What's All the Noise About?
A Guide to the Music Modernization Act for Librarians and Archivists
By Yuri Shimoda

On October 11, 2018, President Donald J. Trump signed the Orrin G. Hatch-Bob Goodlatte Music Modernization Act (MMA), H.R. 1551, into law. Shortly thereafter, I mentioned the new legislation to my boss at the Resources Center of the Autry Museum of the American West. She said that she had heard about the signing but had to admit that she knew very little about what the MMA will actually do. While the Autry has a significant amount of sound recordings in its collections, my supervisor is not a specialized music librarian or audio archivist, so I decided to ask the Senior Director of the Rock & Roll Hall of Fame Library and Archives for his opinion.

"From what I've read about it, it sounds like it's mostly a step in the right direction for our profession, but I don't think I've seen enough information to know for sure how it will play out," he replied.

This paper provides librarians and archivists with a basic understanding of the MMA, while also presenting why it can be seen as a step in the right direction for copyright reform in regards to concerns that are relevant to libraries, archives and museums. The examination of the legislation is divided into four sections: the relevance of the MMA to these institutions; pertinent background information on sound recordings and copyright law; a summary of the different aspects of the MMA; and finally, an analysis of the law's possible effects on the work of librarians and archivists.

Relevance

Ramifications of the MMA's passing on the work that is carried out by librarians and archivists basically comes down to the two goals at the heart of any LAMs: preservation and access. Although the rise of the digital era resulted in many of the nation's sound recordings being digitized for long-term preservation, a considerable amount of valuable audio materials remain locked away in storage.

"There is an ever-decreasing time window to complete the digitization process before the small pool of equipment in operable condition required for the replay of traditional formats vanishes."[1] As stewards of sound carriers that hold the country's cultural heritage, it is imperative that librarians and archivists do all they can to overcome any obstacles that could deter the preservation reformatting of analog recordings before the looming cloud of obsolescence ultimately descends. One of those barriers exists in the complicated nuances of intellectual property law.

In a 2010 study commissioned by the National Recording Preservation Board, Library of Congress, many contributors believed that "recorded sound preservation in the United States is critically affected by restrictions and limitations, as well as by the range of exclusive rights outlined in U.S. copyright law."[2] Elements of copyright law are often incompatible with best practices for digital preservation. Section 108 only allows for three preservation (for unpublished works) or replacement (for published works) copies, but more are necessary to maintain

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[1] Dietrich Schüller et al., introduction to *Handling and Storage of Audio Carriers (IASA-TC 05)*, eds. Dietrich Schüller and Albrecht Häfner (London: Bellsway Print, 2014), 5.

[2] Rob Bamberger and Sam Brylawski on behalf of the National Recording Preservation Board, *The State of Recorded Sound Preservation in the United States: A National Legacy at Risk in the Digital Age* (Washington, D.C.: Council on Library and Information Resources and the Library of Congress, 2010), 108.

geographical separation (storing backups in at least two other locations that are separate from the master file) and to be adequately prepared for the occurrence of natural disasters. In addition, there is often confusion over federal and disparate state copyright laws leading to hesitation to provide wide access to sound recordings for fear of litigation. Due to this limiting of access, collectors could feel discouraged from donating materials to institutions, which is something all LAMs workers should want to prevent.

Background

It is important to define some of the terms that are central to a discussion of sound recordings and intellectual property (IP) law before delving any further into the MMA. Per Title 17, Section 101, sound recordings are "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied."[3] Therefore, a sound recording can be anything from an unpublished ethnographic field recording on a wire spool to a commercially released LP record. When it comes to a recording being unpublished/noncommercial versus published/ commercial, the law defines publication as "the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending."[4] Unless they have particular relevance to an archive's mission or collection focus, commercial recordings may be of lesser value since copies tend to exist across multiple institutions, whereas noncommercial or unpublished recordings are unique or published in limited quantities.

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[3] https://www.copyright.gov/title17/92chap1.html.

[4] https://www.copyright.gov/help/faq-definitions.html.

