The Music Modernization Act of 2018 and its Burgeoning Impact

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Abstract

The Music Modernization Act of 2018 ("MMA"), enacted October 11, 2018, is the most significant reform of music copyright law in decades. As the first major legislation since the Copyright Act of 1976 to affect music royalties, the MMA has made major strides in improving compensation and to level the playing field for all music creators, including songwriters, legacy artists, and music producers. The MMA modernizes the musical works licensing scheme for today's digital music environment, provides federal copyright protection for pre-1972 sound recordings, and ensures that music producers can get a piece of the royalty pie. The MMA may also have some shortcomings that allow room for legislative growth in the modern music era. This paper describes the key parts of the MMA and examines the benefits and criticisms of the Act that have surfaced in the Act's first year as law.

An Overview of the Music Modernization Act

The Music Modernization Act (MMA), proposed as H.R. 1551 by Representatives Orrin G. Hatch and Bob Goodlatte, combined the Music Modernization Act of 2018 (S. 2334), the Classics Protection and Access Act (S. 2393), and the Allocation for Music Producers Act (S. 2625). The MMA, an amended version of S. 2823, passed unanimously both in the House as H.R. 5447 on April 25, 2018 and in the Senate on September 18, 2018. The MMA was enacted October 11, 2018. The MMA is intended to:

1) increase compensation to songwriters and streamline licensing of their music;
2) enable artists who recorded music before 1972 to be paid royalties when their music is played on digital services; and
3) enable music producers (e.g., record producers, sound engineers, and other studio professionals) to receive royalties for their creative contributions to recorded music.

The MMA is the first major legislation to affect music royalties passed since the Copyright Act of 1976.

Title I: The Musical Works Modernization Act (MWMA)

Title I of the MMA, the Musical Works Modernization Act (or MWMA, formerly the Music Modernization Act of 2018), amends §115 of the Copyright Act to create a blanket license for digital music providers to engage in certain "covered activities," specifically "digital phonorecord delivery" via a permanent download, a limited download, and interactive

streaming of musical works embodied in sound recordings.[1] Before enactment of the MMA, musical works were subject to varying statutory licensing requirements under §115 of the Copyright Act depending on whether they were being reproduced/distributed or whether they were being publicly performed (e.g., streamed or played on the radio).[2] But under the MWMA, most digital delivery of musical works may be accomplished on the basis of a statutory "blanket" license.

The MWMA also amends §114 of the Copyright Act regarding the compulsory license for the "digital audio transmission" of sound recordings. Under §114(d)(2) of the Copyright Act, compulsory license fees for the non-interactive streaming[3] of sound recordings were collected and distributed as digital performance royalties to copyright owners by SoundExchange.[4] However, interactive streaming was subject to a negotiated license under §114(d)(3) of the Copyright Act.[5] Now, under the MMA, *interactive* streaming may be performed under a blanket license, while *non-interactive* streaming is still subject to the existing statutory licensing scheme.[6] Under the MMA, SoundExchange still administers the remaining statutory license under the new §114(d)(2) for *non-interactive* streaming, which allows streaming services to deliver sound recordings while paying a fixed rate for each play.[7]

Under the MWMA, in addition to the new blanket license for covered activities, parties may also participate in such covered activities by voluntary negotiated licensing through a publisher or by obtaining authority to make and distribute a permanent download of a musical work from a record label subject to an individual download license.[8] Before the MMA, such negotiated licenses could only be obtained on a song-by-song basis.[9]

Under the MWMA, absent a voluntary agreement, the royalty rates and terms for a new blanket license are to be determined through a uniform market-based standard, set by the Copyright Royalty Board (CRB) consisting of Copyright Royalty Judges.[10] That is, the CRB must set rates and terms that "most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller."[11] Before the MMA,

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[1] *See* 17 U.S.C. §§ 115(a)(1)(A), (e)(10) (2018).
[2] *See* 17 U.S.C. § 115(a)(1) (2006).
[3] *Non-interactive* streaming of digital sound recordings does not allow a user to select which song to stream (e.g., Pandora). Digital phonorecord delivery by *interactive* streaming allows a user to choose a specific song to stream and when to stream it (e.g., Spotify).
[4] *See* www.soundexchange.com.
[5] *See* 17 U.S.C. § 114(d)(3) (2006).
[6] *See* 17 U.S.C. § 115(d)(2) (2018).
[7] *See* SoundExchange General Faqs*,* https://www.soundexchange.com/about/general-faqs/ (last visited October 19, 2019). SoundExchange's services are now focused on the licensing of digital audio transmissions over non-interactive Internet applications, such as Pandora, satellite radio, such as SiriusXM, and cable radio, such as Music Choice.
[8] *See* 17 U.S.C. §§ 115(c)(2)(A), (d)(1)(C) (2018).
[9] *See* 17 U.S.C. § 115(c)(3)(E)(i) (2006).
[10] *See* 17 U.S.C. § 115(c)(1)(F) (2018).
[11] 17 U.S.C. § 115(c)(1)(F) (2018).

the rates were set using a separate standard regardless of what would have been negotiated in a free market.

