Will MOCA Leave a Bitter Taste?

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WILL MOCA LEAVE A BITTER TASTE?

This Note looks at how a new bill entitled the Music Online Competition Act of 2001 (MOCA) would change the current Copyright Act with a focus on how the proposed legislation would limit the ability of copyright owners to negotiate prices for the use of music recordings on the Internet.

I. INTRODUCTION

While many fans of Britney Spears may not know what a vinyl record is, their parents have seen the format of recorded music change from vinyl to cassette tape to 8-track and then to CD and now MP3.¹ Music has continued to evolve on the Internet, but not without a few growing pains. At one point sixty million users downloaded music for free from Napster.² Digital downloads continue to attract headlines, but streaming audio or broadcasting music over the Internet also attracts fans and controversy.³

In the last six years, Congress has made several changes to the Copyright Act to address the use of music on the Internet.⁴ These changes have created new rights for the owners of music recordings.⁵ A new bill entitled the Music Online Competition Act of 2001 (“MOCA”) seeks to change the Copyright Act yet again.⁶

This article will look at how MOCA would change the current Copyright Act with a focus on how the proposed legislation would limit the ability of copyright owners to negotiate prices for the use of music recordings on the Internet. Part I of this essay explains the recent changes to the Copyright Act. Part II discusses the

³ Id.
⁵ Id.
proposed changes by MOCA and the problems it would create.

II. RECENT LEGISLATION

When Congress decided to finally grant public performance rights to the owners of sound recordings, it could have done so simply by adding the words “sound recordings” to the list of works whose owners have the exclusive right of public performance. Instead, they gave birth to an incredibly complex array of regulations.

The Digital Performance Rights in Sound Recordings Act of 1995 ("DPRA") granted sound recordings a very limited right of public performance. The copyright owners were only granted the right to "perform the copyrighted work publicly by means of a digital audio transmission." To understand this right, one must understand several definitions. The term digital transmission is defined as "a transmission in whole or in part in a digital or other non-analog format." A digital audio transmission is defined as "a digital transmission as defined in section 101, that embodies the transmission of a sound recording. This term does not include the transmission of any audiovisual work." The word transmission is not defined in the Copyright Act but the word transmit is defined as "[t]o ‘transmit’ a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent."

The above definitions limit the right only to audio recordings in a digital format that do not include any audio visual material received beyond the place they are sent.

The Copyright Act divides digital audio transmissions into two

7 Nimmer, supra note 4 at 189.
8 Id. ("When Congress decided to plug the historical anomaly under which sound recordings lacked any performance right, it could have acted very simply. Instead, it gave birth to a Frankenstein").
groups, interactive and non-interactive. The main difference between the two categories for a licensee of music is that only non-interactive transmissions are eligible for a compulsory statutory license. An interactive service is defined as "one that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient." In other words, the consumer gets to choose what songs they will listen to. Interactive services have the greatest potential for decreasing record companies sales. The record companies receive revenue from the reproduction and distribution of sound recordings. Because interactive services might enable listeners to substitute on-demand transmissions for CD purchases, the service must negotiate directly with the copyright owner of the sound recording.

For non-interactive services, the Copyright Act provides for a compulsory statutory license under which the record companies can be compelled to license the recordings at fees set by a governmental body. The Copyright Act establishes several conditions with which a service must comply in order to qualify as non-interactive. The purpose of these conditions is to make sure that the transmissions have little chance of replacing the sales of CDs. In order to qualify as non-interactive, the service must meet the following conditions:

The transmission must not be part of an interactive service, the service must not publish an advance program schedule or prior announcement of the

16 *Id.*
17 *Id.*
19 *Id.*
titles of specific sound recordings to be transmitted;\textsuperscript{21} the transmission must not be part of an archived program;\textsuperscript{22} the service must take no affirmative steps to cause or induce the making of a phonorecord by the transmission recipient, and if possible by the technology used by the service, limit the ability by the transmission recipient to make phonorecords of the transmission directly in a digital format;\textsuperscript{23} the service must identify in text the sound recording during, but not before, the time it is performed, including the title of the sound recording, the title of the phonorecord embodying such sound recording, and the featured recording artist, in a manner to permit it to be displayed to the transmission recipient;\textsuperscript{24} [and] the transmission must not exceed the sound recording performance compliment.\textsuperscript{25}

The sound recording performance compliment requires that within any three hour period on a particular channel the service must not use three different selections from any one phonorecord or four different sound recordings by the same artist or four different sound recordings from any set or compilation of phonorecords.\textsuperscript{26}

