

THE WAITING IS THE HARDEST PART: THE MUSIC MODERNIZATION ACT’S ATTEMPT TO FIX MUSIC LICENSING

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I. INTRODUCTION

In 1979, Tom Petty and the Heartbreakers released *Damn the Torpedoes*, an album that would go triple platinum, launch the band to stardom, and become one of the highlights of Petty's career.¹ 1979 was the year Petty changed the music industry, but the bluesy-southern rock singer didn't do it with his guitar: he did it by going bankrupt.² Like many artists in 1976, when a record label executive handed him his first recording contract, Petty unknowingly would become liable to his label, MCA, for all the expenses related to his records production.³ To fight back, he filed for Chapter 11 bankruptcy which would effectively void his contract with MCA and make him a "free-agent"; a self-sabotage that would hurt MCA far more than it would hurt him.⁴ In order to avoid the loss of one of their most valuable artists, MCA agreed to cut a new deal with Petty that allowed him to continue recording under his own label.⁵ This dramatic legal battle left a lasting impact on the music industry as more and more labels like MCA loosened these predatory practices against new songwriters.⁶

It's oddly poetic that Petty, posthumously, became involved in the most recent tectonic shifts affecting the music industry.⁷ On December 31, 2017, Wixen Publishing (that represents valuable portions of Petty's copyright) sued Spotify for \$1.6 billion alleging that they have been illegally making copyrighted music available on their platform without paying for the appropriate mechanical licenses.⁸ Spotify and other on-demand music apps have been fighting these lawsuits for years now, citing the inefficiency of the U.S. licensing regimes while others criticize the apps for simply being lazy.⁹ Wixen was the last major lawsuit filed in these licensing wars between digital on-demand music and copyright holders as Congress has now responded with sweeping legislation that (in theory) is going to make everyone happy.¹⁰

On October 11, 2018, President Trump signed into law the music copyright reform that has been sought by—but consistently denied to¹¹—performers in the

1. Fred Goodman, *How Tom Petty Beat the Labels*, BILLBOARD (Oct. 6, 2017), <https://www.billboard.com/articles/columns/rock/7989387/tom-petty-beat-record-labels>.

2. *Tom Petty Defies His Record Label and Goes Bankrupt*, HISTORY (Nov. 13, 2009), <https://www.history.com/this-day-in-history/tom-petty-defies-his-record-label-and-files-for-bankruptcy>.

3. Goodman, *supra* note 1.

4. *Id.*

5. *Id.*

6. *Id.*

7. See Sarah Jeong, *A 1.6 Billion Lawsuit is Based on a Law Made for Player Pianos*, THE VERGE (Mar. 14, 2018), <https://www.theverge.com/2018/3/14/17117160/spotify-mechanical-license-copyright-wixen-explainer> (highlighting that the endless infringement lawsuits against apps like Spotify have been a catalyst for the MMA).

8. Daniel Kreps, *Wixen's \$1.6 Billion Spotify Lawsuit: What You Need to Know*, ROLLING STONE (Jan. 3, 2018), <https://www.rollingstone.com/music/music-news/wixens-1-6-billion-spotify-lawsuit-what-you-need-to-know-202532>.

9. See *id.* (illustrating the issues these two segments of the music industry have with the current licensing laws).

10. Kreps, *supra* note 8.

11. See Darrell Issa & Tyler Grimm, *A Blanket for a Tired Statute: Congress Must Repair the Mechanical License in Section 115 of the Copyright Act*, 55 HARV. J. ON LEGIS. 23, 29 (2018) (discussing such previous attempts including SIRA in 2006).

music industry for decades.¹² The Music Modernization Act (MMA) is arguably the most substantial reform to music licensing law since the 1970's.¹³ With overwhelming bipartisan support, the Act is Congress' answer to help an industry struggling with how to make sure everyone gets paid when "paying" for music has changed dramatically in even the last decade.¹⁴ New interactive streaming platforms such as Spotify, Pandora, Apple Music, and YouTube, to an extent, have changed the commercial music landscape in monumental ways.¹⁵ Steve Jobs and iTunes may have been the first viable digital music vendor¹⁶ but these on-demand listening platforms have become the primary growing medium to consume music.¹⁷ The MMA is possibly the foundational legislation for the foreseeable future of law regarding music copyright regulation and calculation of royalties.