The MWMA also authorizes the Register of Copyrights to designate a nonprofit mechanical licensing collective (MLC), comprised of publishers and songwriters, to issue and administer the blanket and voluntary licenses for digital downloads and reproductions.[12] The Register of Copyrights must review the MLC designation every five years.[13] The MLC is to be funded by administrative assessment fees, which are to be paid out by blanket licensees and "significant non-blanket licensees"[14] and which are to be based on usage of musical works.[15] A significant non-blanket licensee is a licensee who engages in covered activities outside the blanket license by either (i) making 5,000 sound recordings available on a single day, or (ii) having revenue exceeding $50,000 in a single month, or $500,000 in a preceding 12-month period.[16]

The MLC is responsible for:

1) collecting, distributing, and auditing the royalties generated from blanket and voluntary licenses to and for the respective musical work owners;[17]
2) creating and maintaining a free public database that identifies musical works with their copyright owners along with ownership share information;[18]
3) providing information to help with matching unmatched (or "orphan") musical works with their respective sound recordings, and engaging in such matching;[19] and
4) holding unclaimed royalties for at least three years[20] before distributing them on a market-share basis to copyright owners as reflected by royalty payments made by digital music providers for the applicable covered activities.[21] Musical work copyright owners are required to pay at least fifty percent of these distributed unclaimed royalties to songwriters.[22]

The MLC streamlines the identification of a copyright owner and makes it easier for a potential copier to connect with the owner. Before the MMA, a person could not duplicate a sound recording fixed by another without authorization of the copyright owner, the authorization achieved by serving the copyright owner with a thirty-day notice of intention to duplicate.[23] If the copyright owner could not be identified, the person could file a notice of

[12] 17 U.S.C. § 115(d)(3)(B)(i) (2018).
[13] 17 U.S.C. § 115(d)(3)(B)(ii) (2018).
[14] 17 U.S.C. §§ 115(d)(3)(C)(i)(VI), (d)(7)(A) (2018).
[15] 17 U.S.C. § 115(d)(7)(D)(ii)(III) (2018).
[16] 17 U.S.C. § 115(e)(31) (2018).
[17] *See* 17 U.S.C. §§ 115(d)(3)(G),(L) (2018).
[18] *See* 17 U.S.C. § 115(d)(3)(E) (2018).
[19] *See* 17 U.S.C. § 115 (d)(3)(I) (2018).
[20] 17 U.S.C. § 115 (d)(3)(H)(i) (2018).
[21] *See* 17 U.S.C. § 115 (d)(3)(J) (2018).
[22] 17 U.S.C. § 115 (d)(3)(J)(iv) (2018).
[23] *See* 17 U.S.C. §§ 115 (a)(1), (b)(1) (2006).

intention with the Copyright Office.[24] Under the MMA, a person cannot file this notice of intention to duplicate a digital phonorecord with the Copyright Office,[25] but the MLC provides a streamlined means to identify ownership of the digital phonorecords or a process if one is not identified. Certain burdens of this inefficient notice of intention system are thus removed under the MMA, with the MLC aiming to fill the gaps.

Lastly, the MWMA improves royalty rate proceedings. Before the MMA, the performance rights organizations (PROs) ASCAP (The American Society of Composers, Authors and Publishers[26]) and BMI (Broadcast Music, Inc.[27]) were each assigned a judge to oversee rate proceedings required by consent decrees that govern these organizations.[28] Under §104(b) the MWMA, a district court judge from the Southern District of New York is to be randomly assigned to oversee the public performance royalty rate proceedings for ASCAP and BMI.[29] The assigned judge is to continue to oversee non-rate proceedings, such as consent decree interpretation.[30]

Title II: The Classics Protection and Access Act (CPAA)

Title II of the MMA, The Classics Protection and Access Act (or CPAA, formerly the Compensating Legacy Artists for Their Songs, Service, and Important Contributions to Society Act (CLASSICS Act)), provides a new exclusive federal right for sound recordings fixed before February 15, 1972 ("pre-72 sound recordings"). Pre-72 sound recordings had not previously been protected under federal copyright law but were governed by state law, which typically provided exclusive rights of reproduction and distribution, but no general right of public performance.

Now, under the CPAA, pre-72 sound recordings are subject to protection similar to that accorded to post-72 sound recordings. Specifically, the CPAA provides remedies for infringement by anyone who, without the consent of the copyright owner, engages in a covered activity with respect to a pre-72 sound recording.[31] Remedies are not limited under §412 if a copyright is not registered with the Copyright Office.[32]

However, a rights owner may receive statutory damages or attorneys' fees only if the copyright owner has filed a schedule identifying the title, artist, and copyright owner of the

[24] *See* 17 U.S.C. § 115 (b)(1) (2006).
[25] *See* 17 U.S.C. § 115 (b)(2)(A) (2018).
[26] *See* https://www.ascap.com/.
[27] *See* https://www.bmi.com/.
[28] The consent decrees are negotiated with the Antitrust Division of the Department of Justice, which must report to Congress under §105 of the MWMA on any proposed impact before moving to terminate either of the two consent decrees. Orrin G. Hatch–Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676, 3726-27 (2018).
[29] *Id.* at 3726.
[30] *Id.*
[31] 17 U.S.C. §§ 502-505, 1203 (2018).
[32] 17 U.S.C. § 1401(f)(5)(C) (2018).

sound recording in the Copyright Office, but the alleged infringement must occur more than ninety days after the filing has been publicly recorded.[33] If a copyright owner had filed contact information with the Copyright Office within 180 days of enactment (April 9, 2019), the copyright owner could receive no statutory damages or attorneys' fees for alleged infringement until ninety days after the alleged infringer received notice (or after the notice had been sent, if it was undeliverable to the alleged infringer).[34]

