A MODERN MELODY FOR THE MUSIC INDUSTRY: THE MUSIC MODERNIZATION ACT IS NOW THE LAW OF THE LAND

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On October 11, 2018, President Trump signed the Orrin G. Hatch-Bob Goodlatte Music Modernization Act ("MMA") into law. The MMA is intended to "modernize copyright law" as applied to songwriters, music publishers, digital music providers, record labels, and others involved in the creation and distribution of music. The MMA consists of three parts:

- Title I establishes a licensing collective to grant blanket mechanical licenses to digital music service providers and collect and distribute royalties to music composition rights owners;
- Title II creates a royalty structure to compensate owners of pre-1972 sound recordings; and
- Title III provides a statutory right for producers, mixers, and sound engineers to collect royalties for digital transmissions of sound recordings.

The MMA resulted from unprecedented alignment among Republicans and Democrats, the U.S. House and Senate, and music industry stakeholders. Nonetheless, this major update to copyright licensing law in the music industry may cause upheaval within the complex music marketplace structure, which encompasses songwriters, studio professionals, artists, record labels, and digital streaming services.

TITLE I — MODERNIZING MUSIC LICENSING FOR DIGITAL STREAMING SERVICES

Title I of the MMA changes the way qualified digital music providers, such as online digital music streaming services, pay royalties to songwriters (via their music publisher agents) for the reproduction and distribution of musical compositions. This centralized and streamlined payment process will be a welcome change for most songwriters, digital music providers, and others involved in the creation and distribution of music.

By way of background, most recorded music is subject to two copyrights, one in the underlying musical composition, which protects the music and lyrics of a work, and one in the sound recording, which protects the specific recorded performance of a work. Much of Title I of the MMA attempts to modernize the collection and payment of royalties for the public performance of musical compositions when played through a digital streaming service.

Currently, Section 115 of the U.S. Copyright Act sets forth a process through which almost anyone can obtain an automatic right to reproduce and distribute another's previously recorded musical composition. To obtain this

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right, or "compulsory license," the service must provide notice to the copyright owner of the composition (or, if the copyright owner cannot be located, to the Copyright Office), and agree to pay to the owner a statutory rate set by the Copyright Royalty Board. The MMA amends this process as it applies to digital music providers, theoretically making it simpler for digital music providers to secure the rights to play songs and for composers to receive the corresponding royalty payments.

The MMA creates a centralized "Mechanical Licensing Collective" (the "Collective") funded by digital music providers and administered by a board composed of songwriters and music publishers, with extensive governance, accounting and audit provisions. The Collective will have a board of directors composed of fourteen voting members (and three nonvoting members) that meet at least twice a year. Ten voting members will be representatives of music publishers, and four voting members will be representatives of professional songwriters. The Copyright Office is also allowed to re-designate an entity to serve as the Collective every five years. The MMA also specifies that an independent audit is to be performed every four–five years.

A digital music provider will no longer be able to file notices with the Copyright Office if the copyright owner cannot be identified or located. Instead, it will file a notice with the Collective, which will manage these notices and collect and distribute royalty payments, as well as implement a process for handling unclaimed royalty payments.

The Collective will maintain a database of eligible works. In exchange for providing notice to the Collective and agreeing to pay the statutory rate to songwriters, the digital music provider will receive a "blanket license" that covers use of all of the works in the database. Previously, digital music providers typically received licenses to these works on an individual basis. By obtaining and complying with the terms of the license, the digital music provider also will immunize itself from certain copyright infringement actions. More specifically, a "digital music provider that obtains and complies with the terms of a valid blanket license under this subsection shall not be subject to action for infringement of the [right of reproduction and distribution] arising from use of a musical work . . . to engage in covered activities authorized by such license." The MMA also limits the liability of digital music providers after January 1, 2018, so long as they undertake certain payment and matching obligations. Additionally, as part of the compromises that led to final passage of the MMA, the Collective is allowed to administer only the new blanket license, leaving licensing of synch rights, lyrics, and performance rights, for example, to be handled by existing entities such as the Harry Fox Agency.

To assist licensees in identifying copyright owners and copyright owners in recovering unclaimed accrued royalties, the MMA provides for the designation of a "digital licensee coordinator."

Title I of the MMA also modifies the standard the Copyright Royalty Board ("CRB") must use when determining rates digital streaming services pay songwriters for the mechanical licenses discussed above. This has the potential to increase royalty payments to songwriters from most digital streaming services. Previously, the CRB used a different legal standard to determine the amount streaming services pay, which was based on a series of public interest directives, compared to the rates digital radio services pay, which was based on a willing buyer/willing seller standard. The MMA harmonizes these differences and creates a consistent "willing buyer" and "willing seller" standard that requires the CRB to consider free market conditions. A last-minute compromise in the Senate resulted in language confirming that for satellite digital audio radio services, royalty rates will remain unchanged through 2027 (instead of 2022), in return for SiriusXM foregoing its right to appeal the recent CRB ruling that increased the rate from 11.5 percent of revenue to 15.5 percent of revenue. This compromise essentially cleared the way for passage of the MMA.

