The Music Modernization Act: An Oral History

The Orrin G. Hatch-Bob Goodlatte Music Modernization Act ("MMA")[1] was signed into law on October 11, 2018, a major accomplishment for a mostly united music industry. The MMA has many changes in store, including a new royalty collective for the reproduction of songs on digital music services, changes in the treatment of pre-72 sound recordings, and compensation for record producers.[2] Stakeholders and observers from across the music industry, including recorded music, publishing and the Copyright Office, will discuss some of the topics and controversies the new law addresses[3], how so many were able to come together to get to this historic point and what lies ahead.

I. Problems, Solutions and Compromises[4]

a. Section 115 Reform

i. Problems

Prior to the MMA, digital music providers such as Amazon, Spotify and others obtained "mechanical licenses" – licenses to reproduce and distribute copyrighted musical compositions (songs) in various physical and digital media – directly from the owners of the compositions or via a statutory license in Section 115 of the Copyright Act.[5] That statutory license, available since 1909, provided a mechanism by which users of songs could license their mechanical reproductions by providing notice to the copyright owner and paying fees in accordance with the relevant regulations.[6] In the 21st century, there was an advent of digital music providers making millions of songs available to the public via download or on-demand streaming .[7] These uses (called "digital phonorecord deliveries") required mechanical licenses; however, there was not an efficient way to obtain all the required licenses for the vast libraries of songs made available to consumers, as the available statutory license was not a blanket license. Adding to this

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[1] Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, https://www.congress.gov/115/bills/hr1551/BILLS-115hr1551enr.pdf.

[2] *See* U.S. COPYRIGHT OFFICE, AMENDMENTS TO THE COPYRIGHT ACT AS A RESULT OF THE ORRIN G. HATCH – BOB GOODLATTE MUSIC MODERNIZATION ACT (2018), https://www.copyright.gov/legislation/2018_mma_amendments.pdf. All references will be to the statutory text as it will be revised unless noted otherwise.

[3] For an excellent and detailed overview of the licensing structure in the music industry and surrounding controversies prior to passage of the MMA, *see* U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE (2015), https://copyright.gov/docs/musiclicensingstudy/copyright-and-the-music-marketplace.pdf.

[4] The MMA did not require a formal conference. In lieu of a conference report, and on behalf of the Chairmen and Ranking Members of the House and Senate Judiciary Committees, the House Judiciary Committee posted an amended background and section by section that would have been included in the official Conference Report for H.R. 1551 had a conference taken place: BACKGROUND AND PURPOSE OF THE MUSIC MODERNIZATION ACT (Oct. 19, 2018), https://judiciary.house.gov/wp-content/uploads/2018/04/Music-Modernization-Act.pdf.

[5] *See* 17 U.S.C. § 115 (2017).

[6] *See* 17 U.S.C. § 115(b) (2017); 37 C.F.R. § 210.

[7] These include popular services such as iTunes, Apple Music, Pandora, Spotify, Deezer and Amazon Music Unlimited, among others.

difficulty, there was a significant lack of data about many songs being used.[8] This resulted in substantial uncertainty and major lawsuits.[9]

ii. Solutions

The MMA reforms Section 115 to create a blanket license for digital phonorecord deliveries.[10] It creates a Mechanical Licensing Collective (MLC) that is responsible for collecting and distributing mechanical royalties from digital music providers and maintaining a central database of musical works that will be available to digital music services.[11] The MLC will be controlled by musical work copyright owners, and will be funded through an assessment levied upon digital music providers.[12]

iii. Compromises

Major compromises were reached prior to enactment, including the limitation of the licensing role of the MLC to mechanical reproductions only and adjusting the required composition of the MLC board to better ensure fair representation between songwriters and publishers.[13] The enacted bill also includes requirements to establish bylaws, inclusion of additional requirements in the MLC's annual report, requirements for the independence of officers of the MLC, and transparency and accountability standards for the MLC.[14]

b. Disparate rate standards

i. Problem

Prior to the MMA, rates for the mechanical license in Section 115 and the Section 114 statutory licenses (available to non-interactive digital music services to license the public performance of sound recordings) were set using two different standards. For mechanical licenses and for Section 114 licensees known as "pre-existing" services (which existed as of July 31, 1998), rates were set under a policy-oriented test.[15] Section 114 licensees that came into existence after July 31, 1998 had their rates set under a "willing buyer, willing seller" standard intended to mimic the marketplace.[16] These disparities, and the perception that services could pay rates that might be seen as "below market," were seen as unfair by many stakeholders.

