

# Emerging Technology in the Fashion/Beauty Industries

## Key Issues and Deal Strategies to Mitigate Risk



# Technological Innovation is Changing the Game

- Mainstream adoption and deployment of novel and innovative technologies have altered the landscape
- Evolution of consumer culture, behavior and expectations in the digital age are compelling brands to create and implement new business models and re-invent the customer experience in order to remain relevant
- Marked increase in collection, analysis and exploitation of consumer data, including preferences, purchase history, product reviews, physical attributes, etc.
- “With great power, comes great responsibility ... ***and potential liability***”

# Emerging Technology: Artificial Intelligence (AI)

- “AI” – machine driven intelligence that aims to simulate human intelligence or to perform certain cognitive tasks that typically require human intelligence

Machine based learning uses sophisticated algorithms to parse and analyze large volumes of data

AI used to quickly process and predict consumer behaviors and identify trends

Examples include “smart mirrors”, “virtual stylists”, “hybrid designs”



# Emerging Technology: Mixed Reality - AR and VR

- Augmented Reality – technology that superimposes computer generated information, images, text and sound in a user’s view of the real world in real time
- Virtual Reality – computer generated, interactive simulation of an environment that incorporates sensory feedback to create the immersive illusion of reality
- In-store and in-app implementations are rapidly becoming mainstream, creating a highly personalized and customized consumer experience
  - Interactive and virtual fashion shows
  - Body scanners and “try-on” / “virtual look” and “data dress” applications

# Key Legal Issues and Considerations

- Privacy, Data Protection and Security
- Copyright and IP ownership
- SaaS and Cloud-based implementations and initiatives
- Software and mobile application development
- User Generated Content

# 2018 – Landmark Year for Data Privacy and Security

2018

- General Data Protection Regulation (GDPR) – May 25, 2018
- California Consumer Privacy Act of 2018 (CPA) - Signed into law on June 28, 2018, goes into effect January 1, 2020
- California Security of Connected Devices Law – Signed into law on September 28, 2018, goes into effect January 1, 2020



# GDPR – Key Changes



- **Expanded definition of “Personal Data”**
  - Any information that can be used to ID an individual – even IP addresses and cookie IDs
- **Extra-Territorial Application and Increased Liability**
  - Applies if you process EU citizen data, regardless of where you are based
  - Higher of 4% of global turnover or €20 million
  - Controller and Processor liability
- **Data Breach Notification**
  - GDPR requires "the controller without undue delay, and where feasible, not later than 72 hours after having become aware of it, [to] notify the ... breach to the supervisory authority" (Article 33(1)).
- **Transparency and Stronger Rights of Individuals**
  - How long data will be stored
  - If data will be transferred to other countries
  - Information on the right to make a subject access request
  - Information on the right to have personal data deleted or rectified
  - Consent must be clear and just as easy to withdraw as to give
- **Appointment of a Data Protection Officer**

Organizations that fall into the following 3 categories must appoint a DPO:

- Public authorities;
- Controllers or processors whose core activities consist of processing operations which by virtue of their nature, scope or purposes require regular and systemic monitoring of data subjects on a large scale; and
- Controllers or processors whose core activities consist of processing sensitive personal data on a large scale.

# Practical Impact on Deal Negotiations

- **Consider whether GDPR is really at play**
  - Will EU citizen data be processed?
- **Adding another document to the negotiation – the Data Processing Addendum**
  - Agreements must include the subject matter and duration of processing
  - Purpose of processing
  - Types of personal data and categories processed
  - Confidentiality
  - Processing only on instructions
  - Appropriate technical safeguards
  - Sub processing restrictions
  - Notification of breach
- **Pay attention to the definition of “Applicable Law”**
- **Make sure insurance coverage is sufficient**
  - Definition of “privacy law” in cyber policies is generally limited to laws regulating data *breaches*. The policy should clearly address privacy violations related to all aspects of the handling of data.
- **For any new processing activities, make sure disclosures are up to date**

# California Consumer Privacy Act (CCPA)

## “GDPR 2.0”

- ❑ **Disclosure** - Consumers can request the categories and specific personal information collected about them in the past 12 months , as well as information about that data (e.g., source, how used, categories of third parties with which it shares data).
  
- ❑ **Scope** - Applicable to companies that “do business” in California, process the information of California residents, and:
  - ✓ have at least \$25 million in annual revenue;
  - ✓ collect personal data on at least 50,000 people; or
  - ✓ collect more than 50% of their revenues from the sale of personal data.
  
