



# Music Modernization Act: What Does it Mean for Your Station?

*The Orrin G. Hatch-Bob Goodlatte Music Modernization Act (MMA) passed Congress in September 2018 and contains significant revisions to the music copyright laws. But what does this mean for your station? Read on for a summary of how the new law may impact you.*

## I. ASCAP and BMI: Rate Courts and Consent Decree Reviews

The two largest performing rights organizations (PROs) – ASCAP and BMI – license public performances of songs to virtually every venue and music platform in the United States. To comply with copyright laws, broadcasters and others obtain licenses from PROs to use the songs they control. Because these licenses can cover all the works in each organization's repertoire, it is a more efficient way to license public performance rights than individual negotiations between every songwriter and every licensee. Despite that efficiency, the U.S. Supreme Court has long recognized that collective licensing practices raise antitrust concerns. To ensure compliance with antitrust laws, the Department of Justice (DOJ) entered into consent decrees that provide these organizations the ability to conduct business in a fair, efficient and equitable manner to benefit both songwriters and licensees. As a backstop, there are federal courts to oversee the PROs' behavior and decide rate disputes.

### Admissibility of Sound Recording Rate Evidence

PRO rate courts have been prohibited by the Copyright Act from taking into account the royalties paid for the public performance of sound recordings, due to songwriter and music publisher concerns that the rates set by the Copyright Royalty Board (CRB) for sound recordings would be so low they would harm the musical works rates. In the last 20 years, sound recording royalty rates have ballooned to upwards of 11 times as great as musical works rates, and the CRB has repeatedly rejected efforts by licensees to use the lower musical works rates as benchmark evidence for setting the sound recording royalty rates.

Now, the PROs want to use the sound recording royalty rates in the rate courts in an effort to increase royalty rates paid by PRO licensees. An earlier version of the Music Modernization Act would have fully repealed this prohibition. NAB successfully advocated against that full repeal. Instead, the final law permits the introduction of sound recording rates in proceedings involving most digital music services that also obtain the public performance right in sound recordings, while ensuring a continued prohibition in rate proceedings for certain audio transmissions by broadcasters and venues like restaurants, retail stores and bars. The prohibition also remains for the transmission of audiovisual works.

**Impact on broadcasters:** The bill protects radio and television broadcasters from the litigation uncertainty and potential negative cost impact from harmful evidence in setting rates for their over-the-air and simulcast streaming offerings. However, radio stations engaged in on-demand, interactive or customizable offerings should note this prohibition no longer applies.

### Rate Setting Assignment

Rather than continue to assign all rate setting proceedings under the ASCAP and BMI consent decrees to one specific judge, the bill ensures random assignment to any judge in the Southern District of New York. Interpretations of the consent decrees remain with the current judges overseeing the decrees.

**Impact on broadcasters:** The impact of this change is difficult to predict. Historically, licensees and PROs have found reason to prefer one or the other of the ASCAP or BMI rate court judges depending on the results in a given proceeding. As a result, this change could be positive or negative in each rate setting occurrence, though it is likely to be net neutral.

(see reverse)

### Congressional Oversight of DOJ's Review of the ASCAP and BMI Consent Decrees

In 2016, after a thorough, multi-year review based on an extensive public record, the Department of Justice (DOJ) rejected proposed modifications from ASCAP and BMI that would weaken the consent decrees and reaffirmed their fundamental protections. Despite no discernable changes in the marketplace justifying a different outcome, DOJ is once again reviewing these decrees and has signaled it may terminate them.

Because terminating the decrees would undermine the very certainty and efficiency that the Music Modernization Act promises, the law establishes congressional oversight in any DOJ review of the ASCAP and BMI consent decrees. Specifically, it requires DOJ to:

- Provide timely status briefings of the ASCAP and BMI consent decree review to any member of the House or Senate Judiciary Committees upon request;
- Share with members detailed and timely information and pertinent documents related to the ASCAP and BMI consent decree review; and
- Provide notice to members and committees within a reasonable time prior to filing a motion to terminate either consent decree. This should include a written explanation of the review process, summary of public comments and information regarding the market impact of the proposed termination should the motion be granted.

**Impact on broadcasters:** Broadcasters benefit from congressional oversight of the DOJ's consent decree review. Terminating the consent decrees without first establishing an alternative framework would bring chaos to the music licensing marketplace.

## II. Pre-1972 Sound Recordings

The Music Modernization Act requires digital services to compensate pre-1972 sound recording rights holders when their works are streamed, in addition to addressing other related issues not currently covered under federal copyright law. The lack of federal treatment of pre-1972 sound recordings has led to litigation against broadcasters and digital music services alleging violations of state law copyright provisions, many of which are still pending.

In an effort to bring some clarity to these issues, the law would:

- Establish a clear requirement for digital music services to pay for public performances of pre-1972 sound recordings going forward under the same rates and terms of the statutory license for webcasting. This includes exemptions for digital terrestrial radio performances;
- Preempt claims under state law for alleged violations of public performance rights for pre-1972 sound recordings (both prospectively and over the previous three years), if a service complies with the rates and terms of the statutory license going forward and during the past three years;
- Explicitly allow a service and copyright owner to directly license pre-1972 sound recordings; and
- Extend the safe harbors of section 512 of the Digital Millennium Copyright Act and section 230 of the Communications Decency Act to the use of pre-1972 sound recordings.

**Impact on broadcasters:** There is less impact on broadcasters given that the vast majority already pay SoundExchange for their streaming performances of pre-1972 sound recordings with no distinction from post-1972 sound recording royalties. For those broadcasters that have distinguished the legal frameworks and royalty requirements between pre and post-1972 sound recordings, the law strikes a balance between a new federal payment scheme and preemption of state claims that is supported by both digital streaming services and recording interests.

The law does not address potential state law claims against broadcasters arising out of over-the-air transmissions of pre-1972 sound recordings, but explicitly states that it neither recognizes nor negates any state law public performance right.

NAB worked with members of Congress and music industry stakeholders to shape the Music Modernization Act to benefit local broadcasters. If you have further questions about the impact of the law on your stations, please consult with your outside counsel or contact the NAB Legal and Regulatory Affairs department at (866) 682-0276.