Part II of this Note will elaborate how the MMA integrates with the current landscape of the music industry and copyright law, illustrating the major issues the Act attempts to solve. Part III of this Note will analyze the major changes the MMA implements and highlights areas of needed attention. Finally, Part IV of this Note will highlight recommendations for additional agency considerations to improve and further modernize music copyright law.

II. BACKGROUND

A. *Music Licensing Prior to MMA*

Music—and music licensing—is a unique branch of copyright law because a "song"¹⁸ creates a dual system of copyright ownership.¹⁹ Music copyright protects two owners; the owner of the composition and the owner of the sound recording.²⁰ The artist who composes a song²¹ retains copyright in that written composition while the record company, and occasionally a recording artist with significant bargaining power, typically owns the copyright in the recording that is promoted and sold.²² The composer and performing artist can be the same

12. Amy X. Wang, *Trump Signs Landmark Music Bill into Law*, ROLLING STONE (Oct. 11, 2018), <https://www.rollingstone.com/music/music-news/trump-signs-music-modernization-act-736185>.

13. *Id.*

14. *Id.*

15. *Id.*

16. Brandon Griggs & Todd Leopold, *How iTunes Changed Music, and The World*, CNN BUSINESS (Apr. 26, 2013, 4:40 PM), <https://www.cnn.com/2013/04/26/tech/web/itunes-10th-anniversary/index.html>.

17. Hugh McIntyre, *The Top 10 Streaming Music Services by Number of Users*, FORBES (May 25, 2018, 9:15 AM), <https://www.forbes.com/sites/hughmcintyre/2018/05/25/the-top-10-streaming-music-services-by-number-of-users>.

18. The word "song" in this Note refers to any form of musical composition.

19. JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY (4th ed. 2015).

20. *Id.*

21. The composer of the song and author of the lyrics may share the composition copyright. *See, e.g.*, ELTON JOHN (music) & BERNIE TAUPIN (lyrics), GOODBYE YELLOW BRICK ROAD (MCA) (1973) (providing an example of sharing the composition right).

22. *Copyright Registration of Musical Compositions and Sound Recordings*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/register/pa-sr.html> (last visited Mar. 25, 2019).

person, providing him or her with two different copyrights.²³ Music composers (songwriters) almost always assign their copyright to a publisher who will then handle all of the licensing and commercial business for the work.²⁴ For example, when Carl Perkins wrote *Blue Suede Shoes* in 1955 his publisher would hold the copyright for its composition.²⁵ Sun Records—who recorded the song with Perkins as performer—would own individual copyright for that particular sound recording.²⁶ Sun Records would hold additional copyright in the recording of the same song they made with Elvis Presley and Buddy Holly.²⁷ The distinction of the two kinds of copyright is important because it determines the rights and remedies available for different kinds of licensing within the music industry.²⁸ FM/AM terrestrial radio stations have different licensing requirements to play music than iTunes does to make a song available for purchase.²⁹ Digital radio stations, like SiriusXM, have different requirements than traditional AM/FM radio.³⁰ On-demand (aka interactive streaming) music platforms are unique in how they interact with both the composition and sound recording copyright owners.³¹

1. *Licenses for the Composition: Section 115*

Copyright protection for songwriters is typically complicated.³² Right from the beginning, a songwriter contracts with a music publisher; assigning it the copyright in exchange for a percentage of whatever money is made from the song from various royalties and licenses.³³ Music Publishers act as intermediaries for songwriters and the music industry to facilitate royalty and licensing agreements.³⁴ Performance licenses and mechanical licenses being the main two, discussed further in this Note.³⁵

23. For the sake of clarity in this Note, I will always assume the composers and performing artist are different individuals.