Under the CPAA, consent may be defined as a voluntary license agreement, an exemption under §114(d)(1), or a compulsory license under §114(d)(2). A covered activity is defined as any activity of a sound recording copyright owner as defined under §106 (reproduction, adaptation, distribution, digital audio transmission), §602 (importation and exportation), §1201 (anticircumvention), or §1202 (copyright management information). For voluntary agreements after the date of enactment, the CPAA provides that fifty percent of payments received from non-interactive digital performances (i.e., compulsory license royalties) be distributed directly to artists via SoundExchange.[35]

This CPAA preempts actions for state and common law claims for pre-72 sound recordings for activities taken on or after the enactment date and covered under the statutory license for digital audio transmissions of post-72 sound recordings.[36] The CPAA also preempts state copyright law claims regarding mechanical and distribution rights for pre-72 sound recordings.[37] No preemption is afforded for actions arising from non-subscription broadcast transmission of sound recordings for activities that do not qualify as "covered activities," such as digital audio transmission. Preemption is afforded, however, for digital audio transmissions before enactment, as long as the transmissions would have been exempt under §114(d)(1), or if the transmissions would have qualified for compulsory licensing under §114(d)(2), and the transmitting entity had paid any royalty due within 270 days of enactment (July 8, 2019) or pays a royalty due under a voluntary agreement.[38]

Under the MMA, unauthorized performances of pre-72 sound recordings are now subject to exceptions and limitations under the Copyright Act, including fair use under §107, use by libraries and archives under §108, the first-sale doctrine under §109, safe harbors for internet services providers under §512, exceptions for certain public performances under §110, and the making of ephemeral copies to facilitate lawful public performance under §112. Section 1401(c) of the CPAA creates a procedure to enable persons to non-commercially use orphaned pre-72

[33] 17 U.S.C. § 1401(f)(5)(A)(i) (2018).
[34] *Id.*
[35] 17 U.S.C. § 1401(d) (2018).
[36] 17 U.S.C. § 1401(e)(1)(B) (2018).
[37] 17 U.S.C. § 1401(e) (2018).
[38] 17 U.S.C. § 1401(e)(1)(B) (2018).

sound recordings that are not in the public domain and are not being commercially exploited,[39] provided that three conditions are met:

1) the user makes a good-faith reasonable search in records of the Copyright Office, or on sale or streaming services, but is unsuccessful;
2) the user files a notice in the Copyright Office; and
3) the rights owner does not file a notice opting out within ninety days after the user's notice is publicly indexed.[40]

The CPAA includes a rolling timeline for pre-72 sound recordings to enter the public domain, with sound recordings receiving protection for a period of at least 95 years after publication (or 95 years plus an applicable "transition period").[41] Publication includes the distribution of phonorecords.[42] For sound recordings first published before 1923, the transition period is three years after the date of enactment, extended through December 31, 2021.[43] For recordings first published in 1923 to 1946, the transition period is five years (for a total of 100 years of protection through December 31 of the 100th year).[44] For recordings first published in 1947 to 1956, the transition period is 19 years (110 years of total protection through December 31 of the 110th year).[45] And for recordings first published in 1957 to 1972, the transition period ends February 15, 2067 (for a total of between 110 and 95 years of protection).[46]

Title III: The Allocation for Music Producers (AMP) Act

Title III of the MMA, the AMP Act, authorizes SoundExchange to distribute royalties from the §114(d)(2) compulsory license for sound recordings to a "contracted producer" (e.g., music producers, including record producers, mixers, sound engineers, and other studio creative professionals) from a recording artist (a copyright owner or featured artist).[47] Under §114(g), the following proceed distributions are authorized:

- 50% to sound recording copyright owners;
- 45% to featured artists;
- 2.5% to non-featured vocalists; and
- 2.5% to non-featured musicians.[48]

To facilitate the further distribution from the recording artist to a contracted producer, the AMP Act requires SoundExchange to receive a "letter of direction" from the recording artist

[39] 17 U.S.C. § 1401(c) (2018).
[40] 17 U.S.C. § 1401(c)(1)(C) (2018).
[41] 17 U.S.C. § 1401(2) (2018).
[42] 17 U.S.C. § 1401(b) (2018).
[43] 17 U.S.C. § 1401(a)(2)(B)(i) (2018).
[44] 17 U.S.C. § 1401(a)(2)(B)(ii) (2018).
[45] 17 U.S.C. § 1401(a)(2)(B)(iii) (2018).
[46] 17 U.S.C. § 1401(a)(2)(B)(iv) (2018).
[47] 17 U.S.C. § 114(g)(6)(B) (2018).
[48] 17 U.S.C. § 114(g) (2018).

(e.g., a copyright owner or a featured artist).[49] A letter of direction can comprise instructions based on an agreement between the recording artist and the contracted producer who was involved in creating a sound recording featuring that recording artist.[50] Upon acceptance of such letter of direction from the recording artist by SoundExchange, a portion of royalties the recording artist would have received for a sound recording will instead be distributed directly to the contracted producer.[51]

For sound recordings fixed before November 1, 1995, absent a letter of direction, if certain requirements are met, SoundExchange will allocate two percent of total royalties for a sound recording to be paid to producers involved in the making of that sound recording.[52] A recording artist may avoid paying this two percent by objecting to it in writing.[53]

Key Takeaways and Issues of the MMA

The MMA is intended to simplify protection for sound recordings and provide a better economic deal for a wider range of music creators. Since its enactment on October 11, 2018, the implementation of the MMA has had a discernable impact, both good and bad. The public has been outspoken about the advantages and disadvantages of this law since well before its enactment. The following section is a survey of some of the more prevalent issues and concerns with the implementation of the MMA since enactment.

