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MARK WALKER, CHAIRMAN
RSC THE REPUBLICAN STUDY COMMITTEE

H.R. 5447 – Music Modernization Act (Rep. Goodlatte, R-VA)

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FLOOR SCHEDULE:

Expected to be considered on April 25, 2018, under a suspension of the rules which requires 2/3 majority for final passage.

TOPLINE SUMMARY:

H.R. 5447 would modernize U.S. copyright law as it pertains to music licensing to improve efficiency, decrease liabilities, and accommodate the proliferation of digital media, making music licensing more transparent.

COST:

A Congressional Budget Office (CBO) estimate is not yet available.

Rule 28(a)(1) of the Rules of the Republican Conference prohibit measures from being scheduled for consideration under suspension of the rules without an accompanying cost estimate. Rule 28(b) provides that the cost estimate requirement may be waived by a majority of the Elected Leadership.

This legislation would permanently rescind $100 million of unobligated balances under the Department of Justice Assets Forfeiture Fund as an offset to the costs of the bill.

CONSERVATIVE CONCERNS:

- **Expand the Size and Scope of the Federal Government?** No.
- **Encroach into State or Local Authority?** No.
- **Delegate Any Legislative Authority to the Executive Branch?** No.
- **Contain Earmarks/Limited Tax Benefits/Limited Tariff Benefits?** No.

DETAILED SUMMARY AND ANALYSIS:

H.R. 5447 would modernize U.S. copyright law as it pertains to music licensing to improve efficiency, decrease liabilities, and accommodate the proliferation of digital media, making music licensing more transparent.

Section 102 of this legislation overhauls the existing section 115 of the Copyright Act to create a new blanket licensing system established by the legislation. It clarifies what the requirements are for obtaining a compulsory license for digital music providers.

Section 102 would eliminate the current system of filing a notice of intent with the copyright office, instead requiring the notice be filed with the copyright owner. If the party fails to file notice for non-digital phonorecord deliveries, they become permanently ineligible for compulsory licenses, though may still obtain voluntary licenses. If they fail to obtain a license for digital phonorecord deliveries, the party becomes ineligible to obtain a license for three years. A record company may obtain an individual download license if they comply with notice requirements. The record company would be required to provide statements of account and pay royalties.

Subsection 115(c) provides general conditions relevant to compulsory licenses to accommodate the reforms provided by a new Subsection 115(d) of Title 17, which establishes a new compulsory blanket licensing system.

Under subsection 115(c) to receive royalties under a compulsory license, the copyright owner must be identified in the registration or publicly at the Copyright Office. The owner is eligible for royalties for phonorecords made and distributed after identification. This section would establish what royalties are for phonorecords other than digital phonorecord deliveries and for digital phonorecord deliveries. Copyright owners of nondramatic musical works and those entitled to obtain compulsory licenses would be able to negotiate terms and rates for royalty payments.

This legislation would allow chapter 8 proceedings to determine reasonable rates and terms of royalty payments. The schedule of reasonable rates and terms determined by the Copyright Royalty Judges would be binding on all copyright owners of nondramatic musical works and on those entitled to obtain compulsory licenses, representing rates and terms that most clearly represent those that would have been negotiated between willing parties in the marketplace. This section also enumerates terms and conditions for voluntary licenses and contractual royalty rates.

Subsection 115(d) details the new compulsory blanket licensing system, ending the Notice of Intent process performed through the Copyright Office. A digital music provider that qualifies for a compulsory license would be permitted to obtain a blanket license from copyright owners through a mechanical licensing collective for the creation and distribution of digital phonorecord deliveries of musical works through covered activities. A blanket license:

> ''(i) covers all musical works (or 6 shares of such works) available for compulsory licensing under this section for purposes of engaging in covered activities, except as provided in subparagraph (C); ii) includes the making and distribution of server, intermediate, archival, and incidental reproductions of musical works that are reasonable and necessary for the digital music provider to engage in covered activities licensed under this subsection, solely for the purpose of engaging in such covered activities; and iii) does not cover or include any rights or uses other than those described in clauses (i) and (ii).''

This subsection would further detail the interaction of compulsory licenses with other existing licenses, including voluntary licenses.

