Golden oldies

The US House of Representatives has already passed the Music Modernization Act. One controversial aspect – so called 'CLASSICS' – gives federal protection for pre-1972 sound recordings. **Helene M Freeman** discusses the implications

The Music Modernization Act may become the first US legislation enacted in decades to address music licensing for digital streaming services. The statute, which was approved by the House of Representatives unanimously on 25 April 2018, is a roll-up of a number of separate bills that achieved a rare consensus of all the constituents within the music industry. To become law, it needs the Senate's approval.

Although much of the statute affects a substantial change in the process for licensing musical compositions embodied on recordings streamed by digital services, this section has met with near uniform praise. Another portion of the bill, referred to as the CLASSICS Act, extends to recording artists and owners of sound recordings fixed prior to 15 February 1972 the same right to compensation from online and digital music services for use of their recordings as apply to recordings made after 15 February 1972. It would assure that half of all royalties paid go to the featured artists and the unions for non-featured performers through SoundExchange.

The need for the CLASSICS Act results from the unusual terms of US law, which leaves protection of sound recordings fixed prior to 1972 to state law. The proposed legislation follows extensive litigation in numerous states to obtain compensation for use of pre-1972 works in light of the growing impact streaming has had on sales of physical records and digital downloads.

Statutory background

Sound recordings first became the subject of copyright protection in the US with the enactment of the Sound Recording Amendment on 15 November 1971. The statute applied prospectively to sound recordings first fixed on or after 15 February 1972 and protected only against their duplication in tangible form. At the time, some individual states protected the rights of owners of sound recordings against record piracy through criminal statutes. Some provided civil remedies for the sale of unauthorised copies of sound recordings, either by statute or under judge made "common law copyright" or more general principles such as conversion, unfair competition or unjust enrichment.[1] In 1973, the Supreme Court upheld the right of the states to protect sound recordings, without regard to the limitations of the federal Copyright Act, including affording perpetual protection to recordings.[2]

The Copyright Act of 1976 retained state control of the protection of sound recordings fixed prior to 15 February 1972 provided that no sound recording fixed before 15 February 1972 would be subject to copyright until 15 February 2047. When the term of copyright was extended for an additional 20 years, the sunset date was extended to 15 February 2067.[3]

An exclusive right to public performance for sound recordings was first provided with the enactment of the Digital Right in Sound Recordings Act of 1995, but it was expressly limited to "digital audio transmissions" and was accompanied by a statutory licence for certain webcast and satellite radio transmissions.[4]

Certain foreign sound recordings fixed prior to 1972 are protected by the US Copyright Act

Under the Uruguay Round Agreements Act, implementing the TRIPS Agreement, copyright protection was "restored" automatically for sound recordings fixed by a domiciliary of a nation that adhered to the Berne Convention or was a member of the WTO that were not in the public domain in the source country, provided that the work was first published in an eligible country and not published in the US within the next 30 days.[5] The statute became effective on 1 January 1996. Works originating in countries that were not eligible at the time of enactment

of the statute, can become "restored works", when the source country adheres to Berne or becomes a member of the WTO.

Consequently, most foreign source sound recordings fixed after 1946 can claim to compensation under the copyright law when streamed on digital platforms, even though domestic sound recordings fixed prior to 1972 are not.

Litigation by rightsholders

In 2013, Flo & Eddie, a company formed by two of the founding members of the 1960s musical group *The Turtles*, instituted class actions on behalf of owners of pre-1972 recordings against Sirius XM in California, New York and Florida federal courts asserting violation of their right to control the public performance of their recordings under these states' laws. Flo & Eddie met with initial successes in the trial courts in New York and California.[6]

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The three major record labels, joined by the owner of the pre-1972 Rolling Stones' records, brought their own suit against Sirius XM in California state court. The state court found that California Civil Code § 980(a)(2) provided owners of pre-1972 recordings with an exclusive public performance right.[7] Appellate courts declined to review this decision before trial. Facing the potential disgorgement of the proceeds of its exploitation of the recordings, Sirius XM reached a $210m settlement with the major labels resolving all past claims and obtaining a licence through 31 December 2017. The settlement required licence negotiations for the five-year period commencing 1 January 2018 and arbitration of the licence fee absent agreement.

