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Mechanical Licensing Before and After the Music Modernization Act

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Abstract

The Music Modernization Act (MMA), signed into law in the United States on October 11, 2018, made significant changes to digital music licensing. The act was an omnibus act, combining three previously introduced bills. One of those bills, referred to as the Musical Works Modernization Act (MWMA), focused on the mechanical licensing process. This paper explains the foundational elements of mechanical licensing, including what a mechanical license is, how it is obtained, and who is responsible for obtaining one. It also explores the ways that the MWMA has modified the availability of the compulsory license and created a blanket licensing approach. Finally, it presents several open questions which must be addressed before the new Mechanical Licensing Collective (MLC) can become operational.

Keywords: music copyright, Music Modernization Act (MMA), Musical Works Modernization Act (MWMA), mechanical license, mechanical licensing, Mechanical Licensing Collective (MLC)

Introduction

On October 11, 2018 the Music Modernization Act (MMA) was signed into law.[1] The Act, an amendment to United States copyright law, is made up of three titles. Title I: Music Licensing Modernization (Musical Works Modernization Act), Title II: Compensating Legacy Artists for their Songs, Service, and Important Contributions to Society Act (CLASSICS Act), and Title III: Allocation for Music Producers Act (AMP Act).[2] The first title, the Musical Works Modernization Act (MWMA), probably garnered the most press coverage, and has the most far-reaching implications since it has the potential to impact every songwriter and music publisher with an interest in a song that is streamed through an interac-

tive audio streaming service in the United States such as Spotify or Apple Music. These services must obtain several types of licenses for their use of music. This article, and the MWMA, only address one of these types, the *mechanical license*. A mechanical license grants permission to make and distribute a musical work in the form of a phonorecord, and has been required by law in the United States since the Copyright Act of 1909, with early questions regarding the legal need for permission dating back to as early as 1866 in Europe.[3] The MWMA changes the process of mechanical licensing and related royalties—in a digital audio context only.

Today, less than a year after the passage of the MWMA, and roughly one-and-a-half years away from January 1, 2021 when the Mechanical Licensing Collective (MLC) established under the MWMA will start collecting, allocating, and paying out royalties, there are many unanswered questions about exactly how the overall mechanical licensing process, and the related process for music video, will be modernized as a result of the change in the law. The process of mechanical licensing in the United States is often regarded as complex and cumbersome for a variety of reasons. Before a meaningful analysis of how the process might work under the MWMA can be undertaken, a solid foundation of understanding about how and why the process works as it does today must be established. This paper will describe the process as it is today and explore the open questions that will need to be resolved in the next one-and-a-half years. It will also establish some foundational elements which will help to clarify some critically important points that are often misunderstood by those not very familiar with this area of the music business.

Foundational Elements of Mechanical Licensing

Understanding what a mechanical license is depends on first understanding some basics of music copyright. Each audio recording of a song involves two copyrights: the copyright in the song (the *musical work*), and the copyright in the recording (the *sound recording*). The copyright in a musical work is usually owned or administered by a music publisher, and if there are multiple writers of a musical work, there are typically multiple publishers, each controlling their respective writer's fractional share of the copyright ownership. The fractional share is the proportional interest in the work that is attributed to the writer. For example, two co-writers might decide to each have an equal share, resulting in a 50/50 split, or they might instead decide to not have equal shares, and agree on a 70/30 split.

The fractional shares must sum to one hundred percent. The copyright in a sound recording is usually owned by a single record company.

What is a Mechanical License and How Do You Get One?

A mechanical license is permission to reproduce and distribute a musical work in the form of an audio recording. If a musical work is protected by copyright law, its reproduction and distribution is copyright infringement unless the user has obtained a license. The Copyright Act of 1909 gave the copyright owner of a musical work the exclusive right "to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced."[4] As the way we listen to recorded music has evolved over the past century, so has the copyright law in how it defines what a recording is. Over time, the term *any form of record* evolved into the term *phonorecord* which was described in the Copyright Act of 1976 as follows:

> …material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed.[5]