The MWMA in Practice

Proponents have been vocal regarding the positive impact to music creators who benefit from the additional compensation that the MWMA garners them. One leading criticism of the old framework under the Copyright Act is that licensing was not giving music creators a fair return for their efforts. The MWMA evens the compensation playing field. The MWMA's blanket license allows the streamlined (and thus, quicker) licensing of digital music, and the MLC streamlines the setting of rate standards for the various classes of digital music. The very impetus of the MWMA is to improve how music licensing and royalties are paid in consideration of streaming media services, thus catching the copyright framework up with today's technology.

Under the old framework, it was difficult to find the rights holders to music compositions in order to compensate them. The MWMA eliminates some of the legwork and paperwork with a streamlined, central, and near-comprehensive music works database instead of relying only on the multiple disjointed (and perhaps inconsistent) databases of ASCAP, BMI, and SoundExchange. The MLC will ensure that more royalties are claimed by true copyright owners by facilitating the matching of musical works with their respective sound recordings and their

[49] 17 U.S.C. § 114(g)(5) (2018).
[50] *Id.*
[51] *Id.*
[52] 17 U.S.C. § 114(g)(6)(A) (2018).
[53] 17 U.S.C. § 114(g)(6)(D) (2018).

copyright owners. If royalties are not claimed in three years, the MLC will ensure their distribution to copyright owners or music publishers, instead of these royalties staying in the hands of the streaming services as in the past. In practice, the MWMA should ensure that more rights holders get paid for the use of their musical works at a uniform willing buyer/willing seller rate-setting standard for a §114 license. Under the old framework, the rate-setting standard did not estimate the going rates for music in the free market. The MWMA should ensure that music creators, including legacy artists, do not get short changed. Lastly, the MWMA ends the bulk notice of intention system that had prevented royalties from being paid in the past.[54]

The disadvantages of the MWMA may be more interesting from a legal standpoint. The MWMA was put in place partly to discourage "music litigation that generates legal settlements in favor of simply ensuring that artists and copyright owners are paid in the first place without such litigation."[55] In 17 U.S.C. § 115(d)(10)(A), the MWMA limits the liability a streaming service can incur if the service adheres to the new process.[56] This MWMA provision was originally included in compromise to get streaming services to pay for the set up and operation of the MLC.[57] Essentially, the MWMA removes the ability of potential claimants to bring legal claims for unpaid mechanical royalties in copyright infringement suits after December 31, 2017, and some are questioning the constitutionality of that provision.[58]

For example, Eminem's publishing company, Eight Mile Style, recently brought a lawsuit against Spotify for not properly licensing its songs or paying royalties.[59] Eight Mile Style alleges that Spotify avoided paying royalties on Eminem's streams numbering in the billions by placing several of Eminem's hit songs in a category called "Copyright Control," which is reserved for songs for which the copyright owner is unknown.[60] Eight Mile Style challenges 17 U.S.C. § 115(d)(10)(A) on grounds that the provision violates due process and Eight Mile Style's property rights under the Takings Clause of the Fifth Amendment, as the provision eliminates the right of plaintiffs to receive profits, statutory damages, and attorneys' fees through litigation.[61]

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[54] *Republican Policy Committee's comments on H.R. 5447*, https://www.govtrack.us/congress/bills/115/hr5447/summary (last visited October 19, 2019).
[55] *Id.*
[56] *See* 17 U.S.C. § 115(d)(10)(A) (2018).
[57] Eriq Gardner, *Eminem Publisher Sues Spotify Claiming Massive Copyright Breach, "Unconstitutional" Law*, HOLLYWOODREPORTER.COM (Aug. 21, 2019), https://www.hollywoodreporter.com/thr-esq/eminem-publisher-sues-spotify-claiming-massive-copyright-breach-unconstitutional-law-1233362.
[58] *MMA – The United States Legislation on Music*, MONDAQ.COM, http://www.mondaq.com/x/839828/Copyright/MMA+The+United+States+Legislation+on+Music (last visited October 20, 2019). *See also* Charles J. Sanders, *The Music Modernization Act of 2018: Selected Pros and Cons from the Music Creator Perspective*, *available at* http://www.musiccreatorsna.org/wp-content/uploads/2019/01/The-Music-Modernization-Act-of-2018.pdf.
[59] Jose Landivar, *The Music Modernization Act: A Primer for Copyright Holders*, JDSUPRA.COM (Sept. 10, 2019), https://www.jdsupra.com/legalnews/the-music-modernization-act-a-primer-61777/.
[60] Complaint for Copyright Infringement at 2, Eight Mile Style, LLC v. Spotify USA Inc., No. 3:19-cv-00736 (M.D. Tenn. filed Aug. 21, 2019).
[61] *Id.*

The MLC was designated on July 5, 2019, and the collective was authorized to formally launch operations by January 2021.[62] After the MLC was designated and members were appointed, criticisms of the MLC surfaced. The most general among them is how the MLC will administer the "largest blanket license ever created" by partnering with all the industry players (PROs, streaming services, publishers, creators, etc.) and facilitating an effective administrative body with Copyright Office oversight.[63] One of the main concerns is that the MLC is unbalanced with a majority of the representation given to music publishers, who can decide which songwriters sit on the board.[64] Thus, songwriters are said to be underrepresented and prime for exploitation.