24. COHEN, *supra* note 19, at 410.

25. Perkins' original copyright for the song now belongs to MPL Music Publishing which was founded by former Beatle Paul McCartney. *Search Music*, MPL MUSIC PUB., <https://www.mplcommunications.com/music-search?chk=0499c639384191989d30&showsongs=carlperkins> (last visited Mar. 29, 2019).

26. David Troedson, *Carl Perkins: Blue Suede Shoes and Elvis Presley*, ELVIS AUSTL. (Nov. 1, 2015), <https://www.elvis.com.au/presley/carl-perkins-blue-suede-shoes.shtml> (discussing that Sun Records originally recorded Perkins *Blue Suede Shoes* but at the time sound recordings were not protected by any copyright. Pre-1972 recordings are now protected under MMA).

27. In the 1950's, performing artists almost always gave full sound recording ownership to their record label. Elvis, for example, always assigned his sound recording copyright to his label. This is a little more diverse now with performing artists and record labels agreeing to percent shares of sound recording royalties. COHEN, *supra* note 19, at 411.

28. See 17 U.S.C. §§ 114–115 (2018) (governing the licensing of both the performance right and the reproduction/distribution rights of these two different copyrights).

29. See 17 U.S.C. §§ 114–115 (2018) (distinguishing between transmission and distribution).

30. See 17 U.S.C. § 114(d)(2)(A) (2018) (stating subscription broadcast transmissions are subject to statutory licensing).

31. See Issa & Grimm, *supra* note 11, at 27–29 (discussing the complexities interactive streaming services pose for the current licensing regimes).

32. See *id.* at 24–25 (noting the complications regarding American copyright law).

33. See Jeong, *supra* note 7 (discussing the typical process of a songwriter assigning their work to a publisher under contract).

34. COHEN, *supra* note 19, at 410.

35. *Infra*, Section III (discussing implications of performance and mechanical licenses).

Publishers commonly work with the three Performance Right Organizations (PROs) to license their songs for a fixed royalty rate so that they may be performed on terrestrial (AM/FM) radio and some digital radio formats.³⁶ This is commonly known as the “performance right.”³⁷ ASCAP, BMI, and SESAC are the three main US PROs, and between them nearly every composer or artist is represented (via a contract negotiated by their publisher).³⁸ The PROs grant blanket licenses to radio stations to perform music written by their members for negotiated fees.³⁹ The radio stations pay the PROs for the right to play whatever is in their catalogue, and then the PROs pay the various publishers according to terms of their agreement.⁴⁰ Any disputes as to the royalty rates are assigned to designated rate court Judge in the Southern District of New York.⁴¹ This is relatively efficient for composition copyright owners to receive their royalties and for radio stations to legally play music.⁴² This practice has been going on for decades and is built on the theory that radio performances are advertisements for the eventual sale of sound recordings.⁴³

The PROs were never allowed to distribute “mechanical” licenses for the copyright’s they represent.⁴⁴ Mechanical licenses are what allow companies to actually sell physical or digital copies of music.⁴⁵ In order to sell vinyl, CD’s, or make a song available for streaming or download, a company must obtain a mechanical license.⁴⁶ This is a license to record and distribute the song, *not* to copy someone else’s sound recording.⁴⁷ Therefore, this license is required for anyone wishing to make an original recording of someone else’s composition.⁴⁸ These licenses can be negotiated with music publishers individually, but most acquire them via another third-party organization: the Harry Fox Agency

36. See generally Jeong, *supra* note 7 (noting that broadcasts on FM radio stations are considered a “public performance”).

37. 17 U.S.C. § 106(4) (2018).

38. Alexander Reed Speer, *Internet Killed the Radio Star: Preventing Digital Broadcasters from Exploiting the Radio Music License Committee Rate to the Detriment of Song Writers*, 23 J. INTELL. PROP. L. 357, 364 (2016).

