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Music Licensing Overhaul Signed Into Law

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On October 11, 2018, President Trump signed into law the Orrin G. Hatch-Bob Goodlatte Music Modernization Act ("MMA"). The MMA consolidates three previously separate bills introduced over the past year: the original Music Modernization Act, the CLASSICS (Classics Protection and Access) Act, and the AMP (Allocation for Music Producers) Act. As many commentators have noted, the MMA represents the most significant music-related legislation since 1998's Digital Millennium Copyright Act.

Modernizing the Section 115 Mechanical License

Section 115 of the Copyright Act (17 U.S.C. § 115)[1] establishes a compulsory license for the rights to reproduce and distribute "mechanical" copies of nondramatic musical works, *i.e.*, the underlying compositions embodied in sound recordings. For the better part of a hundred years, recording artists have secured mechanical licenses from songwriters (or their affiliated music publishers) to include specific songs in their albums, CDs and, more recently, digital downloads. But the song-by-song licensing process mandated by the antiquated provisions of Section 115 has proved remarkably burdensome – not to mention risky – for interactive streaming services such as Spotify and Amazon, who typically offer tens of millions of songs for on-demand streaming, and nearly all of whom have been sued for hundreds of millions of dollars in statutory damages as a result of uncleared compositions that fell through the licensing cracks. The MMA was motivated by the industry-wide desire to fix that problem.

The Blanket Mechanical License. The chief innovation of the MMA is the introduction – by January 1, 2021 – of a blanket license for mechanical rights in interactive streams and downloads ("covered activities" under the statute). A digital music provider will be able to obtain a blanket license by filing a simple notice with the newly established Mechanical Licensing Collective, and thus avoid any need to file song-by-song notices.[2] § 115(d)(1)-(2). Rates for the blanket license will be set by the Copyright Royalty Board in judicial proceedings similar to those used to set rates and terms for the current Section 115 compulsory licenses. § 115(c)(1), (d)(8). Digital music providers and music publishers can also continue to negotiate mechanical licenses on a voluntary basis, with works covered by such licenses (and presumably payments for such works) carved out from the blanket license.

Liability Limits for Prior Unlicensed Uses. Digital music providers that comply with the payment and reporting terms of the blanket mechanical license, once available, will be shielded from infringement liability for reproducing or distributing musical works in covered activities. § 115(d)(1)(D). The MMA also severely limits service liability for mechanical copies made *prior* to the 2021 introduction of the blanket license, including activities prior even to enactment of the MMA itself. Specifically, in any infringement suit filed after January 1, 2018, the copyright owner's remedy is limited to the recovery of royalties due, provided the music service has made ongoing good-faith efforts (prescribed in detail) to identify and pay for all works used on its service, and has otherwise accrued payments for unidentified works. *See* § 115(d)(10). This effectively forecloses new lawsuits like those that bedeviled Spotify, Rhapsody, and other on-demand streamers accused of failing to secure mechanical licenses in advance of offering certain songs.

The Mechanical Licensing Collective. The MMA establishes a Mechanical Licensing Collective to collect and distribute section 115 royalties to music publishers and songwriters. § 115(d)(3). In order to fulfill that task, the Collective is charged with building and maintaining a Musical Works Database that will link sound recordings (as reported by licensee services) to the underlying musical compositions embodied in those recordings, along with the information identifying the owners of the compositions and their respective ownership shares. This database shall be made available to the public free of charge in a searchable, online format, and to digital music providers in a bulk, machine-readable format. *See* § 115(d)(3)(E).

Notably, the MMA largely limits the Collective to offering and administering (but not negotiating or pricing) the blanket license – a compromise motivated by the objections of private entities such as the Harry Fox Agency who were concerned the Collective would leverage its role as an industry-subsidized mechanical licensing administrator to compete in the voluntary licensing of performance, synchronization, lyric, and other publishing rights. While the Collective will be allowed to administer voluntary as well as compulsory licenses, that remit is limited to voluntary licenses granting only reproduction and distribution rights in covered activities. *See* § 115(d)(3)(C).

