ROYALTIES FOR STREAMING & THE MUSIC MODERNIZATION ACT

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Abstract

For Music Business II, students were assigned to work on a personal project that related to our career goals. My career goals include advocating for the rights of music creators in the realms of copyright law and music ownership, specifically, in regards to the recent challenge music industries have incurred working alongside the growing trend of streaming services. One key to understanding the current changes in the industry includes becoming aware of the newly formed Mechanical Licensing Collective service who acknowledges the Music Modernization Act. The Music Modernization Act went into legislation in 2018 and was created to co-align digital service providers (mainly streaming services) with the music community. In previous years it has been interpreted that the economics of streaming royalties were “value grabbed” by digital services, consequently copyright holders have accused streaming services of hiding behind the layers of outdated acts (particularly the Digital Millennium Copyright Act of 1998) in order for them to seem ethical in their decision making. Therefore it can be stated that the old system of mechanical licensing is not compatible with the demand of today. The recent change was formed in three titles: the Music Licensing Modernization Act, the Classic Act, and the Allocation for Music Producers Act. In this paper we will discuss the first of the three and how the ultimate goal of it is to make the music business more prosperous.
Types of Streaming Royalties

Master Licensing

The royalties for streaming are provided in three forms: master licensing, public performance licensing, and mechanical licensing. The first of the three, the master license, provides royalties to the performer of the sound recording and the coinciding copyright holders (more than likely the label). After gaining rights to the master, the licensee is then allowed to exploit the recorded master (not the underlining song); consequently, cover versions will need their own master license. There are two ways in which master royalties are given to artists / labels and it is determined by whether or not the streaming services are interactive or non-interactive.

For interactive use, streaming services will directly negotiate with labels / copyright holders for the use of the master sound recording. The negotiation allows both sides to determine what rate streamers pay per on-demand interactive stream. As stated in *The Music Business Handbook and Career Guide* by David Baskerville and Tim Baskerville, master royalties for interactive streaming range between $0.0190 to $0.0044 cents per stream.¹ This in itself has incurred disparity from artists due to the fact that artists are stating they are not paid enough for their work (especially artists who are not connected to a large label or do not have a large amount of negotiation power); however, even artists connected to large labels may not receive large cuts of their royalties due to recoupable advances. Helena Mayer has stated that she earns around $400-$600 per quarter for her music as a spotify artist with a small fan base, however, her

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association with a label has allowed her to earn this type of money. Prior to being associated with a label she barely earned $100 in a year!²

The second type of royalties from master licenses are given to artists is for the use of non-interactive streaming. In terms of paying royalties for non-interactive use, no negotiations with the artist and label is needed. Rather a third party called SoundExchange uses a statutory rate made by the Copyright Royalty Board at $0.0024 cents per stream for noninteractive paid streaming and $0.0018 cents per noninteractive stream free with ads.³

Performance Royalties

The second type of royalties, performance royalties, provides royalties for the composition of the song itself to the songwriters and publishers. This is done through the songwriters and publisher’s performance rights organizations; these associations go by the names of ASCAP, BMI, SESAC, or GMR. The performance rights organizations then collect the performance royalties for both interactive and non-interactive streaming and distributes them to the rightful copyright owners.

One commonality between ASCAP and BMI is their submission to consent decrees. Consent decrees place a restriction on both organizations from using high royalty rates by determining equal rates for all services; the reason for placing restrictions on monetary rates was to promote competition.⁴ Additionally, a second rule of consent decrees states that ASAP and BMI must provide their services to any digital service platform (DSP). Therefore, if a DSP is

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² Helena Mayer, text message to author, March 26, 2020.
unhappy with the rates set by either organization they are allowed to negotiate a deal in court; ASCAP and BMI are bound to such negotiations due to the fact that they must offer their services to any reputable DSP. In recent negotiations it can be seen that judges are more favorable towards digital service providers; ASCAP and BMI's reputation as a “monopoly” has made them the larger target in the eyes of judges. This in turn could create a new type of monopoly where the judge's order is the monopoly.\(^5\) Although the idea of removing consent decree altogether may be enticing, ultimately they have not been removed with the new reformations of the Music Modernization Act. As Adam Candeub states within Forbes Magazine, “the horizontal restraints BMI and ASCAP could impose if freed from the decrees are as illegal now as they were in the 1940s...while it is true that courts have weakened rules on vertical restraints, they have still emphasized that they are still harmful when it influences horizontal competition.”\(^6\) Nonetheless, the Music Modernization Act did create two rulings that can affect the negotiation process of performance royalties in court.

