Copyright & IP Law Developments
In the Entertainment Industry

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Agenda

- Update on Implementation of the Music Modernization Act
- Section 203 & 304 Terminations Recent Case Law Involving

  Recording Contracts/Master Rights and Music Publishing Rights
- NFT's and Music Law – Clearances & Royalties

MUSIC MODERNIZATION ACT

- The law creates a blanket mechanical license and establishes a collective to administer the rights with a “blockchain” like reporting system.
- Reshapes how courts can determine rates, while making sure future performance rates hearings between performance rights organizations BMI and ASCAP and licensees rotate among all U.S. Southern District Court of New York Judges
- Creates a royalty for labels, artists and musicians to be paid by digital services for master recordings created prior to Feb. 15, 1972
- Codifies a process for Sound Exchange to pay producers and engineers royalties for records on which they have worked

THE MLC
THE MUSIC LICENSING COLLECTIVE

How Does the MLC Work?

The MLC administers blanket mechanical licenses for eligible streaming and download services in the United States, collecting royalties due under those licenses and **paying music publishers and administrators; self-administered songwriters, composers, and lyricists; and ex-U.S. collective management organizations (or "CMOs").**

MLC LICENSING

The new legislation did not change the rates for the compulsory license under section 115. However, the legislation does establish a new rate setting standard to be applied by the Copyright Royalty Judges. The new market-based willing buyer / willing seller rate setting replaces the policy-oriented 801(b)(1) rate-setting standard. The Copyright Royalty Judges will apply the new standard to rate determination proceedings that commence on or after October 11, 2018.

THE CRB

- Copyright Royalty Board (CRB) is part of the U.S. Library of Congress
- It consists of three (3) Copyright Royalty Board judges
- The judges determine royalty rates for statutory licenses as provided by the U.S. Copyright Royalty and Reform Act of 2004.

CRB Continued.

- The CRB is mandated by statute to set rates and typically encourages both music licensors and licensees to negotiate on rate settlements.
- But, more often than not, a consensus can't be reached and so a rate trial proceeds, wherein all interested parties make their cases through statements and testimony.
- After listening to testimony, the Judges make a determination as to what the statutory royalty rates will be for the upcoming five-year period.

NEW CRB RATES FOR DOWNLOADS AND PHYSICAL COPIES

- Taking effect on Jan. 1, 2023, songwriters will earn 12 cents per track or 2.31 cents per minute of playing time or fraction thereof, whichever amount is larger for physical products and permanent downloads.
- First increase since 2006, when the rate was .091 cents or 1.75 cents per minute.

CRB STREAMING RATES

- Under a settlement agreement between NMPA and DiMA the "highest royalty rate in the history of streaming anywhere" has been established. The headline rate will escalate from 15.1% of revenue in 2023 to 15.2% in 2024 and then a half a percentage point increase in each of the remaining three years, peaking at 15.35% in 2027, the final year of the term.
- The stand-alone portable subscription offerings — like Spotify — the total content cost (TCC) component of the rate formula will be set at 26.2% of what's paid to labels for the entire term, or $1.10 per subscriber, whichever is lower. Previously, those numbers were 21% of revenue and 80 cents per subscriber.

Sound Recordings **Act of 1995** (DPRA)

- The Digital Performance Right in Sound Recordings **Act of 1995** (DPRA) is a United States **Copyright** law that grants owners of a **copyright** in sound recordings an exclusive right "to perform the **copyrighted** work publicly by means of a digital audio transmission."

LIMITED COPYRIGHT IN MASTER RECORDINGS

- **(a)** The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2), (3) and (6) of section 106, and **do not include any right of performance under section 106(4)**.

ONLY A LIMITED PERFORMANCE RIGHT IN SOUND RECORDINGS

- No royalties paid to artists and record companies when master recordings are played in
- bars,
- restaurants,
- stadiums,
- Cable & Broadcast Television,
- news programs, and
- radio stations

MASTER RECORDING PERFORMANCE RIGHT

- The **Digital Performance Right in Sound Recordings Act of 1995** (**DPRA**) and the **Digital Millennium Copyright Act of 1998** created a master recording performance right for digital transmission.
- These royalties are paid to record labels, recording artist and musicians for the performance of master recordings streamed over the Internet.
- But Webcasting IV doesn't cover other types of performances.
- The U.S. is one of the few countries in the world without a performance right for master recording for performances at terrestrial radio, in public places like retail stores and bars, and on television

American Music Fairness Act

In June 2022, the American Music Fairness Act (AMFA-HR 4130) bill was introduced to Congress.