The Digital Performance Right in Sound Recordings Act of 1995 (DPRA) expanded the definition into the digital realm, as activities such as buying and downloading an audio file, or listening to internet radio, were contemplated and distinguished from each other, defining a *digital phonorecord delivery* as follows:

> …each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein. A digital pho-

> norecord delivery does not result from a real-time, noninteractive subscription transmission of a sound recording where no reproduction of the sound recording or the musical work embodied therein is made from the inception of the transmission through to its receipt by the transmission recipient in order to make the sound recording audible.[6]

The MWMA brought a further expansion of the definition of a digital phonorecord delivery, as well as definitions of a permanent download, limited download, and interactive stream, as follows:

> …'digital phonorecord delivery' means each individual delivery of a phonorecord by digital transmission of a sound recording that results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any musical work embodied therein, *and includes a permanent download, a limited download, or an interactive stream* [emphasis added]. A digital phonorecord delivery does not result from a real-time, noninteractive subscription transmission of a sound recording where no reproduction of the sound recording or the musical work embodied therein is made from the inception of the transmission through to its receipt by the transmission recipient in order to make the sound recording audible. A digital phonorecord delivery does not include the digital transmission of sounds accompanying a motion picture or other audiovisual work as defined in section 101.[7]

The formats that the law describes, phonorecords (physical products such as vinyl records or compact discs), and digital phonorecord deliveries (downloads or interactive streams) all serve to *mechanically* reproduce musical works, hence the name of the license. There is usually an accompanying obligation to pay mechanical royalties for such use.

Mechanical licenses can be obtained by either (a) entering into a voluntary license with the musical work copyright owner(s), their agent(s), or

a party who has the right to grant a mechanical license, or (b) obtaining a compulsory one. The United States copyright law has an exception to the exclusive authority of copyright owners to grant permission to reproduce and distribute their musical works. This exception is called a compulsory or statutory license, and if certain conditions are met, it means that the party wishing to obtain a license is granted one as a matter of law, regardless of what the copyright owner wants, so long as that party complies with the rules set forth in the law regarding the operation of the license. Section 115 of the copyright law establishes a compulsory license for making and distributing phonorecords that embody a musical work. The law establishes eligibility requirements, and obligations, including the paying of mechanical royalties at a rate established by a panel of judges, called the Copyright Royalty Board.

All record companies must obtain permission from musical works copyright owners to make and distribute physical products, in the form of CDs, vinyl, etc., which embody musical works. Similarly, all digital music services which reproduce and distribute musical works, in the form of downloads or interactive streams, must have permission from musical works copyright owners, as well as from sound recordings copyright owners. A mechanical license does not include use in audiovisual formats (e.g., music video, lyric videos, karaoke, etc.), nor non-interactive uses (e.g., internet or satellite radio), as these uses require other types of licenses.

Who is Responsible for Obtaining a Mechanical License?

Historically, a record company was the party who sought a mechanical license and calculated, allocated, and paid the related mechanical royalties. The license was sought in the context of the record company wanting to make and distribute a sound recording, the production of which they generally oversaw, on physical products such as vinyl, cassettes, and audio CDs. Occasionally, the production of a new sound recording was not involved, such as when one record company (licensee) licensed the use of an existing sound recording from another record company (licensor), in order to include it on a compilation record that it (licensee) was going to make and distribute, such as a greatest hits album where some earlier tracks were released by a prior record company. Record companies would traditionally send a license request to the publisher of each share of the musical work (i.e., share-by-share), and the publisher(s) would grant the license on a product-by-product basis, including the product catalog

number(s) as part of the license terms. As more recording artists started composing the musical works they recorded, recording agreements between record companies and artists began including language about these *controlled compositions*, including the granting of a mechanical license.