Rights Ownership of Sound Recordings

Understanding sound recordings within the context of IP law is so daunting because of the complicated nature of rights ownership. While "authors" in other mediums typically maintain the rights over their works while they are alive, a composer and/or lyricist usually retain the copyright in the music composition but often sign over their rights in a sound recording to a record label in exchange for the company covering costs for studio time, production, and marketing. The composition effectively becomes a 'work for hire,' and the label maintains rights over the song's reproduction, distribution, and derivative works per Section 106. Public performance rights are also addressed in section 106. In order to publicly play a sound recording or host a live performance of a work, a business must purchase a license from the publisher/ composer via their Performing Rights Organization representatives at BMI, ASCAP, or SESAC.

History of Sound Recording Protection

The history of recorded sound can be traced back to Thomas Edison's first tinfoil recordings on a phonograph in 1877, but the first appearance of musical recordings in case law actually involved player piano rolls. In *White-Smith Music Publishing Co. v. Apollo Co.* (1908), the Supreme Court ruled that record producers (or in this case piano roll producers) did not have to pay composers/publishers for the use of their music in recordings because they one could not read a piano roll like sheet music.[5]

As mentioned above, copyright law distinguishes between a sound recording and its underlying musical composition (lyrics, sheet music – which is treated like text material). This in

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[5] Peter Jaszi et al., *Protection for Pre-1972 Sound Recordings Under State Law and Its Impact on Use by Nonprofit Institutions: A 10-State Analysis*, (Washington, DC: Council on Library and Information Resources and the Library of Congress, 2009): 2.

turn led to Congress' development of a compulsory license system in 1909 so that composers could charge other artists, producers, or record companies a fixed rate in exchange for permission to create "mechanical" reproductions of their songs. These fees are collected through an agent, such as the Harry Fox Agency, who would also handle synchronization licenses for use in film, television, or home video releases.

The next historic milestone came in the Sound Recording Amendments of 1971, which covered sound recordings fixed in a tangible medium of expression on or after February 15, 1972. This left pre-1972 recordings entangled in a complex web of state civil, criminal, and common laws, with the oldest of recordings not entering the public domain until 2067 at the earliest (i.e. 95 years after 1972). Significant cases in regards to state statutes include 1974's *Goldstein v. California*, in which the Supreme Court reaffirmed "states' authority to grant common law copyright protection both to writings subject to the federal copyright and to those not included within the federal act";[6] *CBS, Inc. v. Charles Garrod, et al.* (622 F. Supp. 532, 1985); and *Capitol Records, Inc. v. Naxos of America, Inc.* (4 NY 3d 540, 2005).

The Road to the MMA

The Copyright Act of 1976 brought about the codification of the fair use defense in section 107. Defendants in cases such as *Campbell v. Acuff-Rose Music* and *Lennon v. Premise Media* argued that their use of musical works by Roy Orbison and John Lennon, respectively, was transformative enough to weigh in the favor of fair use. The act also enacted section 108's exceptions for libraries and archives and extended copyright to last for the life of the author plus

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[6] "Goldstein V. California and the Protection of Sound Recordings: Arming the States for Battle with the Pirates," *Washington and Lee Law Review* 31, no. 3 (1974): 641, accessed November 28, 2018, https://scholarlycommons.law.wlu.edu/wlulr/vol31/ iss3/7.

50 years (or 75 years for a work for hire). However, rights holders saw these terms become even longer (life of the author plus 70 years; 120 for works of corporate authorship) with the passage of the 1998 Copyright Term of Extension Act (aka the Sonny Bono Act). This was also the year that the Digital Millennium Copyright Act (DMCA) was signed into existence. Title Two of the DMCA, the Online Copyright Infringement Liability Limitation, released internet service providers from being held responsible for copyright infringement that was committed by their subscribers. The provision is ultimately what gave many web users the green light to commit music piracy.

Rights became even more complicated with the passage of the Digital Performance Right in Sound Recordings Act of 1995 that dealt with interactive digital subscription services. The dawn of the digital era created an expectation for instant access to streaming or downloadable music files amongst library and archive visitors, too. As was mentioned earlier, though, section 108 only allows for the creation of three preservation and security copies of unpublished work or for a published work that is damaged, deteriorating, lost/stolen, or stored on an obsolete format; these copies must be accessed on the eligible institution's premises.

The *ARSC Guide to Audio Preservation* recommends at least three digital copies of an analog sound recording: a preservation master file that serves as a digital surrogate for the original, an access master created from the preservation master, and an access copy, which is what the user listens to within the library.[7] Due to the fact that digital preservation hardware and

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[7] William Chase, "Preservation Reformatting," in *ARSC Guide to Audio Preservation*, ed. Sam Brylawski et al. (Eugene, OR: Association for Recorded Sound Collections; Washington, DC: Council on Library and Information Resources and the Library of Congress, 2015), 111.

software are ever-evolving, these files must be migrated to updated systems to ensure longevity. This means that many copies of the original sound recording must continue to be made.

