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**MODERN MUSIC DISSEMINATION  
AND LICENSING INNOVATION**

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CONTENTS

INTRODUCTION .....2552

I. THE MUSIC MODERNIZATION ACT: A STREAMING UPHEAVAL  
OF CLASSIC PROPORTION .....2552

A. *The Musical Works Modernization Act—Copyright  
Buckles Under the Weight of Streaming* .....2553

B. *The Classics Protection and Access Act—Federal  
Quasi-Copyright for Pre-1972 Sound Recordings* .....2554

II. COPYRIGHT-DEPENDENT INDUSTRIES AND NONUNITARY  
LAW .....2555

III. PUBLIC AND PRIVATE LICENSE INNOVATION .....2557

A. *Legislative Innovations Such as the Musical Works  
Modernization Act* .....2557

B. *Private Innovations Such as Free and Open-Source  
Software* .....2557

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## INTRODUCTION

The core of copyright should concern authors rather than disseminators. Professor Lydia Loren so begins her critique of the Orrin G. Hatch-Bob Goodlatte Music Modernization Act<sup>1</sup> (the “Music Modernization Act”) in her article written for the symposium celebrating the works of Professor Wendy Gordon.<sup>2</sup> Professor Loren’s critique convincingly demonstrates that many aspects of the Music Modernization Act fall short of this aspiration. The aspiration—emphasis on authors over noncreative disseminators<sup>3</sup>—is one of Professor Gordon’s many contributions to copyright scholarship and part of her groundbreaking efforts to reshape base notions underlying copyright.

This symposium and its corresponding conference enabled a group of scholars to explore Professor Gordon’s many contributions and to discuss, among ourselves and with her, the continuing structure and shape of her ideas. I had the great privilege of attending the conference and providing commentary to the group about Professor Loren’s article and its presentation. During the conference’s conversation, a term spontaneously arose to indicate when an idea or proposition was attributable to one of Professor Gordon’s core scholarly themes: “Gordonian.” Thus, one might say that the proposition that copyright should emphasize authors over noncreative disseminators is a Gordonian one. Or, as another example, one might say that there are certain Gordonian considerations of transaction costs that should be deployed when considering copyright’s fair-use analysis.<sup>4</sup>

In furtherance of honoring Professor Gordon and in the spirit of this symposium, Part I of this Essay traces some of my perspectives about Professor Loren’s critique of the Music Modernization Act in light of Professor Gordon’s scholarship. Part II relates those perspectives to copyright’s unique structure among IP regimes, in particular in comparison to patent law, as highly textured in statutory terms for particular industries. Part III briefly discusses larger issues raised about change and innovation within licensing systems.

I. THE MUSIC MODERNIZATION ACT:  
A STREAMING UPHEAVAL OF CLASSIC PROPORTION

In a Gordonian sense, Professor Loren recognizes that some aspects of the Music Modernization Act are justified by transaction cost ideas, but her critique demonstrates that oftentimes the costs confronted by the Act are the consequence of its injudicious complexity and distorting approach. The

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<sup>1</sup> Pub. L. No. 115-264, 132 Stat. 3676 (2018) (codified in scattered sections of 17 U.S.C.).

<sup>2</sup> See generally Lydia Pallas Loren, *Copyright Jumps the Shark: The Music Modernization Act*, 99 B.U. L. REV. 2519 (2019).

<sup>3</sup> See generally Wendy J. Gordon, *The Core of Copyright: Authors, Not Publishers*, 52 HOUS. L. REV. 613 (2015).

<sup>4</sup> See, e.g., Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1652-53 (1982) (analyzing applications of fair use doctrine in then-emerging uses).

complexity and distortion cloak the Act's changes as benefits for authors when, in fact, current owners and related disseminators are likely the greater beneficiaries. The Music Modernization Act is an upheaval in three parts: Title I, referred to as the Musical Works Modernization Act ("MWMA"); Title II, referred to as the Classics Protection and Access Act ("CPA Act"); and Title III, referred to as the Allocation for Music Producers Act ("AMP Act"). The AMP Act is not a core target of Professor Loren's critique, which focuses first on the MWMA, then on the CPA Act, and then on several overarching Gordonian notions where the MWMA and the CPA Act fall short.