Generally speaking, record companies very rarely sought to acquire a true compulsory license, even though their behavior with respect to voluntary licenses was influenced by compulsory licensing rules.[8] Prior to the MWMA, in order for a compulsory license to be available, the following had to be true:

> When phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner, any other person, including those who make phonorecords or digital phonorecord deliveries, may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work. A person may obtain a compulsory license only if his or her primary purpose in making phonorecords is to distribute them to the public for private use, including by means of a digital phonorecord delivery.[9]

For a record company in the modern era, where recording artists typically record new musical works which have never before been recorded or distributed (known as the *first use*), a compulsory license was simply not available. If a recording artist was to record a musical work that had been recorded and distributed as a record by another artist (a so called *cover record*), even though the compulsory license may be available, the record company would still seek to obtain a voluntary license for a variety of reasons including a lower administrative burden, and potentially lesser legal damages in the event of failing to comply with the terms.[10]

In the United States, when permanent digital downloads came into existence as a new form of product, record companies continued to be the party obtaining the mechanical license, and *passed through* the permission to make and distribute the musical work as a permanent download to the digital download services, such as iTunes.[11] The revenue passed from digital download services to the record companies was inclusive of mechanical royalties, and the record companies would then calculate, al-

locate, and pay the mechanical royalties to music publishers. Record companies were already involved in the mechanical licensing activities related to the physical products they released, and so expanding the voluntary licensing activity to include the equivalent digital products was a natural fit. This was also the case with respect to the early interactive streaming/limited download services.

In 2001, the major music publishers, the Harry Fox Agency, and the major record companies entered into an agreement establishing a framework for obtaining mechanical licenses for interactive streams and limited downloads, enabling the two original streaming services, MusicNet and Pressplay, to launch.[12] In these early days of interactive streaming, the licenses were obtained by the record companies and passed through to the music services. The early streaming services were affiliated with record companies, MusicNet being a joint venture between Warner Music Group, BMG Entertainment, and EMI Recorded Music, and Pressplay being a joint venture between Sony Music and Universal Music. Non-interactive services, like satellite radio and webcasting services, did not need to obtain mechanical licenses because their use of musical works was considered to be only a public performance, and not a substitution for sales (i.e., distributions) the way interactive steaming was. Therefore, with respect to musical works, non-interactive services only needed public performance licenses.

As more streaming services entered the marketplace, and uncertainty about the royalty rates for interactive streaming and limited downloads continued, the practice of pass-through licenses started to change. While the 2001 industry agreement established a framework for licensing, it did not establish royalty rates. Parties who obtained mechanical licenses for interactive streams and limited downloads under the agreement had to accrue estimated royalties, and pay advances to the Harry Fox Agency, until the rates were either negotiated and agreed to, or set by a Copyright Arbitration Royalty Panel (later replaced by the Copyright Royalty Board), at which time royalties would be calculated on past activities, and paid, to the extent not already paid for by the advances.[13] Record companies may have become less willing to carry this estimated liability on their books, and bear the risk of not having accrued sufficiently.

In 2008, when the rates for interactive streaming and limited downloads were determined by the Copyright Royalty Board, they were set as percentage rates with some complex features, as opposed to the traditional

penny rates (e.g., $.091 per song per copy sold), and were therefore not easily calculated by the record companies without significant changes to their royalty systems.[14] At the same time, the music publishers wanted to establish a direct relationship with the digital music services. All of these factors contributed to the end of pass-through licensing for interactive and limited download uses, while it continued for permanent digital downloads.[15] Digital music services offering interactive streaming and limited downloads had to obtain their own mechanical licenses, and pay mechanical royalties, no longer relying on the record companies to do it for them. This marked a significant shift in the mechanical licensing process, moving the responsibility away from the party overseeing the production of the sound recording and manufacturing ("making") and distribution of products embodying the sound recording, to the party overseeing only the reproduction ("making") and distribution of products embodying the sound recording. The impact of this cannot be overstated. Record companies had long ago put in place staff, procedures, and technology systems to support the mechanical licensing and related royalty calculation, allocation, and payment process. However, interactive streaming/limited download services, operated by relatively new companies, had no such infrastructure, and those which originated outside of the United States, such as Spotify, arguably underestimated the complexity and workload involved in obtaining mechanical licenses within the United States.

