



COPYRIGHT CATCHES UP

By Jorge Zamora

Copyright law has traditionally been the branch of intellectual property (IP) law that has lagged behind patents and trademarks. Although some can say that it is because copyright law faces technological challenges that trademarks and patents do not. Streaming has been a constant issue that has made it harder for copyright laws to keep up with the technology. As a result, Congress has recently passed legislation to try to bring copyright laws up to speed with the rest of the IP laws.

Music Modernization Act

The Orrin G. Hatch-Bob Goodlatte Music Modernization Act (MMA)¹ was signed into law on October 11, 2018. Its main goal is to modernize the various copyright issues for music and audio recordings that fell behind thanks to streaming capabilities. The MMA is actually three separate bills that have been consolidated.

Since the MMA is three separate bills that have been consolidated, the Act consists of three main titles, each

of which serves a purpose of updating the copyright laws. Title I—Music Licensing Modernization primarily serves the purpose of modifying the existing section 115 “mechanical” license for reproduction and distribution of musical works in phonorecords. In the past, these mechanical licenses meant that a licensee would have to get a new license for every new work; or more commonly known as a song-by-song basis. The update will establish a new blanket license for digital music providers to engage in specific covered activities. These covered activities include permanent downloads, limited downloads and streaming.

This blanket license excludes physical configurations of works such as CDs and vinyl. Title I further establishes a new legal standard that is market oriented and covers the new section 115 mechanical licenses. There will be a transition period to move to the new blanket license, which will allow digital music providers to limit copyright infringement liability. This liability will be limited as long as the provider engages in good-faith, commercially

reasonable efforts to identify and locate musical work copyright owners. Lastly, Title I modifies the procedure that is used when selecting a federal district court judge to adjudicate the rate-setting disputes concerning performance rights organizations that are subject to consent decrees with the Department of Justice.

Title II—Classics Protection and Access primarily brings pre-1972 sound recordings into the federal copyright system by extending copyright infringement claims to owners of works that predate February 15, 1972. This section applies a statutory licensing regime similar to the one that’s applicable to sound recordings that came after 1972. Title II further establishes a process for lawfully engaging in noncommercial uses of pre-1972 sound recordings not being used for commercial gain.

Title III—Allocation for Music Producers designates Sound Exchange, the Congress-created nonprofit, to distribute royalties on sound recordings and to distribute part of those same royalties to a producer, mixer

or sound engineer who was part of the creative process that created the sound recording.

Implications

Notably, the MMA passed both the Senate and the House of Representatives unanimously. In an age where there is little consensus outside of like-minded individuals, the MMA offers a small ray of hope that there are still issues in which both major political parties can work together as one.

The Bill is essentially a music business peace treaty designed to fix some very longstanding issues within it. It's the result of years of slow-moving compromise between tech companies like Spotify that rely on music, entrenched music industry interests from major and independent labels, publishers, performance rights organizations, artists and the organizations that advocate for them.

On one end, you have tech companies like Spotify who wish to pay as little as possible for the privilege of being able to provide music, and on the other, you have individual artists who seek to get paid as much as possible for the music they compose and release out to the public.

Spotify, when it launched in 2011, did so without having an effective way to identify and pay songwriters for the millions of recordings of those compositions it was making available to its customers. And in the years since, as Spotify has grown into one of the world's most valuable music companies, it has been sued for it many times.

With its implementation, the tech companies and artists now have a method to efficiently distribute the revenue from the musical works as well as patch up many cracks in the copyright royalty system. The Music Modernization Act is an attempt to repair the fissures created as the digital revolution bloomed and to balance the interests of artists and the tech giants who need them.

Conclusion

Although copyright law is still lagging behind the other two main branches of IP, the MMA is an important first step to bring copyright law up to speed with the ongoing technological boom.

At Rao DeBoer Osterrieder, our goal is to help you understand complex aspects of copyright law as they apply to your business. As intellectual property

strategies vary greatly between industries or even businesses, we aim to learn your business goals and function as an in-house IP attorney would for you. There are a number of strategies even after a copyright is registered that can help increase your bottom line.

Tailor a plan to your individual business goals and needs. Make your intellectual property effectively work for you. **N**

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1. https://judiciary.house.gov/wp-content/uploads/2018/04/HR___-MMA.pdf. This is a version of the Bill that was introduced in the House of Representatives, later passed in the Senate and signed by the White House.

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