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THE MUSIC ONLINE COMPETITION ACT OF 2001: MODERATE CHANGE OR RADICAL REFORM?

On August 3, 2001 legislation was proposed to facilitate online broadcasting and distribution of music. The proposed Music Online Competition Act (MOCA) seeks to streamline the distribution of music over the Internet, increase competition, and avoid the monopolization of the online music industry by the record companies. This iBrief discusses several changes that MOCA would implement in the law and the reaction of the recording industry to these proposed changes.

Introduction

¶ 1 On August 3, 2001, Representatives Rick Boucher (D) of Virginia and Chris Cannon (R) of Utah proposed bipartisan legislation (H.R. 2724) to facilitate online broadcasting and distribution of music. Through the Music Online Competition Act (MOCA), the congressmen seek to streamline the distribution of music over the Internet, increase competition and avoid the monopolization of the online music industry by the record companies. The recent formation of two joint ventures between record companies and online music distributors, MusicNet and Pressplay, prompted this legislative initiative.¹ Both congressmen have touted the bill as beneficial for consumers and industry members alike; not only would the bill make it easier for online companies to obtain required licenses, but increased competition would lead to lower costs and more choice for consumers. The bill also seeks to assist recording artists by mandating direct compensation for the online distribution of their music.

¶ 2 Rep. Boucher historically has been a strong supporter of the online music distribution industry. Last year, he introduced the Music Owners' Listening Rights Act late in the legislative session in an effort to protect technology employed by MP3.com from various copyright infringement lawsuits.² This bill was met with significant opposition from both the recording industry and performing artists' groups, and was not reintroduced at the beginning of the current legislative session.³

¶ 3 The Music Online Competition Act is a far more moderate approach to the modification of copyright laws in favor of the online music distribution industry. The bill no

longer addresses the more controversial concerns of MP3.com but focuses instead on making it easier for webcasters and online music services to distribute music over the Internet. Aside from the opposition of the recording industry, MOCA has met with a much more favorable response from artists and media groups alike.⁴ Congressional hearings are scheduled to begin in the fall of 2001.⁵

Overview of the Music Online Competition Act

¶ 4 MOCA proposes seven modifications to U.S. copyright law.⁶ Several of the changes are designed to facilitate the digital transmission of music over the Internet. MOCA also contains various modifications to the copyright law, which are intended to facilitate the sale and distribution of music over the Internet. Finally, MOCA would assist recording artists by ensuring that royalty payments collected under the sound recording statutory license would now be distributed directly to the artists. This iBrief discusses each of these changes in detail below, and further examines the reaction of the recording industry to the proposed legislation.

Enabling the Digital Transmission of Music

Existing Copyright Law and the Digital Transmission of Music

¶ 5 Current copyright law allows radio broadcasters to publicly perform copies of copyrighted music over public airways without compensating the record companies.⁷ Companies that broadcast music over the Internet, known as "web radio" or "webcasting", do not receive this protection; however, they do have the ability to procure what is commonly called a "statutory" or "compulsory" license to broadcast music over the Internet.⁸ With this statutory license, webcasters may transmit copyrighted songs over the Internet as long as they file notice with the United States Copyright Office and pay a royalty determined by the Copyright Office.⁹

¶ 6 The ability to procure a statutory license is limited to noninteractive services.¹⁰ The reasoning behind this distinction is that interactive services, which give the end user the ability to exercise control over his selection of songs, are more likely to displace the sales of the music industry.¹¹ Consequently, current copyright law gives the music industry more control over the distribution of sound recordings than the broadcasting of songs.

Nondiscriminatory Licensing Provision

¶ 7 Recent changes to U.S. copyright law have restricted the exclusive licensing of public performances to record company affiliates in order to promote competition between online music providers. If a copyright owner licenses an affiliated entity (like one of the recently announced joint ventures between record companies and online music distributors) to publicly perform a sound recording by means of an Internet broadcast, the same license must be made available on no less favorable terms to other webcasters.¹² However, the current law does not grant this same protection to interactive services.¹³ It is this nondiscriminatory provision that MOCA seeks to expand.

