Forum on the Entertainment & Sports Industries
AMERICAN BAR ASSOCIATION

VOLUME 35, NUMBER 1
WINTER 2019

ENTERTAINMENT AND SPORTS LAWYER

A PUBLICATION OF THE AMERICAN BAR ASSOCIATION FORUM ON THE ENTERTAINMENT & SPORTS INDUSTRIES

What You Need To Know About The Music Modernization Act

Abdo & Abdo[1]

On October 11, 2018, The Orrin G. Hatch-Bob Goodlatte Music Modernization Act ("MMA") was signed into law.[2] The MMA amends the Copyright Act and will have a significant impact on the music industry in general and the music publishing industry in particular.[3] Since the last major revision of the Copyright Act in 1998,[4] the music industry has experienced a profound paradigm shift. Most music consumers no longer purchase physical records, such as CDs, cassette tapes, and vinyl records.[5] In 2016, for the first time ever, streaming services accounted for the majority of U.S. music industry revenue.[6] As of Mid-Year 2018, the Recording Industry Association of America ("RIAA") reported that streaming accounts for 75% of U.S. recording industry revenue, followed by digital downloads at 12%, all physical product sales at 10%, and master use license fees (as synchronized with visual images for TV, movies, commercials, etc.) at 3%.[7] In the developing streaming economy, rightsholders receive only a fraction of what they once earned from the sale of physical audio recorded products.[8] Interactive and non-interactive digital service providers, such as Pandora and Spotify, are also subject to inequitable licensing regimes.[9] In particular, songwriter and music publishing have struggled in this new economy.[10]

The Copyright Act was ill-suited for the streaming economy. Its mechanical licensing scheme was inefficient.[11] Public performance royalty rates did not reflect the true market value of musical compositions.[12] The Copyright Act did not provide authority for the payment of digital sound recording royalties to those recordings fixed prior to February 15, 1972, ("pre-1972 sound recordings").[13] Finally, producers and engineers, who are creative contributors to sound recordings along with the musical performers, did not enjoy a statutory right to royalties on streaming revenues.[14]

The Copyright Act has been periodically updated to protect authors' economic rights in times of technological advancement.[15] From the invention of phonorecords, to player piano rolls, digital radio, internet file sharing, permanent audio downloads, music streaming and beyond, the law has always chased technology.[16] The MMA is yet another statutory fix that has been years in development following years of need.[17] This Article distills the MMA to its essential provisions, and explains its importance in the context of the digital music streaming economy.

A BREAKDOWN OF THE MMA

The MMA contains three titles: (I) "Music Licensing Modernization," (II) "Classics Protection," and (III) "Access, and Allocation for Music Producers."[18] Each addresses a unique area of copyright law.[19] The MMA, which received unanimous approval in Congress, is the product of compromise among various industry stakeholders.[20]

To understand the MMA, it is essential to understand that music audio recordings embody two distinct copyrights: (1) a musical composition copyright (songwriting and music publishing) and (2) a sound recording copyright (the recorded version of a composition).[21] Songwriters often assigned an administration and perhaps an ownership interest in the musical composition copyright to music publishers. With the administration authority granted by the songwriter (author), music publishing companies are empowered to collect revenues earned from songwriting and then account to and pay the songwriter their share of a

negotiated "split" of the collected revenues. Recording artists (performers) often assign rights to recording companies, by license or by grant of copyright ownership interest, the exclusive right to exploit sound recordings.

Copyright protection in musical compositions was initially created in 1831.[22] A "compulsory" mechanical license (further described below) was established in 1909 because of the mechanical ability of piano rolls to embody a musical composition.[23] The compulsory mechanical license provided the composition's author a fee of the sale of each piano roll containing his work.[24] Copyright protection for sound recordings did not become effective until 1972 (and only prospectively) when reel-to-reel and cassette tapes made copying sound recordings easier than previous technology allowed.[25] Broadcasters opposed the sound recording copyright for fear it would include a public performance right. In response, record labels agreed to a limited copyright that did not include a public performance right. Rights and revenues for both musical compositions and sound recordings are impacted by the MMA though the biggest benefactors are songwriters and music publishing companies.

