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THE MUSIC INDUSTRY: WHAT KEEPS IN HOUSE COUNSEL UP AT NIGHT

Panelists:

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Music Modernization Act

On October 11, 2018, the Music Modernization Act (“MMA”) became law. The purpose of this law is to address multiple copyright-related issues created by the advent of digital streaming in the music industry with the overall intent of protecting all creators of musical works and giving them the opportunity to receive fair compensation when their works are played.

Overview of Changes Accomplished by the MMA:

The MMA made important changes to the old system of compensating songwriters, artists, composers, and studio professionals when music streaming services such as Spotify, Pandora, Apple Music or SoundCloud play their works. These changes include:

- Creation of a new process to streamline licensing of musical works to ensure that songwriters and composers are compensated when digital services use their works;
- Replacement of the archaic system of rate setting to allow songwriters to lobby for greater compensation;
- Closure of the loop for legacy artists with pre-1972 works to be compensated by digital service providers;
- Copyright protection for studio professionals for the first time in history;
- Limitation of the liability of digital service providers for unpaid royalties if they follow the procedures outlined by the MMA.

New Process for Streamlining the Licensing of Musical Works

The biggest change to the prior compensation system for creators of musical works is the creation of a streamlined system for licensing musical works. Prior to the passing of the MMA, digital music services that wanted to stream music were required to submit bulk Notices of Intent through the Copyright Office, which sometimes delayed payment of royalties to songwriters, or prevented them from collecting the royalties at all because there was no centralized source documenting the ownership of the work. The MMA changed this system by mandating the creation of a publicly available database, funded by the digital services, called the Mechanical Licensing Collective (“MLC”). The mechanical license refers to the copyright that covers the composition and lyrics of a song in a sound recording.

Publishers and self-publishing songwriters oversee the MLC to ensure the accuracy of the database, and the appropriate distribution of the royalties. The new system grants blanket licenses for interactive streaming or digital downloads by matching recordings with the songwriters and publishers to ensure the songwriter receives compensation. For the first time, this provides a comprehensive resource where those who want to stream the song can locate the owner of the copyrights, and pay the appropriate royalties. It also identifies songs for which the ownership information is not available so that those who own rights in the songs can come forward to claim their rights. It further permits songwriters and publishers the right to conduct

an audit of royalties payable for the song. The goal of this database is to make the licensing of musical works more efficient, and the calculation and payment of royalties more streamlined.

Improved System for Determining Royalty Rates

Since 1909, the Copyright Act has allowed anyone to seek a compulsory license to reproduce a song in exchange for paying a statutory rate. The Copyright Royalty Board (CRB) was responsible for setting the statutory rate. When disputes arose, however, the prior system disadvantaged songwriters and composers by not reflecting market rates. The Copyright Act forbade the federal rate courts from considering certain evidence when setting performance royalty rates for songwriters and composers. For example, the judges could not consider sound recording royalties as a benchmark when setting the rates for songwriters and composers. Many critics felt that this kept the royalty rates earned by songwriters and composers artificially low. The MMA allows songwriters and composers to present other relevant evidence for consideration, and requires the court to consider other market conditions when determining rates. The expectation is that this change will increase the fairness of the rate-setting process and likely result in higher royalty rates for songwriters and composers.

In addition, the MMA changed the way Performing Rights Organizations (PROs) can advocate for higher royalties for their member songwriters and composers. PROs are responsible for collecting license fees on behalf of songwriters, composers, music publishers, and distributing the royalties to their members when their works are performed. The PROs include BMI (Broadcast Music, Inc.), ASCAP (American Society of Composers, Authors, and Publishers), SESAC (Society of European Stage Authors and Composers), Pro Music Rights, and SoundExchange. When a dispute about royalty rates arose, the old system required the PROs to appear before a single judge to resolve rate disputes for their member songwriters and composers. Under the MMA, the process randomly assigns a district judge from the Southern District of New York to such disputes, meaning the PROs appear before different judges on a rotating basis. The idea is to create a system that allows the PROs to start fresh when presenting evidence of the value of a song and the appropriate royalty rate with the hope that it will lead to a more holistic review of the facts impacting royalty rates.

Compensation for Pre-1972 Works

Prior to the MMA, federal copyright law did not protect sound recordings made before February 15, 1972. Individual states passed laws to close the gap in protection, but this added complexity and confusion to the process because it was difficult to enforce and recoup royalty payments. The MMA closed this loophole by providing copyright protection to pre-1972 recordings through February 15, 2067. This protects musical works that prior to the MMA were difficult if not impossible to protect. It also provides that songs recorded prior to 1923 will enter the public domain three years after the bill passed (2022), and that recordings between 1923 and 1956 will be phased into the public domain over time.

Copyright Protection Afforded to Studio Professionals

For the first time in history, the MMA amended the Copyright Act to provide for the distribution of royalties to a “producer, mixer, or sound engineer who was part of the creative process that created the sound recording.” Before the MMA, these professionals could not recover royalties for their contributions to the musical works.

Limited Liability of Digital Service Providers

The MMA had widespread support from numerous music industry groups as well as the digital streaming media services because it allows them to bring order to a chaotic and often unworkable system that left them exposed to litigation over unpaid royalties. Without a central database tracking the copyright owners, these streaming services could not always find and pay the royalties to the correct entities. The MMA solved this dilemma by creating a system that limits the liability of the streaming service if they follow the procedures outlined by the MMA, thereby limiting their risk of lawsuits over unpaid royalties.

Conclusion

The MMA is intended to protect multiple segments of the music industry. It primarily provides greater transparency and effectiveness in the collection of royalties for mechanical licenses when digital services play their songs. It assists the PROs in securing higher rates for songwriters and composers than the prior system allowed. It closes the copyright loophole for songs recorded prior to 1972, and gives copyright protection to studio producers and engineers to the extent they contributed to a creative work. It also protects the digital service providers from litigation over unpaid royalties. Perhaps the biggest winners will be the fans who can now have access to more music on more platforms.