Sweeping Music Modernization Act Transforms Music Licensing for the Digital Age

By Steve Englund, Alison Stein, and Ava McAlpin

On October 11, 2018, the President signed into law the Orrin G. Hatch-Bob Goodlatte Music Modernization Act ("MMA").[1] This major piece of bipartisan legislation touches on nearly every aspect of U.S. copyright law that relates to licensing of either musical compositions (the musical notes and lyrics of songs) or sound recordings (audio recordings, including recordings of musical performances). The legislation is the result of many years of examination of reform proposals by Congress and the Copyright Office and many years of negotiations among industry stakeholders. The MMA makes five principal sets of changes to the Copyright Act, which are outlined below.

1. Blanket License for Digital Reproduction and Distribution of Musical Compositions

The MMA's centerpiece is a major rewrite of the "mechanical" compulsory license provisions in Section 115 of the Copyright Act. That license was originally created as part of the Copyright Act of 1909 to provide a mechanism for licensing reproduction and distribution of musical compositions embodied in recordings. Such licenses were available by serving on the copyright owner notices of intent ("NOIs") that listed the individual musical compositions that the licensee intended to use, and then paying statutory royalties on those individual compositions. In some cases, an NOI could be filed in the Copyright Office instead.

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However, the mechanical license system was under strain, as ownership of musical composition copyrights became increasingly fractured and the music market migrated from the sale of products such as CDs and permanent downloads and toward Internet streaming. Digital music providers found it difficult and expensive to obtain and administer mechanical licenses for each composition in their vast libraries, while music publishers and songwriters believed that providers often did not obtain valid licenses or pay required royalties, and began filing litigation against streaming services on that basis.[2]

The goal of the MMA's blanket license is to make compulsory mechanical license administration for digital uses more efficient and ensure that a higher proportion of usage results in payment of statutory royalties to the proper music publishers and songwriters. To do so, the MMA establishes the Mechanical Licensing Collective, a non-profit organization that will administer the blanket license industry-wide at the expense of digital music providers.[3] Among other things, the Mechanical Licensing Collective will develop and provide a publicly

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accessible database of current ownership information for musical compositions.[4] Because it will take some time to establish the Collective, the blanket license will not be available until January 1, 2021.[5] To obtain a blanket license once they become available, a digital music provider will need only submit a notice to the Collective.[6]

During the transition period (i.e., prior to January 1, 2021), a digital music provider's potential exposure to liability for copyright infringement is limited, so long as the digital music provider engages in good-faith, commercially reasonable efforts to identify, locate, and pay royalties to the owners of musical compositions, and pays any remaining unpayable royalties to the Collective once it is up and running.[7]

2. Federal Protection for Pre-1972 Sound Recordings

A separate title of the MMA, referred to as the "Classics Protection and Access Act," or the "Classics Act," extends copyright-like federal protection to sound recordings fixed before February 15, 1972, known as "pre-1972 recordings." Previously, such recordings were largely excluded from the federal copyright system and were instead protected under state law.[8] As a result, the law across the country lacked uniformity. For example, while most states gave the owner of a pre-1972 recording the right to control reproduction and distribution of its recording, the highest courts of two states determined that their respective states provided no public performance right in pre-1972 recordings.[9] Some large digital music services refused to pay for the public performance of pre-1972 recordings.

Now, under a new Section 1401, owners of pre-1972 recordings have federal protection against unauthorized use of their recordings that largely mirrors the scope of federal copyright protection, including the exclusive right to publicly perform such recordings by means of digital audio transmission, for the following periods:

- For recordings published before 1923, the term of protection ends on December 31, 2021;
- For recordings published between 1923 and 1946, the term of protection continues until December 31 of the year 100 years after publication;
- For recordings published between 1947 and 1956, the term of protection continues until December 31 of the year 110 years after publication; and
- For all other recordings (including unpublished recordings and ones published after 1956), the term of protection ends on February 15, 2067.[10]

The continuation of state protection for pre-1972 recordings when all other works were brought into the federal system in the Copyright Act of 1976 was a historical anomaly that made increasingly less sense as the music market migrated away from physical distribution and toward digital distribution with national reach. Federalizing protection for these works will

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provide uniform legal treatment that should facilitate commerce and result in consistent payment for the use of these works.

