

New Era In Music Licensing: The Music Modernization Act

Coe W. Ramsey
Amanda Whorton

February 8, 2019

Orrin G. Hatch-Bob Goodlatte Music Modernization Act

- H.R. 1551; Public Law 115-264; 132 Stat. 3676
- Enacted **October 11, 2018**
- **Reforms The Section 115 Musical Works Compulsory License**
 - Musical Works Modernization Act (Title I)
- **Federalizes Pre-1972 Recordings**
 - Classics Protection And Access Act (Title II)
- **Other Items**

H. R. 1551

One Hundred Fifteenth Congress
of the
United States of America

AT THE SECOND SESSION

*Began and held at the City of Washington on Wednesday,
the third day of January, two thousand and eighteen*

An Act

To modernize copyright law, and for other purposes.

*Be it enacted by the Senate and House of Representatives of
the United States of America in Congress assembled,*

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the “Orrin G. Hatch–Bob Goodlatte Music Modernization Act”.

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

Sec. 1. Short title; table of contents.
Sec. 2. Customs user fees.

TITLE I—MUSIC LICENSING MODERNIZATION

Sec. 101. Short title.
Sec. 102. Blanket license for digital uses and mechanical licensing collective.
Sec. 103. Amendments to section 114.
Sec. 104. Random assignment of rate court proceedings.
Sec. 105. Performing rights society consent decrees.
Sec. 106. Effective date.

TITLE II—CLASSICS PROTECTION AND ACCESS

Sec. 201. Short title.
Sec. 202. Unauthorized use of pre-1972 sound recordings.

TITLE III—ALLOCATION FOR MUSIC PRODUCERS

Sec. 301. Short title.
Sec. 302. Payment of statutory performance royalties.
Sec. 303. Effective date.

TITLE IV—SEVERABILITY

Sec. 401. Severability.

SEC. 2. CUSTOMS USER FEES.

Section 13031(j)(3)(A) of the Consolidated Omnibus Budget Reconciliation Act of 1985 (19 U.S.C. 58c(j)(3)(A)) is amended by striking “October 13, 2027” and inserting “October 20, 2027”.

Musical Works Modernization Act (Title I)

TITLE I—MUSIC LICENSING MODERNIZATION

SEC. 101. SHORT TITLE.

This title may be cited as the “Musical Works Modernization Act”.

Musical Works Modernization Act (Title I)

- Changes The Way **Musical Works Mechanical Licensing** Is Handled For Digital Music Providers
- What Is A **Musical Work**?
- What Is **Mechanical Licensing**?

What Is A Musical Work?

- **A Musical Work Is The Copyright Interest In A Song's Underlying Musical Composition**
 - The Specific Arrangement And Combination Of Musical Notes, Chords, Rhythm, Harmonies, And Song Lyrics
- **Musical Work Copyright Is Owned By:**
 - Songwriter(s) (As The "Author(s)"); And/Or
 - Music Publisher(s)
- **Different From Sound Recording Copyright**
 - A Recording Of A Musical Work
 - Owned By Recording Artist And/Or Record Label

What Is Mechanical Licensing?

- **Refers To The Reproduction Of A Musical Work In A Way So That The Song Can Be Played Back By **Mechanical Devices****
- **Mechanical Devices?**
 - Player Piano
 - Gramophone/Turntable
 - Cassette Deck
 - CD Player
 - Computer
 - Mobile Phone
- **Right For Songwriter To Control Mechanical Reproductions Didn't Exist Until The Copyright Act Of 1909**

17 U.S.C. § 106

*Subject to sections 107 through 122, the owner of copyright under this title has the **exclusive rights** to do and to authorize any of the following:*

(1) to reproduce the copyrighted work in copies or **phonorecords;**

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or **phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;**

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

What Are Phonorecords (And DPDs)?

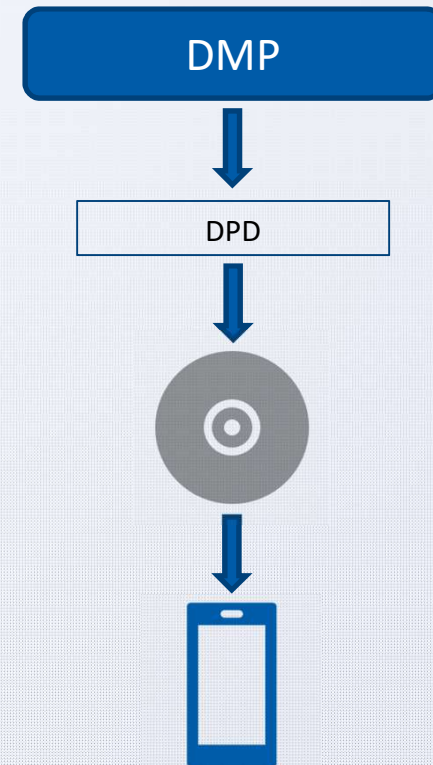
- **“Phonorecord” = A Material Object On Which Sound Recordings Are Fixed And From Which The Sounds Can Be Perceived With The Aid Of A Machine Or Device**
- **Sound Recordings Can Be Distributed On/To Phonorecords **Physically** Or Via **Digital Transmissions****
- **Physical:**
 - Record
 - Tape
 - CD
 - Flash Drive / Memory Card
- **Digital (A **Digital Phonorecord Delivery** Or “DPD”):**
 - Permanent Downloads
 - Interactive Streaming
 - Limited Downloads
- **DPD Does Not Include Non-Interactive Streaming**

How Do You Get A Mechanical License?

