

The Music Modernization Act of 2018:
Selected Pros and Cons From the Music Creator Perspective

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The Major Pros

--STREAMLINED LICENSING SYSTEM—The Act puts an end to the bulk “Notice of Intent” (NOI) process that allowed digital distributors of music to avoid the work of identifying owners of musical compositions by simply filing an NOI with the US Copyright Office indicating they were digitally distributing a composition. The Act does this by establishing, at the expense of digital distributors who will fund it, a Mechanical Licensing Collective (MLC) whose general roles will be to issue blanket licenses to applicants for digital downloading and streaming-on-demand of musical compositions, collect royalties, identify copyright owners through a newly-created and perpetually updated public database, pay to the owners the royalties collected, and potentially audit licensees to ensure accuracy in payments. The Act also mandates audits be conducted on a regular basis of MLC activities.

--UNMATCHED COMPOSITIONS—The Act ensures payment to the MLC of potentially hundreds of millions of dollars in royalties due on musical compositions currently being held by digital distributors as “unmatched” to copyright owners.

--WILLING BUYER/WILLING SELLER—The Act changes the legal standard applied by the Copyright Royalty Board in the setting of compulsory mechanical royalty rates for the use of musical compositions on phonorecords and in digital phonorecord deliveries to a “willing buyer/willing seller” standard. The current, multi-pronged inquiry standard has significantly, artificially depressed the levels of such royalty rates.

--JUDICIAL RATE SETTING OF PERFORMING RIGHTS ROYALTIES—The Act changes the rules for judicial rate-setting of performing rights royalties in musical compositions by eliminating the prohibition on considering the rates being paid for performing rights in sound recordings by the same licensees. The new law also eliminates the former system whereby single rate court judges were assigned, respectively, to each ASCAP and BMI in order to oversee royalty rate-setting under the existing consent decrees. The new rotating selection system will go a long way toward avoiding the inherent unfairness of being saddled on a long-term basis with a judicial overseer biased against the creative community.

--BENEFITS FOR LEGACY RECORDING ARTISTS, PRODUCERS & RECORDING ENGINEERS—The Act incorporates the Classics Act (Compensating Legacy Artists), which guarantees royalties for the digital performance of pre-1972 recordings, and the AMP Act (Allocation for Music Producers Act) which will more effectively enable producers and engineers to share in digital performance royalties in sound recordings.

The Major Cons

--MINORITY MUSIC CREATOR BOARD REPRESENTATION-- The demands of several independent songwriter and composer groups that the board of directors of the Mechanical Licensing Collective consist of at least 50% music creator representatives went unrealized. Only through the efforts of the Songwriters Guild of America and other member organizations of the Music Creators of North America (MCNA) was the number of music creator representatives on the board expanded to four of fourteen. There is concern among many global songwriter and composer groups that this unequal management arrangement in the United States may lead to a lack of meaningful transparency and influence for creators in one of the world's most important music markets, particularly if the process of selecting the music creator board and committee representatives is unduly influenced by the major music publishing conglomerates without strenuous US Copyright Office/Library of Congress oversight. This may impact issues that include the exercise of audit rights, the allocation of operating funds, the energies put into un-matched identification programs prior to distribution of "black box" royalties, and the level of details included in the new public database and in royalty reporting documents.

--MARKET SHARE STANDARD FOR UNMATCHED WORKS AND PREMATURE DISTRIBUTION OF UNMATCHED ROAYLTIES-- There remains concern that the distribution of royalties attributable to unmatched compositions on a market share basis represents an inequitable formula, paying royalties to major music publishers that clearly belong to independent and foreign --but as yet unidentified-- creators and owners that have not registered in ways consistent with MLC formalities. Though costly, energetic outreach to the music community to help identify these creators and owners is mandated (although budgeting for such activities is murky under the legislation), it remains to be seen what percentage of royalties currently attributed to unmatched compositions can eventually be distributed to their rightful owners. In that regard, perhaps most concerning of any issue pertaining to the Act's implementation is the question of whether the three year "suggested" window for distribution of the hundreds of millions of dollars in unmatched royalties currently being held is nearly enough time for the licensing collective to become operational, complete a database, launch an identification outreach program, and fairly exhaust all methods of proper identification before distributing such monies on a market share basis mainly to those parties to whom such royalties most certainly do not otherwise belong. That issue may prove to be extremely contentious in the near future.

--MUSIC PUBLISHER TRANSPARENCY-- Songwriters and composers need to be extremely diligent in ensuring they are receiving their proper share of royalties from copyright owners, who will be the parties receiving such royalties from the Collective. This is especially crucial in regard to unmatched royalties eventually distributed on a market share basis. A music creator is entitled to receive a split of such royalties from the music publisher copyright owner in the same percentage as his or her publishing agreement specifies in regard to mechanical royalties, with fifty percent established as a minimum FLOOR, not as the standard applicable percentage. By way of example, if a songwriter or composer is due 90% of mechanical royalties by contract, he or she is due 90% of the unmatched royalties attributable to his or her share of compositions, without deduction of any additional administrative fees or costs. The Legislative History of the Act makes this point very clear, at the request of the Songwriters Guild of America, because of the possibilities for abuse. (Additional practice tip: It should be noted that the Act's definition of "copyright owner" would seem to include all music creators who hold title in their works, even if the composer or songwriter has entered into an administration deal with a music publisher. Those music creators may wish to explore the possibility of registering with the collective as the proper party to receive ALL royalties directly from the collective.)

--SAFE HARBOR FOR PAST INFRINGERS-- There remains concern over the provisions of the act which remove the ability of copyright owners to sue for statutory damages in copyright infringement suits against unlicensed digital distributors filed after December 31, 2017. This arbitrary, retrospective cut-off date may prompt challenges to those provisions of the legislation under the US Constitution's Fifth Amendment's "takings" clause.

--DIRECT LICENSING OF PERFORMING RIGHTS-- There remains deep concern that direct licensing of performing rights in music compositions outside of the collective licensing societies and organizations (ASCAP, BMI, SESAC, GLOBAL, etc.) will encourage further erosion of the rights of creators to control their share of performing rights and the royalties that flow from such rights and uses. The influence of the Act on the future of collective licensing in general will be very much open to debate as the Act takes effect.

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