**New Changes for Performance Royalties**

The Music Modernization Act has implemented a rotation of judges and the ability for ASCAP / BMI to introduce useful evidence in court.\(^7\) Prior to the MMA, performance rights organizations could not inform judges of the difference between the rates of royalties for the sound recordings vs the composition. With the ability to introduce such knowledge in court it may offer ASCAP and BMI a greater chance in presenting their side of the case. As stated by

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Doug Collins from The Hill Magazine, “Knowing that today’s music ecosystem suffers under heavy-handed government intervention and defunct copyright policy, I’m grateful that my colleagues Rep. Hakeem Jeffries (D-N.Y.) and Sens. Orrin Hatch (R-Utah) and Lamar Alexander (R-Tenn.) look past partisanship toward solutions that will take music licensing from the dark ages into the digital age.” Overall, these two changes are a step in the right direction when it comes to updating the current system for performance royalties in streaming.

**Mechanical Royalties**

The third type of royalties, mechanical royalties, are royalties given to the songwriters / publishers for permission to release the song through an audio-only format (specifically for interactive audio streams). Streaming services that use an audio-only format are still considered to be in their early stages of development due to the fact streaming roughly began in 2007 with only 7% of recorded music revenue being processed through this medium, but it has since then grown to cover 51% of revenue in recent years. Due to this escalation of streaming in the music business, changes in mechanical licensing have occurred in order to handle the demand of the streaming services.

It can be noted that mechanical licenses are compulsory and paid within a fixed royalty rate, meaning that it is required by law that anyone may obtain a mechanical license. Prior to the Music Modernization Act, this was done so through a song-by-song basis in which the digital services would need to send a “notice of intention” for use to the copyright holder per song on

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being played on their platform.\textsuperscript{10} With this system, notice of intentions were flooding into music publishers' offices and copyright offices making the old system incapable of handling the demand of the streaming services nowadays. Not only was this harmful to the songwriters and publishers allocating for the correct amount of royalties to be paid for their music, but to the streaming services who were filed with copyright infringements on songs not even they could detect to be on their sites. For example, in 2017 Spotify was hit with a lawsuit filed by Wixen Music Publishing for $1.6 Billion dollars on the premise of copyright infringement.\textsuperscript{11} Although the lawsuit was settled between the two, this was not the only occurrence of Spotify being hit with alleged copyright infringement. The second problem for streaming services was the obtaining of mechanical licenses for songs with more than two copyright holders. Contemporary songs have multiple songwriters with different publishers of representation, therefore if a service does not get a mechanical license for all publishers involved in a song then they are considered to be infringing on a copyright, and can possibly gain financial penalties.\textsuperscript{12} So how did the Music Modernization Act change the way mechanical licenses were put into order?

\textit{The New System for Mechanical Licensing}

The new system for mechanical licensing will be made possible through the help of the Mechanical Licensing Collective; it is a “nonprofit organization designated by the U.S.

\textsuperscript{10} \textit{“Overview of the Music Modernization Act,”} Congressman Ted Lieu, October 11, 2018.


Copyright Office” that won't go into full effect until 2021, but has already begun the process of building a central database from the aid of the Harry Fox Agency.13

As shown in the visual above, by creating a central database of music from the Harry Fox Agency, the MLC will be able to provide a blanket license to services (much like the blanket licenses provided by PRO’s) through a set royalty rate. This set rate was determined by the Copyright Royalty Board as 11.2% of streaming revenue; over the course of the Music Modernization Act, the Copyright Royalty Board has established that mechanical royalty rates will change to 15.1% of streaming revenue in order to create a more realistic marketplace standard from the years of 2018 to 2022.15 In order for a songwriter / publisher to receive the mechanical royalties from the MLC, at $ 0.0006 cents per stream, individuals must be responsible for uploading their own catalog of music into the MLC system.16 Digital service

providers will then pay royalty fees for mechanical licenses to the MCL through the fees of
listeners collected from the digital service provider themselves. Essentially, a percentage of the
money we provide digital service providers (DSPs) are in turn given to the MLC by the DSP
itself. That money is then distributed in the form of royalties to the proper copyright holders. A
question to be asked is, “How is the money / royalties distributed to copyright holders?” In
short, the MLC will gather music usage reports from DSPs to understand what music is being
used and divide the money into proportions of royalties given to the songwriter and publisher.

The last and final protocol for the new mechanical licensing system is it’s commitment to
transparency. As stated by the MLC, “The MLC will make data on unclaimed works and
unmatched uses available to be searched by registered users of The MLC Portal and the public at
large...registered users will also be able to submit claims for unmatched activity that they believe
relates to their musical works via The MLC Portal.”17 With this commitment, the Mechanical
Licensing Collective is prioritizing rightful copyright owners and the money they deserve.

