The Music Online Competition Act of 2001

Merritt A. Gardiner

Follow this and additional works at: https://via.library.depaul.edu/jatip

Recommended Citation

Available at: https://via.library.depaul.edu/jatip/vol12/iss1/5
THE MUSIC ONLINE COMPETITION ACT OF 2001

I. INTRODUCTION

The Music Online Competition Act of 2001 ("MOCA")\(^1\) was recently introduced to Congress by representatives Rick Boucher (D-VA) and Chris Cannon (R-UT) in order to smooth out the jagged edges created in our current, yet outdated, existing copyright law. The bipartisan legislation was encouraged to promote the rapidly expanding online broadcasting and distribution of music and to prevent antitrust behavior as a result of the recent joint ventures between recording companies and online music distributors: MusicNet, supported by RealNetworks, Warner Music Group, Bertelsmann AG and EMI and Pressplay, supported by Sony and Vivendi Universal.\(^2\) MOCA was drafted to update and clarify provisions of the Copyright Act, which have spurred costly legal and regulatory disputes. MOCA is designed to reduce litigation and provide a framework for consumer-friendly competition in the online entertainment industry.\(^3\) Moreover, MOCA was intended to increase competition in the online music industry ultimately leading to the development of legitimate online equivalents of Tower Records and Sam Goody.\(^4\) Finally, the MOCA legislation benefits musicians by allowing them to receive royalties in a more efficient manner.\(^5\)

\(^1\) H.R. 2724, 107\(^{th}\) Cong. (2001).
\(^5\) Id.
II. AN OVERVIEW OF THE MUSIC ONLINE COMPETITION ACT

The Music Online Competition Act proposes seven amendments to the current U.S. copyright law. These amendments, as discussed later, are designed to overcome obstacles that have developed as a result of the existing, yet outdated, copyright law. These obstacles are impeding the facilitation of innovative and developmental Internet music services. Such obstacles include the difficulty in locating and notifying publishers of a particular musical composition and the need to produce multiple copies of a song in different transmission speeds and different media formats. The Music Online Competition Act is designed to overcome these obstacles, go forward with the evolution of the online music industry, and ensure that copyright law reflects these changes throughout the music industry as a whole.

A. Expansion of Performance Exemption for Retail Establishments

Current U.S. copyright law allows retail music stores to play music within the stores as a tool to promote record sales. However, under current copyright law, online retail music stores are not entitled to the same promotional benefit. MOCA eliminates the discrimination between traditional music retailers and online retailers by treating the two outlets equally. Under MOCA, the benefits of playing music as a promotional tool extend to online music retailers. Specifically, MOCA would modify the definition of “performance” under current copyright law by including “a transmission made [from] a transmitting organization to or on behalf of a vending establishment of a digital online

---

8 Id.
service." However, limitations exist in the transmission itself. The bill requires the transmitting entity to transmit the sample solely to the particular recipient requesting the transmission. Moreover, the length of the sample cannot exceed 30 seconds. Or, in the case of a sound recording of more than five minutes in duration, 10 percent of that sound recording cannot exceed 60 seconds. This provision of MOCA benefits the online music industry by legally decreasing the discriminatory treatment between traditional and online music retailers.

B. Update of Ephemeral Recordings Exemption

Under this section of MOCA, the divided treatment between web casting and broadcasting under current copyright law is further eliminated. Current law allows broadcasters and web casters to make a single in-house (herein, "ephemeral") copy in order to allow the broadcasters and web casters to transmit to recipients. However, this discriminates against web casters since recipients of web casting transmissions require different bit rates, formats and caching devices. The one copy allowed under current copyright law does not account for the web casters' need of various copies to accommodate recipient requirements. Under MOCA, the permitted ephemeral copies are expanded to allow for multiple ephemeral copies accommodating the different bit rates required under various Internet connections, such as dial-up or broadband. Additionally, MOCA allows for different formatting and caching throughout the network to accommodate the different receiving programs, such as RealPlayer or Windows Media Player, and facilitate the efficient and timely delivery to consumers.