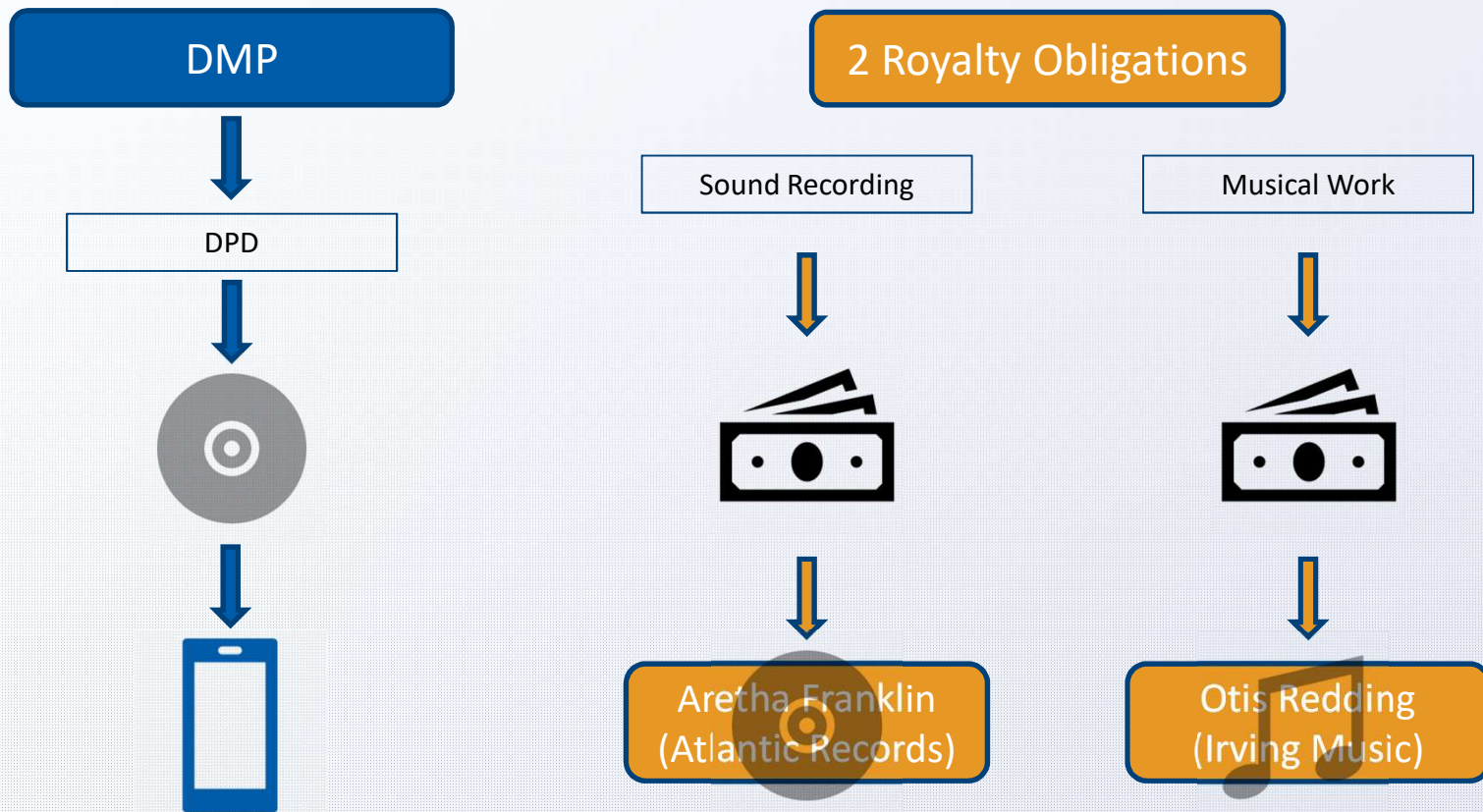
- **So, To Record And Distribute Copies (I.E., “Phonorecords” Or “DPDs”) Of A Musical Work On A Phonorecord You Need A Mechanical License**
- **17 U.S.C. § 115 – Compulsory License**
 - By Complying With Section 115, Anyone Can Obtain A Compulsory License To Make And Distribute Phonorecords Or DPDs Of A Nondramatic Musical Work
 - Statutory Requirements Include Payment Of Royalties Determined By Copyright Royalty Board
- **Private Section 115 Alternatives**
- **Voluntary Licenses**

How Does This Apply To Digital Music Providers?

