

Against the Grain

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Legally Speaking- Music Modernization Act 2018

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LEGAL ISSUES



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Legally Speaking — Music Modernization Act 2018

by **Anthony Paganelli** (Western Kentucky University) <Anthony.Paganelli@wku.edu>

On October 11, 2018, singer, songwriter, and rapper **Kanye West** made an appearance at the Oval Office of the White House to have a conversation with **President Donald Trump**, a discussion which immediately went viral. Interestingly, the conversation between **President Donald Trump** and **Kanye West** overshadowed a significant piece of legislation that was signed into law early that morning by the president. Prior to **West's** visit, singer, songwriter, rapper, and musician **Kid Rock** arrived at the White House, along with **Mike Love** of the **Beach Boys**, **Jeff Baxter** of the **Doobie Brothers**, country singers **John Rich** and **Craig Morgan**, **Sam Moore** of **Sam and Dave**, and members of the Christian band **MercyMe**, as well as legislators and music industry leaders who all came to witness the moment that the **President** signed the **Music Modernization Act** in the Roosevelt Room of the White House.

The **Music Modernization Act** is legislation that enhances the U.S. Copyright Law by providing better financial support for artists as the digital streaming era continues to dominate the music industry. Since this legislation was passed, the last major legislation to help assist with music copyright laws was passed in 1998 with the **Digital Millennium Copyright Act (DMCA)** to confront the issues of online music content. While other legislation had been introduced regarding compensation for artists, the **Music Modernization Act** will expand the rights of songwriters and artists, as well as producers and others that can be credited for their contributions to a specific copyrighted song or songs.

According to U.S. Senator **Orrin Hatch**, a republican from Utah and one of the legislators that introduced the legislation, noted that the previous copyright laws were outdated and needed to be reformed based on the significant increase of musical content being utilized online. He stated, "Our music licensing laws are convoluted, out-of-date, and don't reward songwriters fairly for their work. They've also failed to keep up with recent, rapid changes in how Americans purchase and listen to music."

In 2016, songwriter, singer, and musician **David Crosby** discussed in an

interview with **Ryan Leas** the financial struggles with music streaming providers. **Crosby** stated, "the streaming services, which is the direction it's all going in, are worse. They don't pay us at all. If you played *Déjà Vu* 10,000 times I could buy you a cup of coffee. Is that right? No, that's not right." Due to the lack of royalty payments by the streaming providers, **Crosby** noted that several songwriters and musicians are beginning to rely on concert tours to help compensate the lack of income.

The Senator's comments reflect the **Music Modernization Act** that addresses the compensation issues of paying artists and songwriters, which had not been maintained during the past twenty years as digital streaming increased the changes in musical usage. Several bills were introduced to provide financial support for songwriters and artists during this time period, but most failed to get passed. The **Music Modernization Act** is legislation that assists in updating the copyright laws that benefit both the artists and the publishers, while collaborating with digital streaming providers.

The **Music Modernization Act** provides support for three previous acts. The **CLASSICS (Compensating Legacy Artists for their Songs, Service and Important Contributions to Society) Act** (H.R.3301/S.2393), the **AMP (Allocation for Music Producers) Act**, and the **Fair Play Fair Pay Act** (H.R. 1836). The legislation also closes the pre-1972 AM/FM radio loophole, provides compensation for producers and audio engineers through the "letter of direction" from the copyright owner, provides compensation to eligible participants of recordings made prior to the 1995 digital performance rights through the digital royalties, ends the "Notice of Intent" process to establish the Mechanical Licensing Collective to compensate artists efficiently, creates a publicly accessible database for sound recording royalties, and allows courts to set rates for sound recording royalties fairly.

As noted by **Senator Hatch**, the U.S. Copyright, legislation, and policies needed to be updated and created to maintain the growth of digital uses for music in order to properly pay artists and other contributing personnel involved

in the creation of music. The process to create the **Music Modernization Act** took several years and attempts to create the legislation that a bipartisan leadership and leaders in the music industry could agree upon.

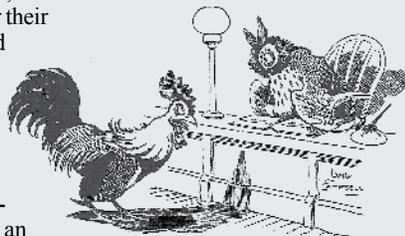
A portion of the **Music Modernization Act** was first introduced in the House of Representatives on April 10, 2018 by Utah Representative **Bob Goodlatte** that included the **AMP (Allocation for Music Producers) Act**, which was introduced by New York Representative **Joseph Crowley** on February 6, 2017. The **AMP Act** would allow the copyright owner to direct assigned royalties to producers, mixers, or sound engineers before November 1, 1995.

In addition, the **Music Modernization Act** reforms the U.S. Copyright Section 115 by eliminating the Notice of Intent and funds a Mechanical Licensing Collective (MLC) entity that would create a blanket music licensing for streaming and digital downloads, as well as a public accessible database of publishers and artists that would be governed by music publishers and songwriters. Writers will also have auditing rights, which was not established in Section 115. Furthermore, Section 115 will provide a legal standard to require courts to set conditions in determining royalty rates. This includes the "Wheel" approach that assigns district judges for rate settlements for the performing rights organizations.

Section 114 is repealed under the **Music Modernization Act**. The prior section stated that a performing rights organization could consider the sound recording statistics as a benchmark to determine royalty rates for artists. For instance, the performing rights organizations could base the fee of a song through sound recording sales, which could potentially lower royalty rates paid to artists. Currently, writers can provide other evidence to base the rate for songs to the judge, instead of the sound recording data.