Digital music providers that obtain and comply with a valid blanket license would not be subject to actions for infringement of exclusive rights provided for in section 106.

The updated subsection 115(d) further outlines the procedures for obtaining a blanket license, including the submission of notice of license to the mechanical licensing collective, specifying the covered activities in which the provider seeks to engage. This subsection would also provide for dispute resolution in federal district court. Blanket licenses would be effective on and after the license availability date.

This subsection details what the mechanical licensing collective is, meeting minimum criteria as a nonprofit single entity that is endorsed by and supported by the majority of musical works copyright owners over the preceding three years, that can demonstrate that it has or will have by the time the license is available, the

capabilities necessary to perform the required functions of the mechanical licensing collective, and has been properly designated by the Register of Copyrights. The independent non-profit would be funded by administrative fees paid for by music streaming companies.

This legislation details the process for designation of the mechanical licensing collective (MLC) by the Register of Copyrights, and provides for the opportunity for redesignation every five years. If the Register cannot identify an appropriate entity that meets all of the conditions for designation, the Register is permitted to choose a closest alternate designation that nearly fulfills the qualifications required for carrying out the MLC's responsibilities. Prior to an initial designation, the Board of Directors, the various committees, and the contact information for the collective must be identified to allow for the submission of comments. This requirement would not be subject to the alternate designation language.

The MLC would be responsible for several activities including: offering and administering the blanket licenses, collecting and distributing royalties from digital providers, performing efforts to identify and locate copyright owners of works embodied in sound recordings, maintaining a musical works database, investing in relevant resources, providing a process so that copyright owners can assert ownership, participating in proceedings before Copyright Royalty Judges and before the Copyright Office, and maintaining records of its activities. The MLC would be permitted to administer voluntary licenses, would be restricted from negotiating or granting licenses pertaining to public performances, and would be prohibited from lobbying the government.

The MLC would consist of 14 voting members and 3 nonvoting members from across the music publishing, professional songwriting, and nonprofit music worlds. It would also include a representative of the digital licensee coordinator. The board would be required to establish an operations advisory committee, an unclaimed royalties oversight committee, and a dispute resolution committee. The MLC would be required to publish an annual report made publicly available and make available a musical works database.

The MLC would be required to make publicly available, lists of blanket and significant nonblanket licensees.

This legislation would detail the process for the MLC to collect royalties and properly and rightfully distribute the royalties. It would provide for the collection of royalties that cannot be distributed for a variety of reasons. It would further provide for efforts on the part of the MLC to collect royalties from bankrupt licensees. Unmatched royalties must be held for a minimum of three years in an interest bearing account. The legislation provides for the process for claiming royalties for works initially unmatched. The MLC must create publicize a searchable rights ownership database. When a work is claimed, the royalties and interest are then paid out, and the database updated so that future royalties are matched.

The unclaimed royalties oversight committee would be required to detail procedures for equitably distributing unclaimed royalties, subject to board of director approval.

The dispute resolution committee would, through a determined process, address and resolve disputes among copyright owners pertaining to ownership interests in licensed musical works. The collective would only face liability in the event of gross negligence. A copyright owner would be permitted to seek redress in a federal district court.

The MLC may be audited by a copyright owner(s) to verify the accuracy of the payment of royalties, after filing a notice of intent to conduct an audit with the Copyright Office.

The MLC would be required to maintain all records of its operations, giving copyright owners the right to access the records.

This legislation would also provide for the terms and conditions of a blanket license. Digital music providers could obtain a blanket license after giving advance notice to the MLC, so long as they correct any errors on

their application and have not had a blanket license cancelled in the previous three years. Digital music providers must report and pay royalties to the MLC under the blanket license on a monthly timetable, with monthly reporting due 45 days after the end of the monthly reporting period. This subsection details the data to be included in the report. Records of use would be required to be maintained and made available to the MLC.

Digital music providers would be required to engage in good faith efforts to obtain information from copyright owners that can be included in the MLC's database. Digital music providers and significant nonblanket licensees would be required to pay the administrative assessment of the MLC.