Before the digital era, the fact that a record company had to incur significant music production costs and the costs of manufacturing physical products before it could generate revenue by selling them to the public, naturally limited the number of recorded music products in the marketplace. In the digital era, several important developments occurred in parallel which contributed to an exponential growth in the number of recorded music products in the marketplace. The cost to make a recording dropped significantly as digital audio workstation software became more common and affordable, and companies like CD Baby in 2004, and TuneCore in 2005, created a pipeline for record companies (which did not have distribution agreements in place) and do-it-yourself artists to get their recordings on digital download services. When Apple iTunes launched in 2003, it had 200,000 tracks on its service.[16] In 2019, Apple Music makes over 50 million tracks available to its subscribers.[17] Trying to manage the mechanical licensing of over 50 million musical works, on a work-by-work basis, is an impossible task for any digital music service.[18] Despite hiring

the Harry Fox Agency, considered to be the most experienced mechanical licensing entity in the United States, to assist with its mechanical licensing and royalties obligations, Spotify found itself facing lawsuits and mounting pressure from songwriters and music publishers, and eventually entered into two highly publicized multi-million dollar settlements.[19]

As a precautionary measure, digital services began pursuing compulsory licenses by sending bulk notices of intention (NOIs) to the Copyright Office, even if they had identified the musical work through other means than the records of the Copyright Office, and even if they had entered into voluntary licenses with the music publisher(s) of the work and were paying them royalties.[20] In order to obtain a compulsory license under the law prior to the MWMA, an NOI had to be sent to the musical work copyright owner before or within thirty days after making, and before distributing any phonorecords of the work.[21] If the registration or public records of the Copyright Office did not identify the name and address of the copyright owner, the NOI could be filed with the Copyright Office. Only after the copyright owner was identified in the registration or public records of the Copyright Office were they entitled to royalties for phonorecords made and distributed from that point onward.[22] Prior to a 2016 change in the Copyright Office procedures and pricing, a separate filing fee of two dollars was charged for each song listed on an NOI. The fee to file NOIs for 250,000 songs would have been $500,000 (plus an overall $75 fee) at a time when roughly 500,000 new songs were being added to the digital music services every month. After the change, the NOIs could be filed on spreadsheets, with each row listing a separate song (i.e., in *bulk*), with a fee of $75 per spreadsheet, and only $0.10 per song.[23] This caused the number of filings to balloon to more than 50 million by the end of 2017. The filings were so voluminous and difficult to search that offerings like the SoundExchange NOI LOOKUP tool were created to help musical works copyright owners determine if the filings included any of their works.[24] The MWMA ended the process of filing NOIs with the Copyright Office for digital uses.[25]

The Impact of the MWMA

Availability of the Compulsory License

The MWNA created an additional eligibility criterion under which a compulsory license is available. In order to understand the need for this additional criterion, it is important to understand the way records are re-

leased to the public today. In the pre-digital era, a record company would oversee the production of a recording, then manufacture and distribute physical products which included the recording to the marketplace. Doing so meant that the musical works embodied in the recordings became eligible for compulsory licensing for any subsequent mechanical uses. In the early digital era, when downloads arrived as a new format, with respect to existing records where the physical products had already been released, the musical works were eligible for compulsory licensing for use as digital downloads. The common practice for a record company was to obtain the mechanical license for both physical products and digital downloads in the same voluntary license request or notification pursuant to a controlled composition clause. Albums were typically released both in physical and digital download formats, generally around the same time. Once the physical products or digital downloads had been distributed to the public in the United States under the authority of the copyright owner, for the public's private use, a compulsory license would be available for use of the musical work as an interactive stream or limited download. However, more recently, some recordings are first released on interactive streaming services, sometimes well in advance of, or to the exclusion of, physical products or downloads being distributed to the public. In this scenario, the musical works would not be eligible for compulsory licensing under the prior version of the law, because they have not been previously distributed to the public. The MWMA creates an additional situation under which a compulsory license becomes available:

> …(i) phonorecords of such musical work have previously been distributed to the public in the United States under the authority of the copyright owner of the work, including by means of digital phonorecord delivery; ***or*** [emphasis added] (ii) in the case of a digital music provider seeking to make and distribute digital phonorecord deliveries of a sound recording embodying a musical work under a compulsory license for which clause (i) does not apply — (I) the first fixation of such sound recording was made under the authority of the musical work copyright owner, and the sound recording copyright owner has the authority of the musical work copyright owner to make and distribute digital phonorecord deliveries embodying

> such work to the public in the United States; and (II) the sound recording copyright owner, or the authorized distributor of the sound recording copyright owner, has authorized the digital music provider to make and distribute digital phonorecord deliveries of the sound recording to the public in the United States.[26]

This change in the law provides digital music services the ability to obtain a compulsory license for an interactive stream, limited download, or permanent download, even if the use is the first time the musical work is distributed to the public. However, note the record company continues to be responsible for the so called *first use* permission, articulated in the quote above in (I), as permission to make the first recording of the musical work and the permission to make and distribute digital phonorecord deliveries.