- ❑ **Privacy Notices** - Prior to data collection, companies must provide notice about their data practices and cannot make additional use without notice. Clear description of methods to make requests and include a “Do Not Sell My Personal Information” buttons on website.
  
- ❑ **Opt-Outs and Opt-Ins** - Consumers can opt-out of the sale of their personal information. Companies must get opt-in consent from anyone under 16 years old.

# “GDPR 2.0” (cont.)

- ❑ **Potential Liability** - Consumers can sue for any unauthorized “exfiltration, theft, or disclosure” that results from the failure to “implement and maintain reasonable security procedures and practices appropriate to the nature”. AG may also levy fines of \$7,500 per incident.
- ❑ **No discrimination** - Companies cannot discriminate against consumers for exercising any of the rights (e.g., denying goods and services, charging different prices). However, companies can offer financial incentives for collection/sale of personal information.
- ❑ **Right to delete** - Consumers can compel deletion of personal information “collected from the consumer.”

# Key Takeaways

- CCPA and GDPR both require transparency and allow consumers certain rights, CCPA has little guidance as to what security procedures and practices are “reasonable.”
- GDPR is more comprehensive and gives data subjects not only deletion rights, but the right to request that controllers rectify mistakes, request that restrictions be placed on the use of their data and require businesses to report data breaches to the relevant DPA and to affected data subjects.
- In sum, GDPR imposes more obligations and provides more rights to consumers.
- Ensure consumer disclosures, privacy policies and data collection and processing procedures are fully compliant; carefully scrutinize agreements and DPAs with Data Processors to mitigate risk

# IoT Devices and Privacy Challenges

- “Internet of Things” allows data collection in the offline world.
- FTC has issued guidance on best practices for security and privacy with IoT devices—building security into devices, oversight of downstream vendor contracts on data collection and privacy, and data minimization practices.
- Consistent with recent privacy reforms, the FTC is focused on disclosures to consumers.
  - Clear disclosures at purchase
  - Developing easy-to-use methods for communicating security updates during a product’s lifespan
  - Providing useful information to consumers that is free of technical jargon



# Mo' Devices, Mo' Problems

- Increased number of devices behind network firewall leads to greater security risks.
- Companies making inexpensive products with Wi-Fi or Bluetooth capability, (e.g., toys), do not have the budgets/expertise for sufficient security like you may find in a smart speaker from a major tech company.
- Not all devices support over-the-air updates, or updates without downtime, so devices might need to be physically accessed.
- Even “sophisticated” IoT devices have major vulnerabilities:
  - Login process not authenticated.
  - Cloud communication lacks encryption.
  - Unauthorized access to the cloud service.



# California – First State to Adopt IoT Security Law



- This first-of-its-kind law addresses the appropriate means of device authentication where a device is capable of connecting to wide-area networks such as a public network.
- Effective January 1, 2020, any manufacturer of a device sold in California that connects “directly or indirectly” to the internet must equip it with “reasonable” security features” to prevent unauthorized access, modification, or information disclosure.
- No more generic default credentials for a hacker to guess - Devices must either be equipped with a unique password or force users to set their own password when they first time connect.
- No private right of action, but government lawyers are vested with enforcement authority.

# Copyright Challenges and Key Takeaways

- Copyright protection for designs somewhat limited in the US
  - Arguably solely extends to original works of human authorship – *Naruto v. Slater* (N.D. Cal. January 23, 2016)
  - US Copyright Office has stated that it will refuse to register a claim if it determines that a human being did not create the subject work
  - Designs created with the assistance of AI, AR and/or VR may not be afforded copyright protection; unclear how much human involvement is required
- In the UK, copyright in a machine-created work of authorship is owned by the person/entity “by whom the arrangements necessary for the creation of the work are undertaken”
- Clearly specify disposition of IP ownership re: developed works in agreements with AI, AR and VR vendors and/or include appropriate restrictive covenants that preclude use/disclosure



# Q&A



Music Modernization Act  
It's not the same old song  
or  
How Digitization is Revolutionizing Copyright Law and Licensing

