



Regulatory Copyright in the Music Industry

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The Music Modernization Act

Quick Overview



So, if you're a[n interactive streaming] service, you're negotiating for four different products, in three separate forums, against at least two different entities, against the backdrop of three different procedures -- and none of these entities or procedures have to acknowledge any of the others.

Meredith Filak Rose, Public Knowledge, *Spotify's Copyright Royalty Board Appeal, Decoded* at <https://www.publicknowledge.org/news-blog/blogs/spotify-copyright-royalty-board-appeal-decoded>

The Music Modernization Act

- ▷ Modernizes copyright law to streamline and rationalize music licensing by simplifying and limiting the number of licenses required and the accompanying rate setting procedures.
- ▷ NOT!
- ▷ Congress enacted an industry-wide compromise that maintains most of the complexity that has arisen the legislative accretion in the digital era.

MMA -Combines three pieces of legislation

- ▷ Title I
- ▷ – Amends the Section 115 Statutory License
 - ▷ Creates a blanket “mechanical” license to **reproduce** and **distribute** the **musical work** for **digital music providers**, who
 - ▷ Offer downloads
 - ▷ Offer “limited downloads” – e.g. Spotify, Amazon, Apple Music
 - ▷ or provide an **“interactive stream”**
 - ▷ Administered by an industry-run Mechanical License Collective (MLC)
 - ▷ Requires the MLC to produce a database of rights in musical works and to provide free public access to this.

MMA -Combines three pieces of legislation

- ▷ Title I
- ▷ – Amends the Section 114 Statutory License
 - ▷ Applies to the noninteractive streaming of the **sound recording.**
 - ▷ Eliminates the 1995/1998 distinction – i.e the Sirius XM/Pandora distinction.
 - ▷ All rates to be set under the willing buyer/willing seller standard.

MMA -Combines three pieces of legislation

- ▷ Title I
- ▷ Maintains and reinforces the mid-20th century antitrust consent decrees that govern the **public performance of musical works** via the rates charged by ASCAP/BMI
- ▷ Those cases remain assigned to individual judges
 - Except when ASCAP or BMI file a motion to adjust the rates – that motion will be randomly assigned
 - When judges decide the motion, legal standard has changed – can now take account of how much the licensee is paying for performance of the sound recording.

MMA -Combines three pieces of legislation

- ▷ Title II
- ▷ Creates a *sui generis* regime for pre-1972 sound recordings
- ▷ Preempts most state law regulation, including of reproduction and distribution.
- ▷ Grants public performance right by streaming
 - Includes these under the same terms as the Section 114 license and directs SoundExchange to pay half of the royalties to performers

MMA -Combines three pieces of legislation

- ▷ Title II
- ▷ Term of protection varies, but it does expire, creating public domain clarity
- ▷ Creates some formalities for claiming royalties to clarify ownership

MMA -Combines three pieces of legislation

- ▷ Title III
- ▷ Recognizes that music producers and sound engineers contribute authorship to sound recordings.
 - If the “featured artist” on a sound recording sends SoundExchange a “letter of direction” to share Section 114 royalties with producers, SoundExchange now to pay them directly.
 - For pre-1995 sound recordings, under some conditions, producers will now get 2%.



Tailoring on steroids!

How did the public interest fare?

Too Early to Tell

- ▷ Focus on the implied theory of the blanket mechanical license.
- ▷ The focus is interactive streaming
 - ▷ The real economic value is associated with public performance
 - ▷ Rates for performance of the sound recording set in negotiations between providers and labels – these rates consume most of the pie
 - ▷ Rates for performance of the musical work set under the consent decrees

Too Early to Tell

- ▷ Composers and music publishers get very little from interactive streaming
- ▷ Theory is to increase their share without directly regulating rates for sound recording performance
- ▷ Instead use the rate for reproductions and distributions of musical work during streaming to do so.
 - ▷ Huh? Which copies count?
 - ▷ Server copies?
 - ▷ Incidental copies?
 - ▷ Limited downloads?

Too Early to Tell

- ▷ Other than limited downloads, I argue that interactive streaming does not need a mechanical license.
- ▷ But, the industry agreed that services would pay for a license anyway in 2008 (without prejudice), and the MMA reinforces this.
- ▷ Uses the rate for the mechanical license to indirectly influence the ratio of sound recording/musical work revenue from streaming.
- ▷ How?

Copyright Royalty Board

“All-in” rates 2018-2022

(Service pays whichever is greater)

	2018	2019	2020	2021	2022
Percent of revenue	11.4	12.3	13.3	14.2	15.1
Percent of Total Content Cost (TCC)	22.0	23.1	24.1	25.2	26.2

Implied theory

First

Rate judges in SDNY can now allow ASCAP/BMI to claim bigger share

The TCC mechanical rate does the same

Second

Streaming services squeezed to the breaking point

Last

Sound recording copyright owners relent and charge less to keep streaming services viable

Alternative theory

First

Rate judges in SDNY can now allow ASCAP/BMI to claim bigger share

The TCC mechanical rate does the same

Second

Streaming services squeezed to the breaking point

Last

Sound recording copyright owners buy the streaming services at a discount and regain control over content distribution

Industry consolidation means much of this is a balance-sheet transfer

- ▶ Three major labels control copyrights of 70% of commercially valuable sound recordings
- ▶ Same labels own music publishers who control musical work copyrights of 60% of commercially valuable compositions
- ▶ Increased payments to publishers will benefit songwriters (b/c usually a 50/50 split)
- ▶ But otherwise transferring from one subsidiary to another.

Policy audit

- ▷ Preliminary views
 - ▷ Some needed rationalization
 - ▷ Market effects are too early to tell
 - ▷ Missed opportunities to better streamline licensing
 - ▷ The database is promising, but shouldn't be left to industry
 - ▷ More to come

Thanks

- ▶ To all the folks at DePaul who hosted us so well!

Credits

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