AMFA is the solution to the long-standing injustice that has unfairly benefited big broadcast companies at the expense of artists. Songwriters, not artists, are currently paid performance royalties for use of music by broadcast radio, these royalties collected and paid by ASCAP, BMI and SESAC.

Reintroduced in February 2023, and sponsored in the Senate by Alex Padilla (D-CA) and Marsha Blackburn (R-TN), and in the House by Darrell Issa (R-CA) and Jerry Nadler (D-NY), AMFA ensures that creators are paid for AM/FM radio plays, requires billion-dollar corporations such as iHeart to pay their fair share for the music they play, and protects small and college radio stations by capping what they would have to pay to as little as $10 to $500 a year. The legislation also levels the music playing field across terrestrial and digital platforms. Creators are currently paid when their music is played on streaming services such as SiriusXM and other digital platforms – but receive no compensation from AM/FM radio stations.

If it passed, it would ensure that recording artists finally be paid when their music is played on the broadcast radio and receive these performance royalties from foreign territories.

INTERNET STREAMING

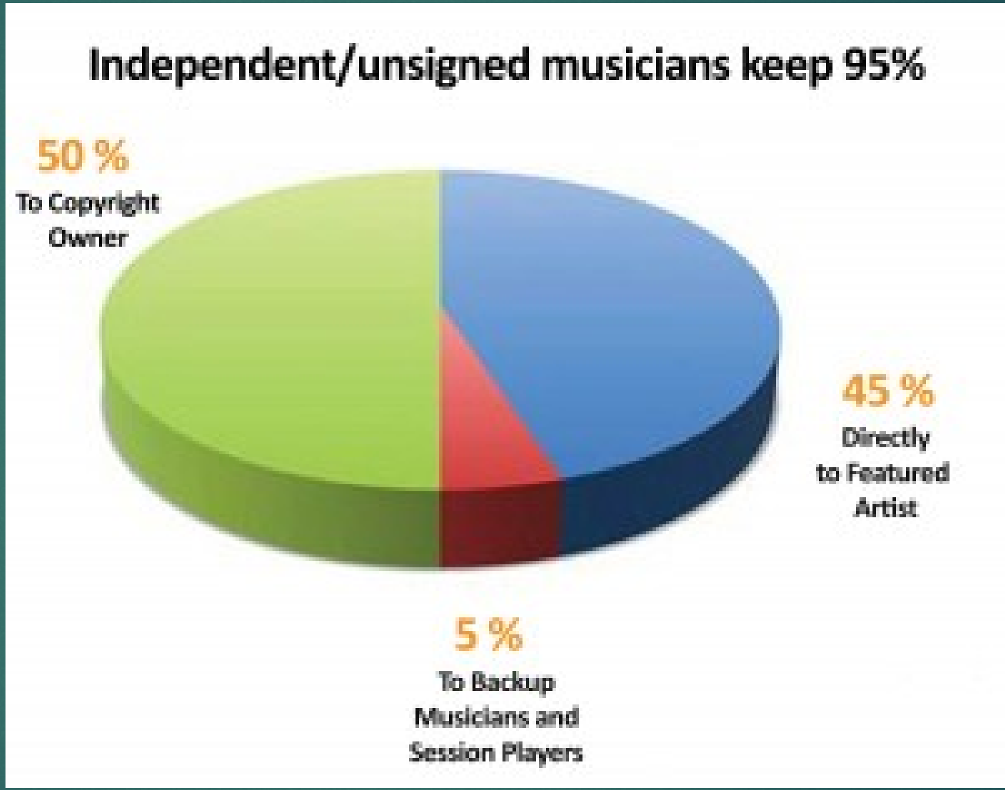
Interactive streaming

Non-interactive streaming

SoundExchange

- If the licensee has not cut a direct deal with the copyright owners, it can get a compulsory licenses which comes with a statutory rate as determined by the CRB judges and is paid to SoundExchange.
- SoundExchange, is an agency set up to administer payments.
- Those payments are split as follows: 50 percent to the master rights owner, which are typically record labels; 45 percent to the artist that recorded the music; and 5 percent to musicians, via their unions.

SoundExchange



FLO & EDDIE CASES

- A Copyright Royalty Board (CRB) decision found that pre-72 recordings are not covered under section 114 of the Copyright Act.
- Sirius/XM Satellite Radio, in response, stopped paying for pre-72 recordings.
- Flo & Eddie, formerly of the group, "The Turtles" filed a lawsuit vs. Sirius/XM pursuant to state and common law copyright claims.
- The major labels also filed lawsuits covering the same subject matter.