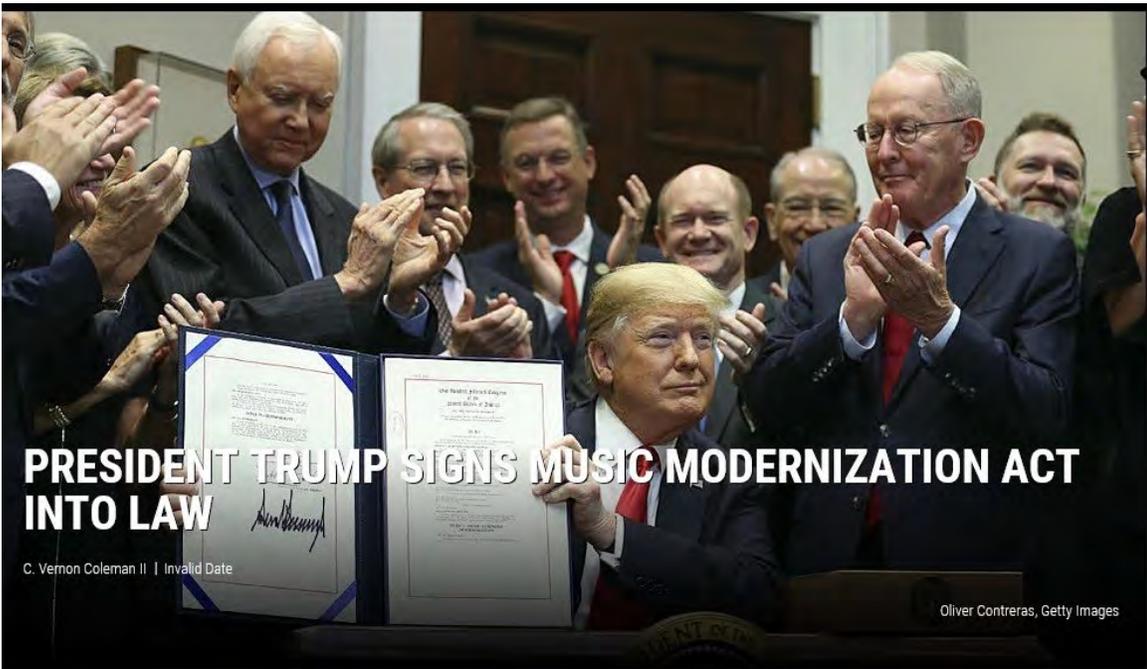
Presented by  
Ed Komen and Pamela Weinstock

# Orrin G. Hatch – Bob Goodlatte Music Modernization Act



# Signed into law by President Trump on October 11, 2018

## Public Law 115-264



- ▶ BUSINESS
- ▶ BREAKING NEWS
- ▶ DIGITAL
- ▶ MUSIC
- ▶ STREAMING
- ▶ ARETHA FRANKLIN
- ▶ MUSIC MODERNIZATION ACT

President Trump signed the [Music Modernization Act](#) into law at a ceremony today at the White House that included Mike Love of The Beach Boys and Kid Rock, two of Trump's most visible supporters in the music community.

# Music Modernization Act or MMA

- Unique
- One of few bills to bring us even with technology – normally tech stays ahead of the law
- And more amazing
- **Passed Unanimously**
- **By both the House and the Senate!**

# The Present State of Affairs of the Music Industry

## A Fashionista's Guide to Music Licensing:

- **Music Licensing** is divided between two components: (i) **Music Publishing**: Rights to the Musical Composition (music/lyrics); and (ii) **Music Recording**: Rights to the Sound Recording. Each can have potentially separate rightsholders;
- **Synchronization Licenses**: When a song is recorded in sequence with the visual images of a video or film to make an advertisement or promotion, one needs a synchronization license (referred to as a “synch license” for the music composition and a master license for the sound recording”;
- **Mechanical Licenses**: When a musical composition is recorded and the song is copied and distributed on CDs, records, tapes, ringtones and digital downloads, a mechanical license paying on the musical composition is required. This is needed when copies of sound recordings are sold or given away (*i.e.*, GWP DVDs or allowing downloads of a recording from a website);
- **Public Performance Licenses**: This enables one to play a sound recording or live performance over radio, in a retail store, at a public venue, over a website streaming (*i.e.*, with no interactivity from the listener in being able to choose, rewind, download, etc. like Pandora);
- **Clearance and Licensing of Music Can Be Complicated and Time Consuming**: There can be multiple rights holders, *i.e.*, labels, songwriters, lyricists, and composers that can be difficult to identify and establish contact with, often each for a separate negotiation; and
- **Pre-1972 Sound Recordings**: Pre-copyright, different results depending upon the jurisdiction and court.