Due to the unanimous bipartisan acceptance of the proposed legislation, it was able to move directly to the president for his approval and eventually becoming a law through the "hotline" process. While it appeared the act was not met with opposition, the major satellite radio provider **SiriusXM** did have opposition towards the legislation, which did have two senators considering to vote against the legis-

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lation that would have sent the legislation back to the senate for further debate.

SiriusXM was against the elimination of the U.S. Copyright 801(b) section that allowed courts to set rates when establishing rates for licensing music, which the *1998 Digital Millennium Act* typically allowed lower rates for the satellite radio providers. Furthermore, the company wanted to ensure that the law included a 50-50 split between the artists and the record labels for the pre-1972 recording payments because prior payments from the **SiriusXM** did not include the artists. Finally, the company was concerned about the terrestrial radio royalty agreement that would require the company to provide royalties to music publishers and writers.

After a last minute agreement, **SiriusXM** agreed to the legislation that prevented the bill from returning to the Senate. The 50-50 split payment was easily agreed upon by the artists and publishers, because that was an increase in royalties, as well as the new standards for setting royalty rates. However, **SiriusXM** was not successful in the terrestrial radio issue that closed the AM/FM radio royalty loophole of music recorded prior to 1972, therefore digital music providers will have to pay royalties for music pre-1972.

A significant aspect of the *Music Modernization Act* is the public accessible database, which would be more efficient for academic libraries to locate copyrighted materials and secure music licensing agreements for pa-

trons faster. The database would also provide transparency, as well as convenience. Another aspect of the act, is the new standards in royalty payments that could possibly make some music more affordable and accessible.

An issue with the act has been noted that includes the public accessible database, which is required by the law to provide a database of each copyright owner in order to pay the royalty. This is the mechanical licensing collective system that receives payments, identifies the copyright holders, and distributes royalties to the owners of the rights. The mechanical licensing collective has to create a public accessible database that contains the information of the copyright owner, as well as maintaining the database, which is important to ensure that the database is accurate and the owners receive their royalty payments.

In addition to maintaining the database, the legislation changed once the Senate revised the legislation. The House bill required an independent group to oversee the mechanical licensing collective that would be selected by the U.S. Copyright Office. In addition, the House bill required a group that would consist of members from all stakeholders to evaluate the mechanical licensing collective. Instead, the Senate bill provides an audit every five years, which the information is reported to the mechanical licensing collective board of directors that includes music publishers and songwriters.

Furthermore, the *Music Modernization Act's* pre-1972 recordings are under the Federal regulations, which excludes state laws regarding the fair use, the first sale doctrine, and protections for libraries and educators do apply

explicit, which would avoid any issues that the state law could possibly hinder in music usage.

Overall, the *Music Modernization Act* will benefit the artists, as well as other important people within the industry. The legislation will also provide a foundation for digital music usage in the future. In addition, the U.S. Copyright was enhanced to maintain the changes in the digital era. Hopefully, the mechanical licensing collective system will create a database that will be transparent and better assist libraries that seek music licensing agreements.

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Cases of Note — Copyright

Sea Divers Implied-in-Fact Contract

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MINNIEAR v. TORS. 266 Cal. App. 2d 495; 1968 Cal. App. LEXIS 1536

In the *September ATG*, our edge-of-the-seat exciting column made a glancing reference to "Sea Hunt," the TV show that launched the career of **Lloyd Bridges**. Now our intrepid legal analyst has chosen to delve deeply.

Mid-decade of the 1950s, **Harold Minniear** dreamed up an underwater adventure series for TV. He had been in the picture business as a writer for 22 years.

Minniear brought in **Lamar Boren**, an underwater photographer. They agreed to collaborate in a pilot film. No written contract was ever executed, but **Minniear** was to bring ideas, talent, cast, writers, directors, script, film editor and



artsy stuff. **Boren** would use his technical skills to film the pilot.

Next, **Minniear** hired **Thomas Scott** to edit and cut the film. **Scott** had worked for **Ivan Tors** and **Ziv Television Programs**. **Scott** worked at the **Ziv** lot on his own time. This was known to other **Ziv** employees. And *Sea Divers* was completed.

In 1956, **Minniear** held a showing of the pilot on the **Ziv** lot. **Ivan Tors** was invited. **Tors** was a seasoned producer for **Ziv TV** and at the time was doing a series called *Science Fiction Theatre*.

Tors pronounced the pilot excellent and said he was interested in doing a series on underwater skindivers. "Where do we go from here?" he asked.

Minniear said he had enough ideas for a full season and described one where a jet pilot is trapped underwater.

Producer **Tors** began *Sea Hunt* for **Ziv**. And hired **Boren** for underwater

photography. And tried to hire **Minniear's** leading man as an actor.

This actor's name has vanished from history. Was he being ethical in his refusal? If so, why didn't he warn Minniear?

Not knowing what was going on, **Minniear** was unsuccessfully trying to sell *Sea Divers*. **Boren** announced he wanted nothing more to do with the **Minniear/Boren** project. **Boren** then sold the trapped jet pilot idea to **Ziv** for the first episode of *Sea Hunt*.

Is it a ruthless world or what?

Sea Divers and *Sea Hunt* both feature an ex-Navy frogman named Mike, commissions for dangerous underwater work, and California honeys in bathing attire.

The pilot of *Sea Divers* has Mike hired to find a canister of smuggled diamonds.

Episode one of *Sea Hunt* has the trapped jet pilot.

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