The 2005 *Copyright Issues Relevant to Digital Preservation and Dissemination of Pre-1972 Commercial Sound Recordings by Libraries and Archives* study addresses the need for more than three copies and calls for the reform of section 108 and proposes the need for pre-1972 sound recordings to be brought under federal law.[8] Three music-related organizations – the Association for Recorded Sound Collections, Music Library Association, and the Society for American Music – banded together to create the Historical Recording Coalition for Access and Preservation (http://recordingcopyright.org/) in 2009. It was at the urging of their united front that the Copyright Office launched that policy study that resulted in a 2011 report,[9] which ultimately echoed the recommendations of the study from 2005.

The idea for a blanket "mechanical" licensing system was mentioned by the Register of Copyright, Marybeth Peters, while testifying before Congress on the need for the modernization of music licensing laws in 2007.[10] The Copyright Office also advocated for such a system in its *Copyright and the Music Marketplace* report of 2015.[11] As these studies are being conducted, platforms like Pandora and Spotify are steadily gaining in popularity. Hence, this timeframe is when artists really started lobbying for reform in terms of how these services track the amount of

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[8] June M. Besek, *Copyright Issues Relevant to Digital Preservation and Dissemination of Pre-1972 Commercial Sound Recordings by Libraries and Archives* (Washington, DC: Council on Library and Information Resources and the Library of Congress, 2005), 65.

[9] https://www.copyright.gov/docs/sound/?loclr=blogcop.

[10] Marybeth Peters, statement taken at the hearing on "Reforming Section 115 of the Copyright Act for the Digital Age," March 22, 2007, https://judiciary.house.gov/_files/hearings/March2007/Peters070322.pdf?loclr=twcop.

[11] https://copyright.gov/docs/musiclicensingstudy/copyright-and-the-music-marketplace.pdf?loclr=blogcop.

times their songs are being played.

The bill that eventually turned into the MMA began as four separate pieces of legislation. The component that became muted on the road to final approval was known as Fair Play Fair Pay. It was aimed at establishing a royalties requirement that AM/FM broadcasters would have to pay to record companies and artists, but as a result of pressure from the National Association of Broadcasters, Fair Play Fair Pay was cut from the law.

Congressman Bob Goodlatte introduced H.R. 5447 in the House, while Senator Orrin Hatch presented S. 2823 to members of Senate. Hatch's bill had the same text as H.R. 5447, which was unanimously voted through on April 25, 2018. After being amended into H.R. 1551, it was unanimously passed by Senate on September 18, 2018 and signed by President Trump a few weeks later.

Summary of the MMA

H.R. 1551 is composed of three sections; the first of which addresses the compulsory license clause in Section 115.

Title I – Music Licensing Modernization sets forth a new blanket license for the interactive digital streaming and downloading of songs. The act standardizes rates for streaming services. A mechanical licensing collective is to be created to oversee a public database of sound recordings and musical works to administer the blanket licenses and distribute rights holders' royalties. Finally, the law changes how federal district court judges are selected to settle rate-setting disputes regarding performance rights organizations (ASCAP, BMI, SESAC).

Title II – Compensating Legacy Artists for their Songs, Service, and Important Contributions to Society is simply known as the CLASSICS Act. It attempts to close the pre-1972 loophole by preempting the myriad of state laws to bring all recordings under a unique (*sui generis*) federal protection, purposely not being called copyright protection.

Title III – Allocation for Music Producers (AMP) expands royalty payments to producers, mixers, and engineers. Collective rights management organization SoundExchange is going to collect and distribute royalties accordingly.

Analysis

"This is a historic day for music creators," shared Recording Academy National Advocacy Committee Co-Chair Mindi Abair in a statement after the Senate voted to unanimously pass the MMA. "We've watched for years as technology has exponentially changed the way our music is consumed. Our laws have not kept up, and today is a huge milestone toward creating a fair living wage and updating the system of how music makers in the 21st century are paid."[12] The new law has its positives for the artists, producers, engineers, and publishers, but it also benefits and drawbacks for librarian and archivist communities.

