THE MUSIC MODERNIZATION ACT:
CHANGING THE LICENSING LANDSCAPE FOR STREAMING

South by Southwest CLE 2018
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The Music Modernization Act (MMA) is currently in consideration in both the U.S. House of Representatives, sponsored by Rep. Doug Collins (R-GA) and Rep. Hakeem Jeffries (D-NY), and the U.S. Senate, sponsored by Senator Orrin Hatch (R-UT) and Senator Lamar Alexander (R-TN).

This legislation revolutionizes how songwriters are paid for use of their works by interactive streaming services. It represents an unprecedented consensus between **music creator groups** (Nashville Songwriters Association International [NSAI], Songwriters of North America [SONA], the Recording Academy), **music publishers** (led by the National Music Publishers Association [NMPA]), **performing rights societies** (ASCAP, BMI), **record labels** (led by the Recording Industry Association of America [RIAA], the American Association of Independent Music [A2IM]), and the groups representing digital services providers, the **Digital Media Association (DiMA)** (which represents Amazon, Apple, Pandora, Spotify, and YouTube), and the **Internet Association** (which represents Amazon, Facebook, Google, Pandora, and others).

In this panel, key personnel who were essential to the development and introduction of the MMA will discuss the bill in depth, including the circumstances leading to the legislation's drafting, the key improvements the legislation will make to licensing for songwriters and digital service providers alike, and the process moving forward.

Panelists:

Moderated by **Dina LaPolt**, Owner, LaPolt Law, P.C.
U.S. Representative **Doug Collins** (R-GA)
David Israelite, President & CEO, National Music Publishers' Association (NMPA)
Chris Harrison, CEO, Digital Media Association (DiMA),

LAPOLT LAW, P.C.

MUSIC MODERNIZATION ACT: A BREAKDOWN

as of February 5, 2018

CURRENT SYSTEM	MUSIC MODERNIZATION ACT
Digital service providers (DSPs) such as Spotify and Apple Music can avoid payments for works that aren't registered with the Copyright Office by sending large quantities of Notices of Intent (NOIs) to the Copyright Office. Rather than determining how to properly make payments, they use NOIs as a loophole to play music while avoiding making payments to songwriters and publishers in the meantime. 45 million notices have been filed to date.	No more NOIs. The MMA creates a single, centralized mechanical licensing entity called a Mechanical Licensing Collective to collect royalties for all songs played by DSPs. DSPs are now required to pay for all uses of your works, even if they cannot find an owner, rather than avoiding payments through the NOI loophole.
When ASCAP and BMI cannot negotiate performance royalties with licensees, they go in front of the same two rate court judges, who decide their royalty rates.	When ASCAP and BMI go to rate court, they can be randomly assigned to any federal judge instead of being stuck with the same one who decides their rates. This is referred to as "the wheel" and benefits us because the DSPs and other licensees won't be able to game the system by going to a judge they believe will give them a more favorable rate.
Rate Courts setting public performance royalties for musical works cannot consider all market evidence, including sound recording rates, when determining songwriter compensation.	Courts can now consider all market evidence, including sound recording royalties, when setting rates for public performances of musical works. This was another key provision in the Songwriter Equity Act which should help songwriters get higher payments going forward.
There is no process to identify ownership of unmatched copyrighted works. The DSPs are holding on to millions of dollars in unclaimed and unmatched monies.	The MMA establishes a clear process through which copyright owners can claim ownership of songs and receive royalties. Rather than allowing the DSPs to keep the unclaimed, unmatched money indefinitely, the money goes to the licensing entity, where we have the power to make sure it is distributed fairly. The licensing entity, in turn, will work to match sound recordings with musical compositions to ensure correct payments.

No requirement that songwriters receive royalties for unmatched works - sound recordings where ownership in the underlying musical work has not been identified. Publishers are not always obligated to share unmatched work $$ with songwriters.	Songwriters are obligated under law to receive at least 50% of all royalties for unmatched works.
DSPs, while paying mechanical royalties on digital interactive streaming (e.g., Spotify), have recently taken the position in litigation that using music on these services does not require a mechanical license.	The law officially states that digital interactive streaming utilizes the mechanical reproduction right under copyright law. DSPs will never be able to argue this point again.
No right to audit the digital music providers' usage of music and royalty payments.	New licensing entity can audit digital services to ensure proper reporting and payment of royalties. Copyright owners will be able to audit the licensing entity to ensure that they are being paid accurately. Both audit rights ensure that songwriters are able to get answers about whether they are being paid accurately.
Mechanical royalty rates are set using an outdated four-part formula (801(b), resulting in below-market rates.	Rates will be based on what a willing buyer and a willing seller would agree to reflect market negotiations. This is one of the main provisions in the Songwriter Equity Act, which has been on the table for years in Congress with no traction.
Songwriters have no involvement in or direct influence over the mechanical licensing system.	Songwriters have positions on three boards governing the operation of the licensing entity: • Self-published songwriters will have four seats (out of fourteen) on the licensing entity board of directors. • Originally, we had NO seats and the board was comprised entirely of publishers – four seats was the compromise. • Songwriters comprise half of an advisory committee (five of ten seats) overseeing the unclaimed royalties process. • Songwriters comprise half of a dispute resolution committee (three of six seats), which oversees