Availability of a Blanket License

The MWMA created a blanket license, which offers a different model from the traditional one of securing permission on a work-by-work basis, having to identify, notify, and pay royalties to, each fractional copyright owner of the musical work. The blanket license is a compulsory license that a digital music provider may obtain through the Mechanical Licensing Collective (MLC), to make and distribute interactive streams and limited downloads of *all* musical works available for compulsory mechanical licensing.[27] The move from work-by-work licensing to a blanket license was one of the most eagerly anticipated features of the MWMA.[28] In order to obtain a blanket license, the digital music service must submit a notice to license to the MLC, rather than a notice of intention to the copyright owner or copyright office.[29]

Open Questions

The MWMA specifies the legal responsibilities of the musical work copyright owner (music publisher), the digital music providers (Spotify, Apple Music, etc.), the MLC, and the sound recording copyright owner (record company), with respect to the blanket licensing and royalty payment processes. To implement the activities broadly described in the law, there will have to be many detailed processes developed. Exactly how some of the processes will work, and their impact on the broader music

licensing landscape, is unclear at this point. The following list describes some of these open questions, however, there are surely many more not listed below:

How will the Mechanical Licensing Collective obtain complete and authoritative musical works information?

The MLC must compile the title of the musical work, the copyright owner(s) names, ownership percentage, and contact information, and if available, the International Standard Musical Work code (ISWC), and information about the sound recordings embodying the musical work. Gathering information about a musical work, especially one that was just created, is regarded by those who regularly attempt to do it as extremely laborious. While the 2019 winner of the GRAMMY Award for Song Of The Year, "This Is America", was co-written by three writers, the 2018 winner, "That's What I Like" was co-written by eight. The way the information about a writer and the respective publisher, for a particular musical work, is gathered is arguably the most inefficient process in the music business today. It begins with all of the creators involved having to agree on exactly who is and is not a writer. This aspect alone can take many months, particularly in the urban and pop genres. Then, confirmation as to the music publisher for each writer is needed, as well as confirmation of the address and tax ID for royalty statement and payment purposes. This can be difficult if writers are new to the industry and have not yet entered into deals with music publishers or established their own companies. Finally, a determination of the fractional share of each writer needs to be made and needs to sum up to no more or less than one hundred percent. This can also take a long time to sort out. Disputes over ownership and writers' fractional shares can sometimes take years to resolve. Who will do the heavy lifting of gathering complete information for a newly written song? How will creators and their administrators be incentivized to actively participate in the process of providing and confirming their information? Music publishing catalogs are bought and sold every day, and so musical works copyright ownership information often changes over time. How will the information be kept up to date? How will the information maintained by the MLC be connected to the information in the Copyright Office registration or public records repositories, if at all? The MWMA requires the MLC, digital music providers, musical works copyright owners, and sound recording copyright owners to all contribute to the collection

of musical work and/or sound recording information in different ways.[30] How the MLC will obtain authoritative information about musical works and their related copyright owners, keep the information up-to-date, and confirm that the musical work has been registered with the Copyright Office, in a timely enough manner to ensure that no royalties go unpaid, is not yet clear.

How will the MLC match data about musical works with data about the sound recordings which embody them?

There has been increased interest in this topic for the past several years among those involved in metadata and rights licensing in the music business. Ideally, business practices and systems would result in the connection of the sound recording unique alphanumeric identifier, the International Standard Recording Code (ISRC) with the musical works unique alphanumeric identifier, the International Standard Musical Work Code (ISWC). However, because ISWCs are generally not issued as early in the process as ISRCs, challenges persist with being able to link these two identifiers early enough to support use of the link throughout the digital supply chain and related revenue reporting. How the process of creating an authoritative link between a musical work and a sound recording might be improved and facilitated and/or used by the MLC is not yet clear.