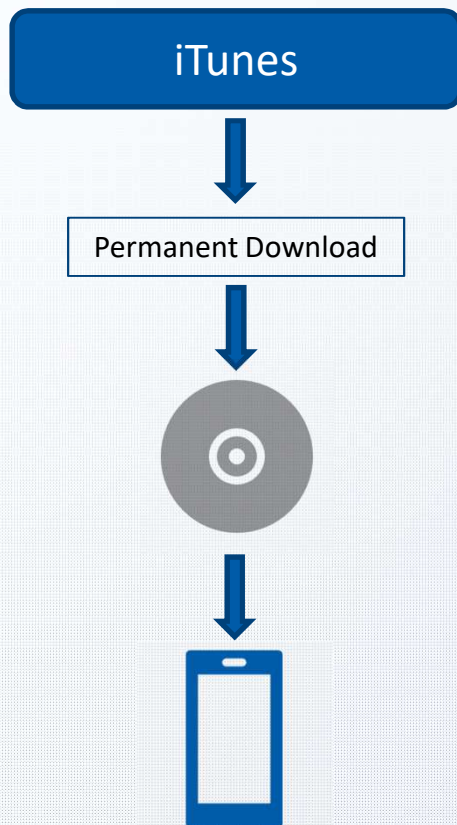
- **“Digital Music Provider” (DMP)**
- **A Service That Makes Digital Phonorecord Deliveries (DPDs) Of Musical Works**



How Does This Apply To Digital Music Providers?

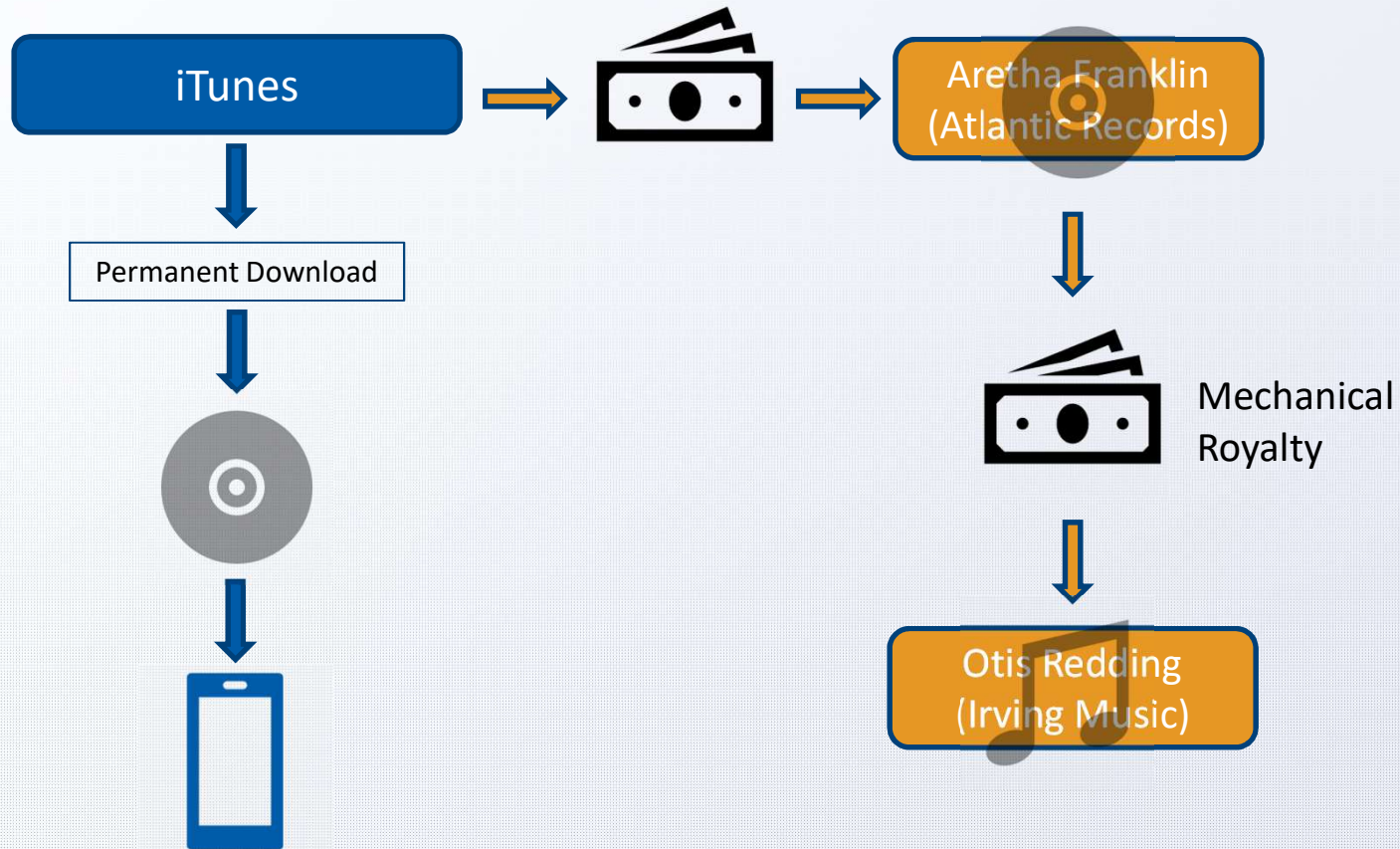


How Is Mechanical From DMP Use Paid? (Permanent Downloads)