Title I: Music Works Modernization Act

Copyright holders enjoy a set of exclusive property rights "intended to provide the necessary bargaining capital to garner a fair price" for their works.[26] Fundamental among these rights is the exclusive right to reproduce one's work and distribute copies thereof to the public.[27] To encourage creativity and prevent monopolization, Congress created a narrow exception to the reproduction and distribution rights for musical compositions: the compulsory mechanical license.[28] The compulsory license affords songwriters a royalty whether the songwriter performed their work or another musician performed it (cover recording).[29] Anyone can record a previously published or distributed audio recording, without permission from the songwriter, provided they pay a pre-set "statutory rate" royalty.[30] Section 115 of the Copyright Act sets forth the statutory scheme governing the license.[31] Section 115, among other things, prescribes strict procedural formalities for obtaining the compulsory license.[32] Failure to abide the statute's strictures, "forecloses the possibility of a compulsory license and, in the absence of a negotiated license, renders the making and distribution of phonorecords actionable as acts of infringement."[33]

Problems:

This process was created to address physical recorded products (and was applicable to digital downloads) for about 90 years, but was not suited for streaming. It permitted streaming services to avoid paying royalties for so-called "orphan works," which are works of unknown authorship or ownership.[34] Digital Music Providers ("DMPs"), such as Spotify, Apple Music, Pandora, etc., would simply not pay the unknown songwriters and would keep that money or treat it as unclaimed property.[35] There was no industry wide public data base pairing writers with songs.[36] Royalty payments were often untimely.[37] Filing requirements imposed a substantial administrative burden.[38]

Previously, when an entity wanted to obtain a mechanical license for a song, it had to file a Notice of Intent ("NOI") with the U.S. Copyright Office on a song-by-song basis (although some DMPs would simultaneously file tens of thousands in a single data dump that were referred to as "bulk NOI filings").[39] For services that license millions of songs, the process was ineffective and inefficient.[40] The Copyright Office was simply overwhelmed and it resulted in songs not being properly licensed and songwriters not being properly paid.[41] By filing the NOI, entities were immune from infringement until and if the songwriter or their publisher could be identified.[42] Since 2016, more than 45 million NOIs had been filed by DMPs.[43] The burden was on the rightsholders to claim royalties. Though DMP's could be exposed to legal liability for failing to comply with statutory formalities, payment, or ultimate possible infringement, the sheer volume allowed DMPs to use this loophole to enjoy the financial benefit of not paying the rightsholders while the overwhelming process was underway.[44] Notwithstanding the precedent of paying, DMPs even took the position in litigation that using compositions for interactive streaming did not require a mechanical license.

Under Section 115 of the Copyright Act, the Copyright Royalty Board ("CRB") sets the compulsory royalty rate for mechanical licenses.[45] A four-point legal standard is provided to determine the rate rather than considering what would be the rate between a willing buyer and a willing seller. The result was depressed rates. This was the thrust of the previously proposed Songwriters Equity Act that was unsuccessful in legislation.

The largest and oldest performing rights organizations ("PROs") in the U.S., ASCAP and BMI, collect money for their member songwriters from the public performance exploitations of their songs, notably broadcast over cable, satellite, and the internet. Because there was little competition in the marketplace, these PROs have been under government regulation vis-à-vis Consent Decrees dating back to 1941. Among other provisions, when these PROs are unable to negotiate an applicable royalty with a licensee, the matter is heard before a singular rate court judge, one for ASCAP and one for BMI, sitting on the District Court for the Southern District of New York, who hears and decides all disputes for the respective PRO. This gave rise to a potentially prejudiced environment where the appointed judge was improperly influenced by prior proceedings.

Furthermore, under Section 114(i) of the Copyright Act, the Federal Rate Court overseeing the Consent Decree, (also the District Court for the Southern District of New York), in setting blanket licenses and other public performance royalty rates applicable to the DMPs, cannot consider sound recording royalty rates negotiated in the free market. This creates a disparity in the sound recording and music composition licensing rates.