Will all mechanical licensing be "modernized" and handled by the MLC?

The law limits the MLC to only performing licensing activities that are related to the making and distributing of *digital phonorecord deliveries* of musical works. While the law does say that the MLC may also administer licenses other than the blanket license, to wit, voluntary licenses (i.e., non-compulsory), or permanent download compulsory licenses that have been obtained by a digital music service or record company, and charge a reasonable fee for such services, it limits these additional activities to *digital phonorecord deliveries*, which means audio-only permanent downloads, audio-only limited downloads, and audio-only interactive streams.[31] The MLC is not permitted to be involved in the mechanical licensing of physical products (i.e., *phonorecords*, such as CDs and vinyl) or any other uses of music, such as the reproduction and distribution of an audiovisual work that embodies a musical work within it (e.g., music video).

While the use of a musical work in a music video is not considered a mechanical use, the process of securing a digital video license must be

considered because of its close proximity to the process of securing a mechanical license. The licensing of musical works for use in music videos which are produced by record companies has evolved in a similar way to how digital download, interactive streaming, and limited download licensing evolved. Around the time when digital video started to grow as a format, new digital media agreements were struck between the major record companies and major music publishers. These were handled as direct deals between one record company and one music publisher. These deals enabled record companies to obtain the musical works digital video licenses they needed to create and distribute the videos, and act as the music publisher's agent to pass them through to the digital video services, like iTunes, and later YouTube.[32] These licenses included the right to synchronize musical works in timed relation with visual images (referred to as a synchronization license), as well as reproduce and distribute the video digitally. More recently, the largest digital video platforms have entered into direct deals with the major music publishers, eliminating the need for them to obtain the musical works licenses as pass-throughs from the record companies for musical works controlled by these publishers.[33] The current common practice in the music industry is for a record company to release related digital music videos for some, if not all, of the audio recordings they release. If record companies continue to release digital video products, where the digital video service provider has not entered into direct deals with the music publisher of the musical works involved, the record company will have to continue to obtain these licenses and pay the related royalties.

The post-MWMA continuation of processes for obtaining mechanical licenses for physical products, and for obtaining digital video licenses, (both of which involve the same parties—record companies and music publishers—and the same musical works that are involved in the mechanical licensing processes for digital audio products), has to factor in to an analysis about how the MWMA will impact the entire digital music licensing landscape. Having multiple parallel licensing processes related to the use of the same musical work in the same audio recording and/or video recording, will continue to inevitably undermine efficiency, which means that more money than necessary will continue to be spent supporting redundant staff, procedures, and technology systems involved in this sort of licensing. And if the data in the multiple systems does not match up, there will inevitably be confusion and potential mistakes.

What other licensing processes might be impacted by the changes required under the MWMA?

Aside from the mechanical licensing process related to physical products, and the musical works digital video licensing process, there are other licensing processes that might be impacted by the creation of the MLC and the business processes developed to support it. The process for obtaining permission to synchronize music with an audiovisual work, such as a film or television program, involves a licensee seeking permission from the sound recording copyright owner, and separately, the musical work copyright owner(s). Licensees often have a difficult time finding out who the copyright owners are and how to reach them. The publicly available database that the MLC is required to operate could play a significant role in helping potential licensees find the appropriate licensors to contact, however, the licensees will still have to negotiate a voluntary license with the owner(s) of the musical works, and of the sound recording, if a pre-existing sound recording will be used. The process of authorizing public performances of a musical work, and receiving related royalties, requires that songwriters or their music publishers must register their song(s) with a performing rights organization (PRO), such as ASCAP or BMI. How the databases maintained by the PROs will replicate, contradict, or relate to, if at all, the data maintained by the MLC is an open question.