A. *The Musical Works Modernization Act—Copyright Buckles Under the Weight of Streaming*

According to the Copyright Office, the MWMA "replaces the existing song-by-song compulsory licensing structure for making and distributing musical works with a blanket licensing system for digital music providers to make and distribute digital phonorecord deliveries (e.g., permanent downloads, limited downloads, or interactive streams)."<sup>5</sup> Additionally, the MWMA creates a new collective for the new blanket license and revises royalty rate proceedings.<sup>6</sup> One perspective on the scope of the extensive changes is that the MWMA increases the scope of § 115 of the Copyright Act by nearly sevenfold in word count, totaling a little over eighteen thousand words.<sup>7</sup>

Given that copyright law, with regard to distributed digital music, is an area of significant legal complexity, Professor Loren's paper describes how the MWMA's length and scope adds a transaction cost via the legislation's novel move to enmesh musical work copyright reproductions and distributions into streaming and new definitions of streaming. The MWMA then "solves" the transaction-cost problem with a new blanket license and collecting entity.<sup>8</sup> Professor Loren's paper demonstrates how this leads to false parity—while the MWMA may seem to put different types of music copyright holders on the same footing, her paper's inquiry into the effects of legal characterizations for the types of streaming shows that there is still differentiation. Under Gordonian notions, the differentiation is a policy concern.

Additionally, the MWMA blanket license covers "unmatched works"—those whose copyright owner cannot be found. While this has the salutary effect of reducing transaction costs to find such owners, royalties for such works will be

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<sup>5</sup> *Music Licensing Modernization*, COPYRIGHT.GOV, <https://www.copyright.gov/music-modernization/115/> [<https://perma.cc/EDW7-KTRG>] (last visited Nov. 17, 2019).

<sup>6</sup> *Id.*

<sup>7</sup> Professor Loren notes that the original 1976 Copyright Act was 33,759 words. Loren, *supra* note 2, at 2525. Section 115, specifically, was originally 2742 words; however, "[a]fter amendment, it increased over 6.5 times in length and now stands at 18,324 words." *Id.* at 2526.

<sup>8</sup> *Id.* at 2528 ("The MWMA then reduces those newly solidified transaction costs by providing a blanket license.").

distributed to known copyright owners after a holding period. As Professor Loren suggests, rather than this differential treatment, perhaps these royalties for unmatched works could be used to promote new creativity among music artists in their nascent period.<sup>9</sup>

An alternative perspective on Professor Loren's critique might consider the fragmented nature of music copyright and the pressures digitization has put on music distribution systems over the last several decades. As in other digital domains impacted by copyright, such as software, what constitutes a legal "copy" that has been instantiated, created, or owned has been under tension as digital technologies evolve. This alternative perspective can put aside nonliteral reproductions: the dissemination issues covered by the Music Modernization Act are about legislation that implements a distribution system, including pricing, for exact copies of the music to be monetized. Given the digitization pressures, the transaction-cost issues solved by the MWMA, even if solved imperfectly, may on balance generate more benefit than harm due to the need to clear rights in unmatched works. The semi-centralization of the MWMA, with all its complexity, will clear rights in a more expansive fashion.<sup>10</sup> Correctly "clearing" inbound rights to an intangible resource is the first step in a licensing scheme that allows a disseminator to provide the correct outbound rights for whatever product or service will deliver or use the intangible resource.

B. *The Classics Protection and Access Act—Federal Quasi-Copyright for Pre-1972 Sound Recordings*

Owners of pre-1972 sound recordings may to some extent have protection under state law, and the protection is more likely for reproduction and distribution as compared to public performance.<sup>11</sup> The CPA Act gives pre-1972 sound recording owners a right over "covered activities."<sup>12</sup> This approach avoided giving such owners a federal copyright but allowed some copyright protections to apply to the pre-1972 recordings. This federal quasi-copyright for

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<sup>9</sup> *Id.* at 2547 (noting that under MWMA, noninteractive streams remain outside definition of digital phonorecord delivery, which covers interactive streams).

<sup>10</sup> This point owes inspiration to the work of Professor Menell. See Peter S. Menell, *Copyright Office Music Licensing Study: Comments of Professor Peter S. Menell 2* (UC Berkeley Public Law Research Paper No. 2441561, 2014), <https://ssrn.com/abstract=2441561> [<https://perma.cc/4DH9-JDCA>] (describing need for broad catalog of music for streaming services and need to disable hampering of that result by record labels).

<sup>11</sup> Loren, *supra* note 2, at 2542-43 tbls.1, 2 & 3 (showing "disparate treatment of the different types of copyright owners (musical works and sound recording) relative to the different rights (of reproduction and distribution, and of public performance) for both interactive and non-interactive streaming").