The Solutions:

Title I of the MMA establishes a new blanket mechanical license for qualified DMPs.[46] This enactment formally recognizes that under copyright law, digital interactive streaming

includes a mechanical reproduction right. A DMP that engages in digital distribution and adheres to other statutory requirements, namely, reporting requirements, may avail itself of the blanket license.[47] The statutory rate for the blanket license is set by the Copyright Royalty Board ("CRB") through scheduled rate-setting proceedings based on the willing buyer, willing seller standard rather than reasonable rate factors.[48] Voluntary licenses, entered prior to the MMA's enactment, remain in effect until the expiration of such licenses in accordance with their terms.[49]

Title I creates the Mechanical Licensing Collective ("MLC") to administer the newly created blanket license.[50] The MLC is an independent not-for-profit organization.[51] The MLC eliminates the need for third party mechanical license administration vendors and therefore results in grater payments to songwriters. The MLC will maintain a publicly accessible, searchable database of eligible works which includes, among other things, titles, mechanical rights ownership information including ownership percentages, and contact information for copyright owners.[52] The MLC database is a key feature of the MMA and will provide a wealth of information for fans and music industry professionals alike. The MLC will also maintain a publicly accessible database of orphan works to be publicized throughout the music industry and will provide a process whereby unmatched works can be reclaimed.[53] This unprecedented data base will make the identification, and hence payment to songwriters, much easier and more accurate. The MLC collects gross revenues from DMPs and remits those fees to appropriate rightsholders. Payment is made by DMPs to the MLC even if the rightsholder is not known. The MLC then remits royalties in accordance with usage data and other relevant information.[54] Royalties for works of unidentified authors ("unmatched works") are held by the MLC in an interest-bearing account.[55] Upon the expiration of the prescribed holding period of three years, unclaimed royalties are distributed (liquidated) on an equitable basis to known copyright owners.[56] Though this will benefit the major publishing companies and the writers they represent (as they control a greater market share) all writers will benefit as money will no longer be suspended in black-box accounts and at least 50% must be distributed to their writers. The MMA provides the right for the MCL to audit the DMPs and the right for the copyright owner to audit the MCL.[57] This accountability mechanism fortifies the likelihood of more accurate accountings and payments.

The MLC is governed by a board of directors consisting of ten members representing music publishers and four members representing self-published songwriters.[58] Industry trade associations are given a nonvoting advisory role.[59] There will be songwriters and self-published songwriters (along with publishers) on the MLC Board of Directors, Operations Advisory Committee, Unclaimed Royalty Oversight Board, and Dispute Resolution Committee. This representation by songwriters in the mechanical licensing regime is unprecedented and will likely contribute to what is expected to be greater revenues to songwriters and publishers.

Title I limits covered DMPs' legal liability for prior unlicensed use of a musical composition in cases commencing on or after January 1, 2018.[60] The copyright owner's sole and exclusive remedy against a covered DMP for such misuse is to recover under the statutorily prescribed royalty rate.[61] The copyright owner may not recover statutory damages or attorneys' fees.[62] To be afforded this protection, DMPs must comply with certain conditions commencing 30 days after enactment and running through the period 90 days after the License Availability Date, April 2021.[63] The Title I further adjusts the statute of limitation for infringement by a covered DMP to three years after the date on which the claim accrued, or two years after the blanket license availability date.[64] These measures, among others, eliminate the NOI regime, reduce DMPs' legal exposure, and foster investor confidence.[65] This limitation of liability, which avoids lawsuits such as the prior class action suits,[66] was a major incentive for DMPs to endorse the MMA.

Title I enacts rate court reform provisions.[67] First, it adopts the wheel approach in selecting judges to adjudicate consent decree disputes.[68] Under this approach, a judge is selected at random from a pool of federal judges of competent jurisdiction over the matter (the District Court for the Southern District of New York).[69] This allows the court to be more responsive to changes in market conditions and approach disputes with new eyes as opposed to the previous practice of a singular judge for each dispute by ASCAP and BMI.[70] Second, prior to the MMA, rate courts were disallowed from considering certain evidence when setting performance royalty rates.[71] Title I repeals Section 114(i) of the Copyright Act and permits courts to consider a broader body of evidence, including, "the rates and terms for comparable types of audio transmission services and comparable circumstances under voluntary license agreements."[72] ASCAP and BMI Rate Courts no longer must rely on the narrow legal standard but can consider free market value including concomitant sound recording rates.[73] Collectively, these considerations are referred to as the "willing buyer, willing seller standard." Satellite radio stations will employ the free market approach in setting rates and not the prior legal standard. These rate court and other reform measures should modernize the rate setting process and bring a fair market approach to the valuation of musical compositions. Accordingly, it is expected the publishers and songwriters will financially benefit.