	and resolves disputes over ownership of musical works and distribution of royalties.
When ASCAP and BMI cannot negotiate performance royalties with licensees, they go in front of the same two rate court judges, who decide their royalty rates.	When ASCAP and BMI go to rate court, they can be assigned to any federal judge instead of being stuck with the same one who decides their rates. This is referred to as "the wheel" and benefits us because ACAP and BMI aren't stuck with the same judges over and over who may be biased in favor of the DSPs.
Songwriters and music publishers pay commission to vendors who administer mechanical licenses.	All costs for the licensing entity and its operations are paid for the by DSPs, eliminating commissions and resulting in higher payments to songwriters.
Digital music services risk legal liability for high statutory damages if they use songs on their services where the copyright owner(s) cannot be found.	Digital services that obtain a blanket license from the Mechanical Licensing Collective and comply with licensing requirements will be exempt from liability of statutory damages. This is really the main motivation that the DSPs have for endorsing the legislation and agreeing to pay all costs in connection with the new licensing entity—so that they can avoid further multimillion-dollar class action lawsuits. In turn, as discussed above, we have assurance that they will pay for every use of every composition rather than using loopholes to avoid making payments.
No transparency of mechanical rights ownership information for copyrighted works.	A free, public, searchable database of musical works with mechanical rights ownership information. This will help songwriters get paid accurately for use of their works.

How We Got Here

In March 2013, Maria Pallante, the Register of Copyrights, delivered a lecture at Columbia University setting forth proposed revisions to the Copyright Act. She then published an extended version of this lecture in an article entitled "The Next Great Copyright Act." The Department of Commerce Internet Policy Task Force followed this with a "green paper" (a tentative government report raising issues for discussion and debate) on the topic in July 2013.

In the U.S. House of Representatives, the committee responsible for copyright legislation is the House Judiciary Committee, which has "jurisdiction over matters relating to the administration of justice in federal courts, administrative bodies, and law enforcement agencies". It is currently run by Chairman Bob Goodlatte (R-VA) with Ranking Member Jerry Nadler (D-NY) as the leading Democrat on the committee. Rep. Goodlatte, Rep. Nadler, and other members of the House Judiciary Committee have lead the charge for copyright reform in Congress.

From 2013 to 2015, the Judiciary Committee held hearings for the overhaul of the Copyright Act. The hearings addressed a multitude of issues, and some bills were introduced to try to change the laws (see next page for the ones currently pending). However, none of these bills gained any significant momentum for creators, and the more groundbreaking ones stood no chance of passing because of strong opposition from the Digital Media Association (DiMA) (which represents Amazon, Apple, Pandora, Spotify, and YouTube), the Internet Association (which represents Amazon, Facebook, Google, Pandora, and others), and the National Association of Broadcasters (NAB) (which represents AM/FM radio and broadcast television stations). DiMA, the Internet Association, and the NAB all command huge power in D.C. because they have immense resources and represent giant industries.

After a lot of battling between music creator and copyright owner groups, on the one hand, and DSPs and the NAB, on the other, along with constant infighting within our own ranks, the one thing the Judiciary Committee said over and over is that the music industry needed to speak internally and reach *consensus* on legislative issues before Congress could make anything realistically happen. Finally, in 2017, the industry came together to craft the Music Modernization Act (MMA), discussed extensively on the previous pages. The MMA is currently in consideration in both the U.S. House of Representatives, sponsored by Rep. Doug Collins (R-GA) and Rep. Hakeem Jeffries (D-NY), and the U.S. Senate, sponsored by Senator Orrin Hatch (R-UT) and Senator Lamar Alexander (R-TN).

The MMA represents an unprecedented consensus between **music creator groups** (Nashville Songwriters Association International [NSAI], Songwriters of North America [SONA], the Recording Academy), **music publishers** (led by the National Music Publishers Association [NMPA]), **performing rights societies** (ASCAP, BMI), **record labels** (led by the Recording Industry Association of America [RIAA], the American Association of Independent Music [A2IM]), and the groups representing digital services providers, **DiMA** and the **Internet Association**.

Pending Legislation Benefitting Record Labels and Performers

Three bills are currently pending in the House of Representatives that will benefit record labels, performers, and producers:

The Allocation for Music Producers (AMP) Act

Sponsored by Rep. Joe Crowley (D-NY) and Rep. Tom Rooney (R-FL).

- In the United States, SoundExchange collects digital sound recording performance royalties.
- The AMP Act would codify SoundExchange's current, voluntary practice of paying royalties directly to music producers upon receipt of a letter of direction from a recording artist.

The Compensating Legacy Artists for their Songs, Service, and Important Contributions to Society (CLASSICS) Act

Sponsored by Rep. Darrel Issa (R-CA) and Rep. Jerry Nadler (D-NY).

- Because pre-1972 sound recordings do not enjoy federal copyright protection in the U.S., digital streaming services such as SiriusXM claim that they do not owe sound recording performance royalties for their use of these works.
- The CLASSICS Act would require these services to pay performance royalties for their use of pre-1972 recordings.
- The Act stops short of offering full federal copyright protection for these recordings.

The Fair Play Fair Pay Act

Sponsored by Rep. Jerry Nadler (D-NY), Rep. Marsha Blackburn (R-TN), Rep. Darrell Issa (R-CA), Rep. John Conyers (D-MI), Rep. Ted Deutch (D-FL) and Rep. Thomas Rooney (R-FL). The bill would introduce a sound recording public performance royalty for AM/FM radio broadcasts. This is a right enjoyed in almost every industrialized country, excluding China, Iran, and North Korea. This costs the United States approximately $100 million each year in foreign royalty income.

Unfortunately, because this bill is strongly opposed by the National Association of Broadcasters (NAB), a powerful lobbying group, there is little to no chance that this legislation will ever pass, unless all record labels agree to some serious compromises regarding royalty rates on interactive digital streaming, which is highly unlikely.