The Digital Millennium Copyright Act ("DMCA"), passed in 1998, was the first real legislation to accommodate the needs of Internet music providers. The Act allows web casters already

12 H.R. 2724, 107th Cong. §2(b) (2001).
15 Id.
possessing the statutory license to broadcast music over the Internet to apply for a second statutory license permitting multiple ephemeral copies.\textsuperscript{16} Under the DMCA, Internet music providers that do not qualify for the statutory broadcasting license are not entitled to this benefit. These providers must negotiate with music companies for voluntary licenses to broadcast music over the Internet.\textsuperscript{17} In contrast, MOCA exceeds the efforts of the DMCA by eliminating the second statutory license requirement. MOCA creates a statutory exception for copies used to facilitate the transmission of a performance.\textsuperscript{18} However, MOCA still does not address the problems faced by those Internet providers who do not qualify for the statutory broadcasting license. As required under current law, they are still required to negotiate voluntary licenses with the music companies in order to avoid copyright infringement. While MOCA does not address all the problems of broadcasting over the Internet, it goes further in closing the divide between the treatment of traditional and online venues.

\textbf{C. Provision of Statutory License Payments to Artists}

The sound recording statutory performance license provision specifies that royalty payments be shared equally by performing artists and recording companies.\textsuperscript{19} Under current copyright law, these royalty payments are dispersed to the recording companies first, before they are distributed to the individual artist(s).\textsuperscript{20} However, many artists oppose this system of royalty management because it is complicated. The artist is usually not paid immediately as a result of this present routing system. MOCA, however, will change the routing system entirely. Under MOCA,
the royalty payments would either be paid to the artist directly or to a collective organization representing the artist that would divide the payments equally and distribute half to the recording companies and half to the artist. MOCA, therefore, seeks to benefit the musicians over the major recording companies — a much needed change in current law.

D. Assurance of Nondiscriminatory Licensing to Affiliated and Non-Affiliated Entities

Recording companies have recently emerged in the online music distribution service by establishing joint ventures with other recording companies, resulting in the creation of MusicNet and Pressplay, among others. To further those efforts, recording companies have acquired well-known, formerly independent Internet services such as CDNow, Emusic and MP3.com. As a result, it is widely anticipated that the distribution services backed by recording companies will cross-license each other, authorizing each site to distribute over the Internet approximately 80 percent of all recorded music.  

It is feared that the reluctance of recording companies to equally license independent, unaffiliated distribution services will create a competitive imbalance, which, in turn, will threaten the establishment and survival of independent online music services.  

Under current law, 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 auto transmission, the copyright owner must also make the licensed sound recording available on no less favorable terms and conditions to all bona fide entities that offer “similar services.” The purpose of this section of the statute is to allow nondiscriminatory treatment of online distribution services not affiliated with the major recording companies and thusly, to increase competition. However,

22 Id.
“interactive services” are exempt from those encompassed as a “similar service” under the statute. MOCA proposes to extend the nondiscriminatory treatment to “interactive services” and “digital distribution services.” The purpose of this proposed amendment is, of course, to further increase competition within the online music industry.

Many are skeptical of just how much MOCA will prevent the major recording companies from engaging in anticompetitive behavior. Even with MOCA, recording companies are free to impose high royalty fees on both the affiliated and nonaffiliated companies. Imposing high royalties on their own affiliated companies will do nothing but increase their profit margin. Imposing high fees on nonaffiliated companies, however, will ultimately burden the consumer.

E. Administration of Section 115 Mechanical License

The rights to make and distribute phonorecords (copies) of nondramatic musical works are subject to compulsory licensing under current law. When copies of a non-dramatic musical work have been distributed to the public under authority of the copyright owner, any other person, including those who make phonorecords or digital phonorecord deliveries, may, by complying with certain conditions, obtain a compulsory license to make and distribute phonorecords (copies) of the work. A person may obtain a compulsory license only if his or her primary purpose in making phonorecords is to distribute them to the public for private use, including distribution through digital phonorecord delivery. A compulsory license will be granted to the requesting party once notice to the copyright owner has been served and royalties have