In a change from typical practice – where the expenses of collecting agencies like SoundExchange, ASCAP, and BMI are deducted from royalty collections prior to distribution – the Collective is to be built and funded by an administrative assessment paid by blanket licensees on top of their license fees. § 115(d)(4)(C), (d)(7). The dollar amount and allocation of this assessment across licensees will be determined in separate proceedings before the Copyright Royalty Board, the first of which is to commence within 270 days of enactment of the MMA and conclude within a year of commencement. *See* § 115(d)(7)(D).

Somewhat controversially, the MMA requires that even entities who may choose *not* to utilize the section 115 blanket license or the services of the Collective – what the Act calls "Significant Nonblanket Licensees" – nonetheless must pay a share of the administrative assessment and provide usage reports to the Collective or face enforcement actions and damages. § 115(d)(6). SNLs are defined as entities engaging in covered activities that offer more than 5,000 sound recordings under voluntary and/or individual download licenses and meet modest revenue thresholds. *See* § 115(e)(31).[3]

In another somewhat controversial provision, in the event a blanket licensee plays tracks that the Collective cannot tie to a copyright owner, the MMA requires the Collective to hold on to the royalties for such performances for three years in an interest-bearing account and to make a series of specified efforts to identify the rightful recipient. After that point, any still unclaimed royalties are to be allocated and distributed to known publishers based on their respective market shares – a process likely to favor large publishers with popular, well-known catalogs over smaller songwriters who may not know to register their works with the Collective. § 115(d)(3)(H)-(J).

Changes Beyond Section 115

The MMA alters in several significant ways the operation of the ASCAP and BMI rate courts and the Copyright Royalty Board, the judicial bodies charged with setting royalty rates for various uses of musical compositions and sound recordings.

Assignment of Judges in ASCAP and BMI Rate-Court Cases. To start, the MMA changes the manner in which judges are assigned to so-called "rate court" proceedings that set rates and terms for the public performance of musical works[4] under licenses from ASCAP and BMI. Currently, rate-setting cases under the ASCAP and BMI antitrust consent decrees are assigned to the same designated judges in the Southern District of New York: Judge Cote for ASCAP and Judge Stanton for BMI. Under the new law, rate-court petitions will be assigned to other S.D.N.Y. judges on a random basis, with Judges Cote and Stanton retaining jurisdiction over the ASCAP and BMI consent decrees generally but getting involved in specific rate-court cases only where a party seeks an interpretation of the respective Decree. *See* § 28 U.S.C. § 137(b).

Benchmark Evidence in Rate Court Cases. Previously, § 114(i) prohibited the ASCAP and BMI rate-court judges from considering as benchmarks the rates paid by digital music providers to sound recording owners (which historically have often been higher than the rates paid to perform the underlying musical works as licensed by ASCAP and BMI). Section 103 of the MMA maintains that prohibition, but now exempts certain service categories – namely, digital audio streamers such as Sirius XM, Pandora, and Spotify – from its ambit, thereby allowing the PROs to present evidence of sound recording royalty rates in future cases involving such entities. The MMA thus preserves the 114(i) prohibition for others, such as radio broadcasters (including their streaming operations) and video streamers.

Department of Justice Review of Consent Decrees. Section 105 of the MMA provides that, upon request, the Department of Justice will provide Congress with information relating to its review of the antitrust consent decrees governing the operations of ASCAP and BMI. The DOJ must also notify Congress before seeking to terminate an existing consent decree in federal court. This provision stems from the recent announcement by the Antitrust Division of the DOJ that it intends to review, and potentially terminate, the existing ASCAP and BMI decrees.