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TITLE II — "LET'S STAY TOGETHER" — CLASSICS ACT CREATES ROYALTY STREAM FOR PRE-1972 SOUND RECORDINGS

In contrast to the forward-looking Title I, Title II allows artists and record labels to obtain compensation for sound recordings created before 1972, the year that federal copyright protection was first extended to music sound recordings. Claims for compensation for the use of those legacy sound recordings by digital music services have been somewhat stymied by an incomplete patchwork of state laws and ongoing litigation over the scope of those state laws. Digital music services must now track, provide notice, and pay royalties for their use of pre-1972 music sound recordings equivalent to the royalties paid for post-1972 sound recordings.

More specifically, Title II, known as the Classics Protections and Access Act (the CLASSICS Act), creates a digital performance right in favor of rights owners of sound recordings recorded before February 15, 1972 (and after January 1, 1923). Absent a separate voluntary license between the sound recording rights owner and digital transmitting entity, the royalties due will be calculated and paid under the same rates and system (SoundExchange) currently applicable to post-1972 works. While the CLASSICS Act makes clear that this royalty extension does not render copyrightable these pre-1972 recordings, it does provide a "special federal sui generis form of protection" for digital music performances.

The CLASSICS Act further mandates protection for pre-1972 sound recordings for a base term of 95 years from first publication, with an additional period of three–15 years, depending on how recently the song was published.

Perhaps the most unique component of the CLASSICS Act is that it partially addresses orphan works — recordings for which the owner cannot be identified or contacted. For these sound recording orphan works, the CLASSICS Act permits "certain noncommercial uses of [pre-1972] sound recordings that are not being commercially exploited," provided that good faith-efforts are undertaken to identify whether the recording is being commercial exploited and further notice is provided to the Copyright Office.

TITLE III — AMP ACT: ACKNOWLEDGING THE VARIETY OF MODERN CREATIVE CONTRIBUTORS

Producers, mixers, and sound engineers contributing to the creation of a sound recording now have a statutory right to royalties from digital performance services through the SoundExchange Collective as result of Title III of the MMA, the Allocation for Music Products ("AMP") Act, amending Section 114(g) of the U.S. Copyright Act. The AMP Act acknowledges and updates the U.S. Copyright Act to include and codify studio professionals among those contributors counted for royalty receipt. Under the AMP Act, producers, mixers, and sound engineers will no longer need to rely upon contractual obligations to be compensated for digital transmissions.

According to the Senate Report, this statutory right codifies the requested royalty allocations from artists to studio professionals that SoundExchange has honored since 2004. While the Senate Report acknowledges that these allocations are already commercially in place for many sound recordings fixed after 1995, the AMP Act authorizes SoundExchange to accept a letter of direction from a featured artist to "distribute, to a producer, mixer, or sound engineer who was part of the creative process that created a sound recording, a portion of the payments to which the payee would otherwise be entitled from the licensing of transmissions of the sound recording."

For sound recordings fixed before November 1, 1995 (enactment of the Digital Performance Right in Sound Recordings Act), producers, mixers, and sound engineers who can demonstrate a failed attempt to solicit a letter

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of direction from the artist, nonetheless, may receive a distribution of 2% of collected receipts from licensing transmissions of the sound recorded; such percentage will be deducted from the amounts payable to the artist after an objection period. AMP Act Sections 114(g)(5)(B) (pre-1995 recordings) and 114(g)(6)(E) (right to receive payments) do not take effect until January 1, 2020, giving SoundExchange time to prepare internal processes.

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[1] The U.S. House of Representatives and U.S. Senate each unanimously passed somewhat separate versions of the MMA (on September 25, 2018, the House concurred in Senate amendments and sent the MMA to the President), and the legislation was introduced and advanced under various bill numbers during the course of its progress. The complete list of related bills is as follows:

1. https://www.congress.gov/bill/115th-congress/senate-concurrent-resolution/48/text (provided final name for the MMA)
2. https://www.congress.gov/bill/115th-congress/house-bill/5447 (full MMA as reported by House Judiciary Committee)
3. https://www.congress.gov/bill/115th-congress/senate-bill/2334 (Music Modernization Act, became Title I of MMA)
4. https://www.congress.gov/bill/115th-congress/senate-bill/2393 (CLASSICS Act, became Title II of MMA)
5. https://www.congress.gov/bill/115th-congress/senate-bill/2625 (AMP Act, became Title III of MMA)
6. https://www.congress.gov/bill/115th-congress/senate-bill/2823 (full MMA as reported out of the Senate Judiciary Committee)
7. https://www.congress.gov/bill/115th-congress/house-bill/1551 (full MMA, as passed by Senate; original House Bill 1551 was unrelated)
8. https://www.congress.gov/bill/115th-congress/house-bill/881 (AMP Act, became Title III of MMA)
9. https://www.congress.gov/bill/115th-congress/house-bill/4706 (Music Modernization Act, became Title I of MMA)
10. https://www.congress.gov/bill/115th-congress/house-bill/3301 (CLASSICS Act, became Title II of MMA)