3. Willing Buyer, Willing Seller Rate Standard

The Copyright Act provides various "statutory licenses" that allow use of music by any qualifying user on set terms, if royalties are paid at a rate determined by the Copyright Royalty Judges. Previously, some users of music under statutory licenses paid statutory royalties set under a "willing buyer, willing seller" standard, while others paid statutory royalties set under an older standard that had been interpreted to allow below-market rates. The MMA establishes a "willing buyer, willing seller" standard for setting royalty rates for mechanical licenses for musical compositions under Section 115 of the Copyright Act[11] and for all users of sound recordings under the statutory license in Section 114 of the Copyright Act.[12]

4. Changes to ASCAP and BMI Rate Court Proceedings

For many decades, royalty rates under performance licenses for musical composition issued by the public performance organizations ASCAP and BMI have been subject to oversight by federal judges in the Southern District of New York, pursuant to antitrust consent decrees between those organizations and the Department of Justice dating back to 1941. Proceedings to set rates under those consent decrees are commonly referred to as "rate court" proceedings. Music publishers and songwriters have long sought changes to certain aspects of those proceedings. The MMA makes two such changes.

First, assignments of judges to hear those proceedings will now be made randomly, on a case-by-case basis.[13] Previously, one judge had retained jurisdiction over each consent decree for many years.

Second, the MMA removes a provision in Section 114(i) that previously prohibited the rate courts from considering evidence of royalty rates for sound recordings when setting rates for public performances of musical compositions. When Congress created the digital performance right in sound recordings, that provision was intended to protect musical composition rates from erosion. However, more than twenty years later, it seemed like an unnecessary constraint on the conduct of rate court proceedings.

5. Payment of Statutory Royalties to Producers and Other Creatives

Yet another title of the MMA is referred to as the "AMP Act," which codifies procedures used to pay producers and certain other creative participants their share of Section 114 statutory royalties for public performances of sound recordings via non-interactive digital transmissions (e.g., by satellite radio and webcasting services).[14] It also creates a new process for such persons who contributed to pre-1995 recordings to claim a share of royalties when they are not able to obtain a "letter of direction" of the kind contemplated by many producer agreements.[15]

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Finally, the AMP Act simplifies the tax treatment of situations where a producer is paid out of the artist's share of statutory royalties.[16]

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Notes

[1] Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (2018).

[2] See, e.g., Wixen Music Publishing, Inc. v. Spotify USA, Inc., consolidated with Ferrick et al. v. Spotify USA, Inc., 16-cv-08412-AJN (S.D.N.Y.).

[3] 17 U.S.C. § 115(d)(3), as amended by Pub. L. No. 115-264, Title I, § 102, 132 Stat. at 3686–88.

[4] 17 U.S.C. § 115(d)(3)(C)(i)(IV) & (d)(3)(E), as amended by Pub. L. No. 115-264, Title I, § 102, 132 Stat. at 3687, 3692.

[5] 17 U.S.C. §§ 115(b)(2)(B), (d)(2)(B), (e)(15), as amended by Pub. L. No. 115-264, Title I, § 102, 132 Stat. at 3678, 3685–86, 3720.

[6] 17 U.S.C. § 115(d)(2)(A), as amended by Pub. L. No. 115-264, Title I, § 102, 132 Stat. at 3684.

[7] 17 U.S.C. § 115(d)(10), as amended by Pub. L. No. 115-264, Title I, § 102, 132 Stat. at 3713 –16.

[8] See 17 U.S.C. § 301(c), prior to amendment by Pub. L. No. 115-264. Sound recordings did not receive any protection under federal law at all until the Sound Recording Amendment of 1971. Sound Recordings Act, Pub. L. No. 140, 85 Stat. 39 (1971). Even then, the Sound Recording Amendment of 1971 excluded protections for sound recordings that were made prior to February 15, 1972. Id. Some foreign-origin pre-1972 recordings were "restored" to federal protection during the 1990s. 17 U.S.C. § 104A.

[9] See, e.g., Flo & Eddie, Inc. v. Sirius XM Radio, Inc., 229 So.3d 305 (Fla. 2017); Flo & Eddie, Inc. v. Sirius XM Radio, Inc., 28 N.Y.3d 583 (N.Y. 2016).

[10] 17 U.S.C. § 1401, Pub. L. No. 115-264, Title II, § 202, 132 Stat. at 3728–3737.

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[11] 17 U.S.C. § 115(c)(1)(F), as amended by Pub. L. No. 115-264, Title I, § 102, 132 Stat. at 3680.

[12] 17 U.S.C. § 114(f)(1)(B), as amended by Pub. L. No. 115-264, Title I, § 103, 132 Stat. at 3723.

[13] 28 U.S.C. § 137(b), as amended by Pub. L. No. 115-264, Title I, § 104, 132 Stat. at 3726.

[14] 17 U.S.C. § 114(g), as amended by Pub. L. No. 115-264, Title II, § 301, 132 Stat. at 3737–3741.

[15] Id.

[16] Id.