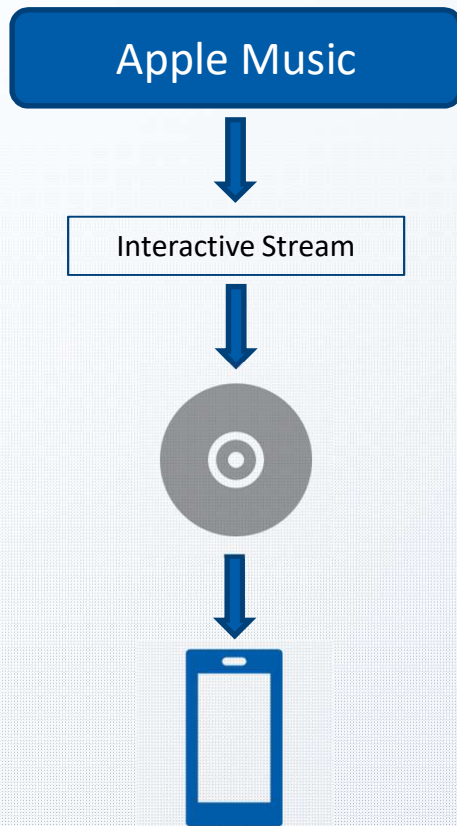


- For **Permanent Downloads**, The **Record Company** Typically Obtains The Mechanical License Authorizing the DPDs
- Mechanical Payment Flows Through the Record Company
- Mechanical Payment Is Based On **Each Phonorecord** Made and Delivered (9.1¢ / Phonorecord)

How Is Mechanical From DMP Use Paid? (Permanent Downloads)

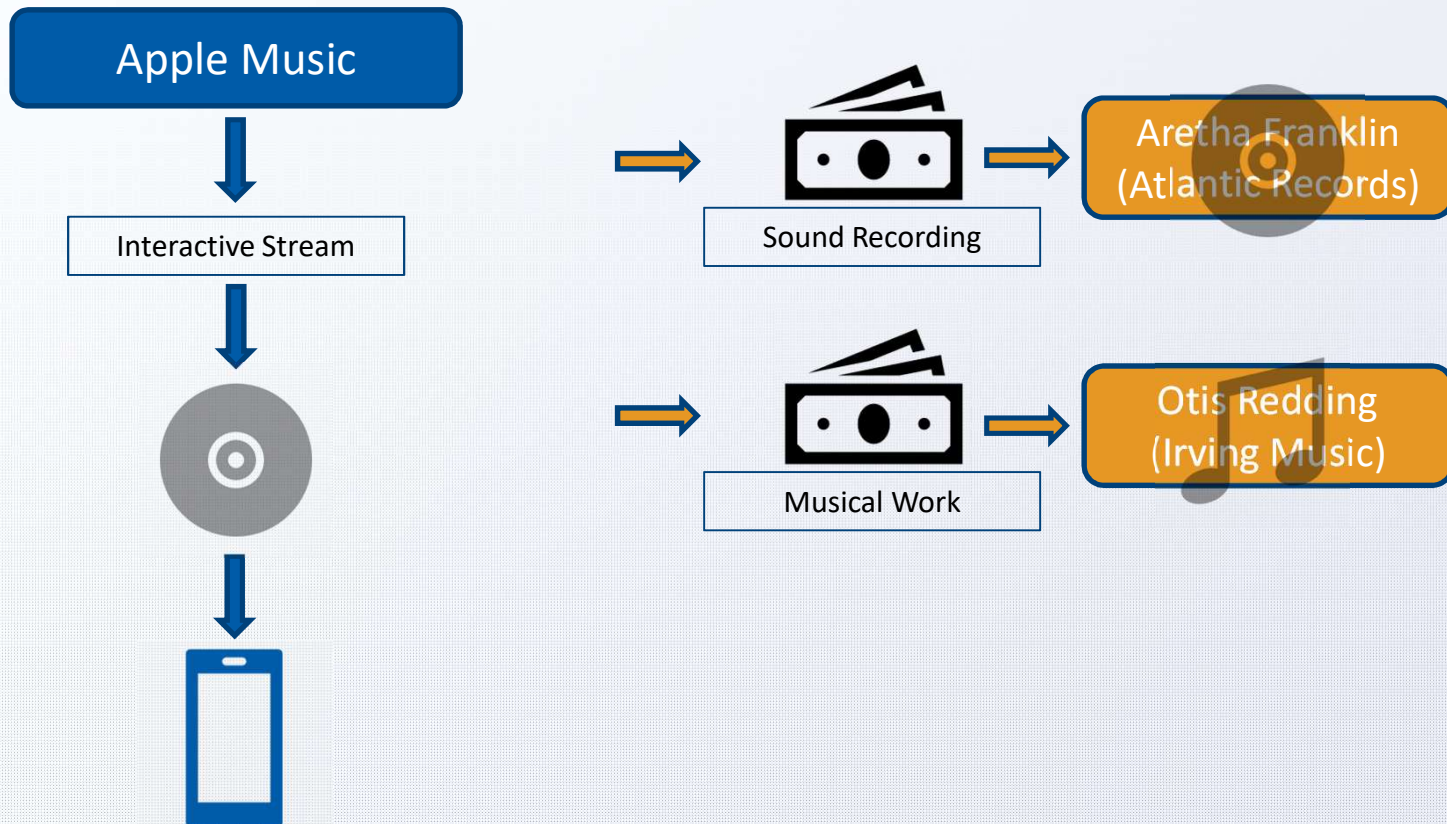


How Is Mechanical From DMP Use Paid? (Interactive Streaming)