The MLC would be permitted to conduct an audit of digital music providers operating under blanket license to confirm the accuracy of royalty payments. This legislation also provides for conditions under which a digital music provider may be considered in default and the procedure for providing notice of default and termination of a blanket license. A provider would be permitted to seek review of this determination, de novo, in federal district court.

This legislation provides for a digital license coordinator (DLC) as a single, non-profit entity, endorsed and substantially supported by digital music providers and nonblanket licenses covering the greatest share of the market over the preceding three years. The DLC represents the interests of digital music services. This provision provides for its initial designation, a periodic review of designation, and potential redesignation, and its core authorities and functions. The coordinator would be prohibited from lobbying the government. The digital licensing system could still proceed even if a coordinator cannot be chosen.

This legislation would further detail requirements for significant nonblanket licenses, including the submission of a notice of nonblanket activity to the MLC within a prescribed time period, accompanied by a report of usage and any payment of the administrative assessment. Significant nonblanket licensees would continue to provide monthly reports of usage. Failure to pay the assessment and/or submit the required reports may be actionable in court for damages. The MLC would be required to provide the coordinator with a monthly report on noncompliant licensees.

The MLC would generally be funded by an administrative assessment set by Copyright Royalty Judges, paid by digital music providers and significant nonblanket licensees and through voluntary contributions made through agreements with copyright owners. The fees would be set as either a percentage of royalties or another usage-based method. This legislation would provide guidance to the Copyright Royalty Judges as to how to set interim rates if the funding is inadequate, as well as on a late fee for nonpayment. The digital licensee coordinator and the MLC could not participate in rate setting. The administrative assessment could be periodically adjusted through enumerated procedures.

This legislation details a procedure for transferring the existing licensing regime to the new blanket system provided for by this legislation. Current compulsory licenses would automatically become blanket licenses on the license availability date. Voluntary licenses remain unchanged until their expiration or dissolution. Notices of Intention would no longer be accepted as soon as the legislation is enacted. This legislation would provide for a limitation on liability for unlicensed uses before January 1, 2018, if digital providers make a good faith effort to locate and pay royalties to the copyright owner for uses before the license availability dates. When a blanket license is available, non-matched royalties must be remitted to the MLC within 45 days. Late fees and infringement causes of action would also be limited for digital music providers in compliance with requirements pertaining to unmatched musical works. This provision would not alter an existing right of action.

This legislation would detail legal protections for licensing activities, including exemptions and limitations. The MLC would not be liable for claims arising from good-faith administration of policies and procedures, other than for correcting under or overpayment of royalties. The MLC, however, would not be immune to suit in a federal district court.

The Register of Copyrights would have the authority to conduct appropriate proceedings and issue relevant regulations. They must adopt regulations pertaining to governing business confidentiality. Regulations would be subject to judicial review.

Blanket licenses would only extend to covered activities and this legislation would not apply in any form to public performance in a musical work.

This legislation includes technical amendments to clarify that the administrative assessment is determined through the provisions supplied by this legislation and not through existing procedures.

Copyright Royalty Judges must update their regulations within 9 months following enactment.

This legislation would create a uniform willing buyer, willing seller rate standard, so that anyone would be permitted to seek a license and pay a statutory rate. The court must consider free-market conditions in setting rates. The current discounted "pre-existing services" rate standard would be repealed.

This legislation would repeal section 114(i) of the Copyright Act, allowing rate court judges to consider royalty rates as benchmarks when setting performance royalty rates for composers and songwriters.

Section 104 would provide for the random assignment of rate court proceedings for ASCAP and BMI to judges in the Southern District of New York who are not the judges that oversee the consent decrees of performing rights societies.

Title II contains the text of the Compensating Legacy Artists for their Songs, Services, and Important Contributions to Society Act (CLASSICS), addressing unauthorized digital performances of songs recorded prior to 1972. Presently, there is no federal copyright protection for pre-1972 works. This title would create a remedy for the use of songs fixed between January 1, 1923 and February 14, 1972, when no framework existed. Transmissions of sound recordings fixed after that date, if the transmitting entity satisfies statutory licensing for nonexempt works, or if the transmitting entity pays statutory royalties and provides notice, are permitted. This legislation would provide for payment for post 1923 works until February 15, 2067, at the same rate as works produced after February 14, 1972. It would preempt litigation in the event back royalty payments are made within 270 days of this legislation becoming law. Pre-1972 royalties and post-1972 royalties would be paid and distributed in the same manner, with SoundExchange performing the duties.

