



THINK FORWARD

Modernizing Digital Licensing: Introducing the Music Modernization Act

By [William Frankel](#)

January 03, 2018

On December 21, 2017, the Music Modernization Act (H.R. 4706) was introduced in the House of Representatives. The bill's purpose is to modernize digital licensing by simplifying licensing for streaming companies and helping songwriters and publishers obtain higher royalty rates for public performances of their musical works.

Background

Since 2015, the U.S. Copyright Office has recognized that digital licensing needs reform.^[1] Under the current system, licensing is inefficient and artists are not always fairly compensated for uses of their musical works.^[2] For example, § 115 of the Copyright Act provides compulsory licenses for making and distributing phonorecords.^[3] These licenses, however, are problematic because they “do[] not permit [copyright owners] to control their works or seek higher royalties.”^[4] Moreover, § 115(b) describes a notice of intent process, stating that:

Any person who wishes to obtain a compulsory license under this section shall . . . serve notice of intention to do so on the copyright owner. If the registration or other public records of the Copyright Office do not identify the copyright owner and include an address at which notice can be served, it shall be sufficient to file the notice of intention in the Copyright Office.^[5]

In effect, streaming companies are required to license songs one by one, which is “a daunting task in a world where online providers seek licenses for millions of works.”^[6] Moreover, copyright owners may not always receive fair compensation for these uses – especially if they are not registered or identified.

With respect to public performance rights, performing rights organizations (“PROs”) can help songwriters and publishers with licensing by allowing “licensees [to, more commonly,] obtain a blanket license, which allows the licensee to publicly perform any of the musical works in a PRO’s repertoire for a flat fee or a percentage of total revenues.”^[7] Parties can negotiate fees, but if they cannot reach an agreement, then they may need to apply for a determination by a rate court.^[8] Under the current statutory framework, however, PROs are at a disadvantage, which hinders their ability to seek fair royalties on the artists’ behalf.^[9]

Music Modernization Act

As a brief overview, this bill has four components:

- **Creating a Mechanical Licensing Collective (“MLC”)**, a publicly accessible database that links copyright owners to their musical works to increase efficiency and transparency in music licensing – especially with respect to the requirements described in § 115. According to a press release by Congressman Doug Collins, a co-sponsor of the legislation, songwriters and publishers would administer the MLC while streaming companies would provide the funding in exchange for “blanket

mechanical licenses for interactive streaming or digital downloads of musical works.”^[10]

While the mechanics of the MLC are yet to be fully worked out, this reform would eliminate the notice of intent process described above.^[11] Moreover, by “publicly identify[ing] songs that have not been matched to songwriters and/or publishers,” the MLC should also improve digital licensing such that songwriters and publishers will “be able to claim the rights to songs and get paid for [uses of] those songs” in a timely manner.^[12]

- **Adopting the “Willing Buyer/Willing Seller” Standard**, which allows the Copyright Royalty Board to account for free-market conditions when they consider and determine royalty rates during rate setting proceedings.
- **Establishing the “Wheel” Approach**, which assigns judges determining royalty rates “on a rotating basis – rather than being assigned to a single judge - for the purpose of rate setting disputes.”^[13]
- **Repealing § 114(i) of the Copyright Act**, which allows courts to use and consider royalty rates from sound recording performances as a factor in determining royalty rates for musical work performances.

Implications

Despite its early stage in the legislative process, several organizations have reacted favorably to the bill’s introduction. For example, representatives from the National Music Publishers’ Association, ASCAP, BMI, Nashville Songwriters Association International, and Songwriters of North America issued a joint statement to demonstrate their support for the bill.^[14]

Other organizations, however, have been less enthusiastic. For example, the National Association of Broadcasters (“NAB”) expressed “serious concerns about unrelated provisions in the bill that may unjustifiably increase costs for many music licensees, including local radio and TV broadcasters, who otherwise receive no benefit from the legislation.”^[15] Despite these concerns, NAB nonetheless appeared willing to move forward with music licensing reform and “work[] with the bill sponsors and impacted parties to resolve [their] outstanding concerns.”^[16]

More information about the Music Modernization Act and its status is available at <https://www.congress.gov/bill/115th-congress/house-bill/4706>.

Contact Us

If you have any questions or wish to discuss how the Music Modernization Act applies to you, please contact a member of the [Brinks Copyright Practice Group](#).

^[1] U.S. Copyright Office, Copyright and the Music Marketplace 12 (Feb. 2015), <https://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf> (“It is a testament to the irresistible power of music that industry and market participants have done their best to adapt the old methods, including pre-digital government policies, to embrace current technologies and consumer expectations. But the costs of failing to update our outmoded licensing methods are escalating.”).

^[2] Id. at 68 (identifying how “music creators need to be fairly compensated for their efforts” and “the licensing process needs to be more efficient”).

^[3] 17 U.S.C. § 115 (2016).

^[4] Id. at 5.

^[5] 17 U.S.C. § 115(b)(1).

^[6] U.S. Copyright Office, *supra* note 1, at 5.

^[7] Id. at 33. Antitrust principles also limit the licensing practices of PROs, namely via consent decrees,

which require PROs “to grant a nonexclusive license to publicly perform all of the works in their repertoires to any potential licensee who makes a written application.” Id. at 40-42. It is important to note that “the mere submission of the application gives the applicants the right immediately to begin using the musical works in the PRO’s repertoire without payment of any fee or compensation during the pendency of negotiations or a ratesetting proceeding” – thereby delaying royalty payments. Id. at 41.

[8] Id. at 41.

[9] Id. at 41-42 (describing how PROs carry “the burden of proving that the royalty rate it seeks is ‘reasonable’” and how “[§] 114(i) of the Copyright Act prohibits the rate court from considering the licensing fees paid for digital performances of sound recordings in its ratesetting proceedings for the public performance of musical works”).

[10] Press Release, Congressman Doug Collins’ Press Office, Collins Introduces Music Modernization Act to Reform Licensing Landscape (Dec. 21, 2017), <https://dougcollins.house.gov/media-center/press-releases/collins-introduces-music-modernization-act-reform-licensing-landscape>.

[11] Id.

[12] Id.

[13] Id.

[14] Press Release, Am. Soc’y Composers, Authors & Publishers, U.S. Rep. Collins Introduces Music Modernization Act to Reform Licensing Landscape (Dec. 21, 2017), <https://www.ascap.com/press/2017/12-21-music-modernization-act-collins-release>.

[15] Press Release, Nat’l Ass’n of Broad., NAB Statement on Introduction of Music Modernization Act (Dec. 21, 2017), <http://www.nab.org/documents/newsRoom/pressRelease.asp?id=4320>.

[16] Id.