Additionally, unclaimed royalties may never be paid to songwriters and recording artists after the three-year holding period, because the MLC's immense database may not be able to prevent song misidentification or issues of missing or incorrect data.[65] Due to the unequal bargaining power between music publishers and recording artists, where music publishers essentially hold both the decision-making power and the purse strings, music publishers may collect the bulk of the unclaimed royalties that are finally released.[66] Critics say that there is too much corporate control and a lack of transparency from those in power, and there is no ability for artists to audit the financial allocations from streaming distributions.[67]

The MWMA is intended to shift the costs of the new MLC to those who benefit from the collective, that is, the licensees.[68] Yet, the MWMA is said to not help independent or lesser-commercially-successful songwriters, of which there are many. Considering the MWMA's impact with respect to royalties only within the songwriter community itself, the issue is significant enough. The MWMA does not address the inequities within this community that is

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[62] Jose Landivar, *The Music Modernization Act: A Primer for Copyright Holders*, JDSUPRA.COM (Sept. 10, 2019), https://www.jdsupra.com/legalnews/the-music-modernization-act-a-primer-61777/. *See also Designation of Music Licensing Collective and Digital Licensee Coordinator*, THE COPYRIGHT SOCIETY OF THE USA (July 8, 2019), https://www.csusa.org/news/460117/Designation-of-Music-Licensing-Collective-and-Digital-Licensee-Coordinator-.htm.

[63] Jose Landivar, *The Music Modernization Act: A Primer for Copyright Holders*, JDSUPRA.COM (Sept. 10, 2019), https://www.jdsupra.com/legalnews/the-music-modernization-act-a-primer-61777/.

[64] *MMA – The United States Legislation on Music*, MONDAQ.COM, http://www.mondaq.com/x/839828/Copyright/MMA+The+United+States+Legislation+on+Music (last visited October 20, 2019).

[65] *See* Charles J. Sanders, *The Music Modernization Act of 2018: Selected Pros and Cons from the Music Creator Perspective*, *available at* http://www.musiccreatorsna.org/wp-content/uploads/2019/01/The-Music-Modernization-Act-of-2018.pdf.

[66] *See id.*

[67] *What is the Music Modernization Act and How Will It Affect You?*, CAREERSINMUSIC.COM, https://www.careersinmusic.com/music-modernization-act/ (last visited October 20, 2019). *See also* Charles J. Sanders, *The Music Modernization Act of 2018: Selected Pros and Cons from the Music Creator Perspective*, *available at* http://www.musiccreatorsna.org/wp-content/uploads/2019/01/The-Music-Modernization-Act-of-2018.pdf.

[68] *Republican Policy Committee's comments on H.R. 5447*, https://www.govtrack.us/congress/bills/115/hr5447/summary (last visited October 19, 2019).

part and parcel of the nature of music streaming revenues. Ninety (90) percent of streaming revenues are generated by less than ten (10) percent of the songs.[69] Millions of streams are needed to generate any kind of significant income when payouts to artists historically have been anywhere from $0.019 to $0.00735 per stream.[70] Simply put, there is just not a lot of money that most songwriters can make from streaming. And the better that the big artists do, the worse the little ones do.[71] Only ten percent of artists have benefitted appreciably from streaming revenues, and the MWMA is not likely to not change that.

Instead, the biggest beneficiaries of the MWMA are said to be the music publishers and the digital streaming services, who will benefit across the board.[72] But these heavyweights do not necessarily have the songwriters' best interests in mind, even when the CRB tells them what to do. In early 2019, the CRB ruled[73] that streaming services had to increase royalty rates over the next four years by about 44%,[74] but streaming services Spotify, Amazon, Google, and Pandora appealed that decision, and songwriting organizations were none too happy.[75]

If certain creators are benefiting little but taking on costs to participate, and even feeling shortchanged by streaming services, an incentive for these creators may be to go outside of the MLC construct to directly license recordings through voluntary arrangements. But critics warn that direct licensing of performing rights in music compositions outside of the PROs (e.g., ASCAP and BMI) could lead to further erosion of the rights of music creators to control their share of performing rights and royalties.[76]

As the MWMA rolls out, there is also a dilemma over the consent decrees that have been in place between the U.S. Department of Justice (DOJ) and the PROs (BMI and ASCAP) for about