<sup>12</sup> Covered activities under the CPA Act are defined as "any activity that the copyright owner of a sound recording would have the exclusive right to do or authorize under section 106 or 602, or that would violate section 1201 or 1202, if the sound recording were fixed on or after February 15, 1972." 17 U.S.C. § 1401(l)(1) (2018).

pre-1972 sound recordings purportedly places the earlier group on an even footing with the post-1972 group.<sup>13</sup>

Professor Loren demonstrates several Gordonian issues with the CPA Act's approach. First, the Act does little to incentivize the original pre-1972 creators, i.e., the performers and related musicians who generated the recordings.<sup>14</sup> The current-time recognition of quasi-copyright in the pre-1972 recordings is a reward for noncreative disseminators who have current ownership of the recordings. Second, because the "covered activities" mechanism is a mode of quasi-copyright, the pre-1972 recording owners do not enjoy the author-centric termination rights in the Copyright Act.<sup>15</sup>

An alternative perspective to these critiques arises from the potential beneficial effects of standardization and thinking about the issue in terms of federalism. Even with the imperfections and nonauthorial-facing effects Professor Loren demonstrates with regard to the CPA Act, perhaps the Act also is a net positive for industry functioning, writ large, as compared to a plethora of vague, potential state law protections for pre-1972 sound recordings. Professor Loren recognizes that this federal standardization is likely a part of what the music industry sought, but standardization has other values even if in this case it does not accrue sufficient benefits to the original authors.

## II. COPYRIGHT-DEPENDENT INDUSTRIES AND NONUNITARY LAW

The institutions of copyright and patent, writ large, seem more dissimilar than similar from my perspective. That each relies on Congress for its base legislation is a similarity. Whether and, if so, to what degree legislative activity for each institution plays out differently in Congress is a question. One can posit that patent law is "unitary" from the perspective that its statute varies little from industry to industry. Putting aside medical and pharmaceutical technologies, the proposition that statutory patent law is unitary is reasonably strong,<sup>16</sup> at least in comparison to copyright.

Copyright law seems less unitary than patent law—in the sense that music and broadcasting, if modeled as two separate industries, have significant

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<sup>13</sup> See U.S. COPYRIGHT OFF., FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDINGS (2011), <https://www.copyright.gov/docs/sound/pre-72-report.pdf> [<https://perma.cc/D3YC-8C5C>] ("[A]lthough sound recordings were brought within the scope of federal copyright protection beginning in 1972, protection of pre-1972 sound recordings remains governed by a patchwork of state statutory and common law").

<sup>14</sup> Loren, *supra* note 2, at 2523 ("For many of these works, the artists who created them will not benefit from this new protection."); *id.* at 2537 ("Thus, the possibilities for increased remuneration created by the CPA Act will largely be reaped by record companies.").

<sup>15</sup> *Id.* at 2549 (describing Congress's failure to rectify CPA Act's lack of termination rights in pre-1972 recordings in Music Modernization Act).

<sup>16</sup> *But see* DAN L. BURK & MARK A. LEMLEY, THE PATENT CRISIS AND HOW THE COURTS CAN SOLVE IT 65 (2009) (factoring in the effect of case law interpreting the patent statute and questioning degree to which U.S. patent system is unitary across industries).

legislative underpinnings for disseminator structure and functioning in those industries. The legislative rent-seeking of disseminators discussed by Professor Loren in her critique of the Music Modernization Act<sup>17</sup> is a cautionary tale for patent law: remain unitary or suffer perversions to the legislative process similar to what copyright has seen. Professor Loren characterizes the MWMA as the most recent perversion of the legislative process for copyright: “an extensive and complicated licensing agreement worked out by [music] industry insiders and subsequently codified by Congress.”<sup>18</sup>

Looking at the Copyright Act in total, music and broadcasting seem different in kind compared to other industries that rely on copyright. Other technology or industry areas may have some uniquely applicable provisions, such as section 117 for software, but music and broadcasting have statutorily encoded licensing schemes that underlie industry structure.

Other copyright-dependent industries function without such legislative licensing schemes. The list might include movies, print publishing, the performing arts, and software. In these industries, clearing rights for inbound and outbound licensing and for dissemination seem dependent to a much greater degree on private copyright licensing approaches. These approaches include both organized private licensing efforts and de facto standardization of form licensing contracts.

For software in particular the private licensing scheme is richly textured and complex, yet it is exclusively the result of private contracts and patterns of activity. Software may be an exception to the other copyright-dependent industries due to its “thinness”—its functional nature—and its creators and disseminators are more likely on average, compared to other copyright industries, to be one and the same.<sup>19</sup> The programmer is rarely generating new code in a mode akin to the “starving artist” musician, painter, or novelist. The programmer is likely an employee with an employer vesting original ownership of the code at the time of its making. Thus, in software, the creator-versus-disseminator dichotomy is generally less strong.

Whether, as a policy matter, greater nonunitary copyright law is beneficial depends on the specifics. However, unitary patent law is not suggested to be a panacea. The point is that the nonunitary approach changes the political economy of the lawmaking. It increases the possibility for entrenched incumbents to block new entrants or approaches and have an outsized influence on the industry-ordering results.