Long Term Effects of the MMA

Conclusively, the Music Modernization Act will put into place an entirely new system of
mechanical royalties while also taking extra negotiation measures for performance royalties in
judicial courts. In the long run the Mechanical Licensing Collective will be up and running by
2021; therefore, it is important that self-administered songwriters and publishers connect or sign
up with the MLC’s online system. By signing you up you will receive weekly or monthly notices
of new events occurring within the MLC and news related to the company. It should be noted
that the Music Modernization Act will affect the lives of large publishers (with large catalogs of

music) more so than the lives of individual songwriters because, the larger amount of copyright ownership an individual has to a large catalog of hit music the more royalties that individual will earn. The Music Modernization Act will ultimately decrease the administration cost for publishers (due to the fact there's no need for notice of intentions), reduce the amount of unclaimed royalties and unlicensed tracks, as well as set equal standards in court room negotiations in order to “modernize” the music business.

**Additional Information for Songwriters / Publishers**

Before ending the paper, additional tools and resources for aspiring songwriters or publishers will be mentioned. These resources are helpful to understanding the full extent of royalties, licensing, and streaming.

**Berklee’s Online Handbooks and Youtube Account**

The Berklee College of Music is known for its extensive reputation in the world of music education; perhaps the college itself is non-feasible financially for some, but it still offers free resources to people interested in the music business. The *Music Business Digital Handbook* by Berklee provides a quick look into the revenue streams of the modern music industry; supplemental youtube videos also offer knowledge on copyrights, the Music Modernization Act, and more.  

**The Music Industry Blueprint**

The Music Industry Blueprint is a podcast that can be streamed from your computer or smartphone; it discusses the various details of the music business that are important to artists, professional musicians, producers, songwriters, and publishers. Episodes include discussions on

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social networking, how to earn spots on DSP playlists, and personal experiences from the host Rick Barker.

Conferences and Events

Chances are that if you live in a large city then there are bound to be conferences or events correlated to your field of interest. As an example, I went to an event titled “Women in Music” by California Lutheran University in early February. The event was free and offered insight on the current music business from a panel of women in the industry. This included Doreen Ringer-Ross, the Vice President of Creative Relations for BMI, and an agent from Kraft-Engel Management named Sarah Kovacs. Although I was unallowed to interview them outside of the panel, I was able to listen to their guidance about the Music Modernization Act. This is one example of the multiple events hosted around the L.A. county, but multiple events can be found on websites such as Eventbrite. A few conferences that reoccur each year would include: The NAMM Show, The ASCAP Experience, and the Durango Songwriters Expo.19 The three listed are specifically located in California, but the list of events in other cities is expansive. Not only are conferences a great way to learn about the business, but it is a fantastic way to meet people in the business as well! With all of this in saying, it is important to learn about the music business in order to succeed within your career and stay up-to-date with the constant changes.

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Music royalties are generated for the use of a copyright. And every song has two copyrights attached to it—one for the song as written down (the composition) and one for the song as recorded (the recording). Songwriters earn royalties on the composition copyright, and performers earn royalties on the recording copyright. The Music Modernization Act of 2018 helped update various aspects of the music publishing sector, especially for the mechanical streaming royalty rate. As previously mentioned, the MMA creates a mechanical licensing collective similar to how Europe handles its interactive streaming royalties. Like Europe, the MMA creates a blanket license and a Music Licensing Collective (MLC) to administer streaming mechanical royalties. With the president's signature, the Modernization Act is officially the law of the land! We must applaud all Members of Congress, both in the House and in the Senate, who voted unanimously to pass the MMA and helped the bill become law. We owe a big thanks to legislators for coming together, recognizing the value music has in both society and our hearts and passing this critical reform. Amending Section 114(i) of the Copyright Act to enable the rate court judge to consider royalties paid to recording artists when determining what streaming services will pay songwriters for the exact same performance. Currently, recording artists can make six to ten times more than songwriters. The Music Modernization Act aims to perform a number of functions to update existing music licensing laws. Specifically it combines the CLASSICS Act that applies to works written or recorded before 1972, the Fair Play Fair Pay Act, Musical Works Modernization Act for songwriters and publishers, and MP Act for producers and engineers. To Apple Music and its streaming competitors, the bill also adds in protections, in that the services cannot be sued for damages over royalties, so long as they comply with the law and create a database of authors and composers for all hosted music. This would help eliminate the practice of reimbursement suits against some streaming services, which have occurred in the past. Music Modernization Act Transition Period Transfer and Reporting of Royalties to the Mechanical Licensing Collective. A Proposed Rule by the Copyright Office, Library of Congress on 07/17/2020. Document Details. On October 11, 2018, the president signed into law the Orrin G. Hatch-Bob Goodlatte Music Modernization Act which, among other things, substantially modifies the compulsory license for making and distributing phonorecords of nondramatic musical works under 17 U.S.C. 115. It does so by switching from a song-by-song licensing system to a blanket licensing regime that.