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[69] *What is the Music Modernization Act and How Will It Affect You?*, CAREERSINMUSIC.COM, https://www.careersinmusic.com/music-modernization-act/ (last visited October 20, 2019).
[70] Danika Miller, *Streaming Royalties and the Starving Artist: How Musicians Make Money*, REVIEWS.COM (Aug. 27, 2019), https://www.reviews.com/blog/music-streaming-royalties/.
[71] *See* Victor Luckerson, *Is Spotify's Model Wiping Out Music's Middle Class?*, THERINGER.COM (Jan. 16, 2019, 5:30 AM), https://www.theringer.com/tech/2019/1/16/18184314/spotify-music-streaming-service-royalty-payout-model.
[72] *MMA – The United States Legislation on Music*, MONDAQ.COM, http://www.mondaq.com/x/839828/Copyright/MMA+The+United+States+Legislation+on+Music (last visited October 20, 2019).
[73] COPYRIGHT ROYALTY BOARD, *Attachment A, Part 385—Rates and Terms for Use of Nondramatic Musical Works in the Making and Distributing of Physical and Digital Phonorecords*, *available at* https://www.crb.gov/rate/16-CRB-0003-PR/attachment-a-part-385-regs.pdf.
[74] Anna Washenko, *In Historic Ruling, Copyright Royalty Board Dramatically Raises Royalties for Streaming Services*, RAINNEWS.COM (Jan. 29, 2019), https://rainnews.com/in-historic-ruling-copyright-royalty-board-dramatically-raises-royalties-for-streaming-services/.
[75] Anna Washenko, *Quartet of Streaming Companies File Intent to Appeal CRB Mechanical Royalties*, RAINNEWS.COM (March 8, 2019), https://rainnews.com/quartet-of-streaming-companies-file-intent-to-appeal-crb-mechanical-royalties/.
[76] Charles J. Sanders, *The Music Modernization Act of 2018: Selected Pros and Cons from the Music Creator Perspective*, *available at* http://www.musiccreatorsna.org/wp-content/uploads/2019/01/The-Music-Modernization-Act-of-2018.pdf.

80 years.[77] The DOJ has been considering terminating the consent decrees because opponents of the decrees are questioning whether their rules disadvantage artists and limit music publishers from making their own licensing deals, which the opponents claim leads to musicians earning smaller payments for digital streaming and competition being suppressed.[78] The rate-setting rules in the consent decrees could also be changed to better match the MWMA's lean toward a market-based approach.[79] The consent decrees, in governing the PROs behavior, are believed to be relevant to the functioning of the U.S. music market regarding how performance rights are published, especially because they are meant to protect songwriters, despite any changes to law via the MWMA.[80] A primary purpose of the agreements is to guarantee reasonable non-discriminatory licensing rates for similarly-situated businesses that play copyrighted music.[81] The agreements require ASCAP[82] and BMI[83] to make their full portfolios available and work with established rate courts to settle licensing disputes.

Both BMI and ASCAP, which license about 90% of the music in the U.S. on behalf of songwriters, composers, and publishers,[84] combined forces in an open letter regarding the potential long-term impact over any changes to the consent decrees that might come about due to the MWMA's changes to copyright law.[85] Both BMI and ASCAP believe that removing the consent decrees "would cause chaos in the marketplace,"[86] although both BMI and ASCAP have lobbied in the past to terminate the decrees, claiming that the rules interfere with the best interests of licensees and music creators.[87] Now, instead of doing away with the consent

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[77] *See BMI President and CEO Mike O'Neill and ASCAP CEO Elizabeth Matthews Issue Open Letter to the Industry on Consent Decree Reform*, ASCAP.COM (Feb. 28, 2019), https://www.ascap.com/openletter.
[78] Brent Kendall and Anne Steele, *Washington Considers Overhaul of Music-Licensing Rules*, WSJ.COM (Feb. 26, 2019, 7:00 AM), https://www.wsj.com/articles/washington-considers-overhaul-of-music-licensing-rules-11551182401.
[79] Sergey Bludov, *The Consent Decree Dilemma: Music Licensing for the Digital Age*, MEDIUM.COM (Aug. 19, 2019), https://medium.com/swlh/the-consent-decree-dilemma-music-licensing-for-the-digital-age-87c33b56424e.
[80] *See* Tim Ingham, *US Regulation for Songwriters is Archaic – and It Results in Less Than Fair Outcomes*, MUSICBUSINESSWORLDWIDE.COM (Aug. 14, 2019), https://www.musicbusinessworldwide.com/us-regulation-for-songwriters-is-archaic-and-it-results-in-less-fair-outcomes/.
[81] *See* Second Amended Final Judgment at 11-12, United States v. ASCAP, No. 41-1395 (S.D.N.Y. June 11, 2001), *available at* https://www.justice.gov/atr/case-document/file/485966/download, and Final Judgment at 4-5, United States v. Broadcast Music, Inc., No. 64-Civ-3787 (S.D.N.Y. Nov. 18, 1994), *available at* https://www.justice.gov/atr/case-document/file/489866/download.
[82] *See* Second Amended Final Judgment at 13-15, 17, United States v. ASCAP, No. 41-1395 (S.D.N.Y. June 11, 2001), *available at* https://www.justice.gov/atr/case-document/file/485966/download.
[83] *See* Final Judgment at 4, 7-8, United States v. Broadcast Music, Inc., No. 64-Civ-3787 (S.D.N.Y. Nov. 18, 1994), *available at* https://www.justice.gov/atr/case-document/file/489866/download.
[84] Brent Kendall and Anne Steele, *Washington Considers Overhaul of Music-Licensing Rules*, WSJ.COM (Feb. 26, 2019, 7:00 AM), https://www.wsj.com/articles/washington-considers-overhaul-of-music-licensing-rules-11551182401.
[85] *See BMI President and CEO Mike O'Neill and ASCAP CEO Elizabeth Matthews Issue Open Letter to the Industry on Consent Decree Reform*, ASCAP.COM (Feb. 28, 2019), https://www.ascap.com/openletter.
[86] *Id.*
[87] Sergey Bludov, *The Consent Decree Dilemma: Music Licensing for the Digital Age*, MEDIUM.COM (Aug. 19, 2019), https://medium.com/swlh/the-consent-decree-dilemma-music-licensing-for-the-digital-age-87c33b56424e.