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[8] To the extent that a user lacked information about the copyright owner after a search of Copyright Office records, the user could file public notice with the Copyright Office. *See* 17 U.S.C. § 115(b)(1) (2017). Such a notice obviated any obligation to pay royalties. *See* 17 U.S.C. § 115(c)(1) (2017) (stating that the copyright owner must be identified in the Copyright Office's public records to be entitled to receive royalties under the statutory license).
[9] *See* Class Action Complaint for Damages and Injunctive Relief, Lowery v. Spotify USA Inc., No. 1:16-cv-08412-AJN (S.D.N.Y. Dec. 28, 2015); Complaint for Copyright Infringement, Wixen Music Publishing, Inc. v. Spotify USA Inc., No. 2:17-cv-09288-GW-GJS (C.D. Cal. Dec. 29, 2017).
[10] 17 U.S.C. § 115(d).
[11] *Id.*
[12] *Id.*
[13] 17 U.S.C. § 115(d)(3)(C)(ii). Compare this with the language of the bill originally introduced in the House of Representatives, Music Modernization Act, H.R. 5447, 115th Cong. § 101 (2018), which does not contain any such restriction and explicitly allows the MLC to administer (but not negotiate or grant) public performance licenses.
[14] 17 U.S.C. § 115(d)(3)(C)(vii)-(ix). These transparency and accountability standards were expanded between the introduction of H.R. 5447 and final enactment of the bill.
[15] *See* 17 U.S.C. §§ 114(f)(1), 115(c)(3), 801(b)(1) (2017).
[16] 17 U.S.C. § 114(f)(2)(B) (2017).

ii. Solution

The MMA conforms the rate standard to "willing buyer, willing seller" for all uses under the Sections 114 and 115 statutory licenses.[17]

iii. Compromise

At the 11th hour, pre-existing services were able to lobby successfully for a change that would extend the rates determined under the policy-oriented test. Specifically, the MMA locks in the rates *initially* determined for satellite radio through December 31, 2022 until December 31, 2027.[18] The MMA also extends the *final* determination of rates for pre-existing subscription services for the rate period ending on December 31, 2022 through December 31, 2027.[19]

c. Consent Decree Rate Court Modifications and DOJ Review

i. Problems

Consent decrees have governed the activities of the major U.S. performing rights societies, ASCAP and BMI, since the 1940s. The two judges in the U.S. District Court for the Southern District of New York that oversee the consent decrees for ASCAP and BMI have also been assigned to hear rate determinations under those consent decrees.

The DOJ is currently reviewing all "legacy" consent decrees, including those governing ASCAP and BMI. There is a concern among some stakeholders that the DOJ might abruptly terminate the consent decrees and seriously disrupt the music industry.[20]

ii. Solutions/Compromises

In the MMA, the original judge who oversees interpretation of the consent decrees is not allowed to preside over rate determinations: the district court will use a random process to determine which judge presides over each case.[21]

As for the DOJ's consent decree review, the MMA requires that the DOJ provide timely briefings upon request to any Member of the Senate or House Judiciary Committees, and that the DOJ share with Members information and documents related to the review, subject to confidentiality.[22]

d. Pre-72 Sound Recordings[23]

i. Problems

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[17] *See* 17 U.S.C. §§ 114(f)(1), 115(c)(1)(F), 801(b)(1).
[18] *See* 17 U.S.C. § 804(b)(3)(B).
[19] *Id.*
[20] Victoria Graham, *Music Industry Eyeing Antitrust Cop's Next Move in Licensing*, Bloomberg Law (June 13, 2018), https://www.bna.com/music-industry-eyeing-n73014476476/.
[21] *See* 28 U.S.C. § 137(b)(1)(B).
[22] Pub. L. No. 115-264 § 105.
[23] For a thorough history and background on the treatment of Pre-72 Sound Recordings, *see* U.S. COPYRIGHT OFFICE, FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDINGS (Dec. 2011), https://www.copyright.gov/docs/sound/pre-72-report.pdf.