¶ 8 Under MOCA, if a record company licenses an affiliated entity to broadcast or distribute music over the Internet via an interactive service, then the record company must make the sound recordings available on no less favorable terms and conditions to all other entities that offer similar services.¹⁴ The record companies may require that webcasters use a digital rights management technology, but cannot mandate the use of any particular one; nor can the record companies dictate the use of any particular digital music player.¹⁵

¶ 9 The overriding policy consideration behind this measure is to increase competition in the online music industry. As the office of Rep. Boucher has stated, "[i]t is anticipated that the distribution services owned by record companies will cross license each other, so that each side will be authorized to distribute over the Internet approximately 80 percent of recorded music. If the major record companies do not also license independent non-affiliated distribution services, music will be distributed exclusively by a vertically integrated duopoly [namely, MusicNet and pressplay]."¹⁶ Indeed, the Justice Department has already started looking into allegations of anti-trust violations on the part of record companies in their licensing practices.¹⁷ MOCA is designed to force the record companies to offer more choices in the marketplace.

¶ 10 While the proposed legislation is likely to increase the number of web sites available for the distribution of online music, it still remains to be seen whether this will result in a benefit to consumers. MOCA only expands the nondiscriminatory license provision of copyright law to apply to interactive services but does not give interactive services the right to apply for compulsory licenses, which have governmentally-determined royalty rates. Consequently, the record companies are free to charge both their own affiliated joint ventures and non-affiliated companies the same high royalty fees. The joint ventures would still be beneficial to the record companies because all the profits could be realized through copyright royalties. The only real way to prevent this anticompetitive strategy would be to expand the compulsory license to interactive services. However, it seems Reps. Boucher and Cannon are reluctant to take this

approach due to intense opposition from the Recording Industry Association of America (RIAA).¹⁸ As discussed below, the RIAA is even opposing the provisions regarding nondiscriminatory licensing that are in the bill.¹⁹ Thus, although the bill may increase the choices consumers have, it is unlikely to have a large effect on the use of copyright law by the recording industry to create anticompetitive practices.

Modifications to the Ephemeral Recordings Exemption

¶ 11 Existing copyright law further distinguishes between webcasting and radio broadcasting in its treatment of the ephemeral recordings exemption. An ephemeral recording is a temporary copy of a sound recording, which is maintained by a transmitting organization, such as a television, radio or webcasting service.²⁰ Under the present law, transmitting organizations are allowed to retain a single ephemeral copy free of charge.²¹ The copy must be destroyed within six months from the first date of the transmission unless it is intended for archival purposes.²²

¶ 12 While these copying restrictions do not interfere with radio or television broadcasts, webcasting is a different matter altogether. In order to accommodate users with varying streaming capabilities, webcasting organizations need to create multiple copies of a sound recording at different bit rates.²³ Recent amendments to the copyright statutes have begun to pave the way for the legal creation of multiple ephemeral copies; for instance, the Digital Millennium Copyright Act (DMCA) allowed webcasters who already possess the statutory license to broadcast music over the Internet to apply for a second statutory license permitting multiple ephemeral copies.²⁴ However, Internet music providers that do not qualify for the statutory broadcasting license must negotiate voluntary licenses with music companies.²⁵

¶ 13 MOCA seeks to streamline the broadcasting of music over the Internet from both a technical and licensing point of view.²⁶ This bill goes much further than the amendments to the DMCA in its efforts to make the licensing process easier for webcasters. Under MOCA, the second statutory license would no longer be required. Rather, MOCA allows for the creation of multiple ephemeral copies by creating a statutory exception for copies used to facilitate the transmission of a performance.²⁷ The bill would also permit webcasters to store the copies on geographically diverse servers in order to facilitate the streaming of music to consumers.²⁸ However, the ephemeral recording exception would still be restricted to webcasters who have been granted a statutory license to broadcast music.²⁹ Internet music services, which do not meet the statutory licensing requirements, would still have to negotiate

voluntary licenses with the record companies to avoid copyright infringement lawsuits. MOCA will therefore help only the online webcasters who have obtained a statutory license for broadcasting and will not provide ephemeral copy benefits to other Internet music services.