decrees, in an effort to facilitate transition to a free market efficiently and to prevent any movement backwards to government rate setting as the MWMA is rolled out, BMI and ASCAP proposed four provisions in newly formed consent decrees that would:

1) Allow all music users to still gain automatic access to the BMI and ASCAP repertoires with the immediate right to public performance contingent upon a fairer, more efficient, less costly and automatic mechanism for the payment of interim fees.
2) Retain the rate court process for resolution of rate disputes, as reformed by the MMA.
3) Allow BMI and ASCAP to continue to receive non-exclusive U.S. rights from writers and publishers, allowing licensees, songwriters, composers and publishers to make direct deals if they choose.
4) Preserve the current forms of licenses that the industry has grown accustomed to beyond the traditional blanket license, such as the adjustable fee blanket license and the per-program license.[88]

Finally, the MWMA contains a notable omission: the failure to extend the public performance right to cover terrestrial radio. Originally justified on the theory that radio promoted physical sales, it is far from clear that this rationale still applies. While this omission obviously disappointed record labels, it was a necessary concession for the support of broadcasters and helped make the other improvements of the legislation a reality.

The CPAA in Practice

The CPAA is intended to provide the long-missing federal protection for pre-72 sound recordings enjoyed for almost 50 years by post-72 recordings. In practice, under the requirements of the final rule,[89] the impact of pre-72 protection under the CPAA will be wide-ranging.

Practical considerations are being discussed by the music industry with a lean toward skepticism concerning the formalities involved in ensuring protection under the new law.[90] For example, to be eligible to recover statutory damages and/or attorneys' fees under the CPAA,[91] copyright owners must file schedules (using the required Copyright Office Excel spreadsheet with many rules[92]) listing their pre-72 recordings and contact information to be indexed by the

[88] *See BMI President and CEO Mike O'Neill and ASCAP CEO Elizabeth Matthews Issue Open Letter to the Industry on Consent Decree Reform*, ASCAP.COM (Feb. 28, 2019), https://www.ascap.com/openletter.
[89] *See* 37 C.F.R. § 201.35 (2019), *available at* https://www.copyright.gov/title37/201/37cfr201-35.html.
[90] *See*, *e.g.*, Chris Castle, *A Look at The Copyright Office's New Regulations Concerning Pre-72 Recordings*, CELEBRITYACCESS.COM (July 15, 2019, 5:01 PM), https://celebrityaccess.com/2019/07/15/new-copyright-office-regs-concerning-pre-72-recordings/.
[91] *See* 17 U.S.C. § 1401(f)(5)(A) (2018).
[92] *Requirements for Submitting Schedules of Pre-1972 Sound Recordings, Including Supplemental Schedules,* COPYRIGHT.GOV, https://www.copyright.gov/music-modernization/pre1972-soundrecordings/schedulefiling-instructions.html (last visited Oct. 21, 2019).

Copyright Office.[93] This information forms a searchable public database once indexed,[94] and the accuracy of the data is dependent on what is submitted by copyright holders. "[T]he Office does not analyze Schedules for legal sufficiency, interpret their content, or screen them for errors or discrepancies."[95] Statutory damages extended under section 1401 are only available ninety (90) days after indexing, to provide notice to possible infringers.

The Copyright Office allows rights owners to correct information ("limited mistakes") in the database on a recording-by-recording basis, and more than one schedule can be filed for a given sound recording,[96] potentially confusing the true ownership of works. Because a second person can independently submit a schedule for the same sound recording to correct ownership of a previous entry, the process appears ripe for disputes.

Filing fees are $75 per schedule plus $10 per group of 1-100 additional sound recordings.[97] The schedules are to be submitted to the Copyright Office via a dedicated email address.[98] In a practical sense, the process appears clunky and prone to error and electronic file problems, and the requirements may not be as feasible to complete for independent artists versus more sophisticated agents, performer representatives, and record labels.

In addition to these formalities, the MMA has two safe harbors for possible infringers of pre-72 recordings. For the first safe harbor, if the infringer is making a non-commercial use of a sound recording that is not being commercially exploited, statutory damages are not available provided that the infringer has made a ''good faith, reasonable search for'' the sound recording in the database before determining that the sound recording is not being commercially exploited.[99] This requirement makes the accuracy and searchability of the database all that more important. However, the Copyright Office's database searching functionality is limited, not permitting "fuzzy" searching, [100] making finding a sound recording less likely if a title is not entered correctly or is entered using alternative words. But, the final rule requires a user to perform a complex six-step search in a "checklist" approach to encourage thoroughness of a search.[101] In addition to searching the database, the MMA requires users to also search a major search engine, a major streaming service, YouTube, the SoundExchange ISRC database, and an

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[93] *See Schedules of Pre-1972 Sound Recordings*, COPYRIGHT.GOV, https://www.copyright.gov/music-modernization/pre1972-soundrecordings/search-soundrecordings.html (last visited Oct. 21, 2019).
[94] *Id.*
[95] *Requirements for Submitting Schedules of Pre-1972 Sound Recordings, Including Supplemental Schedules,* COPYRIGHT.GOV, https://www.copyright.gov/music-modernization/pre1972-soundrecordings/schedulefiling-instructions.html (last visited Oct. 21, 2019).
[96] *See id.*
[97] *Id.*
[98] *Id.*
[99] 17 U.S.C. § 1401(c) (2018).
[100] *See Schedules of Pre-1972 Sound Recordings*, COPYRIGHT.GOV, https://www.copyright.gov/music-modernization/pre1972-soundrecordings/search-soundrecordings.html (last visited Oct. 21, 2019).
[101] *See* Noncommercial Use of Pre-1972 Sound Recordings That Are Not Being Commercially Exploited, 84 Fed. Reg. 14242, 14243 (April 9, 2019) (to be codified at 37 C.F.R. pt. 201), *available at* https://www.govinfo.gov/content/pkg/FR-2019-04-09/pdf/2019-06883.pdf.

online retailer of physical product (at least Amazon.com, and potentially one other).[102] Both copyright owners and potential infringers, regardless of sophistication, would be smart to brush up on the final rule.