Direct licensing of song recordings fixed between January 1, 1923 and February 14, 1972 is permitted if the transmission is included in a voluntarily negotiated license agreement between the rights owner and the entity performing the recording. For license agreements that pertain to sound recordings during the prescribed period, the licensee would be required to pay to the collective that distributes receipts, "50 percent of the performance royalties for the transmissions due under the license, with such royalties fully credited as payments due under the license." This title would preempt state common law copyrights or other equivalents. Fair use, use of libraries, archives, and educational institutions, and section 512 limitations are available as defenses to claims. Principles of equity would apply to remedies for a violation in the same matter as they apply to remedies for copyright infringement.

An award of damages may be made if the rights owner has filed a schedule specifying the title, artist, and rights owner with the Copyright Office. Suit may not arise until 90 days after the works are indexed in the Copyright Office. Transmitting entities would be required to furnish their contact information with the Copyright Office, so that owners can pinpoint which entities are transmitting their works to notify them to stop, if they choose not to receive webcasting royalties. This title provides a limitation on the award of statutory damages and attorney's fees for the first 90 days a notice is issued to the transmitter. If a notice is undeliverable, the 90-day clock would begin on the attempted delivery date. Safe Harbors found in Section

230 of the Communications Act of 1934 would also apply to works specified under this title. This title would be made effective on the date of enactment of the legislation.

Title III would provide for the text of the Allocation for Music Producers (AMP) Act

This legislation would codify the practice of SoundExchange to accept letters of direction in order to pay producers, mixers, or sound engineers that were part of the creative process in creating a sound recording, a portion of the webcasting royalties collected. This practice would be expanded to include new royalties for pre-1972 works that can now be included due to Title II of this legislation. Absent a letter of direction, following 4 months' notice to a copyright owner without objection, a set amount of 2% of the webcasting royalties from the work are paid to the producers, mixers, and sound engineers.

This legislation would permanently rescind $100 million of unobligated balances under the Department of Justice Assets Forfeiture Fund.

A comparison of the current system vs. the legislation can be found here.

Information on the CLASSICS Act can be found here.

A list of support can be found here.

An infographic can be found here.

OUTSIDE GROUPS IN SUPPORT:

National Music Publishers Association: NMPA Praises House Judiciary Committee Unanimous Passage of Music Modernization Act
Internet Association: Statement by Michael Beckerman, CEO of Internet Association
Free Market Groups (including Americans for Tax Reform, Freedom Works, Digital Liberty, and more): Free Market Groups Letter in Support of Music Modernization Act
Association Society of Composers, Authors, and Publishers: ASCAP CEO Elizabeth Matthews Statement on Introduction of Music Modernization Act H.R. 5447
Recording Industry Association of America: House Leaders Introduce New "Music Modernization Act"
The Recording Academy: Music Modernization Act Delivers Recording Academy's Vision for Unity
Copyright Alliance: Copyright Alliance Applauds Yesterday's Intro & Today's Unanimous Passage of Music Modernization Act of 2018 (H.R. 5447)
National Association of Broadcasters: NAB Statement on the Introduction of the Music Modernization Act
Council for Citizens Against Government Waste: CCAGW Urges Support for Music Copyright Modernization Act
Chamber of Commerce Global Innovation Policy Center: The Legislation That's Music to Music's Ears

COMMITTEE ACTION:

H.R. 5447 was introduced on April 10, 2018, and was referred to the House Committee on the Judiciary, and was ordered reported by the yeas and nays, 32-0, on April 11, 2018.

ADMINISTRATION POSITION:

A Statement of Administration Policy is not available at this time.

CONSTITUTIONAL AUTHORITY:

According to the sponsor, Congress has the power to enact H.R. 5447 pursuant to: Article I, Section 8, Clause 8 of the U.S. Constitution.

NOTE: *RSC Legislative Bulletins are for informational purposes only and should not be taken as statements of support or opposition from the Republican Study Committee.*