39. COHEN, *supra* note 19, at 411.

40. See Jeong, *supra* note 7 (summarizing the collection and payment procedures of PROs); see, e.g., Resource Center, ASCAP, <https://www.ascap.com/help> (last visited Mar. 29, 2019) (stating ASCAP gives a license to use “ANY or ALL” or the music in its catalogue).

41. The MMA altered this practice from assigning one rate court judge for all ongoing disputes to now assigning judges on a rotating basis. *Musical Works Modernization Act (changes to section 115)*, COPYRIGHT, <https://www.copyright.gov/music-modernization/faq.html> (last visited Mar. 20, 2019); see Amy Goldsmith, *Musically Inclined: The Music Modernization Act of 2018*, IP WATCHDOG, (Nov. 9, 2018), <https://www.ipwatchdog.com/2018/11/09/music-modernization-act-2018/id=102954> (discussing the changes to the rate court judge procedures); see also *In re Pandora Media, Inc.*, 6 F. Supp. 3d 317, 367 (S.D.N.Y. 2014), *aff’d sub nom. Pandora Media, Inc. v. Am. Soc. of Composers, Authors & Publishers* 785 F.3d 73 (2d Cir. 2015) (highlighting an example of one of these disputes).

42. 17 U.S.C. § 106 (2018); COHEN, *supra* note 19, at 411.

43. *In re Pandora Media, Inc.*, 6 F. Supp. 3d at 367.

44. See generally Jeong, *supra* note 7 (discussing PROs and on what they are allowed to collect royalties).

45. See *id.* (describing the history and interpretations behind mechanical licenses).

46. *FAQs*, HARRY FOX AGENCY [hereinafter HFA FAQs], <https://www.harryfox.com/#/faq> (last visited Mar. 29, 2019); see generally Jeong, *supra* note 7 (depicting a helpful flow chart to understand the licensing process).

47. 17 U.S.C. § 115 (2018); see also HFA FAQs, *supra* note 46 (illustrating the purpose and scope of the license).

48. 17 U.S.C. § 115 (2018).

(HFA).⁴⁹ Similar to the PRO's, publishers contract a royalty agreement with the HFA, and then the agency distributes mechanical licenses for the song to whomever seeks them.⁵⁰ Since 1998, Section 115 provides a compulsory mechanical license for songs that have been “previously distributed to the public, embodied in a phonorecord created under the authority of the copyright owner.”⁵¹ To take advantage of this, a license seeker can simply pay statutory rate to the composer.⁵² However, since the HFA maintains a vast catalogue of copyright owners, most licensees obtain through them in lieu of the compulsory process.⁵³

2. *Licenses for the Sound Recording: Section 114*

The copyright owner of the sound recording also maintains a “performance” and “reproduction/distribution” right which are licensed with different scope and purpose.⁵⁴ First, it's important to note that Section 114(b) only provides protection from direct duplication of the recorded sounds.⁵⁵ Therefore, someone who records their own version of song—that doesn't use any of the originals recorded sounds—doesn't infringe the sound recordings copyright.⁵⁶ Simply put, if you if sing “Yesterday” exactly like Paul McCartney, he has no claim against you for infringement of the sound recording.⁵⁷ To obtain a license for the performance of a sound recording, licensees can either directly negotiate with the record company or pay a statutory fee to a third-party broker: SoundExchange being the most popular.⁵⁸ As discussed earlier, the performance of sound recordings are theoretically believed to be advertisements for the eventual sale of the sound recording.⁵⁹ Therefore, Sections 112 and 114 of the Copyright Act provide this statutory license for qualified entities to perform the sound recordings for a small royalty rate.⁶⁰ Qualified entities include digital radio stations.⁶¹ Digital music broadcasters, such as the non-interactive Pandora

49. COHEN, *supra* note 19, at 414.

50. *Id.*

51. *Id.* at 413.

52. *Id.*; 17 U.S.C. § 115(c) (2018).

