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Music Modernization Act: 4 Big Things You Need To Know

By **Bill Donahue**

Law360, Washington (January 25, 2018, 10:11 PM EST) -- A new copyright bill promises to "modernize" the way digital streaming music services pay royalties, but what exactly does that mean?

The bill, the Music Modernization Act, has been introduced in both the House and the Senate by a bipartisan group of lawmakers who say they want to update copyright law for the new world of streaming, which has more than doubled in revenue since 2015 and now accounts for more than 60 percent of the music market.

The proposal would make a number of changes to copyright law, but the centerpiece is a major rewrite of how streaming services like Spotify pay so-called mechanical royalties — which go to songwriters and publishers when their musical compositions are recorded or reproduced.

Perhaps most notably for a piece of copyright legislation, the Music Modernization Act has won the support of the two main camps that will be governed by it: music publishers and songwriters on one side, and digital streaming services on the other.

That has experts taking the bill seriously in a way that couldn't be said for the many previous attempts to change music copyright law in recent years.

"What's remarkable here is that we are seeing a bill with buy-in from stakeholders across the spectrum — songwriters, publishers, the record industry, digital media services," said Stefan Mentzer, a partner at White & Case LLP. "That bodes well for the bill or a version of it passing soon."

As the bill moves forward — it hasn't gone before committee in either house yet — here's what you need to know about what it would do.

Create a Blanket License for Streaming Services

The meat of the new bill is a reworking of how on-demand digital services like Spotify get a mechanical license to reproduce all those thousands of musical compositions that appear on their platforms — a thorny issue that's led to litigation in recent years.

Under the Copyright Act's Section 115, anyone can get an automatic license to reproduce a composition. They need to file a so-called Notice of Intention through the Copyright Office, pay a set rate, and they

have access to the song.

But both sides have complained that the current process isn't working.

The digital services claimed it was hard to find the right author for every single song, a problem songwriters claimed was then used as an excuse for services to "infringe now, apologize later." The dispute led to high-profile lawsuits against Spotify and others; some artists settled for $43 million, but others are continuing to press a $1.6 billion lawsuit over the royalties.

The proposed legislation aims to address the concerns of both sides.

Rather than bulk-filing NOIs for various songs, digital services would instead pay for a broad blanket license that covers every song in a database called the "Mechanical Licensing Collective." The streaming services will fund the operation, but the publishers will administer it.

Broadly speaking, the goal is for streaming services to pay for the songs they use even when identifying the author is tricky, and to have a centralized entity that tries to get the money to the right owner.

"That will reduce uncertainty for music services and serve songwriters and music publishers by empowering a single body to license and administer rights," said Mentzer, the White & Case partner. "It's a win-win for all sides."

Notably, for digital services that play by the new rules, the bill would give them strong legal protections against past infringements. In any lawsuit filed after Jan. 1, 2018, against a complying service, plaintiffs can only recover the royalties owed under the new system, not damages for infringement.

It was that provision, according to media reports, that prompted the music publisher representing Tom Petty and others to sue Spotify over unpaid mechanical royalties on Dec. 29, just days before the proposed deadline.

Such indemnity was almost certainly an inducement designed to get the Digital Media Association — the group that represents Spotify, Pandora and other streaming services — to support the legislation, but Robert E. Allen, a principal at McKool Smith PC and a veteran music publishing attorney, said the provision went much too far in forgiving past behavior.

"I think that's completely unfair to songwriters," Allen said. "It gives these services a pass for their past misconduct."

Adopt a "Willing Seller, Willing Buyer" Standard

Beyond rewriting the process for how digital services get a mechanical license, the new bill would also change how the rates for licenses are determined.

The Copyright Royalty Board, which sets the rate paid for mechanical licenses, currently does so according to a series of public-interest directives, known as the 801(b)(1) factors. They require the board to "maximize the availability of creative works to the public," for instance, and "minimize any disruptive impact on the structure of the industries involved."

The Music Modernization Act would order the CRB to instead use a standard called "willing buyer/willing

seller," which instead simply aims to recreate marketplace conditions. The board already uses that standard when setting performance royalties for digital radio services like Pandora.

The bill's authors and supporters say the 801(b)(1) factors have unfairly depressed the rates paid for mechanicals, and that the changes will result in a fairer payment to owners.

"Until now, we have been tied to outdated rate standards Congress first adopted for player piano rolls back in 1909," said Steve Bogard, president of the Nashville Songwriters Association International, in statement issued this week.

Allow New Evidence on Performance Royalties

The Music Modernization Act also contains changes to how so-called performance royalties are calculated, most notably repealing a rule that bans courts from considering certain kinds of evidence when doing so.

Performance royalties — payments made when a composition is played on the radio or in a public space — are calculated by two federal judges in the Southern District of New York. Pandora has fought a number of such rate-setting cases in recent years, winning some and losing others.

The two judges conduct a trial-like proceeding, but the Copyright Act's Section 114(i) expressly bars them from considering one kind of evidence: the separate rates that digital services are paying in performance royalties for sound recordings.

The rates that digital services pay for sound recordings, determined by the Copyright Royalty Board, are generally much higher than the rates they pay for compositions, and are thus a benchmark that song owners would like to be able to cite when arguing in court.

The new bill would simply repeal Section 114(i).

It might seem like a technical tweak, but the repeal provision is the only measure in the new bill to draw direct criticism from an outside group. The National Association of Broadcasters, the lobby for AM/FM radio stations, has said the rule would "almost certainly result in unjustifiable cost increases for local radio and TV broadcasters."

Why's that? Because AM/FM radio stations have their performance royalty rates set by the same two federal judges, and they have no interest in unfavorable evidence entering the proceedings.

"Our concern with the bill is over a provision in the legislation that would unjustifiably allow introduction of sound recording evidence unfavorable to broadcasters into musical work rate court proceedings," Dennis Wharton, NAB spokesman, said in an email. "We are working with the bill's sponsors and hope to resolve those concerns."

Pick New Judges for Rate-Setting Cases

The most unusual aspect of the new bill is a provision that would alter which judges hear those performance royalties rate-setting cases, replacing two long-standing specialists with a random selection.

Currently, all of the rate-setting cases are heard before Southern District of New York Judges Louis L. Stanton or Denise Cote, depending on which of the two major royalty-collecting groups the case involves.

The bill would replace that system with one in which a random Southern District judge is selected for each new case. This "wheel approach," according to a press release issued by the authors when the House bill was released, "ensures that the judge will find the facts afresh for each rate case based on the record in that particular case, without impressions derived from prior cases."

That language seemed strange to Bobby Schwartz, a veteran copyright litigator at Irell & Manella LLP, who called the rule "judge shopping" from music publishers who "don't like the outcomes they've been getting with Judges Cote and Stanton."

"For every new case filed in a federal court that is related to a prior case, the wheel assignment is ignored and the case is reassigned to the judge hearing the prior filed/related case," Schwartz said. "Why? Because Congress and the courts believe that better outcomes are achieved and judicial resources are conserved."

"It's sophistry to say that those principles shouldn't apply to this specific subject," Schwartz said.

--Editing by Mark Lebetkin and Catherine Sum.