The CLASSICS law's application of federal exceptions (Section 107 and 108) for all pre-1972 recordings is great for LAMs in states where there were major inconsistencies in application. While pre-1923 recordings enter the public domain after a three-year transition period, ending December 31, 2021, recordings published after 1923 actually have a longer term than 95 years now: 100 years for 1923-1946 and 110 years for 1947-1956. Recordings from

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[12] Ed Christman, "Music Modernization Act Passes in Senate with Unanimous Support," *Billboard.com*, September 18, 2018, https://www.billboard.com/articles/business/8475876/music-modernization-act-passes-senate-unanimous-support.

1957-1972 will still enter the public domain in 2067 as before. This is good for any rights holders (or their heirs) who are still living, but not so great for LAMs.

A benefit of the interim rule is that the Copyright Office is asking rights owners to enter information about their pre-1972 sound recordings in an Excel spreadsheet form (The template can be found at https://www.copyright.gov/rulemaking/pre1972-soundrecordings-schedules/.) so that they can be indexed into a searchable online database. This could prove to be useful when librarian-archivists are trying to locate rights holders, especially since the most recent index dates will be listed first, allowing for easy discoverability.

One of the most helpful outcomes of the new legislation for LAMs is going to be the ability to file a notice to use a pre-'72 recording for non-commercial purposes (after checking first to make sure the recording isn't in commercial use). A rightsholder will have 90 days to object, in which case the LAM can decide if they would like to make an argument that their use is fair. The fact that the response period is only 90 days could be of a LAM's advantage, since it is not that large of a window for a rights holder to become aware of the listing, let alone formulate an objection.

This database has great potential for those LAMs wanting to make use of an orphan work in their collection, but have exhausted all other leads in terms of attempting to identify or contact a rights holder. "The newly created mechanical licensing collective will be tasked with developing and maintaining a database of musical works and sound recordings, which will be publicly available and is expected to become the most comprehensive database in the music

industry."[13] It will definitely be interesting to see how this database goes into effect, and if librarians and archivists are able to take make use of it.

Recommendations

After becoming acquainted with all aspects of the MMA, I have formulated two recommendations in regards to this addition to IP law. Since the legislation is so new and serves to add even more layers to the already complex area of sound recording copyright, I firmly believe that librarians and archivists at every stage of their carriers could benefit from a professional development workshop on the MMA. The curriculum for the training session could even follow the format of this paper, in that, the history and nuances of the copyright of sound recordings could be reviewed, followed by a presentation on the three different prongs of the new law.

As the International Association of Sound and Audiovisual Archives' Ambassador for the Western United States, I have added the MMA as a proposed topic for future workshops we are planning across the country. The aspects of the MMA with the most potential to affect LAMs, like the recordings database, can only be of use to librarians and archivists if they are aware of it and truly understand what it can be utilized for.

"Now that the bill has become law, the Copyright Office will be focused on implementing its new duties required by the Music Modernization Act and on outreach activities to help interested members of the public understand the changes that result from this new legislation," writes Regan A. Smith, General Counsel and Associate Register of Copyrights, in a blog post for the department. "In particular, these activities will include educating songwriters and others with

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[13] https://www.copyright.gov/music-modernization/.

respect to the new process by which a copyright owner may claim ownership of musical works and royalties for works."[14]

The Copyright Office's desire to reach out to the parties that the law will have an impact serves as inspiration for my second idea. I would like to see academic music libraries and public libraries build free programming around helping to educate their patrons about the MMA, particularly those who are musicians, songwriters, composers, producers, mixers, or audio engineers.

Like the continuing education training for librarians and archivists, the outreach effort could simply take the form of a classroom lecture comprised of a brief history on copyright law and sound recordings, followed by details on the overall structure of the MMA. Then, a discussion focused on step-by-step instructions on how to become a part of the mechanical licensing collective and add their works to the musical database could take place. The workshop could close out with a question-and-answer period. A librarian who has taken part in one of the training sessions I discussed in my first recommendation could deliver the lecture and lead the discussion.

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[14] Regan A. Smith, "The Orrin G. Hatch-Bob Goodlatte Music Modernization Act," *The Library of Congress* (blog), October 11, 2018, https://blogs.loc.gov/copyright/2018/10/the-orrin-g-hatch-bob-goodlatte-music-modernization-act/.

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