FLO & EDDIE V. SIRIUS/XM CASE NEW YORK

- Plaintiff was a corporation owned by two of the original members of The Turtles, a band most famous for its song “Happy Together.” Plaintiff controlled the master recordings of approximately 100 Turtles songs recorded before 1972. Defendant, the nation’s largest satellite digital radio service, broadcast pre-1972 Turtles songs but did not have licenses with the performers or sound recording copyright-holders and did not pay them for broadcasts. Plaintiff commenced this federal putative class action alleging common-law copyright infringement and unfair competition. The federal district court denied Defendant’s motion for summary judgment, concluding that New York common law includes a right to control public performances of pre-1972 copyrighted sound recordings. The court of appeals certified a question to the Court of Appeals regarding an unresolved issue of New York copyright law. The Court of Appeals answered that New York common-law copyright does not recognize a right of public performance for creators of sound recordings.

FLO & EDDIE CASE CALIFORNIA

- Pre-1972 sound recordings aren't protected by federal copyright. So, until recently, rights holders weren't being compensated for hits played on digital channels like SiriusXM Radio's '60s on 6.
- Two of The Turtles, Mark Volman and Howard Kaylan, who are known as Flo & Eddie, won summary judgment in 2014 when the court found Sirius' use of their music violates public performance rights. The trial was set to determine exactly how big of a check Sirius would have to write to fairly compensate the artists.

MUSIC MODERNIZATION ACT

PRODUCER COMPENSATION

Codifies a process for Sound Exchange to pay producers and engineers royalties for records on which they have worked.

COMPULSORY/STATUTORY LICENSES

- MECHANICAL LICENSES
  - Section 115 of the **Copyright Act** provides a **compulsory license** to make and distribute sound recordings. The **compulsory license** for non-dramatic musical compositions under Section 115 of the Copyright Act of 1976 allows a person to distribute a new **sound** recording of a musical work, if that has been previously distributed to the public, by or under the authority of the copyright owner.
- BROADCAST LICENSES
  - Section 111 establishes a compulsory licensing system that allows cable companies to make secondary transmissions of copyrighted works.
- DIGITAL AUDIO LICENSES
  - DIGITAL PERFORMANCE RIGHTS IN SOUND RECORDINGS ACT OF 1995

TERMINATION OF GRANTS
DURATION OF COPYRIGHT

- In general, copyrighted works created on or after January 1, 1978 remain protected for the duration of the author's life, plus 70 years.
- For works-made-for-hire, the duration of copyright is 95 years from first publication or 120 years from creation, whichever is shorter.
- Rights are divisible

Sections 203 & 304 of the Copyright Act

Waite et al. v. UMG Recordings, Inc.,

- The plaintiffs brought a class action against UMG. The case turns on whether the works created constituted works made for hire. If so, under the Copyright Act, grants of copyright interests in these works cannot be terminated. UMG filed a Motion to Dismiss.
- The defendant recording company argued the plaintiffs could not bring their claims because of the three-year statute of limitations under the Copyright Act. The Waite Court disagreed.
- The *Waite* court held also that small errors contained in the termination notices were harmless and that there was sufficient information for the defendant to know the plaintiffs sought to terminate.
- Further, importantly grants made by plaintiffs' loan-out companies could be terminated!
- The Court ruled on Jan 30, 2023 against the class certification and proclaimed that each individual artist would have to file separately, but that this was no indication of whether their claims were valid.

Statute of Limitations

The *Waite* Court, Judge Lewis A Kaplan, reasoned that the SOL did not bar plaintiffs' claims:

"Section 203(a)(3) prescribes the time period in which an author may terminate his or her grant. At the earliest, the termination right may be exercised thirty-five years after copyright ownership was transferred. That the statute of limitations would begin to run against an artist the day the contract is signed would be incongruent with a termination right that does not vest for at least thirty-five years from that date." *Waite* at p. 13.

GAP GRANTS

"The dynamic between Section 203 and 304(c) created a category of grants for which there was no termination right. These "gap grants" refer to those grants executed prior to January 1, 1978, but the work was created on or after January 1, 1978. Based on the grant execution date, Section 304(c), but not Section 203, is applicable. However based on the work's creation date, the grant could be terminated only under Section 203. Accordingly, gap grants cannot be terminated under either provision." *Waite* at p. 22.

Grants May be Terminated Only by the Grantor

Only grants "executed by the author" (or the statutorily designated successor) may

be terminated. Therefore, third parties to a contract and **loan-out companies**, which "loan" out an artist's services to employers and enter into contracts on behalf of the artist, do not have a termination right under the statute.