26 Id.
28 Id.
29 Id.
been paid to the U.S. Copyright Office.\textsuperscript{30}

Under current copyright law, this process for clearing publishing rights, or obtaining a mechanical or compulsory license, is both complicated and time consuming. Recently, at a Judiciary Committee hearing about online music, witnesses representing the major music labels, RealNetworks, and MP3.com, uniformly pleaded for an effective mechanism for obtaining these mechanical licenses.\textsuperscript{31} MOCA proposes to make the process of obtaining a compulsory license less complicated and more efficient. The legislation will allow online companies to deposit royalty payments and accounting information with the Copyright Office, and have such funds and information distributed to the owners of the copyright by a collective agency representing the publishers and songwriters.\textsuperscript{32} Thus, under MOCA the administration of the publishing statutory license would parallel the administration of the sound recording performance statutory license.\textsuperscript{33}

The legislation also calls for the development and implementation of an electronic filing system for receiving notices of statutory licenses, replacing the current and somewhat prehistoric paper filing system.\textsuperscript{34} In addition, the bill reduces the current uncertainty in the status of limited downloads by extending the compulsory license to limited digital phonographic delivery.\textsuperscript{35} A limited digital phonographic delivery is a restricted transmission. In other words, the lengths of time for which and devices through which sound recordings may be heard are restricted. The bill instructs the Copyright Office, in setting royalty rates, to consider limited downloads separately from permanent downloads, and to examine the economic value of a

\begin{itemize}
\item \textsuperscript{30} Id.
\item \textsuperscript{31} \textit{Summary of Music Online Competition Act, available at} http://www.house.gov/boucher/docs/moca-summary.htm.
\item \textsuperscript{32} H.R. 2724 107th Cong. §5(a) (2001).
\item \textsuperscript{33} \textit{Summary of Music Online Competition Act, available at} http://www.house.gov/boucher/docs/moca-summary.htm.
\item \textsuperscript{34} H.R. 2724 107th Cong. §5(d) (2001).
\item \textsuperscript{35} \textit{Summary of Music Online Competition Act, available at} http://www.house.gov/boucher/docs/moca-summary.htm.
\end{itemize}
limited download as compared with a permanent arrangement.\textsuperscript{36} This provision applies royalty rates to limit the extent to which digital phonorecord deliveries may promote or may substitute for the sales of phonorecords or otherwise may enhance or may interfere with the copyright owner's stream of revenue.\textsuperscript{37} Overall, this provision of MOCA is beneficial to the online music industry by providing an easier administration of the compulsory license. As the online music industry continues to evolve, organization and efficiency is extremely important in facilitating its development.

\textbf{F. Clarification of Incidental and Archival Copying}

Current copyright law does not exempt buffer copies made in the course of browsing or web casting from copyright liability.\textsuperscript{38} Buffer copies are copies made in the course of browsing or web casting and have no independent economic value.\textsuperscript{39} In other words, buffer copies are simply technical incidents that occur in the ordinary course and operation of the Internet.\textsuperscript{40} A buffer copy is made as a result of a digital download and has no resale value. Recognizing this, MOCA adapts current copyright law to the reality of digital transmissions by exempting buffer copies from copyright liability.\textsuperscript{41} In addition, MOCA would formally allow consumers to make archival back-up copies of music that they lawfully acquire over the Internet.\textsuperscript{42} Back-up copies will protect consumer collections against hard drive crashes, accidental damage or viruses,\textsuperscript{43} boosting the online purchase of music by

\textsuperscript{36}H.R. 2724 107\textsuperscript{th} Cong. §5(b) (2001); See also Summary of Music Online Competition Act, available at http://www.house.gov/boucher/docs/moca-summary.htm.
\textsuperscript{37}H.R. 2724 107\textsuperscript{th} Cong. §5(b) (2001).
\textsuperscript{40}Id.
\textsuperscript{41}H.R. 2724, 107\textsuperscript{th} Cong. §6(b) (2001).
\textsuperscript{42}Id.
consumers who feel safer knowing that they may legally hold a back-up copy of their purchase.