Request for a Study of the Effects of Limitations on Programming on Digital Cable, Satellite and Webcasting Services

¶ 14 Digital cable, satellite and webcasting services must currently abide by a number of restrictions on their programming in order to be classified as a noninteractive service.³⁰ Such services are not permitted to play more than three selections from a particular album or more than four selections from a particular artist in a three hour time period, and are prohibited from using a set play list announced in advance.³¹ If the companies do not abide by the restrictions, they are ineligible to obtain statutory licenses for the songs they broadcast.³² MOCA instructs the Register of Copyrights to produce a report on the costs of compliance and the impacts of changing these requirements.³³ While 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.

Facilitating the Online Sale and Distribution of Music

Expansion of the Performance Exemption for Retail Establishments

¶ 15 Under current U.S. copyright law, retail stores are permitted to play songs within the store in order to promote record sales.³⁴ MOCA would give the same performance exemption to online music retailers.³⁵ The bill specifies digital audio transmission as a type of performance for purposes of the statute.³⁶ Furthermore, the bill sets certain parameters for exempt electronic transmissions; the sample must only be transmitted to the recipient requesting the transmission and limits the size of the sample to 30 or 60 seconds, depending on the length of the sound recording.³⁷ Since most online music retailers currently offer music samples on their websites under voluntary licensing, these modifications to the copyright law will simply facilitate what is already common practice.

Streamlining the Process for Obtaining a Mechanical License

¶ 16 U.S. copyright law provides for a separate compulsory license, known as a mechanical license, which has traditionally allowed a person to distribute copies of a copyrighted nondramatic musical work for private use so long as certain conditions are

met.³⁸ To obtain a mechanical license, the copyrighted work must have already been distributed to the public, the person seeking the license must serve notice on the copyright owner, and the license seeker is further required to pay royalties set by the U.S. Copyright Office.³⁹

¶ 17 MOCA contains a provision that is designed to streamline the process for obtaining a mechanical license.⁴⁰ The bill allows a person wishing to obtain a mechanical license to file an application directly with the U.S. Copyright Office and deposit the royalty fee there, instead of being required to serve notice on the copyright holder.⁴¹ It also extends the applicability of mechanical licenses to "limited digital phonographic delivery," which is defined as "a digital phonographic delivery that uses a technology that restricts the time or manner in which the transmission recipient may render such sound recording audible."⁴² Finally, it instructs the Copyright Office to establish a procedure for electronic filing of notice.⁴³ These changes would be beneficial to the online music distribution industry; MOCA would not only make the system of obtaining mechanical licenses simpler and less costly, but would also bring the law up-to-date by recognizing modern technology.

Clarification of Incidental and Archival Copying

¶ 18 MOCA further seeks to modernize U.S. copyright law by revising the treatment of incidental and archival copies.⁴⁴ Incidental copies, also known as buffer copies, are created during the process of downloading digital music files.⁴⁵ Under current law, the ability to legally copy sound recordings is limited to the owner of the copyright.⁴⁶ MOCA acknowledges that incidental copies that are not intended for resale are simply a byproduct of the music distribution process and should be made legal.⁴⁷ Furthermore, MOCA would clarify current copyright law by formally legalizing the creation of archival copies of music purchased over the Internet.⁴⁸ The bill would allow consumers to create backup copies for use in the event of a computer crash, a change that is certain to promote the sale of digital music over the Internet.⁴⁹ Such modifications are essential not only to increasing consumer confidence in the purchase of music online, but also serve to conform the law to the technological requirements of online music distribution.

Direct Compensation for Artists

¶ 19 The statutory license that permits webcasters to broadcast music over the Internet also mandates the distribution of royalties collected under the license.⁵⁰ Under current law, the proceeds are divided equally between the recording companies and the artists.⁵¹ All payments to the artists are presently routed through the record companies, which in turn pay the

artists.⁵² MOCA proposes a major change by mandating that this money be paid directly to the recording artists.⁵³ Recognizing that artist support is critical to the success of this bill, this provision was probably included to entice more artists to support MOCA than had previously supported the Music Owners' Listening Rights Act of 2000.⁵⁴ The effect of this provision is likely to be a small step in improving the treatment of artists who have often complained of unfair treatment by record companies.