Plaintiffs argued that the loan-out company is only a tax-planning device. The Court rejected this argument.

Sections 203 & 304 of the Copyright Act

Johansen et al. v. Sony Music Entertainment Inc.,

Plaintiffs also brought a class action against Sony Music Entertainment.

Plaintiffs asserted their notices of termination served on Sony terminated recording agreements between the parties. Sony countered by filing a motion to dismiss arguing that the notices of termination contained technical errors which should make them ineffective and were not timely served.

Judge Edgardo Ramos denied the motion to dismiss, reasoning that the notices of termination gave sufficient information and that the errors were harmless, and that they were timely.

PUBLIC POLICY BEHIND TERMINATION RIGHTS

- “The Copyright Office has unambiguously explained that the purpose behind § 203 is to provide protections for authors of creative works. Analysis of Gap Grants under the Termination Provisions of Title 17, at i.

- One motivation behind the Sections is to counterbalance the unequal bargaining position of artists, resulting in part from the “impossibility of determining a work’s value until it has been exploited.” H.R. Rep. No. 94-1476, at 124 (1976).

- A “competing objective” of the sections is “for the existing assignee to receive reasonable notice of what rights of theirs are being affected through the exercise of the [artist]’s . . . termination right.” *Seigel II*, 690 F. Supp. at 1055–56; see also 42 Fed. Reg. 45916, 45918 (stating that the regulation ‘attempts to avoid the imposition of costly or burdensome requirements while, at the same time, giving the grantee and the public a reasonable opportunity to identify the affected grant and work from the information given in the notice’).” ***Johansen*** Court at p. 9.

NFT'S & COPYRIGHT LAW
WHAT IS AN NFT?

- Non-fungible token

Description:

- A non-fungible token is a non-interchangeable unit of data stored on a blockchain, a form of digital ledger, that can be sold and traded. Types of NFT data units may be associated with digital files such as photos, videos, and audio. Wikipedia

The First Sale Doctrine

- The Doctrine: The owner of a copy or phonorecord of a copyrighted work may sell or dispose of that copy without the copyright holder's authorization.
- Applies to the sale of a copyrighted work, not a license of that copy
- An assessment must be made as to whether a sale of a copy of a work or a license of a work has occurred.
- Don't take any chances! Avoid ambiguity in the license agreement:
  - Specify the work is licensed, not sold.
  - Place restrictions against the transfer of the work.
  - Place restrictions around the use of the work to demonstrate only a usage right is being granted.

Miramax vs. Quentin Tarantino

Tarantino planned to auction off seven “exclusive scenes” from the 1994 motion picture Pulp Fiction in the form of NFTs, but Miramax claimed to hold the rights needed to develop, market, and sell NFTs relating to its deep film library.

Miramax alleged:

- Tarantino breached their original agreement.
- Copyright Infringement Under 17 U.S.C. § 501 when Tarantino infringed of Miramax’s assigned copyright
- Trademark Infringement Under 15 U.S.C. § 1114 due to Tarantino’s unauthorized use of Miramax’s Pulp Fiction Trademark.
- Unfair Competition Under 15 U.S.C. § 1125(a)) because Tarantino’s unauthorized use of the Pulp Fiction Mark alleged herein is likely to deceive consumers.

Miramax vs. Quentin Tarantino continued….

- This matter was settled on undisclosed terms, but with the parties agreeing to do NFT's together in the future.

- In January 2022, the first NFT from Tarantino's collection sold for over $1 million at auction.
- The case was seen by many as a classic example of Web2 copyright laws being applied in a Web3 environment. Tarantino's camp had argued that NFTs, which didn't exist at the time of the film's release, fell outside of the scope of restricted mediums for redistribution.

NIKE vs. Stock X

Without Nike’s authorization or approval, StockX is “minting” NFTs that prominently use Nike’s trademarks, marketing those NFTs using Nike’s goodwill, and selling those NFTs at heavily inflated prices to unsuspecting consumers who believe or are likely to believe that the NFT’s are, in fact, authorized by Nike. This battle seems to be headed to trial.

Nike alleged:

- Trademark Infringement Under 15 U.S.C. § 1114
- FALSE DESIGNATION OF ORIGIN / UNFAIR COMPETITION Under 15 U.S.C. § 1125(a)
- TRADEMARK DILUTION Under 15 U.S.C. § 1125(c)
- INJURY TO BUSINESS REPUTATION AND DILUTION NEW YORK GENERAL BUSINESS LAW § 360-1
- COMMON LAW TRADEMARK INFRINGEMENT AND UNFAIR COMPETITION

ROC-A-FELLA RECORDS, INC vs. DAMON DASH AND GODIGITAL RECORDS, LLC

Roc-A-Fella, Inc. claimed to own all rights to Jay Z's critically acclaimed album, *Reasonable Doubt*. Damon Dash, a former owner of Roc-A-Fella attempted an auction of the album *Reasonable Doubt* as an NFT. This matter was settled.