**G. Examination of Programming Restrictions**

There are certain restrictions provided by the sound recording statutory license for digital cable, satellite and web casting services.\(^{44}\) For example, a provider is restricted from playing more than three selections from a particular CD or more than four selections from a particular artist within a three-hour window.\(^{45}\) If the companies fail to adhere to these restrictions, they are forbidden from broadcasting the artist's songs and will be denied a statutory license to do so.\(^{46}\) Broadcast radio is not subject to these restrictions.\(^{47}\) For many digital music services, these restrictions impose an undue burden on their services, reduce their ability to compete with broadcast radio, and leave them unable to obtain a statutory license to deliver those same services offered by radio broadcasters.\(^{48}\) MOCA seeks to prevent these burdens by instructing the Copyright Office to consult with the Department of Commerce in order to study the impact these restrictions have on digital music services, copyright owners and the public.\(^{49}\) Their findings must then be reported to Congress.\(^{50}\) Congress will use these findings to study the impact of modifying or even eliminating these restrictions in the future. While this provision does not change the current copyright law in respect to its discriminatory restrictions on digital music services, it is the first major step toward advancement.

---

\(^{44}\) Davie *supra* note 16, at paragraph 14.  
\(^{46}\) *Id.*  
\(^{48}\) *Id.*  
\(^{49}\) H.R. 2724, 107\(^{th}\) Cong. § 7 (2001).  
\(^{50}\) *Id.*
While there are many traditional music venues that detest the Music Online Competition Act, there are many groups who support the proposed legislation. The Digital Media Association ("DiMA") praises the bill and views it as legislation to modernize the currently outdated law. \(^{51}\) The DiMA, as well as many digital music services, believes current law impedes the development of the online entertainment industry. \(^{52}\) DiMA and many others believe that consumers should have access to new innovative technologies that provide quality entertainment. Most importantly, DiMA believes that creators and copyright owners should be compensated in the most efficient manner. \(^{53}\) The Digital Media Association, the Electronic Frontier Foundation and many other groups warn that content creators and consumers will suffer if MOCA is not approved. \(^{54}\) These groups believe that without MOCA many copyright owners will leverage the limited copyright monopoly granted by Congress to control digital distribution channels. \(^{55}\) Zack Zalon, General Manager of Radio Free Virgin, said, "Radio Free Virgin is confident that as more people discover and enjoy new music, more people will buy new music and all participants in the music value chain – most importantly creators and consumers – will benefit . . . such legislation will help companies like RFV to deliver music fans the highest quality experience, will permit retailers to increase conversion of browsers into buyers, will ensure easier distribution of music to consumers and guarantee payment directly to the artists that create music." \(^{56}\)

Industry artists such as Alanis Morissette and Don Henley support


\(^{52}\) Id.

\(^{53}\) Id.


\(^{55}\) Id.

Several house members, as well as other groups, believe it premature for Congress to pass legislation that regulates such a highly evolving marketplace. Moreover, the recording companies are seeking to defeat the legislation in order to keep market power in their newly acquired online subscription services, MusicNet and Pressplay, which now control approximately 80 percent of the market for online music distribution. Hilary Rosen, director of the Recording Industry Association of America ("RIAA") commented on MOCA: "A protracted legislative fight will not move us closer to where the music industry wants to be – delivering music to fans through a variety of different, innovative websites. Unfortunately, the Cannon/Boucher bill introduced today will divert time, energy and resources from achieving that goal. It is essentially a solution – a very bad solution – in search of a problem." The RIAA also believes that MOCA substitutes government legislation for marketplace.

A. What MOCA Does Not Address

Does MOCA really eliminate discrimination between radio broadcasting and web casting? The answer is clearly no. Discrimination still exists. For example, many traditional radio stations are now streaming their broadcast programming on the Internet. However, the U.S. Copyright Office in December 2000 ruled that transmissions of an AM or FM broadcast signal over a digital communications network, such as the Internet, are subject to copyright liability. Under the Copyright Office's ruling, radio stations must now secure licenses to transmit their AM or FM programs over the Internet even though they are not required to pay royalties to sound recording owners for over-the-air broadcasts.

---

57 Id.
58 Id.
59 Id.
61 See Pena, supra note 16, at 536.
of songs.\textsuperscript{62} The United States District Court for the Eastern District of Pennsylvania affirmed the Copyright Office’s ruling in \textit{Bonneville International Corporation v. Peters.}\textsuperscript{63} Discrimination between broadcasting and web casting has yet to be eliminated. However, MOCA does seek to equalize the treatment between the two services.