Title II: Classics Protection and Access Act

In 1971, Congress extended limited federal copyright protection to sound recordings fixed on or after February 15, 1972, ("post-1972 sound recordings").[74] Congress limited the exclusive rights in sound recordings to a reproduction right and a distribution right.[75] Congress did not grant sound recording copyright owners a public performance right.[76] Unfortunately for performers (recording artists) and their recording companies, the MMA does not change this existing law. Performers still do not receive a performance royalty for the broadcast of their works over terrestrial (AM/FM, non-digital) radio. This had been a hard-fought

campaign by performers that was opposed principally by the National Broadcasters Association ("NAB") because such a payment would increase the cost of business for an industry that is losing market share and advertisers to the internet, cable, and satellite broadcasters.

Congress did not protect sound recordings fixed before February 15, 1972, ("pre-1972 sound recordings").[77] Congress, however, did not preempt states from protecting pre-1972 sound recordings under common law or state statute.[78] In 1976, Congress enacted sweeping copyright reform, but again declined to extend federal protection to pre-1972 sound recordings.[79] The Digital Performance Right in Sound Recordings Act created a limited public performance right for post-1972 sound recordings performed "by means of a digital audio transmission."[80] Pre-1972 sound recordings were not afforded this digital performance right.[81] Courts had subsequently declined to recognize a digital performance right in pre-1972 sound recordings on the grounds that it is an "inherently legislative task."[82]

Title II of the MMA creates a digital performance right for pre-1972 sound recordings.[83] Pre- and post-1972 sound recordings now enjoy the same digital performance royalty rights.[84] This creates new income for the performers of many pre-1972 hit recordings. SoundExchange will administer royalties for pre- and post-1972 sound recordings.[85] Title II does not afford complete federal copyright protection to pre-1972 sound recordings; rather, it creates a *sui generis* digital performance right.[86] The term of protection under this new scheme is as follows:[87]

PUBLICATION DATE	TERM
Pre-1923	Ends December 31, 2021
1923–1946	100 years from first publication, ending on December 31 of that year
1947–1965	110 years from first publication, ending on December 31 of the year
1957–February 15, 1972	Ends on February 15, 2067

Title II also provides a limitation on liability for state law claims for covered actions.[88]

Title III: Allocation for Music Producers Act

In addition to creating a digital performance right, the Digital Performance Right in Sound Recordings Act of 1995 established a statutory royalty right for featured recording artists for works performed on non-interactive, digital music services.[89] Studio professionals (i.e., producers, mixers, and sound engineers) were not included in the act and thus not afforded any portion of the royalty under the terms of the act.[90] Title III of the MMA addresses this inequity by amending Section 114(g) of the Copyright Act to give studio professionals the right to collect royalties from non-interactive, digital streaming pursuant to a letter of direction with the featured artist.[91] Title III codifies what has already been industry practice. Producers and engineers have often been accommodated by the recording artist with a share of that artist's "featured artist share" (administered by SoundExchange). However, there was no legal right for producers or engineers to this share and the accommodation was made only if there was an agreement between the featured artist and the producer (and other studio professionals). The allocation was also revocable by the artist at any time.

Since the digital performance right was not created until 1995, sound recordings released prior to 1995 did not contemplate the featured artist share nor the letter of direction process. Title III directs SoundExchange to establish a procedure for studio professionals to collect royalty payments without a letter of direction.[92] Provisions regarding pre-1995 recordings do not take effect until January 1, 2020.[93] Perhaps most significantly, Title III gives recognition to producers, engineers, and other studio professionals in U.S. copyright law for the first time ever.

COMPROMISE

Those that believe the MMA did not go far enough are dismayed that a provision of the Fair Play Fair Pay Act, which would have created a public performance right for sound recordings when broadcast over terrestrial radio, was not included in the legislation over concerns raised by the broadcast industry.[94] They see the legal protection given to streaming services as an unnecessary concession.[95] And they complain that the MMA does not address the licensing regime of musical works embodied in physical recordings. Those who believe the MMA went too far question the MLC's ability to maintain an accurate database and timely remit royalties to rightsholders. They dislike the administrative burden placed on songwriters and publishers to submit copyright applications for all of their musical works and sound recordings to the MLC. And they question whether the MLC database will inspire litigation over copyright ownership among co-authors. Others express umbrage at the government taking such an active role in regulating the marketplace at all.[96]

