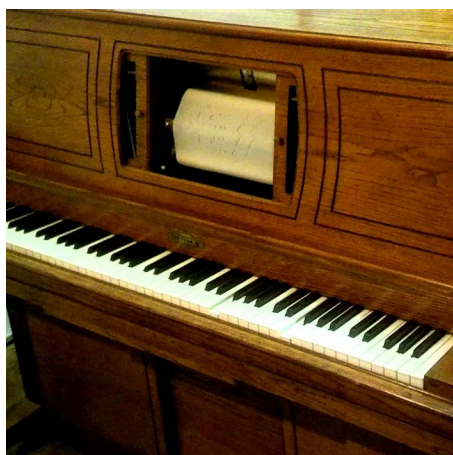


Will Copyright Rules for Player Pianos Continue to Govern Digital Music Delivery?

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by Brad Hattenbach



Last month in our Olympics edition, we provided a glimpse into the arcane world of licensing of musical works under the U.S. Copyright system. It's actually crazier still. Who knew that the legislative reaction to the introduction of player pianos at the turn of the last century would continue to govern the royalty scheme for satellite radio and digital streaming services? In large part it's true! However, U.S. Representatives Doug Collins (R-Ga.) and Hakeem Jeffries (D-N.Y.) have introduced legislation in the form of the "Music Modernization Act" (MMA) avowedly to bring the

royalty determination formula for digital music services into the 21st Century. In truth, the MMA is a modest step, but a step nonetheless.

As a refresher, recall that there are two separate, primary expressions of music subject to copyright: 1) the song composition (i.e., the words and music, for example, embodied in sheet music); and 2) the sound recording, i.e., the performance of a song by an artist you hear on the radio or (for some of us Luddites) on the CD that you buy. Strangely, the ability to collect a royalty for the use of these two forms of the same song is different under the Copyright Act and it further differs when the sound recording is in a digital form.

A license to reproduce the composition (for example, on a record or CD, or in a digital file) is called a "mechanical right." In the early 1900's, songwriters railed against the introduction of the player piano, fearing a loss of revenue in the sale of sheet music. A court sided against the songwriters, stating that the royalty provisions in the Copyright Act at the time did not address anything other than copies of sheet music. Significant lobbying prompted Congress to amend the Copyright Act to include a "mechanical

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license” and related royalties. The lore is that “mechanical” referred to the machinery of the player piano using paper rolls to substitute for a human being reading sheet music to play a tune.

As recording mediums evolved beyond a paper roll into phonographs, cassette tapes, compact discs, and now digital files, the mechanical royalty has been applied to each new medium such that the songwriter receives a royalty for copies made. If copies of the song are sold even once, then anyone else can record and sell their sound recording of the song, without any negotiation over terms, as long as they pay the mechanical license royalty. Mechanical license royalties are paid to and distributed by a collective society of the songwriters and music publishers called the Harry Fox Agency (HFA) authorized by the Act. Compensation for the rights in particular sound recordings come in the form of a percentage of the actual record sales paid to the recording artist per contract with the record distributor.

Any public performance of a musical composition (which includes broadcast radio) is subject to a compulsory license fee to the songwriter. Typically a license is taken from one or more of the big three performance rights organizations (ASCAP, BMI, SESAC). The fees per performance are standardized and set by a panel of administrative judges. These clearinghouses keep databases of songs and songwriters, manage the performance royalties, and send appropriate payments to the songwriters according to the statutory fees.

Strangely, however, the performing artists that make the sound recordings you hear on the radio do not receive any compensation for the performance. Up until the Copyright Act of 1976, there were no rights in sound recordings. In the lead-up to the 1976 Act, terrestrial broadcasters (radio stations) argued that the performing artists did not need compensation for airplay because they received free publicity through airplay of the songs and received adequate compensation through record sales. This argument won and an exemption still resides in the Copyright Act today for terrestrial radio, music clubs, restaurants and live performances.

But not with respect to digital performances. Think streaming internet radio (Pandora) and interactive streaming services (Spotify). In 1995, the exemption for royalties for sound recordings was removed with respect to the digital delivery of music performances by the Digital Performance in Sound Recording Act (DPRA). A new agency called SoundExchange was created by the DPRA to collect and distribute sound recording royalties implemented by the act. Mechanical royalties were left to administration under the historical structure with the HFA. However, because they are not broadcast services, interactive streaming services fall under a different mechanical royalty scheme and do not receive the benefit of a blanket license with the HFA. (The explanation why is worthy of another article.) Thus, the streaming services sometimes must seek out individual songwriters and publishers, who often may be difficult to find, or at least provide public notice at the Copyright Office. Failure to provide such notice can lead to hefty statutory penalties.

With all of this stratification, one might think that proposed MMA legislation would offer a

comprehensive solution. In actuality, the MMA, at over 100 pages long, really only accomplishes three narrow objectives related to mechanical licenses for digital music delivery. First, the MMA sets up yet another rights clearinghouse called the “Mechanical Licensing Collective” (MLC) with a mandate to grant blanket mechanical licenses for streaming and interactive digital music delivery services and to remove the penalty for failure of notice to songwriters. The MLC database would be public and any songwriter could claim rights in a song on the platform if not previously identified. Second, the MMA would remove restrictions on consideration of market conditions in the setting of statutory royalty rates by the Royalty Board Judges. (Curiously, this is not presently the case.) Third, the MMA removes a limitation on single courts and judges having jurisdiction over rate challenges and instead provides for the random assignment of judges from the judicial district in which the case is properly brought, just as in all other civil cases.

The MMA does not address the third rail of payments to performing artists for public performance of sound recordings (i.e., radio airplay). Nor does it propose to consolidate the various collectives and agencies that manage mechanical and performance royalties. In fact, it adds yet another agency into the mix. The MMA thus appears to be merely another patch on top of the original player piano rules.

There is no guarantee that the MMA will be enacted—this is the U.S. Congress we are talking about here. However, there is strong industry support from all sides—music publishers, performance rights organizations, broadcasters, and digital media companies—so it may just have a chance. We will be monitoring progress of the MMA over the coming year and will update you if any significant actions occur.