\textbf{B. MOCA: Friend or Foe?}

The Music Online Competition Act is likely to spur competition in the online music industry, but at what cost? Should the government intervene and substitute legislation for market freedom? Will consumers benefit from the regulation? For many, the answers are debatable. The Internet is unknown territory. The recording companies view the online market as the market that was already theirs. The independent music distribution companies view the online market as a new market in which they have an opportunity to stake a claim. While it is true that MOCA will benefit current copyright law by bringing it somewhat up to date, does it do enough to point copyright law in a direction to take hold of this messy online situation?

Will MOCA really increase competition? While MOCA attempts to reduce anticompetitive behavior, it is questionable whether or not the bill will actually eliminate it. It is true that under MOCA, if a recording company licenses an affiliated entity to broadcast or distribute music over the Internet via interactive service, then the recording company must make the sound recordings available on equal terms and conditions to all other companies offering similar services.\textsuperscript{64} However, MOCA only expands the nondiscriminatory license provision of copyright law to apply to interactive services. It does not provide compulsory licenses.\textsuperscript{65} Since the government determines royalty rates under compulsory licensing, MOCA does not prevent recording

\textsuperscript{62}\textit{Id.}


\textsuperscript{64}H.R. 2724, 107\textsuperscript{th} Cong. §4(b) (2001).

\textsuperscript{65}\textit{Id.} See also Davie, \textit{supra} note 16, at paragraph 10.
companies from charging high royalties rates to obtain the sound recordings.\(^ {66} \) Therefore, the recording companies may charge both their own companies (i.e., MusicNet and Pressplay) and independent companies the same high royalty rates.\(^ {67} \) For MusicNet and Pressplay, a high royalty rate is of little consequence, as both companies are backed by the major recording companies.\(^ {68} \) However, for the independent companies, the high royalty rates may be enough to either drive or keep them out of the online music industry. This may ultimately increase the price of purchasing or listening to music online. Is this really benefiting the public?

C. Squeezing Out the Middle Man

Putting aside the possible negative side effects that MOCA may have on the general public, the bill seeks to benefit the online music industry. Unfortunately, the Recording Industry Association of America would like to see the bill disappear into thin air. With the RIAA representing a $15 billion industry, it just might happen. Why is the RIAA so afraid of legislation such as MOCA? Are they afraid of being squeezed out of the middle between musicians and consumers?

Recording companies have recently been attacked by consumers, antitrust investigators both domestically and internationally, musicians and lawmakers.\(^ {69} \) Moreover, the industry’s sales are slowly dropping. The dollar value of music sales dropped five percent in the first half of 2001.\(^ {70} \) Product sales, including CDs and tapes, have also declined. As the curtain unveiled the Internet market, the recording companies voiced their disgruntled opinions about the online distribution of music. After

\(^{66}\) Davie supra note 16, at paragraph 10.
\(^{67} \) Id.
\(^{68} \) Id.
\(^{70} \) Id.
all, it was the little companies who got there first. Why wouldn’t they oppose the online distribution of music? Now, recording companies have created the two biggest online music distributors, MusicNet and Pressplay, who dominate 80 percent of the market. While the recording companies disfavored the Internet before they were a part of it, they are now becoming one of its biggest fans. The passage of MOCA would not only limit the recording companies from controlling the online market, but also eliminate them from controlling the distribution of royalty rates. MOCA seeks to boot them off their high horse in certain areas of the industry and place them back on their pony. There is no doubt that MOCA would benefit the industry by putting a leash on the recording companies. If the recording companies already control approximately 80 percent of the market, regulation seems the only way to tame them despite the fact that many individuals do not support government regulation.

IV. CONCLUSION

In reality, the Music Online Competition Act does not really change the music industry. It merely seeks to bring current copyright law up-to-date and prevent anticompetitive behavior within the recording industry. MOCA would be the first real step, after the Digital Millennium Copyright Act, in legally recognizing the evolving online music industry. While most of the music sold today is sold in retail stores, it is only a matter of time before everyone is connected to the Internet. The number of Americans using the Internet continues to increase. Computers are becoming as common as the telephone and law must reflect these changing times. MOCA may not address all the problems embedded in our current copyright system, but at least it is a start.

Merritt A. Gardiner, University of Miami School of Law