Recording Industry Reactions to MOCA

¶ 20 The RIAA has vigorously opposed the passage of the Music Online Competition Act, and has focused its opposition primarily on the nondiscriminatory licensing provision of MOCA. Claiming that "[t]he bill substitutes government regulation for the marketplace," RIAA President Hilary Rosen further claims that "the marketplace is already moving in the right direction and... consumers will be served well by both the current and coming plans for online music services."⁵⁵

¶ 21 One supporter of the RIAA has claimed that MOCA's nondiscriminatory licensing provision verges on compulsory licensing for the online distribution of music.⁵⁶ Such a compulsory license would threaten the recording industry by removing the competitive advantage of forming a vertically integrated online music distribution system, like MusicNet or pressplay. Although the sponsors of the bill do not rule out the possibility of creating a compulsory license for online music distribution in the future, the congressional sponsors were very careful not to include such a license in the final version of MOCA. As Rep. Cannon noted in his introductory remarks, "[a] number of people did come to us seeking a compulsory license, but Rick [Boucher] and I felt that would be premature - especially now that MusicNet and PressPlay [sic] have announced that they will license downloads to some of their competitors."⁵⁷ However, Rep. Cannon warned the recording industry with these words: "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."⁵⁸ Thus, although MOCA would not impose the compulsory license feared by the recording industry, the bill's sponsors have not ruled out such a measure if online music distribution is hindered by anticompetitive practices.

Conclusion

¶ 22 Despite the RIAA's opposition to the Music Online Competition Act, the Act does not go as far as it could in modifying copyright law in favor of online music distribution. Several

of the changes proposed by MOCA are intended to modernize the applicable copyright laws with simple technical changes. Others, such as the extension of the performance exemption for retail establishments to online music distributors, merely serve to codify practices that are already well established. The sponsors have also followed previous legislative concessions to the recording industry by maintaining the distinction between webcasting and online music distribution services. Furthermore, while the nondiscriminatory licensing provision is the most extreme proposition in the bill, it does not go as far as it could in changing the relationship between record companies and online music distributors. A compulsory license may be the only mechanism that would adequately protect the competitiveness of the marketplace. Although further modifications will most likely be needed in the future, MOCA represents an important first step in making beneficial changes to copyright law.

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Footnotes

1. See *Introductory Statement of Representative Chris Cannon*, at <http://www.house.gov/cannon/press2001/aug03.htm> (last visited August 26, 2001); see also *Statement of Congressman Rick Boucher*, at <http://www.house.gov/boucher/docs/moca-statement.htm> (last visited August 26, 2001).
2. H.R. 5275, 106th Cong. (2000).
3. Stacey Fiene, *The Music Owners' Listening Rights Act of 2000: I want my MP3*, 10 DePaul-LCA J. Art & Ent. L. & Pol'y 515, 532-33 (2000).
4. See *Quotations Regarding "MOCA" From Inside the Music Industry*, at http://www.house.gov/cannon/bills2001/moca_press.html (last visited August 26, 2001).
5. Brad King, *Music May Yet Stream from the Web*, at <http://www.wired.com/news/mp3/0,1285,45813,00.html> (last visited August 26, 2001).
6. *Summary of Music Online Competition Act*, at <http://www.house.gov/boucher/docs/moca-summary.htm> (last visited August 26, 2001).

7. 17 U.S.C. §114(d)(1) (2001).
8. See Martha F. Phelps, *Complying with Requirements for a Statutory License in Sound Recordings Under the Digital Millennium Copyright Act of 1998*, 45-APR B. B.J. 6, 20 (2001).
9. See 17 U.S.C. §114(d)(2) (2001); See also Steven J. Pena, *Licensing Music for Use on the Internet*, 662 PLI/Pat 525 (2000).
10. 17 U.S.C. §114(d)(2)(A)(i) (2001).
11. Pena, *supra* note 9, at 530.
12. 17 U.S.C. §114(h) (2001).
13. 17 U.S.C. §114(h)(2)(A) (2001).
14. H.R. 2724, 107th Cong. §4(b) (2001).
15. *Id.*
16. *Statement of Congressman Rick Boucher, at <http://www.house.gov/boucher/docs/moca-statement.htm>*(last visited August 26, 2001).
17. See Laura M. Holson, *Recording Industry's Top Lobbyist Seeks Harmony in Time of Discord*, at <http://www.nytimes.com/2001/08/20/technology/20ROSE.html?searchpv=day06>(last visited August 26, 2001).
18. See *Introductory Statement of Representative Chris Cannon, at <http://www.house.gov/cannon/press2001/aug03.htm>* (last visited August 26, 2001).
19. See Brad King, *Music May Yet Stream from the Web*, at <http://www.wired.com/news/mp3/0,1285,45813,00.htm> (last visited August 26, 2001).
20. Pena, *supra* note 9, at 529.
21. 17 U.S.C. §112(a)(1) (2001).