If a service is not interactive, but is unwilling to meet the above conditions, then the service does not qualify for the statutory license and must negotiate directly with the copyright owner of the sound recordings. This is similar to the licensing of sound recording for an interactive service, except that this type of use is subject to a statutory most favored nation clause.\textsuperscript{27} In order to

\textsuperscript{27} Nimmer, supra note 4 at 252.
understand the most favored nation clause, one must first understand the definition of an affiliated entity.\textsuperscript{28} The Copyright Act defines the term "affiliated entity" as an entity engaging in digital audio transmissions covered by section 106(6), other than an interactive service, in which the licensor has any direct or indirect partnership or any ownership interest amounting to five percent or more of the outstanding voting or non-voting stock."\textsuperscript{29} With this in mind, one can appreciate the most favored nation clause, which states:

If the copyright owner of a sound recording licenses an affiliated entity the right to publicly perform a sound recording by means of a digital audio transmission ... the copyright owner shall make the licensed sound recording available...on no less favorable terms and conditions to all bona fide entities that offer similar services.\textsuperscript{30}

The statute has certain exceptions which allow the copyright owner to set different terms and conditions if there are material differences in the scope of the license, the particular sound recordings, the frequency of use, the number of subscribers or the duration.\textsuperscript{31} The most favored nation clause was created to promote competitive licensing.\textsuperscript{32} The legislative history does not explain why the most favored nation clause applies so narrowly.\textsuperscript{33} One could infer that because the clause only applies to services that are not interactive, the legislature did not see the need to grant the copyright owners the same protection.\textsuperscript{34} Even though these types of services do not qualify for the statutory license, they still do not threaten CD sales to the degree that an interactive service does.

\textsuperscript{28} Id.
\textsuperscript{31} Id. See also Nimmer, supra note 4 at 252-253.
\textsuperscript{32} Nimmer, supra note 5 at 252.
\textsuperscript{33} Id. at 254.
\textsuperscript{34} Kohn, supra note 18.
III. MOCA

"This bill has something for everyone. And it also has provisions that will give various members of the music industry heartburn."35

MOCA proposes six changes to the Copyright Act and evaluation by the Copyright office and the Department of Justice.36 The evaluation would look at the conditions that a service must meet in order to qualify for the statutory license.37 Even though MOCA would not change the conditions one commentator observed, "[w]hile the inquiry into the effects of these requirements mandated by MOCA is welcome, it seems to do very little except lay minimal groundwork for their eventual alteration."38 Representative Boucher appears to have predetermined what this study will show. As part of his statement introducing MOCA, the Congressman said:

Broadcast radio is not subject to these programming restrictions. Certain digital music services contend that some of these programming restrictions impose undue burdens upon their service, reduce their ability to compete with broadcast radio, and unfairly preclude their ability to take advantage of the statutory license to deliver the type of services

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that consumers expect from a radio offering.\textsuperscript{39}

It appears that Boucher has decided that the ability of digital music services to obtain the music they want at the price they want is more important than the rights of copyright owners. A statutory license usurps the copyright owner's right to exclude others from using their intellectual property and predetermines the rate they must charge.\textsuperscript{40} If the requirements are loosened up, then these services will become closer to interactive services and the copyright owners will be unable to maximize the value and fully protect their property.

The major change that MOCA proposes is to expand the most favored nation clause to all uses by an affiliated entity.\textsuperscript{41} The legislation would change the definition of an affiliated entity to mean:

An entity, other than an entity that wholly owns or is wholly owned by the licensor, engaging in digital audio transmissions...or digital phonorecord deliveries in which the licensor has any direct or indirect partnership or any ownership interest amounting to 5 percent or more of the outstanding voting or nonvoting stock.\textsuperscript{42}

MOCA would also change the most favored nation clause to read as follows:

If the copyright owner of a sound recording licenses


\textsuperscript{41} Davie, supra note 38.

\textsuperscript{42} H.R. 2724, 107th Cong. § 4 (b) (2001).
an affiliated entity the right to reproduce the copyrighted work, to distribute the copyrighted work to the public by means of a digital phonorecord delivery or to perform the copyright work publicly, the copyright owner shall make the licensed sound recording available on no less favorable terms and conditions to all bona fide entities that offer similar services. ... 43

The proposed changes would punish copyright owners for owning as little as five percent of an Internet music service. Their punishment would be to lose control of what price they can charge and who they have to sell their intellectual property to. 44 As expanded, the most favored nation clause would affect all uses of sound recordings on the Internet, including interactive services and the downloading of music on to a user’s computer.