[2] As stated by MMA sponsor and namesake, Rep. Goodlatte: "The reasons for such widespread support are clear. This legislation boosts payments for copyright owners and artists while reducing litigation costs for all parties; streamlines rights clearance for music delivery services; allows songwriters to help determine how their royalties are collected and allocated; protects the works of recording artists who created pre-1972 recordings; ensures sound engineers, mixers, and producers get paid; and gives the public more access to more music. This legislation will truly usher in a new era for music creators, distributors and consumers." 164 CONG. REC. E1319-20 (daily ed. Sept. 27, 2018) (statement of Hon. Bob Goodlatte of Virginia), https://www.govinfo.gov/content/pkg/CREC-2018-09-27/html/CREC-2018-09-27-pt1-PgE1319-3.htm.

[3] The MMA as enacted does not impact performance royalties for traditional, over the airwaves, broadcast radio services (essentially AM and FM stations, also termed terrestrial radio), but may impact the online services offered by traditional radio stations.

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[4] "Digital music provider" as defined under the MMA refers to a service engaged in covered activities that "has a direct contractual, subscription, or other economic relationship with end users of the service; … is able to fully report on any revenues and consideration generated by the service; [and] is able to fully report on usage of sound recordings of musical works by the service." "Covered activities" include permanent downloads, limited downloads, or interactive streams that qualify for compulsory licenses.

[5] Songwriters often grant their rights in the musical composition to a music publisher, which handles licensing and royalty collection and accounting for the songwriter for a share of the songwriter's revenue.

[6] For restrictions on the availability and scope of compulsory licenses, *see generally* 17 U.S.C. § 115(a).

[7] Paragraph 1 of the new Section 115(d) defines how the compulsory license for digital music providers interacts with other existing licenses, such as a voluntary license.

[8] The Collective will have a board of directors composed of fourteen voting members (and three nonvoting members) that meet at least twice a year. The ten voting members will be representatives of music publishers, and the four voting members will be representatives of professional songwriters. The Copyright Office is also allowed to re-designate an entity to serve as the Collective every 5 years. The MMA also specifies certain audit rights ….

[9] The MMA defines a "blanket license" as a compulsory license described in Section 115(d)(1)(A) to engage in covered activities.

[10] The rates that digital services pay for sound recordings currently are much higher than the rates digital services pay songwriters for musical compositions, and the free market provision in the MMA was intended to address that discrepancy.

[11] The MMA also implements a variety of other more technical changes. For example, the MMA modifies the procedure for selecting rate court judges for the consent decree proceedings for ASCAP and BMI, the two largest groups that collect performance royalties for most of the music industry. Instead of the current assignments of the Southern District of New York judges that have handled the administration of those consent decrees (for ASCAP, Judge Cote, and for BMI, Judge Stanton), the district court will use a random "wheel" process to determine which Southern District of New York judge will hear future consent decree rate setting cases.

[12] The public performance right in post-1972 sound recordings is limited to "digital audio transmissions." 17 U.S.C. 106(6).

[13] After enactment, music composition rights owners will have 180 days to file schedules of works subject to claims of statutory damages for ultimate population of a new searchable database established by the Copyright Office. Entities that publicly perform digital sound recordings must provide contact information with the Copyright Office within 30 days of enactment.

[14] Throughout the legislative process, Title II was commonly referred to as the "CLASSICS Act," the acronym for the Compensating Legacy Artists for their Songs, Service, & Important Contributions to Society Act.

[15] The CLASSICS Act emerged from the Senate as compromise with Sen. Wyden's now-defunct ACCESS to Recordings Act, which was poised to federalize pre-1972 sound recordings, with all attendant rights and limitations applicable to copyrightable works.

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[16] S. Rept. 115-339 (115th Congress Sept. 17, 2018) (Report of the Committee on the Judiciary to accompany S. 2823, The Music Modernization Act). As to these legacy sound recordings, the CLASSICS Act preempts state property laws governing infringement claims and also clarifies the applicability of certain limitations on the remedies afforded to these pre-1972 rights owners, including: fair use, certain uses by libraries and archives, section 230 of the Communications Act of 1934, 47 U.S.C. § 230, and certain permissions of educational institutions.

[17] S. Rept. 115-339 (115th Congress Sept. 17, 2018) (Report of the Committee on the Judiciary to accompany S. 2823, The Music Modernization Act).

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