22. 17 U.S.C. §112(a)(1)(C) (2001).

23. Pena, *supra* note 9, at 529.

24. *Id.*

25. Pena, *supra* note 9, at 529-30.

26. *See Statement of Congressman Rick Boucher, at <http://www.house.gov/boucher/docs/moca-statement.htm>* (last visited August 26, 2001).

27. H.R. 2724, 107th Cong. §3(b) (2001).

28. H.R. 2724, 107th Cong. §3(b) (2001); *see also Statement of Congressman Rick Boucher, at <http://www.house.gov/boucher/docs/moca-statement.htm>* (last visited August 26, 2001).

29. H.R. 2724, 107th Cong. §3(b) (2001).

30. *See Phelps, supra* note 8, at 21.

31. 17 U.S.C. §§ 114(d)(2)(B)(ii), 114(d)(2)(C)(i), 114(j)(13) (2001).

32. 17 U.S.C. §114(d)(2) (2001).

33. H.R. 2724, 107th Cong. §7 (2001).

34. 17 U.S.C §110(7) (2001).

35. H.R. 2724, 107th Cong. §2(a) (2001).

36. H.R. 2724, 107th Cong. §2(b) (2001).

37. H.R. 2724, 107th Cong. §2(a) (2001).

38. 17 U.S.C §115 (2001).

39. 17 U.S.C. §115; *See also* H. R. Rep. No. 94-1476 (1976).

[40.](#) H.R. 2724, 107th Cong. §5 (2001).

[41.](#) H.R. 2724, 107th Cong. §5(a) (2001).

[42.](#) H.R. 2724, 107th Cong. §§ 5(b), 5(c) (2001).

[43.](#) H.R. 2724, 107th Cong. §5(d) (2001).

[44.](#) H.R. 2724, 107th Cong. §6 (2001).

[45.](#) *Summary of Music Online Competition Act*, at <http://www.house.gov/boucher/docs/moca-summary.htm> (last visited August 26, 2001).

[46.](#) 17 U.S.C. §106.

[47.](#) H.R. 2724, 107th Cong. §6(b) (2001).

[48.](#) *Id.*

[49.](#) H.R. 2724, 107th Cong. §6(b) (2001).

[50.](#) 17 U.S.C. §114(g).

[51.](#) *Id.*

[52.](#) *Id.*

[53.](#) H.R. 2724, 107th Cong. §4(a) (2001).

[54.](#) *Compare Fiene, supra* note 3, at 532 (Artists' groups such as ASCAP and the Songwriters Guild of America were opposed to the Music Owners' Listening Rights Act), *with Quotations Regarding "MOCA" From Within the Music Industry*, at

http://www.house.gov/cannon/bills2001/moca_press.html

(various artists, including Alanis Morissette and Don Henley, speak out in support of MOCA) (last visited August 26, 2001).

[55.](#) *Statement by Hilary Rosen on the Cannon Boucher Bill*, at http://www.riaa.com/News_Story.cfm?id=442 (last visited August 26, 2001).

56. Clyde Wayne Crews, *Musical Mandates: Must the Pop Music Industry Submit to Compulsory Licensing?* Recording Industry Association of America, at http://www.riaa.com/News_Story.cfm?id=444(last visited August 26, 2001).

57. *Introductory Statement of Representative Chris Cannon*, at <http://www.house.gov/cannon/press2001/aug03.htm>
(last visited August 26, 2001).

58. *Id.*