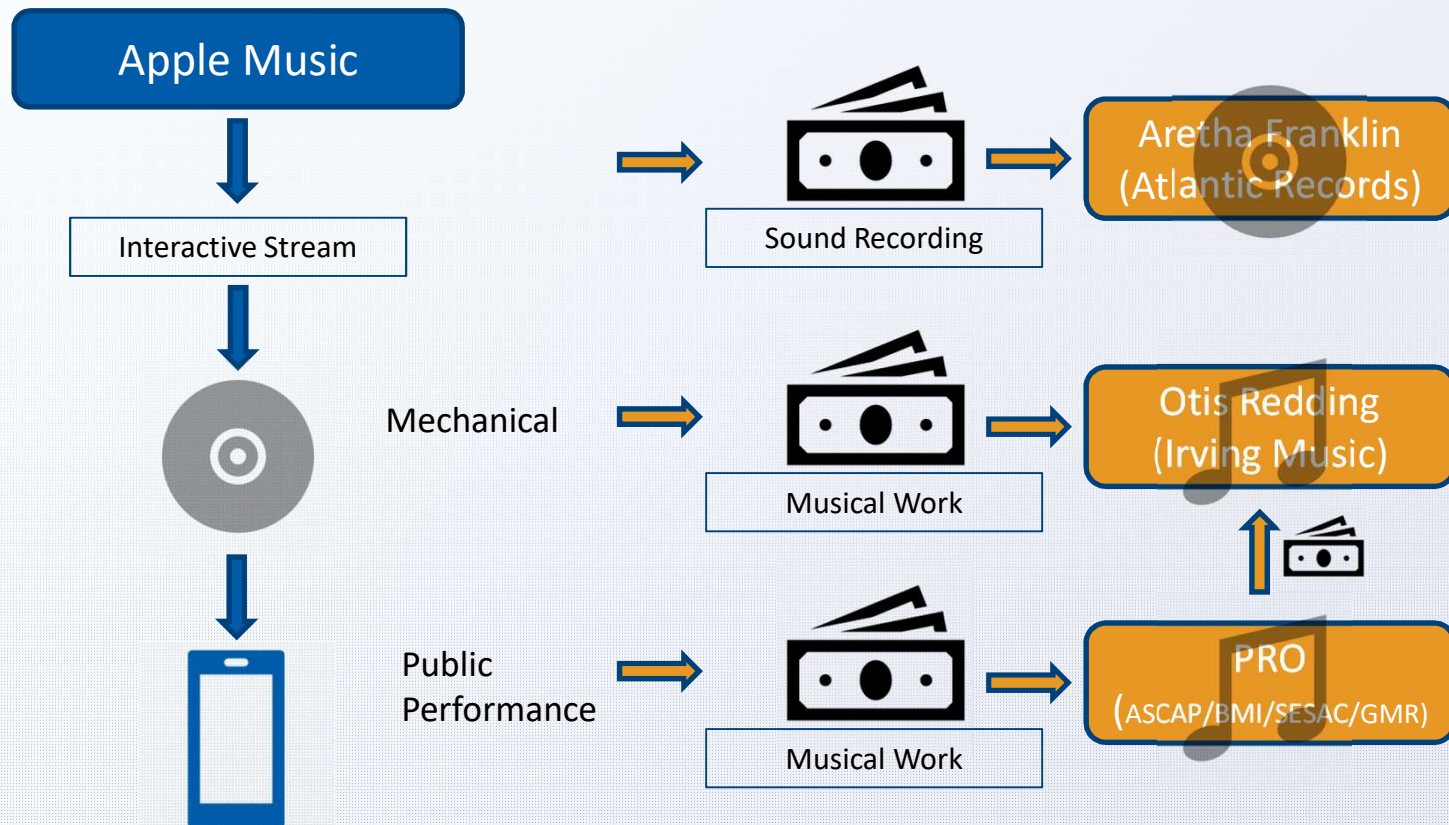


- For **Interactive Streaming / Temporary Downloads**, The **Digital Music Provider** Obtains The Mechanical License
- Mechanical Payment Paid Directly (Not Through Record Company)
- Mechanical Payment Is Based On **The DMP's Revenues** (10.5%* Less Performance Royalties)
 - *CRB Final Determination Increased Rates For 2018-2022 (44% increase from 2017), Published 2/5/19

How Is Mechanical From DMP Use Paid? (Interactive Streaming)



Side Note: Two Musical Work Payments



DMP Mechanical Licensing **Before** MMA

- **17 U.S.C. § 115 (Compulsory License) Required Song-By-Song Licensing For Each Musical Work Transmitted By The DMP:**
 - Identify And Locate The Copyright Owner
 - Serve A “Notice Of Intention” On The Copyright Owner
 - Make Monthly Payments And Statements Of Account To The Copyright Owner
 - If The Copyright Owner Is Unknown, File A NOI With The Copyright Office
 - But No Deposit Of Royalties
- **A Big Problem For Digital Music Providers With Millions Of Song**
 - DMPs Didn’t Build The Infrastructure To Handle The Huge Task Of Song-By-Song Licensing
 - Rush To Market
 - General Outsourced to HFA
 - Tens Of Millions Of Songs
 - How Do You Identify/Locate Song Owners?