Thereafter, Sirius XM reached a settlement with Flo & Eddie, the ultimate amount to be paid contingent upon the outcome of the appeals then pending from the decisions in Florida and New York and its separate litigation against Pandora in California.

In December 2016, the highest court of the State of New York held, over a strong dissent, that under New York law the owner of a sound recording did not have a right to control its public performance.[8] The highest state court in Florida, Illinois and Georgia under the laws of those states came to the same conclusion.[9] Flo & Eddie's case against Pandora Media remains pending before the Supreme Court of California.

While the tide of state court decisions has been negative, they contain the seeds for future litigation possibilities. Sirius XM and iHeartMedia operate non-interactive services that are most analogous to traditional radio services. The New York Court of Appeals majority opinion addressed only rights under common law copyright and noted that unfair competition for copying of the recordings might afford a different avenue for relief, as would new legislation. In a concurring opinion, one judge noted that interactive/on demand services that allowed listeners to select specific recordings would constitute a publication of the recording under state law and not merely a public performance. As the federal court in Illinois stated:

> "The distinction between piracy and broadcasting is patent in this case, but may be more difficult to discern in future cases involving new forms of music distribution, such as streaming on demand, that like broadcasting do not involve the distribution of a copy of the recording but nevertheless eliminated the need for purchase of the recording itself….."[10]

The future

According to the Recording Industry Association of America, 65% of the revenues of the US music industry in 2017 derived from streaming music platforms. The growth in streaming revenues has come at the expense of sales of physical records and digital downloads, the latter falling by 25% in 2017 alone.

The House of Representatives recognised that it would be unfair to enact the Music Modernization Act, which is designed to streamline music licensing, foster the growth of music streaming platforms and compensate, songwriters, without assuring compensation for older recording artists and their families, whose livelihoods are being destroyed. It also makes little sense to provide compensation for foreign rightsowners and recording artists, while denying it to Americans.

However, as this article was in preparation, a bill was introduced in the Senate to fully federalise the protection of pre-1972 sound recordings to simultaneously shortening the term of their protection. This is a proposal that has been rejected for decades and is opposed by the music industry. In context, it is viewed as an effort to derail the CLASSICS Act.

Should that occur, state legislatures may be pressed to fill the void, potentially exposing the digital media platforms to different state schemes, an unworkable outcome.

Footnotes

1. See generally, Report of the Register of Copyrights, Federal Copyright Protection for Pre-1972 Sound Recordings (December 2011).
2. *Goldstein v California,* 412 US 546, 560-61 (1973).
3. 17 USC § 301 (c).
4. 17 USC § 106 (6). The statutory licences are codified in 17 USC § 114(d)(2) and (f).
5. 17 USC § 104A.
6. *Flo & Eddie v Sirius XM Radio,* 2014 US Dist Lexis 139053 (CD California, 22 September 2014); *Flo & Eddie v Sirius XM Radio*, 62 F.3d 325 (SDNY 2014).
7. *Capitol Records v Sirius XM,* No 520981 (Cal. Superior Court 14 October 2014).
8. *Flo & Eddie v Sirus XM Radio,* 28 NY 3d 583, 70 NE 3d 936 (2016).
9. *Flo & Eddie v Sirius XM Radio*, No SC 16-1161 (Florida Supreme Court 27 October 2017); *Sheridan v iHeart Media,* 255 F. Supp. 3d 767 (N.D. Ill. 2017); *iHeart Media v Sheridan*, 798 S.E.2d 223 (Georgia Supreme Court 2017).
10. *Sheridan,* 255 F Supp 3d at 781 n13.

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