CONCLUSION

The MMA marks the latest evolution in copyright law. The MMA closes loopholes, streamlines the collection and remittance of royalties, reduces legal uncertainty for music streaming services, and adopts the "willing buyer, willing seller" standard for royalty rate setting. Songwriters, legacy recording artists, and recording professionals are treated more equitably under the law and will receive increased financial reward. Streaming services benefit from the efficiency of the blanket mechanical license and reduced legal exposure. Ultimately, the MMA will hopefully benefit fans, who will now have improved access to their favorite songs on more music delivery platforms. ■

IMPORTANT DATES

OCTOBER 11, 2018 (ENACTMENT DAY)	The Copyright Office will no longer accept NOIs (and NOIs filed with the Copyright Office prior to the enactment date will not provide licensing coverage after the License Availability Date).
NOVEMBER 10, 2018: (ENACTMENT + 30 DAYS)	Compliance with requirements to take advantage of the limitation of liability. In order for a licensee to avail itself of the limitation of liability, it must comply with requirements between this November 10, 2018, and April 1, 2021 (90 days after the License Availability Date). The requirements include engaging in certain matching efforts, including through a bulk electronic matching process, repeated every month with respect to unmatched compositions and other requirements regarding statements of account, royalties, accruals and transition to the Collective following the License Availability Date.
FEBRUARY 8, 2019 (ENACTMENT + 90 DAYS)	Due date for publication of notice in the Federal Register soliciting information to identify the appropriate entities to serve as the Collective and as the Digital Licensee Coordinator.
AUGUST 7, 2019 (ENACTMENT + 270 DAYS)	Due date for: (1) The Register of Copyrights to designate the Collective and the Digital Licensee Coordinator, if any (designations to be reviewed every five years after the initial designation); and (2) The Copyright Royalty Judges to commence a proceeding to establish the initial administrative assessment by publishing a notice in the Federal Register seeking petitions to participate.
JANUARY 1, 2021	License Availability Date (substitution of blanket license and expiration of prior compulsory licenses).

ENDNOTES

1 Kenneth J. Abdo and Jacob M. Abdo are the father-son law-writing team whose works include: *Rock of Aging: Celebrity Estates*; *Termination of Music Copyright Transfer: The Renegotiation Reality*; *The Value Gap's Disruptive Impact on the Online Music Marketplace*; *Occasional Sex, Prescription Drugs & What's Left of Rock & Roll*; and *Will Streaming Services Turn the Tide or Leave the Music Industry High and Dry?*. Ken is a Partner at Fox Rothschild, LLP and is Chair of its Minneapolis Entertainment Law Department. Jacob graduated Mitchell Hamline School of Law *summa cum laude* and currently lives in Long Beach, CA. The authors gratefully acknowledge the contributions by Todd F, Dupler, Esq., Bob Donnelly, Esq., and John Simson, Esq.

2 The Orrin G. Hatch–Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264 (2018) ("This title, and the amendments made by this title, shall take effect on the date of enactment of this Act.").

3 *See* Copyright Act of 1976, 17 U.S.C. §§ 101-1332 (2012).

4 *See* The Digital Millennium Copyright Act of 1998, Pub. L. No. 105–304, 112 Stat. 2860 (1998).

5 *See e.g.*, Steve Knopper, *The End of Owning Music: How CDs and Downloads Died*, Rolling Stone (June 14, 2018), https://www.rollingstone.com/music/music-news/the-end-of-owning-music-how-cds-and-downloads-died-628660/ ("CD sales have fallen 80 percent in the past decade . . . Downloads have plummeted 58 percent since peaking in 2012.").

6 Joshua P. Friedlander, News and Notes on 2016 RIAA Shipment and Revenue Statistics 1 (2016), http://www.riaa.com/wp-content/uploads/2017/03/RIAA-2016-Year-End-News-Notes.pdf.

7 Joshua P. Friedlander, Mid-Year 2018 RIAA Music Revenues Report 3 (2018), https://www.riaa.com/wp-content/uploads/2018/09/RIAA-Mid-Year-2018-Revenue-Report.pdf.

8 *See* Kenneth J. Abdo, John Simson & Jacob M. Abdo, *Will Streaming Services Turn the Tide or Leave the Music Industry High and Dry?*, Tech: Disruption and Evolution in the Entertainment Industries, 34, 37-38 (2017) (presenting royalty payment data by streaming services to rightsholders).