For the second safe harbor, entities that were transmitting pre-72 recordings at the time MMA was enacted (October 11, 2018) are due specific notice from rights owners before rights owners can pursue remedies against them.[103] To provide the notice, a transmitting entity must have registered its contact information with the Copyright Office within 180 days of enactment of the MMA (i.e., by April 9, 2019).[104]

The CPAA has had a number of other interesting impacts. The CPAA has special implications for tribal (e.g., American Indian and Alaska Native) entities because the law could widen public access to tribal sound recordings for non-commercial purposes, which is a concern of tribal entities that want to protect their unique ceremonies, songs, oral histories, and linguistics from unauthorized use and exploitation by the public.[105] Complicating the matter is that many tribal recordings made on tribal lands were not made by the members of the particular tribe, but by anthropologists, missionaries, sociologists, tourists, museum representatives, academics, and the like.[106] Tribes are often unaware of the existence of some of these sound recordings or that they hold copyright interests in them, or there is little documentation regarding ownership and other identifying information about the recordings.[107]

One critic suggested that the CPAA might be a "colonization of knowledge" with regard to tribal entities and their sound recordings, arguing that tribal recordings are special intellectual property that is very sensitive to a tribe's private customs and way of life.[108] There is also a question as to whether the MMA even applies to sound recordings made on tribal lands.[109] Lastly, the reasonable search requirement may prevent some use and exploitation,[110] but there

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[102] *Id.*

[103] *See* 17 U.S.C. § 1401(f)(5)(B)(iii) (2018).

[104] *Directory of Notices of Contact Information for Transmitting Entities Publicly Performing Pe-1972 Sound Recordings*, COPYRIGHT.GOV, https://www.copyright.gov/music-modernization/pre1972-soundrecordings/notices-contact-information.html (last visited Oct. 21, 2019).

[105] *See* Trevor Reed, *The Music Modernization Act and Its Impact on Tribal Interests*, ARIZONA STATE UNIV., AM. INDIAN POLICY INST. 1 (Feb. 20, 2019), https://aipi.clas.asu.edu/sites/default/files/02.20.2019_aipi_brief_mma_0.pdf.

[106] *Id.* at 2.

[107] *Id.*

[108] Graham Lee Brewer, *Is a New Copyright Law a 'Colonization of Knowledge'?*, HCN.COM (March 5, 2019), https://www.hcn.org/issues/51.5/tribal-affairs-is-a-new-copyright-law-a-colonization-of-knowlege.

[109] Trevor Reed, *The Music Modernization Act and Its Impact on Tribal Interests*, ARIZONA STATE UNIV., AM. INDIAN POLICY INST. 3 (Feb. 20, 2019), https://aipi.clas.asu.edu/sites/default/files/02.20.2019_aipi_brief_mma_0.pdf.

[110] In consideration of this issue, the Copyright Office added a seventh step to the required reasonable search steps: "In the case of ethnographic Pre-1972 Sound Recordings of Alaska Native or American Indian tribes, searching through contacting the relevant tribe, association, and/or holding institution." Noncommercial Use of Pre-1972 Sound Recordings That Are Not Being Commercially Exploited, 84 Fed. Reg. 14242, 14243 (April 9, 2019) (to be codified at 37 C.F.R. pt. 201), *available at* https://www.govinfo.gov/content/pkg/FR-2019-04-09/pdf/2019-06883.pdf.

are concerns about the cost to tribes in identifying sound recordings for itself or potential non-commercial users.[111]

The AMP Act in Practice

The MMA widens the playing field, ensuring under the AMP Act that more types of music creators, such as record producers, sound engineers, and other studio professionals, are financially rewarded. In fact, the AMP Act is the first legislation in which music producers have been mentioned in copyright law, giving music producers their first statutory right to royalties.[112] As the AMP Act is still in its infancy, it remains to be seen how much financial impact the Act will have for music producers, but industry professionals are hopeful.

Conclusion

The Music Modernization Act represents the most significant reform of music copyright law in decades. While imperfect, it greatly simplifies and rationalizes statutory music licensing, and provides long-overdue protection to classic musical works. It is a major step forward, accomplished at a time when legislative accomplishments are few and far between.

[111] Trevor Reed, *The Music Modernization Act and Its Impact on Tribal Interests*, ARIZONA STATE UNIV., AM. INDIAN POLICY INST. 4 (Feb. 20, 2019), https://aipi.clas.asu.edu/sites/default/files/02.20.2019_aipi_brief_mma_0.pdf.
[112] Rory PQ, *What is the Music Modernization Act and Why It Matters?*, ICONCOLLECTIVE.COM (July 3, 2019), https://iconcollective.com/music-modernization-act/.