# The Present State of Affairs of the Music Industry

- **Where's the Beef?**: When music moved to the digital world, services like Spotify (depending on the interactivity level of the subscription) looked closer to the distribution of a song requiring a mechanical license than just internet radio requiring a performance license. But rightsholders were not seeing payment. Some like Jay-Z and Beyoncé launched their own platform (Tidal);
- **Too Many Mouths to Feed:** Sometimes record labels were licensing whole catalogs where payment may not flow down to artists or songwriters. Additionally, it is often difficult to track where payment should go sometimes as these days pop music is now being created by multiple songwriters, lyricists, arrangers and artists who contribute different portions of the music and the lyrics.



# MMA – Bipartisan works



# Headed Home – Orrin Hatch and Phil Springer

- Published on Aug 26, 2009
- Here is a stirring tribute song to my good friend, Senator Ted Kennedy called 'Headed Home.' I wrote this song with the great Phil Springer. Take a moment to listen to the words. You don't have to agree with everyone's politics...none of us agree 100% of the time. But you have to admire a lifetime dedicated to public service and improving the lives of others -- and that is just one of the many things that made Ted great. I think this song captures a small part of Ted's legacy of service. Listen to it and see what you think.

# Music Modernization Act

- Combines three previously pending bills
- Title I – Music Licensing Modernization – Amended version of the Music Modernization Act
- Title II – Compensation Legacy Artists for Their Songs, Service, and Important Contributions to Society – the CLASSICS Act
- Title III – Allocation for Music Producers – the AMP Act

# Music Licensing Modernization

- Primarily amends the Section 115 compulsory license for making phonorecords
- A compulsory license for the underlying music – not the sound recording
- Requires an authorized first phonorecord or digital phonorecord delivery (DPD)
- Can still obtain a compulsory per work license
- BUT... also creates a blanket mechanical license for digital music providers
- Blanket license available on January 1 following expiration of the second year period following enactment – In this case January 1, 2021

# Music Licensing Modernization

- Low tech – Physical configurations still licensed on a per-work, individual song basis
- Digital Music Providers – Blanket license for --
  - Permanent downloads
  - Limited downloads
  - Interactive streaming

# Transition period

- Notice of intent on the musical work owner
- If unknown – no longer serve on Copyright Office
- If unknown – must continue to search for musical work owner until the blanket license availability date (1/1/2021) then turn over accrued royalties to the musical licensing collective (MLC) created under the MMA along with reports of usage.
- Following license availability date, DMP may obtain a blanket license by submitting a notice of license to the MLC.

# Penalties for noncompliance – not serving notice of intent

- Before blanket license availability date - not serving notice of intent on music owner– forecloses DMP from securing a compulsory license during transition
- After blanket license availability date – not serving notice of license on the MLC foreclosed DMP from securing a blanket compulsory license for three years
- Blanket license provides safe harbor from copyright liability
- 60 day notice and cure under blanket license -- failure to timely cure may lead to default, termination and copyright liability

# Rates still set by Copyright Royalty Judges

- New rate setting standard
- Willing buyer / Willing seller
- Same standard used for similar compulsory license provisions for sound recordings in Section 114(d)(2) and Section 112.

# Mechanical Licensing Collective

- Meets certain criteria – most importantly a non-profit entity not owned by any other entity but one created by copyright owners to carry out the responsibilities set under the MMA
- Designated by the Copyright Office with the approval of the Librarian of Congress
- Initial designation not later than 270 days after enactment – Approximately June 11, 2019.
- Periodic review of designation every five years

# Mechanical Licensing Collective

- Board composition
- 14 voting members and 3 nonvoting members
- 10 voting members shall be representatives of music publishers
- 4 voting member shall be professional songwriters
- 1 nonvoting member for 1) representative of nonprofit trade association of music publishers; 2) representative of the digital licensing coordinator and 3) representative of nonprofit trade association advocating on behalf of songwriters in the U.S.
- DMPs and significant nonblanket licenses pay an administrative assessment to support activities of the MLC

# Mechanical Licensing Collective

## Authorities and functions

- Offer and administer blanket licenses
- Collect and distribute royalties from DMPs.
- Identify musical works in sound recordings and locate musical work owners
- Administer a process for copyright owners to claim musical work ownership
- Collect administration fee from DMPs and significant nonblanket licensees
- Includes a dispute resolution committee
- Maintain musical work database

# Musical Works Database

- Matching musical works with their sound recordings and identifying musical work owners
- Matched works – Includes title, owner, contact information, international standard musical work code, identifying information for sound recordings which include the musical work and other information as may be prescribe by regulation by the Register of Copyrights
- Unmatched works – similar information but only to the extent known

# Sound recording information

- Musical work copyright owner with works listed in the musical works database shall engage in commercially reasonable efforts to deliver to the MLC information on the names of the sound recordings in which the musical works are embedded.