9 *See Id.*

10 *See* Jack Denton, *'We're on Life Support': Is Streaming Music the Final Note for Professional Songwriters?*, Pacific Standard (Apr. 23, 2018), https://psmag.com/economics/is-streaming-music-the-final-note-for-professional-songwriters.

11 *See* Bill Rosenblatt, *Here Are the Loopholes Closed by the Music Modernization Act*, Forbes (Oct. 11, 2018), https://www.forbes.com/sites/billrosenblatt/2018/10/11/music-modernization-act-now-law-leaves-one-copyright-loophole-unclosed/#7a6334f7272c.

12 *See Id.*

13 *See Id.*

14 *See Id.*

15 *See e.g.*, Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124 (1790) (establishing the first federal copyright act at the urging of President George Washington); Act of February 3, 1831, ch. 16 § 1, 4 Stat. 436, 436 (1831) (protecting musical compositions); Act of July 8, 1870, ch. 230, § 86, 16 Stat. 198 (1870) (codifying the right of authors to make dramatizations and translations of literary works in response to *Stowe v. Thomas*, 23 F. Cas. 201 (1853)); Copyright Act of 1909, Pub. L. No. 60-349, ch. 1, § 1(a), 35 Stat. 1075, 1077-78 (1909) (creating the compulsory mechanical license in response to *White-Smith Music Publishing Co., v. Apollo Co.*,

209 U.S. 1 (1908)); The Copyright Act 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in scattered sections of the U.S. Code) (extending copyright protection to "original works of authorship fixed in any tangible medium of expression, *now know or later developed*,") (emphasis added); Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995), as amended by the Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860, 2905 (1998) (codified at 17 U.S.C. § 114) (creating a digital public performance right in response to the development of satellite radio); The Digital Millennium Copyright Act of 1998, Pub. L. No. 105–304, 112 Stat. 2860 (1998) (enacting sweeping reform in response to the Internet).

16 *See supra* n. 14.

17 The Orrin G. Hatch–Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264 (2018).

18 *Id*.

19 *Id*.

20 *See* Rosenblatt, *supra* n. 10.

21 17 U.S.C. §§ 102(a), (7) (2012).

22 Act of February 3, 1831, ch. 16 § 1, 4 Stat. 436, 436 (1831) (protecting musical compositions).

23 Copyright Act of 1909, Pub. L. No. 60-349, ch. 1, § 1(a), 35 Stat. 1075, 1077-78 (1909).

24 *See* 17 U.S.C. § 115.

25 *See* The House Report on the Sound Recording Amendment of 1971, H.R. Rep. No. 92–487, at 2 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1556.

26 Stewart v. Abend, 495 U.S. 207,229 (1990).

27 *See* 17 U.S.C. § 106(1), (3).

28 *See* 17 U.S.C. § 115; *see also* Cherry River Music Co. v. Simitar Entm't, Inc., 38 F. Supp. 2d 310, 312 (S.D.N.Y. 1999) (discussing the history of the compulsory mechanical license).

29 *See* 17 U.S.C. § 115(c).

30 *See Id*. § 115(a).

31 *See Id*.

32 *See Id*. § 115(b).

33 *Id*.

34 *See generally* The Music Modernization Act: Changing the Licensing Landscape For Streaming, Southwest by Southwest CLE 2018 (Mar. 16, 2018), https://www.sxsw.com/wp-content/uploads/2018/03/LaPolt-MMA-CLE-Materials.pdf.

35 *See Id*.

36 *See Id*.

37 *See Id*.

38 *See Id*.

39 *See* 37 CFR 201.18(f)(3)).

40 *See* Ed Christman, *Spotify Hit With $150 Million Class Action Over Unpaid Royalties*, Billboard (Dec. 29, 2015), https://www.billboard.com/articles/business/6828092/spotify-class-action-royalties-david-lowery-cracker-150-million.

41 *See Id*.

42 *See Id*.

43 Doug Collins, Opinion, *The Music Modernization Act Will Provide a Needed Update to Copyright Laws*, The Hill (Jan. 1, 2018), https://thehill.com/blogs/congress-blog/technology/368385-the-music-modernization-act-will-provide-a-needed-update-to.

44 *See* Judy Dunitz, *The Easiest Wat to Fix the Streaming Mechanical is to Get Rid of It*, Digital Music News (Sept. 25, 2017), https://www.digitalmusicnews.com/2017/09/25/fix-streaming-mechanical/; Staff, *Spotify Hit with $1.6 Billion Lawsuit from Publisher Representing Tom Petty, Neil Young, Other,* Variety (Jan. 2, 2018), https://variety.com/2018/biz/news/spotify-hit-with-1-6-billion-lawsuit-from-publisher-representing-tom-petty-neil-young-others-1202651199/.