DMP Mechanical Licensing Before MMA

- **Many Lawsuits, Including:**

- *Bluewater Music Services Corp. v. Spotify USA Inc.*, No. 3:17-cv-01051-JPM (W.D. Tenn. Sept. 29, 2018)
- *Ferrick et al v. Spotify USA Inc.*, No. 1:16-cv-08412-AJN (S.D.N.Y. 2015)
- *Wixen Music Publishing, Inc. v. Spotify USA Inc.*, No. 2:17-cv-09288-GW-GJS (C.D. Cal. 2017)
- *Eich v. Apple Inc.*, No. 1:17-cv-09857 (S.D.N.Y. 2017)

Musical Works Modernization Act (Title I of MMA)

- **Amends Section 115 (Compulsory License) To Replace Song-By-Song Licensing With A **Blanket License****
 - One License Covers All Musical Works
 - A One-Stop-Shop
 - No Immediate Change In Rates/Rate Structure
- **DMPs Can Obtain The Blanket License From New **Mechanical Licensing Collective (MLC)****
 - To Be Designated By Register Of Copyrights (By July 2019)
 - Nonprofit Entity Representing Music Publishers (Licensors)
 - To Establish And Maintain A Comprehensive **Public Musical Works Database**
 - To Collect Royalties From DMPs And Distribute Royalties To Copyright Owners
 - Funded By Administrative Assessments Paid By DMPs (And Voluntary Licensees)
 - Section 115 Licensing Only (MLC Does Not License Synch, Public Performance, Etc.)

Musical Works Modernization Act (Title I of MMA)

- **“Unmatched Works”? Mechanical Licensing Collective To Hold **Unmatched Royalties** In Interest Bearing Account For Not Less Than 3 Years From Receipt**
 - MLC To Maintain Public List Of Unmatched Works (Owner Has Not Be Identified/Located)
 - When Owner Is Identified, MLC To Update Musical Works Database And Pay Accrued Royalties With Interest To The Owner
 - If Owner Not Identified After 3 Years, MLC Shall Distribute Accrued Royalties/Interest To The **Copyright Owners In The Records Of The MLC** Based On Relative Market Share
- **Voluntary Licenses Will Still Be Given Effect In Lieu Of Blanket License**
 - **“Significant Nonblanket Licensees”** (SNBLs) (>5,000 Recordings Or >\$50,000/Month)
 - Must Notify MLC
 - Provide Monthly Usage Reports And Payment Of Administrative Assessment To MLC
 - Record Companies May Still Do Song-By-Song Licensing For Downloads

Musical Works Modernization Act (Title I of MMA)

- **Digital Licensee Coordinator (DLC)**
 - To Be Designated By Register Of Copyrights (By July 2019)
 - Nonprofit Representing Digital Music Providers (Licensees)
 - To Assist MLC In Matching Unmatched Works
 - MLC To Report Noncompliant SNBLs To DLC

- **Effective Date Of New Blanket License:**

January 1, 2021

Musical Works Modernization Act (Title I of MMA)

What Happens Before January 1, 2021?

- **Song-By-Song Licensing Continues**

- Serve Notice Of Intention To Copyright Owner
- But, [No Longer File NOI With Copyright Office](#) Where Owner Unknown

- **Safe Harbor For Prior Unlicensed Use**

- DMP Liability [Limited To Statutory Royalties](#) Due (No Statutory Damages) Provided:
 - Engaged In Good-faith, Commercially Reasonable Efforts To Identify/Locate Owners; And
 - If Located, Provide Statement Of Account And Pay Accrued Royalties
- Safe Harbor Applies To All Actions Commenced On Or After [January 1, 2018](#).

Musical Works Modernization Act (Title I of MMA)

What Happens Before January 1, 2021?

- **For Owners Not Identified/Located (Approx. \$1 Billion Unpaid)**
 - DMP To Hold Accrued Royalties In Accordance With GAAP
 - If Owner Located Before 1/1/21, Pay Accrued Royalties To Owner
 - If Owner Not Located Before 1/1/21, [Transfer All Accrued Royalties To MLC](#)
- **MLC Holding Of Transferred Accrued Royalties**
 - MLC To Hold For 3 Years After The Date On Which Funds Accrued
 - If Owner Not Identified, MLC Shall Distribute Accrued Royalties/Interest To The Copyright Owners In The Records Of The MLC Based On Relative Market Share
 - First Distribution Not To Occur Until On/After [January 1, 2022](#) (1 year)

Musical Works Modernization Act (Title I of MMA)

■ Take-Away For Songwriters/Publishers:

- Determine If Mechanicals Have Been Paid
 - Remember, These Are Different Than Payments For Sound Recordings And Public Performance Payments
- If They Have Not Been Paid, Claim Them Before [January 1, 2022](#)
 - Don't Wait For Them To Be Transferred To MLC
 - Contact DMPs
- When MLC Database Launched, Confirm Your Musical Works Are Registered And All Information Is Accurate
- Burden Is Now On **The Rights Holder** (No Longer the DMPs)

Classics Protection and Access Act (Title II)

TITLE II—CLASSICS PROTECTION AND ACCESS

SEC. 201. SHORT TITLE.

