

# Intellectual Property & Technology Law Journal

Edited by the Technology and Proprietary Rights Group of Weil, Gotshal & Manges LLP

VOLUME 31 • NUMBER 1 • JANUARY 2019

## Copyright Law Enters the Digital Age: The Music Modernization Act Is Now Law

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The Copyright Law of the United States (the Copyright Law) has been in need of significant revisions to reflect the importance of digital delivery and consumption of music since the turn of the century. Indeed, digital streaming of music has become the dominant means by which music is accessed and consumed. In a rare and remarkable exercise of bipartisanship, Congress made significant progress towards achieving those revisions through the unanimous passage of the Music Modernization Act (the MMA). President Trump signed the MMA into law on October 11. This legislation is being hailed by nearly every segment of the music industry.

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What follows is a brief summary of the provisions of the MMA that are expected to be most beneficial to songwriters, music publishers, recording artists, record companies and, for the first time, record producers, engineers, and mixers.

### Pre-1972 Recordings Granted Federal Copyright Protection

Previously, sound recordings created prior to February 15, 1972 were not eligible for federal copyright protection; rather, they were protected by a patchwork of state common laws. This meant, among other things, that the owners of those recordings and the performers on those recordings were not entitled to be paid digital performance royalties when the recordings were streamed. Under the MMA, all such recordings are automatically granted the privileges associated with federal copyright, such as:

- (a) An up to 95-year term of federal copyright protection (depending on the year in which the recording was created), but ending no later than February 15, 2067;
- (b) Statutory remedies for copyright infringement under the Copyright Law; and

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- (c) The entitlement of owners and performers of such recordings to be paid digital performance royalties through Sound Exchange or direct licenses.

### **Producers, Engineers, and Mixers Now Statutorily Entitled to Share in Sound Exchange Royalties**

Prior to the passage of the MMA, Sound Exchange was not required by law to accept letters of direction from artists to share a portion of their royalties with record producers, engineers, and mixers; rather, Sound Exchange had a voluntary process in place for accepting letters of direction. The MMA codified this process by granting “producers, mixers, and sound engineers who were part of the creative process that created a sound recording” a statutory right to receive a share of digital performing rights royalties that would otherwise be payable to featured artists on such recordings.

These interested parties must follow various procedures set out in the MMA in order to receive such royalties, principal among them, obtaining a letter of direction from the featured artist(s) directing Sound Exchange to pay a share of the artist royalties to one or more of these individuals. If such a letter cannot be obtained, all is not lost with respect to recordings made prior to November 1, 1995 (on which date the Digital Performance Right in Sound Recordings Act of 1995 (DPRA) was signed into law). For such pre-DPRA recordings, the MMA establishes a process to nonetheless compensate these individuals for up to two percent of the featured artist’s digital performance royalties, if the claimant(s) can establish that they are entitled to a share of these royalties.

### **Increases Likelihood That Songwriters and Music Publishers Will Be Paid for More Digital Performances**

At present, the digital distribution services stream many performances of sound recordings without being able to identify the songwriters or publishers of the songs embodied on those recordings. The principal reason for this is that sound recordings are too often delivered to digital distribution services without sufficient data about the songwriters and publishers of the songs embodied

on those recordings. In part, this is because the industry lacks a centralized, uniform, and publicly accessible database containing songwriter and rights holder information. Accordingly, songwriters and publishers are not paid for the many performances of songs for which the songwriter and publisher information is missing. The MMA tries to address this problem by establishing a central database to identify all of the songs (and the songwriters and publishers of the songs) embodied on the sound recordings streamed by digital distribution services to the public. A “Mechanical Licensing Collective” is to be formed to oversee the creation and maintenance of this database. If the necessary parties cooperate in the creation and maintenance of this database, there should be many fewer unidentified digital performances of copyrighted songs and an increase in royalties paid to songwriters and publishers.

### **MMA Establishes New Criteria for Setting Future Digital Royalty Rates**

In the past, digital royalty rates were established by a Copyright Royalty Board working with a set of limited rate-making criteria that did not take into account how certain music royalty rates in the market were constrained. For example, the rates charged by ASCAP and BMI are constrained by antitrust consent decrees. The MMA establishes new criteria that, in the future, will require the judges of the Copyright Royalty Board to take into account what a “willing buyer” and “willing seller” would pay and accept for the musical rights at issue in connection with the digital distribution of music. Songwriters and publishers hope that this new criteria will eventually lead to substantial increases in the statutory license fee rates paid for the digital performances of songs.

Future changes will not affect the rates recently established in the just-concluded rate proceeding before the Copyright Royalty Board which resulted in royalty rate increases of up to 40 percent over the next five years. While those increases are significant, even after implementation, songwriters and publishers will still be receiving far less of the digital performance royalty pool than the record companies and recording artists performing their songs.

These are only a few of the important changes wrought by the MMA.

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