-23204.pdf.

b. Congress's Role in Ensuring That the MLC Costs and Budget Are Reasonable

DiMA's members are directly invested in the MLC's success. Not only do the services pay for the MLC's operations in addition to their royalty obligations, but they have also made significant investments in changing their own reporting practices and workflows. In short, the transition to the blanket license system has been expensive, but the benefits are also clear. Congressional oversight of the budget of the MLC, as a quasi-governmental entity that exists solely to administer the statutory license that Congress created, is not only proper, it is essential.

The MLC has a unique financial structure, under which the music streaming services (users of the Section 115 license) pay directly for the MLC's costs, rather than the MLC's expenses being deducted from royalties collected, as happens with other collectives all over the world. This funding structure is a feature of the statute, and the services have repeatedly agreed to the MLC's funding requests, which have increased steadily over time and represent significant increases over the total costs that were collectively spent on license administration by the services before the MMA.

As noted, there have been clear improvements in the matching of works and payment of royalties—the core goal of the MLC's mandate. But DiMA's members also believe, based on their years of experience in license administration, that the centralization of more, higher quality data in the MLC database as required by the MMA, has been the primary driver of that improvement.

The MMA explicitly provides that the services are responsible only for the *reasonable* costs of running the collective. Reasonableness inherently includes the principles of cost-benefit and responsible financial stewardship, which should be central to the MLC's budgeting and spending approach. For other collectives, which must use the royalties they collect to cover their operations, these concepts are implicitly and explicitly incorporated in their financial planning. Just as those organizations must justify their expenses as a share of the royalties that would otherwise get paid to rightsholders, the MMA did not hand the MLC a blank check.

The true measure of reasonableness should be clear improvements in efficiency and effectiveness in the MLC's core functions—are more royalty-bearing works registered, are more works matched, are more royalties paid through to the right owners, and is all of that done with increasing efficiency over time. And along with that increase in efficiency and effectiveness, we should ultimately expect to see costs *improve* over time, rather than simply continue to increase.

Reasonable budgeting becomes particularly important in the context of overreaching statutory and regulatory interpretations and resulting disputes in which the services are being asked to pay for advocacy that is both adversarial and outside the scope of the MLC's statutory remit, as I discussed above.

Regular review by Congress of budgeting and spending, measured against ongoing performance improvements and key performance indicators will help ensure that

the law lives up to its full potential and help the parties avoid inefficient and costly Copyright Royalty Board litigation over costs.

IV. Conclusion

While challenges remain in music licensing, the MMA was a major stride forward. DiMA and its members were proud to be a central part of the law's passage, and we continue to support the law. Our member companies interact with the MLC on a near constant basis, and we believe that they, like us, fundamentally want to improve the system, ensuring that songwriters get paid and fans can legally access music anytime, anywhere that they want.

When the MMA passed Congress, it was described on multiple occasions as a once-in-a-generation measure to improve the licensing system for all stakeholders, and to update our music licensing laws. Five years in, we continue to believe that is true. We will continue to do our part, working with our music industry partners, to promote a healthy music ecosystem.

DiMA's members want the MLC to succeed. More than that, they *need* the MLC to succeed. There is a tremendous opportunity for the MLC to sit at the center of a robust partnership between songwriters, music publishers, and digital music services, assisting all parties to realize the full commercial potential of this modern music marketplace. Guidance from this Committee to ensure that the MLC acts as a neutral administrator will help to advance the goals of the MMA and improve the system for all.

Thank you again for the opportunity to appear before you today, and I am happy to answer any questions.