This title may be cited as the “Classics Protection and Access Act”.

Classics Protection and Access Act (Title II)

- **Historically No Federal Copyright Protection For Sound Recordings Created Prior to February 15, 1972**
- **MMA Federalizes Pre-1972 Sound Recordings**

1967

Aretha Franklin
(Atlantic Records)

Pre-72 Recordings **Before** The MMA

- **1971 Congress Passed The Sound Recording Act**
 - Copyright Protection for Sound Recordings Fixed After [February 15, 1972](#)
- **Even When Federal Protection Created For Post-72 Recordings, There Was **No Public Performance Right** (Just The Rights To Reproduction, Derivative Works, And Distribution)**
 - Narrow Public Performance Right Post-72 Recordings Created In 1995
 - Limited To [Digital Audio Transmissions](#) (FCC-licensed OTA Broadcasts Exempt)
 - 17 U.S.C. §§ 112 & 114 – Compulsory Licenses
 - For **Noninteractive Streaming** Services
 - Such As SiriusXM, Pandora, Internet Radio, Etc.
 - Administered By SoundExchange

17 U.S.C. § 106 (Limited Sound Recording Public Performance Right)

*Subject to sections 107 through 122, the owner of copyright under this title has the **exclusive rights** to do and to authorize any of the following:*

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, **musical**, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to **perform the copyrighted work publicly**;

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

(6) in the case of **sound recordings**, to **perform the copyrighted work publicly by means of a digital audio transmission**.

Pre-72 Recordings **Before** The MMA

- **Pre-72 Recordings Rights And Non-DAT Public Performance Rights Governed By Patchwork Of State Laws**
 - Do Streaming Services Have To Pay Royalties For Pre-72 Recordings?
 - Do Broadcasters And Others Who Publicly Perform Sound Recordings (Including Post-72 Recordings Other Than By DAT) Have To Pay Royalties?
- **Dozens of Lawsuits, Including:**
 - *ABS Entertainment, Inc. v. CBS Corporation*, No. 2:15-cv-06257-PA-AGR (9th Cir. Oct. 31, 2018)
 - *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*
 - Florida: 1:13-cv-23182-DPG (S.D. Fla. 2013)
 - New York: 1:13-cv-05784-CM (S.D.N.Y. 2013)
 - California: 2:13-cv-05693-PSG-GJS (C.D. Cal. 2013)

Classics Protection and Access Act (Title II)

- **Creates A New Right To Engage In “Covered Activity” For Pre-72 Recordings**
 - Any Activity That The Owner Of A Sound Recording Would Have The Exclusive Right To Do If The Sound Recording Were A Post-72 Recording
 - Still No Public Performance Right Other Than For Digital Audio Transmissions
- **Term Of New Right**
 - Pre-1923 Recordings – Expires 12/31/22
 - 1923-1946 Recordings – Expires 100 Years After First Publication
 - 1947-1956 Recordings – Expires 110 Years After First Publication
 - Post-1956 Recordings – Expires 2/15/67

Classics Protection and Access Act (Title II)

- **Extends Compulsory Licenses Under Sections 112 & 114 To Pre-72 Recordings**
 - For Voluntary Direct Licenses Covering Pre-72 Recordings, 50% Of The Agreed-Upon Royalties To Be Paid To SoundExchange For Distribution To Artists
- **Preemption Of State Law**
 - State Law Claims Over Use Of Pre-72 Recordings Are Preempted Effective 10/11/18
 - Except: No Effect On Question Of Whether Copyright Act Preempts State Law Claims Regarding Performance Of Sound Recordings By FCC-licensed OTA Broadcasts
 - Claims Over Use Of Pre-72 Recordings Prior To 10/11/18 (Pre-MMA Use) Preempted If:
 - The Prior Use Would Have Satisfied Section 112 And Section 114 Compulsory Licenses If The Recordings Had Been Post-72 Recordings; And
 - Royalties For 3 Year Period Before 10/11/18 Paid By July 2019

Classics Protection and Access Act (Title II)

- **“Partial” Federalization**
- **Applies Many Other Copyright Provisions To Pre-72 Recordings (But Not All)**
 - Fair Use; 3-year SOL; DMCA Safe Harbor; Etc.
 - Not [Termination Of Transfers](#) Provisions
 - Special Rules For Certain Noncommercial Uses
 - Noncommercial Use Of Pre-72 Recordings Permitted If The Recordings Are Not Being Commercially Exploited
 - Special Rules About Statutory Damages And Attorney Fees
 - Notification Procedures Before Statutory Damages And Attorneys Fees Are Applicable