53. See Skyla Mitchell, *Reforming Section 115: Escape from the Byzantine World of Mechanical Licensing*, 24 CARDOZO ARTS & ENT. L.J. 1239, 1253, 1258 (2007) (finding “HFA is the largest service of its kind” and “the compulsory license can be prohibitively expensive and time-consuming”).

54. 17 U.S.C. § 114 (2018).

55. 17 U.S.C. § 114(b) (2018).

56. *Id.*

57. Although the composition copyright owner certainly may. 17 U.S.C. § 115 (2018).

58. U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE 21–23 (2015), <https://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf>.

59. *In re Pandora Media, Inc.*, 6 F.Supp.3d 317, 367 (S.D.N.Y. 2014) (“There is agreement between the parties that it is appropriate to require a higher licensing fee from a music service that acts as a substitute for the sale of a musical work, when compared to one that does not. To the extent that a music service is a replacement for sales, it is said to cannibalize the sales . . .”).

60. *Id.* at 332 (describing the royalty fee structure mandated by Sections 112 and 114 of the Copyright Act).

61. U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE 46 (2015), <https://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf>.

app and SiriusXM, qualify when they operate similar to traditional radio.⁶² These qualifications for digital platforms are based on numerous considerations aimed at ensuring the music broadcast is limited, randomized, and do not archive their broadcasts for extended periods of time.⁶³ SoundExchange is the only authorized entity to administer mass licenses by Congress and this remains fairly efficient for both record companies and music broadcasters.⁶⁴

Licensing the reproduction and initial distribution of copies of sound recordings was easy to understand before the MMA.⁶⁵ To secure a distribution license for the sound recording, distributors would simply have to contract with the individual record companies.⁶⁶ Big music distribution companies, such as Spotify, have made deals with the three biggest Record Label conglomerates: Universal, Sony, and Warner Music Group.⁶⁷

B. On-Demand Platforms

On-demand music platforms include companies like Spotify, Apple Music, Amazon Music, and even YouTube.⁶⁸ On-demand service are centered around the practice of interactive streaming; the subscriber can pick and choose to listen to any song they like as many times as they like.⁶⁹ The rise of these platforms in the last several years has left the music industry with mixed emotions.⁷⁰ On one hand, these services have reduced the practice of pirating music, but on the other, disputes over appropriate licensing and royalty rates have become far more complicated.⁷¹ Regardless, on-demand continues to grow towards

62. *In re Pandora Media, Inc.*, 6 F.Supp.3d 317, 367 (S.D.N.Y. 2014) (describing how Pandora's competitors include Sirius XM and terrestrial radio).

63. *Licensing 101*, SOUNDEXCHANGE, <https://www.soundexchange.com/service-provider/licensing-101> (last visited Mar. 29, 2019).

64. *Id.*

65. Michelle Castillo, *Spotify IPO Filing Reveals How Insanely Complicated it is to License Music Rights*, CNBC (Feb. 28, 2018), <https://www.cnbc.com/2018/02/28/how-spotify-licenses-and-pays-for-music-rights.html>.

66. *Id.*

67. *Id.*

68. Lucy Ingram, *And the Winner is... Best Music On-Demand Streaming Service*, CULT OF MAC (Feb. 18, 2014), <https://www.cultofmac.com/265655/winner-best-music-demand-streaming-service>.

69. *Id.*; Bill Rosenblatt, *SiriusXM's Pandora Deal Consolidates Digital Radio Amid Increasing Competition*, FORBES (Sept. 25, 2018, 1:35 PM) [hereinafter Rosenblatt I], <https://www.forbes.com/sites/billrosenblatt/2018/09/25/siriusxms-pandora-deal-consolidates-digital-radio-amid-increasing-competition> (“[T]he interactive streaming services all have features for listening to programmed music, including Spotify’s Weekly Playlist, Deezer’s Flow, and Apple Music’s large selection of expert-curated playlists in addition to playlists published by individual users.”).

70. Rosenblatt I, *supra* note 69 (“One reason why SiriusXM and Pandora are consolidating is that they are facing competition from two sides[,]” including from terrestrial and streaming radio.).