# Also

- Significant nonblanket licensees have reporting obligations to MLC
- MLC collects and distributes royalties as reflected in usage reports and MLC records
- Holds royalties accrued from unmatched works for three years then distributes to copyright owners identified in the MLC records
- Audit rights – each copyright owner has right to audit only once in a year for any or all of the preceding three calendar years.
- Adds 36 new definitions to the Copyright Act

# Also – Consent decrees

- ASCAP and BMI since 1940's
- Consent decree rate proceedings – Judges to be randomly selected.
- Original consent decree oversight judges foreclosed from rate proceedings
- Consent decree review by the Antitrust Division of the Department of Justice could affect the careful balance created by the MMA
- Congress given oversight role in any process or decision of Justice to move for motion to terminate or “sunset” these consent decrees but only those governing performing rights societies.

# CLASSICS Act

- Creates digital performance rights royalties for sound recordings fixed before February 15, 1972 – the date sound recordings first received federal copyright protection.
- Covers works fixed between January 1, 1923 and February 15, 1972.
- Leaves existing litigated settlements in place
- Limited state law preemption
- Does not apply to other uses of sound recordings
- Significantly – Pre-1972 copyright owners must file with the Copyright Office a schedule of works subject to potential claims of statutory damages or attorneys' fees – Copyright Office Interim Regulation issued October 16, 2018, Fed. Reg. Vol. 83, No. 200, page 52150

# CLASSICS Act

- Section 1401 (a) Unauthorized Acts – Anyone who before February 15, 2067, and without the consent of the rights owner, performs publicly, by means of a digital audio transmission, a sound recording fixed on or after January 1, 1923 and before February 15, 1972, shall be subject to the remedies in sections 502 through 505 to the same extent as an infringer of copyright.
- Period of protection – 95 years from first publication of recording
- But subject to certain additional transitional periods
- Recordings before 1923 – Protection ends December 31, 2021
- No protection for pre-February 15, 1972 recordings after February 15, 2067
- Certain noncommercial uses of sound recordings that are not being commercially exploited are permitted – Copyright Office Notice of Inquiry – October 16, 2018

# Allocation for Music Producers – AMP Act

- Shortest of the three titles
- Codifies the Letters of Direction presently received and administered by Sound Exchange for distribution of digital performance royalties in sound recordings to copyright owners and artists who either self-identify or are identifiable.
- Currently applies to works fixed on or after November 1, 1995, the enactment date for federal protection for digital performance rights in sound recordings.

# AMP Act — Sound recordings fixed before November 1, 1995

- Absent Letter of Direction these provisions apply
- Deduct 2% of recording artist receipts for distribution to those eligible
- Eligible people include – a producer, mixer or sound engineer of the sound recording
- Such eligible persons must file written certification of eligibility with Sound Exchange
- Must include: 1) falls within eligible category; 2) had written contract with record company or recording artist providing entitlement to royalty payments based on exploitation of the sound recording payable to the recording artist(s); and 3) made creative contributions to the sound recording

# MMA Takeaways You Need To Know:

## The MMA essentially corrects two critical issues:

- **Simplifies Payment of Mechanical Royalties:** The MMA simplifies how mechanical royalties get paid to music publishers/songwriters for music streaming. Clearinghouses (like ASCAP/BMI/SESAC for performance rights) created to centralize process will take payments, find correct parties and allocate payments (this takes it out of record labels hands which is more efficient and there is less risk of conflict over who gets paid what, etc.);
- **Licensing of Mechanical Rights Is Simplified:** For mechanical licensing, unless a brand is utilizing a clearinghouse or a service, the process of finding the right publisher and/or artist can be complicated and difficult. The MMA simplifies the process but also ensures that someone is likely to get paid;
- **The Litigation of Pre-1972 Works is Over:** The extensive litigation over whether rights to pre-1972 sound recordings were pre-empted by the Copyright Act and who owned what rights is clarified by the MMA; and
- **Licensing of Pre-1972 Sound Recordings Simplified:** Licensing of a sound recording by brands is clarified and much more simple.

# Music Modernization Act

- Useful links
- <https://www.congress.gov/115/bills/hr1551/BILLS-115hr1551enr.pdf> (enrolled bill)
- <https://www.congress.gov/115/crpt/srpt339/CRPT-115srpt339.pdf> (Senate Report)
- <https://www.copyright.gov/music-modernization/implementation.html>
- (Copyright Office news)
- <https://www.copyright.gov/music-modernization/> (Copyright Office summary)

# Thank you