According to Boucher MOCA is trying to protect independent services. 45 Boucher explains:

Recording companies have recently entered into the online music distribution business by establishing joint ventures with other record companies (e.g., MusicNet and Pressplay) and by acquiring well-known, formerly independent Internet services (such as CDNow, Emusic and MP3.com). It is anticipated that the distribution services owned by record companies will cross license each other, so that each site will be authorized to distribute over the Internet approximately 80 percent of all recorded music. If the major record companies do not also license independent unaffiliated distribution services, this could create a competitive

43 Id.
44 Messerly, supra note 40.
imbalance that could threaten the establishment and survival of independent online music services.\textsuperscript{46}

If this is his goal, there are other less drastic steps that can be taken. The U.S. Justice Department is investigating the online music business.\textsuperscript{47} Until this investigation is complete, it would be premature to enact legislation for behavior that at this time is only anticipated.

The policy consideration behind the expansion of the most favored nation clause is that the government should step in to increase competition in the Internet music industry, but the measure has several loopholes.\textsuperscript{48} The first loophole is that it does not apply to entities that are solely owned by the licensor.\textsuperscript{49} Each record company could create their own music service that would be solely owned. This would force the consumer to go to multiple websites to get the music they want and would do nothing to help the independent music service. Another way around the expansion of the most favored nation clause would be for the record companies to charge both their own affiliated services and non-affiliated services the same high license fee.\textsuperscript{50} This would not be a burden to the affiliates because the fees would be going to a partner of the service who could then reinvest that money into the company.

Congressman Cannon as part of his introduction of MOCA stated:

\begin{quote}
Let me take a moment to respond to criticism we have already heard from the Recording Industry Association [of America ("RIAA")]. RIAA has
\end{quote}

\begin{footnotes}
\footnote{Id.}
\footnote{John Gerals, Online Music Under US Investigation, Vnunet.com at http://www.vnunet.com/News/1124484 (June 8, 2001). ("US regulators running the investigation will be examining the record giants' use of copyright and licensing practices regarding their control of online music distribution").}
\footnote{Davie, supra note 38 at para. 9.}
\footnote{H.R. 2724, 107th Cong. \S 4 (b) (2001).}
\footnote{Davie, supra note 38 at para 10.}
\end{footnotes}
said that MOCA contains a compulsory license.... That is just not true.

A number of people did come to us seeking a compulsory license, but Rick and I felt that would be premature — especially now that MusicNet and PressPlay have announced that they will license downloads to some of their competitors. Should that change, however, or if other signs of anticompetitive behavior emerge, I think the Judiciary Committee would almost certainly have to consider a compulsory license to address not only copyright concerns, but antitrust concerns as well.  

The RIAA opposes MOCA, stating “[t]he bill substitutes government regulation for the marketplace.” One pundit has observed “the attendant regulatory price-setting — is rooted in the idea of ‘market failure,’ the perception that it is too difficult for scattered owners and licensees to agree on terms or gauge usage.” This is not the current state of the industry. Some record companies may be waiting for the public to have greater access to broadband Internet services. If this is the case, the government should not step in, but it should allow the market to evolve naturally. Not everyone in the industry is taking a wait and see attitude, but lobbying for a statutory license may frustrate voluntary contractual business arrangements. The government should not compel licensing because of a few special interests. If

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51 Cannon, supra note 35 (emphasis added).
54 Id.
55 Id.
56 Id.
they do, these same parties will be clamoring for forced licenses for books and movies.57 The government should not force a better deal for these services than they could negotiate privately.58 As one commentator remarked, "[I]t's hard to make a case for a right to be entertained, even in today's advanced welfare state."59 Ultimately, everyone would be better served by licenses that reflect the current market incentives, rather than an adversarial compulsory license designed by a Washington committee.

IV. CONCLUSION

The DPRA granted sound recordings a very limited right to "perform the copyrighted work publicly by means of a digital audio transmission."60 Along with that right came a compulsory statutory license for non-interactive services.61 If a service is interactive, or is non-interactive but doesn't meet the conditions for the statutory license, then the service must negotiate with the copyright owner.62 The exception to this rule is the most favored nation clause. This clause requires the licensor to charge the same rate to independent non-interactive music services as they do to music services in which they have an ownership or partnership interest.63 A new bill before Congress, MOCA, would expand the most favored nation clause to all uses of sound recordings on the Internet.64 Rather than interfere, the government should allow the market to evolve naturally.

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57 Id.
58 Crews, supra note 53.
59 Id.
61 Kohn, supra note 18, at 355.
62 Id.