Other Items In Music Modernization Act

(F) SCHEDULE OF REASONABLE RATES. Royalty Judges shall, subject to paragraph (G), determine the rates and terms of licensing for the use of all copyright owners of nondramatic literary and musical works and persons entitled to obtain a compulsory license under subsection (a) during the period specified in paragraph (E), such other period as may be determined by the parties may agree. The Copyright Royalty Judges shall establish rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller. In determining such rates and terms for digital phonorecord deliveries, the Copyright Royalty Judges shall take into account the economic, competitive, and promotional impact of each type of use on the market for the copyrighted work and the copyright owner's decision on economic, competitive, and promotional information presented by the copyright owner.

SEC. 104. RANDOM ASSIGNMENT OF RATE COURT PROCEEDINGS.
Section 137 of title 28, United States Code, is amended—
(1) by striking “The business”; and
(2) by adding at the end the following:
“(b) RANDOM ASSIGNMENT OF RATE COURT PROCEEDINGS.—
“(1) IN GENERAL.—In this paragraph
“(A) DEFINITION.—The term ‘forming rights society’ has the meaning given that term in section 101 of title 17.”

(c) ACTION BEFORE MOTION TO TERMINATE.—

(1) IN GENERAL.—Before filing with the appropriate district court of the United States a motion to terminate a consent decree between the United States and a performing society, including a motion to terminate a consent decree for the passage of a specified period of time, the Department of Justice shall—

(A) notify Members of Congress and committees of Congress described in subsection (b); and

(B) provide to such Members of Congress and committees information regarding the impact of the termination on the market for licensing the public performance of musical works should the motion be granted.

(i) **TIMING OF RATE DETERMINATION.** The term "effective date" in title 17, United States Code, is amended by inserting the following after "that"—(i) with respect to preexisting and rates finally determined for the 31, 2022, shall remain in effect through there shall be no proceeding to determine terms preexisting subscription services for the period beginning on January 1, 2023, and ending on December 31, 2027; and" (ii) with respect to pre-existing satellite digital audio radio services, the terms and rates set forth by the Copyright Royalty Judges on December 14, 2017, in their initial determination for the rate period ending on December 31, 2022, shall be in effect through December 31, 2027, without any change based on a subsequent set or adjust the royalties or owners for the public performance of musical works or a transmission other than a transmission account only.

(c) USE IN MUSICAL WORK PROCEEDINGS.—
(1) IN GENERAL.—License fees payable for the public performance of sound recordings under section 106(6) of title 17, United States Code, shall not be taken into account in any administrative, judicial, or other governmental proceeding to set or adjust the royalties payable to musical work copyright owners for the public performance of their works except in such a proceeding to set or adjust royalties for the public performance of musical works by means of a digital audio transmission other than a transmission by a broadcaster, and may be taken into account only with respect to such digital audio transmission.

TITLE III—ALLOCATION FOR MUSIC PRODUCERS

SEC. 301. SHORT TITLE.

This title may be cited as the “Allocation for Music Producers Act” or the “AMP Act”.

Other Items In Music Modernization Act

■ **CRB Rate Setting**

- Uniform Application Of “Willing Buyer And Willing Seller” Standard For Section 115 And Section 114 Rates
- Section 114 Rates For Satellite Radio Extended Through 2027 (From 2022) (And No Appeal Of 2018-2022 Rate Determination).

■ **Performance Rights Organization Antitrust Consent Decrees/Rate Proceedings (ASCAP/BMI)**

- DOJ Required To Notify Congress Before Terminating Consent Decrees
- Random Assignment Of Judges In Rate Court Proceedings
- Sound Recording Digital Performance Fees Can Be Benchmark Evidence In Determining Royalties For Musical Work Digital Performances (Other Than Digital Transmissions By An FCC-Licensed Broadcaster).

■ **Allocation For Music Producers Act (Title III)**

- Requires SoundExchange To Establish Policies For Payment Of Royalties To Producers/Mixers/Sound Engineers.
- Comes From The 45% Share For Featured Recording Artist

Coe W. Ramsey

919.839.0300

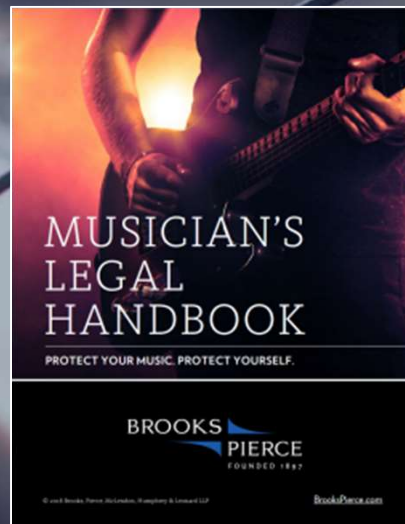
cramsey@brookspierce.com

Amanda Whorton

919.839.0300

awhorton@brookspierce.com

Brookspierce.com



DJCounsel.com

Passcode:
brookspiercemusiclaw