Changes to Copyright Royalty Board Rate Setting. Currently, the Copyright Royalty Judges are guided by the so-called "801(b)" standard when they set rates for the Section 115 compulsory mechanical licenses and the Section 114 statutory licenses covering the public performance of sound recordings by satellite radio and "preexisting subscription services" (*e.g.*, Music Choice). The MMA eliminates the 801(b) standard – which previously has provided the Judges a degree of policy discretion when setting rates – and imposes an across-the-board application of the "willing buyer/willing seller" rate-setting standard currently used to set the rates for non-interactive webcasters. That standard requires the Judges to set rates based on what would be negotiated on the open market, without the accompanying policy considerations. § 115(c)(1)(F); § 114(f)(1)(B).

Section 103 of the MMA also extends the statutory license rates applicable to satellite radio and the preexisting subscription services (currently set through year-end 2022) through the end of 2027, meaning there will be no need for the "SDARS IV" CRB rate-setting proceeding that otherwise would have set rates for the 2023-2027 period.

The CLASSICS Act

Title II of the MMA, the Classics Protection and Access Act (the "CLASSICS Act"), provides a new, *sui generis* digital performance right for sound recordings made before February 15, 1972, which had not previously been subject to federal copyright protection. Rather than providing for a full copyright in pre-72 recordings, the CLASSICS Act instead states that the unlicensed use of pre-72 recordings subjects the user (other than terrestrial radio broadcasters) to federal copyright infringement liability, with otherwise applicable state and common law claims preempted. 17 U.S.C. §§ 301(c), 1401(a), 1401(e). Furthermore,

statutory damages and attorneys' fees are available only if the rights owner has (i) previously filed paperwork with the Copyright Office identifying its pre-72 recordings and (ii) provided 90 days' notice to a music service that its use of the recordings is unauthorized. 17 U.S.C. § 1401(f).

To avoid infringement liability, music services can pay for pre-72 recordings through voluntary licenses or (if they qualify) under the above-mentioned statutory licenses (which on their face have governed only copyrighted post-1971 recordings). Such services must also pay three years of *back* royalties, if they have not done so already, to avoid liability for the pre-enactment period. § 1401(e). The law further provides that digital services that voluntarily license pre-72 recordings after enactment shall pay half of the agreed-upon royalties to SoundExchange for distribution to recording artists under the prevailing statutory splits. § 1401(d)(2).

In an effort to address the concerns of various public-interest groups, the CLASSICS Act does not extend this new federal protection for all pre-72 recordings until 2067, as was the case in previous drafts of the legislation. Rather, such recordings will enter the public domain after a period of 95 years after their publication plus a "transition period" that varies depending on their year of publication. (The net effect of the transition period, however, is that works recorded from 1956-1972 will still not enter the public domain until February 15, 2067.) § 1401(a)(2)(A). The CLASSICS Act also confirms that federal defenses to infringement such as fair use and the DMCA safe harbors apply to pre-72 recordings, and provides certain additional safe harbors for the non-commercial use of orphaned pre-72 recordings by librarians, archivists, and the like. § 1401(c), (f).

The AMP (Allocation for Music Producers) Act

Title III of the MMA, likely the least controversial portion, provides that the entity that collects and distributes sound recording royalties under section 114 statutory licenses (currently SoundExchange) can distribute a share of the royalties to producers, sound engineers, and mixers pursuant to "letters of direction" submitted by artists or record companies where the producers' or engineers' contracts with the artists provide for such payment (or, for sound recordings fixed before November 1, 1995, even absent such a contractual promise). § 114(g)(5). Such producer payments are to be made from the 45 percent share of streaming royalties currently allocated to recording artists under the statutory license.

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[1] Subsequent section citations are to Title 17 (17 U.S.C.) unless otherwise indicated.

[2] Traditional section 115 licensees such as record companies can continue to follow the existing work-by-work licensing process for songs included in their recordings, and may obtain individual "download licenses" to cover their own distributions of such works in the form of downloads.

[3] Public broadcasting entities and digital providers offering only short, free-to-the-user preview streams in conjunction with *non*-covered activities (e.g., video synchronization) are specifically exempted. *See* § 115(e)(31)(B)(i)-(ii).

[4] Performance rights are distinct from the mechanical (reproduction and distribution) rights discussed above and covered by the § 115 blanket license.

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