The process of a record company securing permission to use a music sample may also be impacted. If an existing sound recording is going to be used as a sample, the record company enters into a sample license with the sound recording copyright owner. However, the record company only facilitates bringing together the music publishers of the sampled musical work with the music publishers of the newly created work, so that they can agree between them to allow the sample use, and how to divide up the ownership and/or income participation rights to the newly created musical work. Often the record company offers an inducement to the music publishers of the existing work in the form of an advance payment recoupable against mechanical royalties, in exchange for a mechanical license for the music publishers' share of the new work. There is no separate *sample use* license between a record company and a music publisher, because the permission to make and distribute records of the new musical work, which includes the sample, is given in the mechanical license. In a world where a recording may only ever be released to the marketplace on an interactive streaming service, what does that mechanical license look like?

How would the record company ever recoup the advance if the mechanical royalties are paid directly by the MLC to the musical work copyright owners? In order for the compulsory license to be available to the digital music services, the record company must still obtain permission to make a recording of the musical work, and to make and distribute digital records, from the musical work copyright owner.[34] Will the processes involved in obtaining that permission change as a result of the MWMA?

More broadly, in all cases where a musical work, or a portion of the musical work (such as with a sample), is considered to be *non-controlled*, meaning generally that it is not composed by the artist or producer, what sort of contractual financial consideration will be used in the mechanical licenses a record company is still required to obtain, if mechanical royalties do not flow through the record company, and an advance against mechanical royalties is no longer available? The answers remain unclear.

Conclusion

Mechanical licensing was a complicated area of copyright law before the passage of the MWMA, and it is no less so now. There are a number of open questions about exactly how the MLC will accomplish its mission. There are also a number of open questions about how the changes related to this one slice of the music licensing pie will impact other related areas of music licensing. These questions will surely generate much discussion and debate over the next two to three years as the answers become clear.

Endnotes

1. Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (2018). A history of the Act can be found at https://www.govtrack.us/congress/bills/115/hr1551.
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4. Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (1909), §1(e).
5. Copyright Act of 1976, Pub. L. No. 94-533, 90 Stat. 2541 (1976), codified at 17 USC § 101.
6. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No 104-39, 109 Stat. 336 (1995), codified at 17 USC § 115(d).
7. Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (2018), codified at 17 USC § 115(e)(10).
8. Copyright Royalty Board, Library of Congress, *Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding*, 74 Fed Reg 4509 (January 26, 2009) (amending 37 C.F.R. § 385), page 4513, citing the May 12, 2008 testimony of Andrea Finkelstein, Senior Vice President Business Affairs Operations and Administration, at Sony BMG Music Entertainment, regarding the "ghost-in-the-attic like effect" that compulsory mechanical licenses have on voluntary agreements. https://www.govinfo.gov/content/pkg/FR-2009-01-26/pdf/E9-1443.pdf.
9. 17 USC §115(a)(1)(A)(i) (2016).
10. The administrative obligations require a party seeking a compulsory license to send a notice of intent (NOI) to the copyright owner no later than 30 days after making, but before distributing, any phonorecord of the work. 17 USC § 115(b)(1). Payment of royalties and a statement of account must be sent to the copyright owner monthly, as opposed to the standard industry practice of quarterly statements and payments, and a cumulative annual statement, certified by a public accountant, must also be sent. 17 USC § 115(c)(2)(I). Failure to file a timely NOI forecloses the possibility of a

compulsory license, and absent a voluntary license, the making and distributing of phonorecords is an act of copyright infringement. 17 USC § 115(b)(4). Failure to provide monthly and annual accountings may cause the copyright owner to give written notice of the automatic termination of the license if the default is not remedied within 30 days, and if the license terminates, the making and distributing of phonorecords is an act of copyright infringement. 17 USC § 115(c)(2)(J). Failure to comply with the terms of a voluntary license may give rise to a claim of breach of contract.