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<sup>17</sup> Loren, *supra* note 2, at 2534 (discussing extensive lobbying by major industry players who ultimately supported MWMA because it results in higher royalties).

<sup>18</sup> *Id.* at 2522.

<sup>19</sup> “Thin” copyright is actually a lightweight, technical term of art in copyright doctrine, but not a term in the Copyright Act. *See, e.g.,* Feist Publ’ns Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991) (“[C]opyright in a factual compilation is [inevitably] thin.”).

### III. PUBLIC AND PRIVATE LICENSE INNOVATION

In light of the Music Modernization Act critique discussed thus far, this last Part briefly considers change and innovation within licensing systems from a broad perspective. To make the discussion concrete, the topics are the music and software industries. Current licensing systems in both industries are dependent on the past, as is change for either in the future. This path dependency, however, may not control the licensing structure forever given the pace of technological change for the generation and dissemination of digital copyright works.

#### A. *Legislative Innovations Such as the Musical Works Modernization Act*

The MWMA component of the Music Modernization Act established a new collecting society and implemented various new approaches to streaming music. The need for the MWMA was in no small part due to the technological overhaul of music delivery occasioned by streaming. Just as, a decade earlier, digital distribution via downloads (first often unlicensed, and then later increasingly licensed) upended certain aspects of copyright law,<sup>20</sup> the MWMA is a legislative response to a problem that results from the leverage and power of those in a position to put it in place.<sup>21</sup> By this I do not necessarily mean Congress but, as pointed out by Professor Loren in her critique, the disseminator interest groups who wanted to restructure licensing for music streaming.<sup>22</sup>

For those powerful enough to encode a licensing scheme in legislation, the benefits seem plentiful, including the power to bind parties in compulsory licensing. The negatives for such a situation include ossification of the law and administrative structure, turnabout in a future legislative cycle, and potential loss of flexible response mechanisms as change proceeds.

Legislative innovations like the MWMA are rare occurrences for a licensing structure. They lack the opportunity for percolation, granular experimentation, and pretesting. In music, however, given the legacy of preexisting compulsory licensing structures in copyright for both music and broadcasting, the legislative revision seems to be the only path forward available to the industry incumbents.

#### B. *Private Innovations Such as Free and Open-Source Software*

From a multidecade perspective, the recent revisions to legislative music copyright licensing stand in stark contrast to the most important new influence in software licensing during that same time frame: free and open source software (“FOSS”). The reasons why FOSS license originators followed their path relate to their characteristics, which stand in opposition to those of the powerful interest groups influencing music licensing.

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<sup>20</sup> See Peter S. Menell, *This American Copyright Life: Reflections on Re-Equilibrating Copyright for the Internet Age*, 61 J. COPYRIGHT SOC’Y U.S.A. 201, 216-35 (2014).

<sup>21</sup> Loren, *supra* note 2, at 2521.

<sup>22</sup> *Id.* (“[I]n the absence of evidence to support policy choices, our copyright rules are driven significantly by industry-led lobbying efforts.”).

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FOSS originators did not have the money or power to lobby Congress. In opposition to FOSS, there was an entrenched incumbent group: all those in information technology whose revenues, in whole or in part, depended on proprietary software licensing. While the FOSS originators could not leverage the traditional power of an incumbent, they were able to harness changes in information technology to promulgate a new important mode of software licensing.

Thus, while one technological change, such as streaming, was a threat to the music license innovators (the incumbents), another technological change (the rise of the internet) was a key motivating force for the software license innovators (the FOSS originators). The internet's growth was dramatically subsidized by excellent and free software under a variety of FOSS licenses, in particular with operating systems based on the GNU/Linux kernel. The growth of the internet itself accelerated the mode of software development promoted by FOSS licenses. These two forces combined with other influences,<sup>23</sup> including the variety of benefits that come with software developed under FOSS approaches, and spawned a revolution in how software is disseminated and developed—namely, with transparent source code and, depending on the license, a variety of conditions to promote future transparency and free use. The new software generated under the FOSS approach carried the licensing system around the world as that software was adopted and adapted.

One last point can be added to the story to show how technological change can motivate licensing-system change. For FOSS licenses, the emergence of the cloud and delivery of software functionality via the cloud has threatened its original approaches, which are typically based on license conditions triggered by a distribution of the software. FOSS originators will have no recourse to Congress for this technological change, a clear dissimilarity from the music industry incumbents.

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<sup>23</sup> Among the influences that shaped the potency of FOSS licensing is the strength of copyright as applied to software heightened during this era, roughly characterized as the early 1990s through today.