

Dueling Pianos – Copyright Rules for Digital Music Delivery Almost in Harmony

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As we reported this spring, the “Music Modernization Act” (MMA) working through Congress avowed to bring the royalty determination formula for digital music services into the 21st Century. In April, the House of Representatives actually approved the MMA unanimously (415-0), likely one of the few, if only, things the House has agreed upon in some time. Not to be outdone, the Senate just last week unanimously passed the bill (with significant changes), and renamed

it the “Orrin G. Hatch Music Modernization Act,” for good measure. (Apparently, the Hon. Mr. Hatch is a songwriter in the Christian pop genre, having composed lyrics to more than 300 songs.) The MMA was sent back to the House for consideration of the Senate changes and was unanimously approved. Now, President Trump just needs to sign it and what was a mere bill will become a law. With the exception of satellite radio providers and some streaming services, the vast majority of the music industry is elated about the MMA, which was basically written by and for various interests in the industry.

Recall that there are two separate, primary expressions of music subject to copyright: 1) the song composition (i.e., the words and music embodied in sheet music); and 2) the sound recording (i.e., the performance of a song by an artist you hear on the radio or your MP3 digital download). The ability to collect a royalty for the use of these two forms of the same song is different and it further differs when the sound recording is in a digital form.

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A license to reproduce the composition (e.g., on a record or CD, or in a digital file) is called a “mechanical right.” Over time as recording mediums evolved beyond a piano paper roll into phonographs, cassette tapes, compact discs, and now digital files, the mechanical royalty has been applied to each new medium such that the songwriter receives a royalty for copies made. If copies of the song are sold even once, then anyone else can record and sell their sound recording of the song, without any negotiation over terms, as long as they pay the mechanical license royalty.

The primary focus of the MMA is to create a new mechanical rights clearinghouse called the “Mechanical Licensing Collective” (MLC) with a mandate to grant blanket mechanical licenses for streaming and interactive digital music delivery services and to remove the penalty for failure of notice to songwriters. The MMA charges the Copyright Office to solicit applications for an entity to undertake the functions of the MLC and report to a 14 member board. The Copyright Office must reevaluate and potentially rebid the MLC provider every 5 years.

Any public performance of a musical composition (which includes broadcast radio) is subject to a compulsory license fee to the songwriter only. The performing artists that make the sound recordings playing on the radio do not receive any compensation for the performance. However, the providers of “digital performances,” i.e., satellite radio and digital music streaming services do have to pay royalties to the owners of the sound recording (i.e., the performers).

The CLASSICS Act (Compensating Legacy Artists for their Songs, Service, & Important Contributions to Society Act), which is rolled into the MMA, extends the rights of owners of sound recordings to collect royalties for digital performances to songs recorded before 15 February 1972, which were exempt under the previous statutory scheme. Terrestrial broadcasters are still exempt from payment of any license fees to the artists for playing their songs on the radio, for either pre or post 1972 recordings. This is why satellite radio broadcasters and some of the digital music streaming services are not happy about the MMA.

Interestingly, the CLASSICS Act specifically states that pre-1972 recordings are not copyrightable subject matter under the Copyright Act, but that most of the remedies available to a copyright holder under the Copyright Act are available to owners of sound recordings. Thus, the CLASSICS Act does not preempt state and common-law rights for infringement of sound recordings as presently exist in a few states. Rather, the new federal law merely complements those other rights.

Finally, the MMA incorporates The AMP Act (Allocation for Music Producers Act), which provides for distribution “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. The AMP Act thus creates an entirely new class of rights-holders who are often incredibly involved in the creation and artistic development of sound recordings, but who have never participated in receipt of royalty revenue for performances of the sound recording they helped create. Note again, these royalties are limited to those collected

from digital satellite broadcasts or streaming services and not from radio performances.

It appears that the dueling pianos of the House and Senate are now playing the same tune and the MMA will be enshrined in the Copyright Act. Most industry stakeholders are excited about this “modernization” of the Copyright Act. Consumers of satellite radio and streaming services may see a rise in fees to cover the additional royalty schemes put in place on decades of music that was previously immune. Not to fear though—you can still get your music free on the radio.