

The Road Ahead For Music-Streaming Licenses

By **Dave Davis** (April 25, 2019, 3:05 PM EDT)

Congress legislates, but it is an agency that typically has to translate the mandates in the law into effective regulation. That is certainly the case with the Music Modernization Act, passed and signed back in October, 2018.[1]

Even with all the (well-deserved) accolades the music industry and Congress garnered at the time for crafting this solution and steering it through, implementing the law may well prove the harder part. And the U.S. Copyright Office bears the brunt of that regulatory responsibility.[2] Additionally, setting up a new — and putatively comprehensive — database of rights and works for worldwide music will itself be a tall order and a great benefit to the public as it grows over time to become more reliable.



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But let's back up a bit. What is the problem this lawmaking effort was intended to address?

Digital streaming services, like Spotify, Apple Music and others as they come along, are the principal corporate entities that will operate under these new rules. Hopefully, they will thrive, and music lovers will enjoy endless streams of their favorite tunes, the companies will make money, and everyone will be happy. We'll see.

For a provider, the core virtue of a single, standard collective license — a “blanket license” as it is sometimes called — is that permission to use the works of creators and their agents is one-and-done. Also, the cost of doing business should be more predictable, and the business itself overall more efficient. And, there should be fewer lawsuits clogging up the courts, consuming everyone's time and money when they'd rather be doing something else.

Toward implementing this more streamlined licensing regime, the law calls for two new entities to be created and launched. The first is called the Mechanical Licensing Collective.[3] Submissions from parties interested in operating this not-for-profit for at least its first five years are currently in review, with the Copyright Office making a selection in July. The second is the office of the digital licensee coordinator,[4] whose responsibilities will be “to locate and identify copyright owners who are due unclaimed accrued royalties and ensure proper payment to those parties.” This obviously brings along a need for the creation of a new and robust database of musical works.

The MLC, as it turns out, will be the first new collective licensing organization set up in the U.S. in many

years. It's worthwhile to take a quick aside here to explain what we mean by "collective licensing" and "blanket licensing."

At the most abstract level, collective licensing may be thought of as a method of providing a standard license to exercise a particular copyright right across thousands or millions of works, all from a single provider (sometimes referred to as a one-stop shop), and as an alternative to seeking individual licenses from individual rightsholders (creators, agents, publishers, etc.). This arrangement is in lieu of each user seeking permission each time a work is used, which would be a tedious and uncertain process at best.

Blanket licenses are, in effect, a subcategory of collective licensing: These cover all works in a specified category — in this case, all recorded music that can be, or may be, streamed over a digital network. A repertory license, by contrast, provides a single standard license but only for those works which are specifically covered, usually by an arrangement which seeks rightsholders to opt in.

Back to the rights and responsibilities.

The term “mechanical rights,” in the context of licenses for works under copyright, refers to the long-established right to reproduce and distribute recordings of musical compositions (including covers).[5] The new Mechanical Licensing Collective is — or will be, once it begins operation — a nonprofit corporation operating under the general supervision of the Copyright Office, whose primary role will be the administration of the new blanket license for streaming digital music. The award of this responsibility to a particular team operating the collective is subject to periodic review by the Copyright Office.

The digital licensee coordinator, on the other hand, will carry out the responsibilities described above (presumably separately from, but in coordination with, the MLC), will assist both the board and the licensees of the MLC, and will participate (presumably as the “voice of licensees”) in proceedings before the copyright royalty judges to determine distributions of royalties among artists and publishers/studios.

The Copyright Office's explanation of these new roles[6] is relatively clear:

The legislation establishes a “mechanical licensing collective” (“MLC”) to administer the blanket license, and a “digital licensee coordinator” (“DLC”) to coordinate the activities of the licensees and designate a representative to serve as a non-voting member on the board of the MLC. The MLC will receive notices and reports from digital music providers, collect and distribute royalties, and identify musical works and their owners for payment. The MLC will establish and maintain a publicly accessible database containing information relating to musical works (and shares of such works) and, to the extent known, the identity and location of the copyright owners of such works and the sound recordings in which the musical works are embodied. In cases where the MLC is not able to match musical works to copyright owners, the MLC is authorized to distribute the unclaimed royalties to copyright owners identified in the MLC records, based on the relative market shares of such copyright owners as reflected in reports of usage provided by digital music providers for the periods in question.

Note the reference to a “publicly accessible database” in that paragraph. The prospect of this new database is exciting not just to people in the industry, but also to many music fans as well as students and scholars of music. The scope of the universe of digital music is immense: According to one estimate, “each month alone in the U.S. there are over 500,000 new recordings of new songs,[7]” and that is in addition to the vast back catalog of recordings already known to the labels.

The Hard Part: Whacking Up the Money

The collective licensing approach the MMA requires will entail some complicated formulas to be used for revenue distribution. As Ed Christman's insightful article in *Billboard* asks, "does the greatest percentage of the licensor market mean market share, based on overall revenue from mechanical royalties, as in the number of consumer plays? Or does it mean the number of licensed copyright owners and the number of song licenses they issue and control?" [8] Whichever way they eventually go, such distribution formulae are a common feature of collective licensing, and their complications result from the requirement — and the usual difficulty arising from trying — to be fair to everyone in the pool.

Careful students of copyright know that there are always some works for which owners cannot be found, at least not in a timely manner — what have come to be called "orphan works." [9] In due course, one hopes, the total number of such orphan works will be brought down to a minimum through the operations of the MLC, in part through updates to the database of known musical works and recordings. Until then, however, there are a couple of big open questions: Who will get the "leftover" funds? And, according to what formula? These are decisions that the MLC is going to have to tackle early on and that have already been the subject of significant debate among the several groups bidding to run the MLC.

The hard part of collective licensing — probably the hardest part — is that which is perhaps least thought about by the public: the final, unglorified step of distributing the royalties collected back to the appropriate rightsholders — that is, cutting checks and getting them out to people.

Although use metrics enter into it, questions about weighting certain kinds of uses more heavily than others (or not) in the payment process become eminently political questions: A blanket license approach does not necessarily depend on a straight-line, song-by-song count in the way that transactional-licensing systems do; for example, there can be a "social" choice made to pay additional money to more obscure works (which may not have corporate money behind them) or to "new artists" or to works from outside the West. The MCL will face a steep challenge in determining a distribution procedure that not only is fair but is perceived as fair by a consensus of stakeholders.

When we look back a few years from now, we may think of this time, 2019, as the hopeful season for the new collective licensing mechanism for digital streaming. But much of the work is still to be done.

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[1] <http://www.copyright.com/blog/music-modernization-act-introduced-house-senate/>

[2] <https://www.copyright.gov/newsnet/2018/736.html>

[3] <https://www.copyright.gov/music-modernization/115/>

[4] <https://www.copyright.gov/music-modernization/faq.html>

[5] <https://secure.harryfox.com/public/MechanicalLicensesLicensee.jsp>

[6] <https://www.copyright.gov/music-modernization/115/>

[7] <https://www.billboard.com/articles/business/8499237/american-music-licensing-collective-competition-needed-forming-mma-mlc>

[8] <https://www.billboard.com/articles/business/8491460/copyright-office-begins-create-music-modernization-act-licensing-collective>

[9] <https://futureofmusic.org/article/fact-sheet/orphan-works>