Prior to the MMA, sound recordings fixed prior to February 15, 1972 ("pre-72 recordings") were, for the most part, not subject to federal copyright law.[24] Instead, protection of those recordings was subject to the varying laws of the states.[25] In the digital age, this meant that the public performance of pre-72 recordings often went uncompensated, since it was particularly unclear whether that use was protected by the states. This resulted in several lawsuits, and conclusive determinations in New York and Florida that the public performance of pre-72 recordings was not protected.[26]

ii. Solutions

The MMA gives federal protection to pre-72 recordings under title 17, preempting state law.[27] The MMA also makes the statutory licenses for the non-interactive public performance of sound recordings available for pre-72 recordings.[28]

iii. Compromise

Certain digital music services, most notably Sirius XM, had entered into settlements regarding their use of pre-72 sound recordings. Sirius XM was concerned that the MMA would eradicate the benefit of those settlements.[29] The enacted bill contained a provision maintaining the benefit of those settlements while creating an obligation to pay the Collective for Section 114 statutory royalties (SoundExchange) a share of the settlement monies that would be paid to artists.[30]

e. Section 114 Royalties for Producers, Mixers and Engineers

The MMA includes a provision codifying a business practice of SoundExchange that allowed producers, mixers and sound engineers to receive royalties via a "letter of direction" submitted by the featured performing artist.[31] The MMA also creates a framework that allows these creative participants in recordings fixed prior to November 1, 1995 (the date that the digital public performance right for sound recordings was created) to participate in royalty payments if they follow a set of steps designed to notify the featured performing artist of their intent.[32]

II. What Lies Ahead

The most radical change in the MMA, the Section 115 blanket license, is technically not available until January 1, 2021, giving a two year lead up which allows time for legal, business and technological

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[24] 17 U.S.C. § 301(c) (2017).
[25] *Id.*
[26] *Flo & Eddie, Inc. v. Sirius XM Radio, Inc*., 28 N.Y.3d 583, 589 (2016); *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.* 229 So. 3d 305, 307 (Fla. 2017). The public court website versions are in the materials.
[27] Pre-72 recordings are technically not subject to "copyright." 17 U.S.C. § 301(c). Instead, the protection is *sui generis* under Section 1401 of Title 17, which, with limited exception, tracks the exclusive rights (and limitations) for sound recordings in the Copyright Act. 17 U.S.C. § 1401(a).
[28] 17 U.S.C. § 1401(b).
[29] Jim Meyer, *SiriusXM CEO Jim Meyer Explains the Trouble With The Music Modernization Act (Guest Op-Ed)*, Billboardbiz (August 23, 2018), https://www.billboard.com/biz/articles/news/legal-and-management/8471803/siriusxm-ceo-jim-meyer-explains-the-trouble-with-the.
[30] *See* 17 U.S.C. § 1401(d)(B).
[31] *See* 17 U.S.C. § 114(g)(5).
[32] *See* 17. U.S.C. § 114(g)(6).

developments to be made in preparation for the administration of the blanket license.[33] In the meantime some key rulemakings are ahead:

- Designation of MLC: The Register shall initially designate the MLC within 270 days of enactment – i.e. by July 8, 2019.[34]
- Musical Works Database: The Register shall establish requirements to ensure the usability, interoperability, and usage restrictions of the musical works database. [35]
- Reports of Usage: The Register shall adopt regulations regarding the form, content and maintenance of reports of usage.[36]

Other key rulemakings for other aspects of the MMA include:

- Noncommercial use of pre-72 recordings that are not being commercially exploited: The MMA contains a provision allowing non-commercial uses of pre-72 recordings that are not being commercially exploiting to obtain clearance if their use via a public notice process with the Copyright Office.[37]
- The Copyright issued an interim rule regarding the filing of pre-72 schedules. After receiving public comment, the Copyright Office is expected to finalize that rule.[38]

[33] *See* 17 U.S.C. §§ 115(d)(2)(B), (e)(15).
[34] 17 U.S.C. § 115(d)(3)(B).
[35] 17 U.S.C. § 115(d)(3)(E)(vi).
[36] 17 U.S.C. § 115(d)(4)(A)(iii).
[37] 17 U.S.C. § 1401(c).
[38] *See* 83 Fed. Reg. 52150 (Oct. 16, 2018).