45 *See Copyright Royalty Judges Publish Notice of Inquiry Regarding Modification and Amendments to CRB Regulations Following Enactment of a New Law Regarding the Music Industry*, Copyright Royalty Board (Nov. 9, 2018), https://www.crb.gov/announcements/.

46 Music Modernization Act, Pub. L. No. 115-264 § 102 (2018).

47 A Digital Music Provider is an entity that, has a direct contractual, subscription, or other economic relationship with end users of the service, or, if no such relationship with end users exists, exercises direct control over the provision of the service to end users; 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 (or procure such reporting). *Id.* § 102(e)(8).

The blanket mechanical license covers all musical works (or shares of such works) available for compulsory license . . . include[ing], the making and distribution of server, intermediate, archival, and incidental reproductions of musical works that are reasonable and necessary for the digital music provider to engage in covered activities licensed under this subsection, solely for the purpose of engaging in such covered activities. *Id.* § 102(d)(1)(B).

48 *Id.* § 102(d)(7)(F).

49 *Id.* § 102(d)(9)(C).

50 *Id.* § 102(d)(3)(A).

51 *Id.* § 102(d)(3)(C).

52 *Id.* § 102(d)(3)(E).

53 *Id.* § 102(d)(5)(C).

54 *Id.* § 102(d)(3)(C), (G).

55 *Id.* § 102(d)(3)(H).

56 *Id.* § 102(d)(3)(C), (d)(3)(J).

57 *Id.*

58 *Id.* § 102(d)(3)(D).

59 *Id.*

60 *Id.* § 102(d)(10)(A)–(C).

61 *Id.* § 102(d)(10)(A).

62 *Id.*; *see also* Amy Goldsmith, *Musically Inclined: The Music Modernization Act of 2018*, IP Watchdog (Nov. 9, 2018), https://www.ipwatchdog.com/2018/11/09/music-modernization-act-2018/id=102954/.

63 *Id.* § 102(d)(10)(B).

64 *Id.* § 102(d)(10)(C).

65 *See* Eriq Gardner, *Spotify Wins Approval of $112.5 Million Deal to Settle Copyright Class Action*, The Hollywood Reporter (May 23, 2018), https://www.hollywoodreporter.com/thr-esq/spotify-wins-approval-1125-million-deal-settle-copyright-class-action-1114307 (dissing how the Music Modernization Act will improve investor confidence in music streaming service Spotify). *See also* Complaint at 1, Wixen Music Publishing, Inc. v. Spotify USA INC., No. 2:17-cv-09288-GW-GJS (C.D. Cal. Dec. 29, 2017) (alleging copyright infringement against Spotify with damages of $1.6 billion); Daniel Kreps, *Wixen's $1.6 Billion Spotify Lawsuit: What You Need to Know*, Rolling Stone (Jan. 3, 2018), https://www.rollingstone.com/music/music-news/wixens-1-6-billion-spotify-lawsuit-what-you-need-to-know-202532/ (reporting on the *Wixen* case).

66 *See* Sarah Jeong, *A $1.6 Billion Spotify Lawsuit Is Based on a Law Made for Player Pianos*, The Verge (Mar. 14, 2018).

67 The Orrin G. Hatch–Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264 §§ 104–05 (2018).

68 *Id.* § 104(b)(1).

69 *Id.*

70 *See* Randall Colburn, *ASCAP's Clara Kim on the Legal Impact of the Music Modernization Act*, Profile (Jun 4, 2018), https://profilemagazine.com/2018/ascaps-clara-kim-on-the-legal-impact-of-the-music-modernization-act/ (interviewing Clara Kim, executive vice president and general counsel of the American Society of Composers, Authors, and Publishers (ASCAP)).

71 *See* 17 U.S.C. § 114(i) (2012).

72 The Orrin G. Hatch–Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264 §103(a)(1)(B).

73 *See Id.*

74 *The Sound Recording* Act of 1971, Pub. L. No. 92-140, § 1, 85 Stat. 391.