Roc-A-Fella claimed:

- DECLARATORY JUDGMENT ON OWNERSHIP OF THE COPYRIGHT
- BREACH OF FIDUCIARY DUTY
- CONVERSION
- REPLEVIN
- UNJUST ENRICHMENT
- VIOLATION OF NEW YORK GENERAL BUSINESS LAW § 349

LIL YACHTY vs. OPULOUS

Opulous utilized LiL Yachty's name, trademark, and photograph to successfully raise NFT funds without LiL Yacthy's consent. The battle continues as the Court denied a 12(b)(6) motion on a jurisdictional basis.

Yacthy alleged:

- Federal Trademark Infringement (15 U.S.C. §§ 1114)
- Federal Unfair Competition and False Representation of Affiliation (15 U.S.C. § 1125)
- Violation of the California Common Law Right of Privacy
- Violation of the California Statutory Right of Publicity (Civil Code § 3344)
- California Unfair Competition (Business & Professions Code § 17200)

Hermès International vs. Mason Rothschild

Rothschild appropriated the trademark METABIRKINS to identify a business that creates, markets, sells, and facilitates the exchange of investable NFT's without Hermès' consent or authorization. Hermes won the first battle. But Rothschild claims they will appeal./

Hermès alleged:

- Trademark Infringement Under 15 U.S.C. § 1114
- False Designation of Origin / Unfair Competition Under 15 U.S.C. § 1125(a)
- Federal Trademark Dilution 15 U.S.C . § 1125(c)
- Cybersquatting Under the Anti-Cybersquatting Consumer Protection Act 15 U.S.C. § 1125(d)
- Injury to Business Reputation and Dilution New York General Business Law § 360-1
- Common Law Trademark Infringement
- Misappropriation and Unfair Competition Under New York Common Law


NOT YOUR MOTHER'S BIRKIN

NFT ROYALTIES

- **<u>COMPENSATION</u>.**
- **Sales Revenue**. Company shall be entitled to receive seventy-five percent (75%) of Primary Sale Revenue from the Licensed Content via the Service.

- "**Primary Sale Revenue**" means all revenue actually received and recognized by Platform from the initial sales of the Licensed Content via the Service, less applicable taxes, charges, and fees, including transaction fees (the foregoing deductions altogether referred to as "**Costs**"). Company's share of Primary Sale Revenue shall be payable after deduction of the Platform Share and Costs. The Platform Share shall be calculated "off the top'' solely after the deduction of Costs and prior to Company receiving its quarterly share of Primary Sale Revenue.

- "**Secondary Sale Revenue**" means the percentage-based royalty deducted from the gross proceeds of each downstream, secondary sale of the Licensed Content on the Platform marketplace platform. Company's share of Secondary Sale Revenue shall be 9.5% of each sale payable after deduction of the Platform Share and Costs. For the avoidance of doubt, Company shall be responsible for paying all third parties who control rights in the Licensed Content. The parties agree that up to five percent (5%) of all digital collectibles created may be retained from public sale by Platform for free distribution or archival purposes, for reasons including, but not limited to, customer service, incentivizing of content provider and/or artists, promotional campaigns, historical reasons, and community giveaways. From time to time, Platform reserves the right to destroy unsold digital collectibles in order to preserve scarcity and support prices in secondary markets. Royalties payable hereunder shall be paid on a quarterly basis. Please advise what % costs typically represent?

NFT ROYALTIES

	Influencer/Brand share (if applicable)	NFT Provider share	Artist share	Artist Collaborator
No Engagement	70%	30%	N/A	N/A
Artist Collaboration Engagement	45%	25%	30%	N/A
Combined Engagement	40%	20%	20%	20%

NFTs & SECURITIES LAWS

While the SEC has not provided guidance on when an NFT is a security, the SEC staff have noted: the main issue in analyzing a digital asset under the ***Howey*** test is whether a purchaser has a reasonable expectation of profits (or other financial returns) derived from the efforts of others. A purchaser may expect to realize a return through participating in distributions or through other methods of realizing appreciation on the asset, such as selling at a gain in a secondary market. ***See*** Framework for "Investment Contract" Analysis of Digital Assets (2019), available at: https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets# edn 1.

Questions

Thank You!