



Virginia Association of Broadcasters Legal Review



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Legal Memorandum

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Senate Passes “Music Modernization Act” — Bill Heads Back to House, Without a Performance Fee on Broadcasters

Last week, by a unanimous voice vote, the Senate passed the [Orrin G. Hatch Music Modernization Act](#) (“MMA”) (H.R. 1551), which will bring sweeping reforms to music copyright law for the first time in decades. You’ll recall that a version of the MMA unanimously passed the House in April. Because the Senate made several changes to that bill, the legislation now heads back to the House for another vote, which may happen this week. Once the House approves the bill, it’ll be sent to the White House for President Trump’s signature. The MMA is supported by many stakeholders within the music industry—and by NAB.

Perhaps of most interest to broadcasters regarding the MMA is what is not in the bill: there is no performance fee (often referred to as a performance “tax” or “royalty”) that would require local radio broadcasters to pay record companies and recording artists for playing music over the air. The absence of such a performance fee in the legislation was not a foregone conclusion. In fact, up until the “11-hour” of passage, Sirius XM lobbied vigorously for various changes to the MMA, including for the elimination of the long-standing exemption of terrestrial radio stations from having to pay a performance royalty.

Below please find a brief summary of several of the MMA’s provisions, including those of most significance to broadcasters.

Pre-1972 Sound Recordings. The MMA creates a public performance right for the digital streaming of songs recorded prior to February 15, 1972. This provision does not affect play of these sound recordings over the air, but it does affect stations that stream pre-1972 songs online, as they will have to begin paying public performance royalties for these sound recordings if they don't already should the MMA become law. Stations that are streaming pre-1972 recordings and not already paying SoundExchange may wish to contact their communications counsel to discuss how they will be affected by this change.

Rate Court Proceedings for ASCAP and BMI. ASCAP and BMI are subject to consent decrees, approved by the Department of Justice, which govern the setting of rates for the public performance royalties paid for an underlying musical work (i.e., the royalties that stations currently pay to composers/publishers). The MMA adds a layer of Congressional oversight over DOJ action regarding these consent decrees. NAB supported the provision, which ensures that Congress will review any DOJ changes to consent decrees. “These decrees are essential to a functioning music marketplace,” said NAB President and CEO Gordon Smith in a statement. “[A]nd any action to terminate them will now be preceded by appropriate Congressional oversight to protect the interests of songwriters, licensees, and consumers of music.”

Additionally, the MMA would allow the courts that oversee the ASCAP and BMI rate-setting proceedings to take into account the public performance royalty rates that music services pay to SoundExchange for sound recordings when those courts determine the royalty rates to be paid by streaming services to ASCAP and BMI for musical compositions. However, the MMA preserves an agreement reached between NAB, ASCAP, and BMI earlier this year that narrows the courts’ consideration of this “SoundExchange evidence” so that such evidence cannot be used to raise the ASCAP and BMI royalty rates for broadcasters.

The MMA brings another change to the ASCAP and BMI rate-setting process. Currently, all such rate proceedings are overseen by the same two judges, in the same venue—the Southern District of New York. One judge is assigned to preside over all of ASCAP’s “rate” court proceedings, and another judge is assigned to do the same for BMI’s proceedings. The MMA would change this process by randomly assigning these rate-setting cases among all judges on the court.

Other Notable MMA Provisions. Here are a few other notable items in the legislation, none of which should have a significant impact on broadcast radio stations.

- Mechanical Licensing Collective. The “reproduction” and “distribution rights” of a musical composition are covered by what’s called the “mechanical license” in Section 115 of the Copyright Act. The MMA would create a new Section 115 blanket mechanical license for digital uses, as well as new procedures and a new entity—the mechanical licensing collective—to administer the new blanket license. These changes are designed to modernize the royalty process for interactive streaming services like Spotify or Apple Music, and generally do not affect broadcasters. The MMA also would require the mechanical licensing collective to establish and maintain a database containing information relating to the copyright owners of songs. This database could prove useful for broadcasters when researching copyright information to clear uses of music in commercials and other station productions.

- Mechanical License Rates. The MMA would change how the Copyright Royalty Board (“CRB”) determines Section 115 royalty rates. Per the MMA, the CRB would determine the rates using a “willing buyer, willing seller” standard, which asks what a willing buyer and a willing seller would negotiate for in an arm’s-length transaction.
- AMP Act. Finally, the MMA includes a portion of the bill known as the AMP Act and allows for some royalties that are paid to SoundExchange to be distributed directly to producers of sound recordings, provided that copyright owners agree to those distributions.

We are following this legislation closely and will keep you posted on relevant developments.

More Music Copyright News: Court Upholds Radio Streaming Rates Set by Copyright Royalty Board

Also last week, the United States Court of Appeals for the District of Columbia rejected an appeal from SoundExchange and [upheld](#) the royalty rates that the Copyright Royalty Board (“CRB”) set (way back in 2015) for SoundExchange for the years 2016 through 2020. (Each year, the CRB is required to adjust the royalty rates it adopted for that 2016—2020 time period if there are increases in the Consumer Price Index.)

SoundExchange had argued that the rates set by the CRB did not reflect a “fair market” price for radio stations’ online streaming of music and that the CRB used the wrong benchmarks when it crafted the royalty rates. The Court rejected SoundExchange’s position, finding that the CRB had adequately justified its decision.

We have previously reported on the current CRB rates that noninteractive webcasters pay to SoundExchange, which became effective January 1, 2018. (These are the current rates among the 2016—2020 rates that the Court affirmed in its decision.)

To Whom Do These Rates Apply? The royalty rates discussed here apply to all noninteractive webcasters (as opposed to interactive webcasters) who pay SoundExchange for Section 114 statutory licenses. A Section 114 (that’s Section 114 of the Copyright Act) license covers the public performance of digital audio transmissions. Noninteractive services do not allow a user to choose which song the user will hear. Interactive services, on the other hand, allow a user to select a particular song upon request.

2018 Rates for Commercial Webcasters. The 2018 per-performance rate for nonsubscription webcasters is \$0.0018. Note that most broadcasters who simulcast online fall into the nonsubscription category. For subscription webcasters, the 2018 rate is \$0.0023 per performance.

2018 Rates for Noncommercial Webcasters. Noncommercial webcasters will continue to pay a flat, annual \$500 fee; in addition, they must pay at the \$0.0018 per-performance rate for streams that exceed the monthly limit of 159,140 aggregate hours.

These 2018 rates apply through the end of 2020, unless a cost-of-living adjustment requires a change before then.

If you have any questions concerning the information discussed in this memorandum, please contact your communications counsel or any of the undersigned.

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