75 *See Id.*

76 *See Id.*

77 The Sound Recording Act of 1971, Pub. L. No. 92-140, § 1, 85 Stat. 391.

78 *Id.* § 3 (Nothing "shall be . . . construed as affecting in any way any rights with respect to sound recordings fixed before [February 15, 1972]".); *see also* Goldstein v. California, 412 U.S. 546, 571 (1973) ("Congress has indicated neither that it wishes to protect, nor to free from protection, recordings of musical performances fixed prior to February 15, 1972."); *see* U.S. Copyright Off., Federal Copyright Protection for Pre-1972 Sound Recordings: A Report of the Register of Copyrights 14–17 (2011) (discussing state law protection for pre-1972 sound recordings);

79 The Copyright Act 1976, Pub. L. No. 94-553, § 101, 90 Stat. 2541, 2544-45. Regarding preemption, the Act states, in relevant part:

With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2067. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings commenced on and after February 15, 2067. Notwithstanding the provisions of section 303, no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2067.

Id. § 301(c). *See also* Barbara Ringer, *First Thoughts on the Copyright Act of 1976*, 22 N.Y.L Sch. L. Rev. 477, 479 (1977) ("The [Copyright Act of 1976] is rather a completely new copyright statute, intended to deal with a whole range of problems undreamed of by the drafters of the 1909 Act."); Jessica Litman, *Copyright, Compromise and Legislative History*,72 Cornell L. Rev. 857 (1987) (discussing the Copyright Act of 1976's legislative history); U.S. Copyright Off., Federal Copyright Protection for Pre-1972 Sound Recordings: A Report of the Register of Copyrights 14–17 (2011) (discussing the decision to maintain two separate systems for protecting sound recordings).

80 *See* Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995), as amended by the Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860, 2905 (1998) (codified at 17 U.S.C. § 106(6)).

81 *Id.*

82 *Flow & Eddie, Inc. v. Sirius XM Radio, Inc.*, 229 So. 3d 305, 316 (Fla. 2017) (refusing to recognize a right of public performance under Florida common law); *see Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 28 N.Y. 3d 583, 605-06, 70 N.E. 3d 936, 949-50 (2016) (refusing to recognize a right of public performance under New York's common-law). *But see Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, No. CV-13-5693, 2014 WL 4725382, at *1 (C.D. Cal. Sept. 22, 2014) (granting summary judgement on the plaintiffs on the issue of public performance rights). The latest iteration of *Flo & Eddie* is before the California Supreme Court. Notwithstanding, the Recording Industry Association of America ("RIAA") and music services Sirius XM and Pandora settled in October and June of 2015, respectively. *See* Eriq Gardner, *Record Giants Win $210M Settlement from SiriusXM over Pre-1972 Music*, The Hollywood Reporter (June 26, 2015), https://www.hollywoodreporter.com/thr-esq/record-giants-win-210m-settlement-805313; Eriq Gardner, *Pandora Reaches $90 Million Settlement with Labels over Pre-1972 Music*, Billboard (Oct. 22, 2015), https://www.billboard.com/articles/business/6738203/pandora-settlement-record-labels-pre-1972-music-riaa.

83 Music Modernization Act, Pub. L. No. 115-264 § 202(a) (2018).

84 *Id.* § 202(a).

85 *Id.* § 202(d)(2).

86 *Id.* § 202(a).

87 *Id.* § 202(a)(2).

88 *Id.* § 202(e).

89 See Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995), as amended by the Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860, 2905 (1998) (codified at 17 U.S.C. § 114(g)(2)).

90 17 U.S.C. § 114(g)(2). The sound recording copyright owner is required to remit fifty percent of the statutory royalty: forty-five percent to "featured recording artist" and five percent to "nonfeatured artists." *Id.*

91 Music Modernization Act, Pub. L. No. 115-264 § 302(a) (2018).

92 *Id.* § 302(b)

93 *Id.*

94 *See* Fair Play Fair Pay Act of 2015, H.R. 1733, 114th Cong. § 9(a) (2015).

95 Richard Busch, *I'm One of the Attorneys Suing Spotify. And Here's Why the 'Music Modernization Act' Makes Little Sense*. (Jan. 19, 2018) https://www.digitalmusicnews.com/2018/01/19/spotify-music-modernization-act/

96 *See generally* Thomas Lenard & Lawrence White, *The Same Old Song*, 41 Regulation 30, 33 (2018) (cautioning against the Music Licensing Collective as a government sanctioned monopoly).