

The Honorable Mitch McConnell  
Senate Majority Leader  
Russell Senate Office Building 317  
Washington, DC 20510

The Honorable Chuck Schumer  
Senate Democratic Leader  
Hart Senate Office Bldg 322  
Washington, DC 20510

The Honorable Chuck Grassley  
Chairman, U.S. Senate Committee on the Judiciary  
Hart Senate Office Building 135  
Washington, DC 20510

The Honorable Dianne Feinstein  
Ranking Member, U.S. Senate Committee on the Judiciary  
Hart Senate Office Building 331  
Washington, DC 20510

July 16, 2018

**Re: CLASSICS Act (S. 2393 and H.R. 3301) and ACCESS to Recordings Act (S. 2933)**

Dear Majority Leader McConnell, Minority Leader Schumer, Chairman Grassley, and Ranking Member Feinstein,

We are a group of library, archives, and cultural preservation professionals that cares about the preservation and continued public access to sound recordings. We strongly urge the Senate to support Senator Wyden's ACCESS to Recordings Act and reject the deeply flawed CLASSICS Act.

We understand that a number of potential amendments have been proposed to the language of the CLASSICS Act with an eye towards evening out the balance between large commercial stakeholders and libraries who serve the public; however, even with amendments, CLASSICS will do permanent and irreparable harm to the public's interest in preserving older sound recordings and assuring public access to the same. On the other hand, ACCESS would apply the same rules that apply to other copyrighted works, benefitting artists and helping to preserve our cultural heritage and open up older works to rediscovery by scholars, creators and the public. ACCESS would establish a true public domain for older sound recordings, as well the a full complement of limitations and exceptions available for every other class of work—providing the necessary balance for the valuable monopoly rights granted to artists under copyright law.

We are particularly concerned with attempts to amend CLASSICS to include allowances for libraries to deal only in so-called orphan works, or works that are “not commercially available.” In our experience, such provisions are very challenging to apply in practice, and impossible to apply at scale. Making an orphan work determination is notoriously difficult and time consuming under any circumstances; but here, in the negotiations over this bill, the record labels have complained that they do not know what they own. It would be the height of hypocrisy to require libraries to figure out ownership status, when rightsholders themselves cannot do so.

Further, making determinations as to whether a specific work is “commercially available” imposes significant search costs, and generally requires case by case assessments with uncertain knowledge of rights ownership. In the abstract, it make seem like an easy task to figure out whether a work is “commercially available,” but in reality it can take up a huge amount of resources and yield no certainty at the end of the search.

For example, each 78rpm disc generally includes a single 3 minute sound recording on each side. To determine whether the recording is “commercially available,” a librarian would need to search any or all available databases, and possibly the physical holdings of record stores around the country, to determine whether the recording is available for purchase, online or offline. Whether used copies would satisfy the “commercial availability” standard remains unclear. The librarian would have to search all streaming services, whose offerings are in constant flux as licensing deals are made, amended, and canceled. A work which is available one day may be gone the next, while a work that is not offered on Friday may suddenly appear on Monday, without notice or fanfare. Finally, the librarian would have to assess whether the recording is potentially available for direct licensing--a practice normally engaged in only by commercial actors operating at substantial scale.

If we were to assume for the sake of argument that on average, it takes 1 hour to determine the “commercial availability” of a single recording, it would take 1 year working around the clock to clear 8,760 recordings. For the Great 78 Project<sup>1</sup> which aims to digitize and make available every 78rpm disc ever recorded (an estimated 3 million works) it would take 342.5 years. Complying with this system would pose a challenge even if there were only a handful of works at issue. But for scale users like libraries and archives, it would be an impossible hurdle.

CLASSICS cannot be “fixed.” The United States Copyright Office, at the request of Congress, spent more than a year studying how best to solve the problem of pre-1972 recordings, considering and balancing the needs of all stakeholders, and their report<sup>2</sup> is very much in line with the bill proposed by Sen. Wyden. We therefore urge the Senate to focus on creating a reasonable and balanced approach to reforming music copyright laws, and the ACCESS Act is the clear path forward.

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<sup>1</sup> <http://great78.archive.org>

<sup>2</sup> <https://www.copyright.gov/docs/sound/pre-72-report.pdf>

Sincerely,

Brewster Kahle, Founder and Digital Librarian  
Internet Archive

Tanya Zanish-Belcher, President  
Society of American Archivists

Cary Ginell, President  
Tim Brooks, Chair, Copyright and Fair Use Committee  
Association for Recorded Sound Collections

B. George, Director  
ARChive of Contemporary Music

Mark McKnight, President  
Music Library Association

George Blood, President  
George Blood Audio/Video/Film/Data

David Seubert, Curator for the Performing Arts Collection  
University of California, Santa Barbara