11. 17 USC § 115(b)(3) allows for a record company to obtain a compulsory license to make and distribute, or authorize the making and distributing, of musical works in permanent downloads. The copyright law now refers to this as an "individual download license" (individual meaning work-by-work, rather than a blanket license), and it is referred to informally in the industry as a pass-through license that the record company passes through to the permanent download service. The MWMA amended the law to make compulsory pass-through licenses unavailable for interactive streaming or limited downloads. See Music Modernization Act, H.R. Rep. No. 115-651, at 4 (2018); Music Modernization Act, S. Rep. No. 115-339, at 4 (2018), and 17 USC §115(c)(2)(C)(i)(II).
12. Brian Garrity, "Agreement Leaves Digital Royalty Issues Unresolved," *Billboard,* October 20, 2001, 8. Also see Todd Larson, "Don't Believe the Hype: Spotify Is Right to Challenge Mechanical License Demands for Interactive Streaming," *Bloomberg Bureau of National Affairs Patent, Trademark & Copyright Journal* 94 PTCJ 1466 (October 20, 2017).
13. The agreement, described in the "Joint Statement of the Recording Industry Association of America, Inc., National Music Publishers' Association Inc. and the Harry Fox Agency, Inc." was submitted to the Copyright Office on December 6, 2001. The Copyright Office published a Request for Comment regarding *Mechanical and Digital Phonorecord Delivery Compulsory License,* in the Federal Register, 66 Fed. Reg. 64783 (December 14, 2001), which included a URL on the Copyright Office website where the agreement could be found. The URL is no longer active.

14. For a description of the rates, see *Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding*, 74 Fed. Reg. 4509 (January 26, 2009), amending 37 C.F.R. § 385.
15. 17 USC § 115(c)(2)(C)(i)(II). The MWMA eliminated pass-through licensing for interactive streaming and limited downloads, but it remains available for permanent downloads.
16. Brandon Griggs and Todd Leopold, "How iTunes changed music, and the world," *CNN Business*, April 26, 2013, https://www.cnn.com/2013/04/26/tech/web/itunes-10th-anniversary/index.html.
17. Apple Music website, accessed September 16, 2019, https://www.apple.com/apple-music/.
18. Sarah Jeong, "A $1.6 Billion Spotify Lawsuit Is Based on a Law Made for Player Pianos," *The Verge,* March 14, 2018, https://www.theverge.com/2018/3/14/17117160/spotify-mechanical-license-copyright-wixen-explainer.
19. Spotify entered into two large settlements. One was with the National Music Publishers Association (NMPA) on behalf of its members, in March of 2016, resulting in a US$30 million settlement fund. Ed Christman, "Spotify and Publishing Group Reach $30 Million Settlement Agreement Over Unpaid Royalties." *Billboard*, March 17, 2016, https://www.billboard.com/articles/business/7263747/spotify-nmpa-publishing-30-million-settlement-unpaid-royalties. The other was in the class action case *Ferrick v. Spotify USA Inc*, No. 1:16-cv-08412-AJN (S.D.N.Y), in May of 2018, resulting in a US$43.4 million settlement fund. Also see https://spotifypublishingsettlement.com/ for more information.
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21. 17 USC § 115(b)(1) (2016).
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23. Ed Christman, "Say You Want a Revolution? U.S. Copyright Office Modernizes Key Part of Digital Licensing," *Billboard,* June 24, 2016, https://www.billboard.com/articles/news/7416438/us-copyright-office-music-reports-compulsory-licensing-digital-notice-of-intent.

24. According to the United States Copyright Office NOI website, https://www.copyright.gov/licensing/115/noi-submissions.php, as of November 15, 2018, there are at least 6,947 bulk NOI filings, which represent more than 70 million individual work NOIs. The SoundExchange NOI LOOKUP tool can be found at https://noi.sx-works.com/login.
25. 17 USC § 115(b)(2)(A).
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29. 17 USC § 115(b)(2) and (d)(2).
30. 17 USC § 115(d)(3)(E)(iv) and (a)(4)(B)(ii).
31. 17 USC § 115(d)(3)(C)(iii).
32. The 2006 affidavit of Ron Wilcox, Executive Vice President and Chief Business and Legal Affairs Officer, Sony BMG Music Entertainment, submitted as part of the 2006 Copyright Royalty Board proceeding *Adjustment or Determination of Compulsory License Rates for Making and Distributing Phonorecords* describes the new digital media agreements (NDMAs) in detail. https://www.crb.gov/proceedings/2006-3/riaa-wilcox-amended.pdf.
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