71. See Glyn Moody, *Spotify Reduces Piracy, But Also Cuts Into Digital Track Sales*, ARS TECHNICA (Oct. 28, 2015, 11:34 AM), <https://arstechnica.com/tech-policy/2015/10/spotify-reduces-piracy-but-also-cuts-into-digital-track-sales> (explaining how giving wide access to consumers has lowered the incentive to pirate music); *but see* Marsha Silva, *Netflix and Spotify Aren't Reducing Piracy, Study Finds. 'Piracy is Higher than Ever...'*, DIGITAL MUSIC NEWS (Mar. 22, 2018), <https://www.digitalmusicnews.com/2018/03/22/music-piracy-spotify-netflix> (arguing that music piracy is still a serious concern and previous reports oversold the success apps like Spotify would have. However, Silva notes that visits to stream-ripping sites has declined by approximately 34%).

becoming the primary medium for music consumption.⁷² The MMA could be viewed as the music industry accepting this reality and attempting to end the growing pains of the past several years of this transition.⁷³

On-demand platforms essentially require performance and mechanical licenses from both the composer and sound recording copyright owners.⁷⁴ Paying and negotiating for these licenses are—by a clear margin—on-demand's biggest expenditures.⁷⁵ For example, Spotify spent about \$3.9 billion of its \$4.9 billion revenue on licensing fees in 2017.⁷⁶ These costs are so high because they have to negotiate licensing deals with the major music publishers, record labels, and the three PROs.⁷⁷ The Copyright Royalty Board sets the royalty rate for all sound recordings covered under the Section 114 statutory license.⁷⁸ If any artist or song is unlicensed and a platform, like Spotify, makes it available for streaming they are liable for infringement.⁷⁹

Prior to the MMA, on-demand platforms were competing in a risky race to dominate the industry by having the largest catalogue of music to make available to their consumers.⁸⁰ Similar to the competition between video streaming services (i.e. Netflix, Hulu, Amazon Prime Video) on-demand music subscriptions are more valuable the more content they provide.⁸¹ Spotify is the clear leader in the industry but the key to their success was providing more music early on than their competitors.⁸² In the race to the top, these streaming services undoubtedly failed to obtain or maintain licenses for significant portions of their catalogue, which led to countless infringement lawsuits over the past few years.⁸³ Which brings us back to Tom Petty.

Wixen Publishing filed an infringement suit against Spotify for \$1.6 billion in December, 2017, on behalf of their songwriters.⁸⁴ Prior to that, songwriters Melissa Ferrick and David Lowery led a class action suit demanding \$150 million in 2016⁸⁵ and Bluewater Music Services Corp. sued for \$15 million in unpaid royalties in 2016.⁸⁶ All of these suits have now settled with Spotify

72. Archana Oberoi, *The Rise of On-Demand Music Streaming Services*, DAFFODIL (June 17, 2018, 5:33 PM), <https://insights.daffodilsw.com/blog/the-rise-of-on-demand-music-streaming-services>.

73. *Understanding the Music Modernization Act: 5 Things You Should Know*, ONES TO WATCH, <https://www.onestowatch.com/blog/understanding-the-music-modernization-act-5> (last visited Mar. 29, 2019).

74. Castillo, *supra* note 65.

75. *Id.*

76. Felix Richter, *Spotify's Losses Widen as Royalty Costs Pile Up*, STATISTA (Mar. 1, 2018), <https://www.statista.com/chart/4894/spotify-revenue-vs-costs>.

77. *Id.*

78. *Commercial Webcaster 2019 Rates*, SOUNDEXCHANGE, <https://www.soundexchange.com/service-provider/rates/commercial-webcaster> (last visited Mar. 29, 2019).

79. 17 U.S.C. § 106.

80. Newsbeat, *How Spotify Came to be Worth Billions*, BBC (Mar. 1, 2018), <https://www.bbc.com/news/newsbeat-43240886>.

81. *Id.*

82. *Id.*

83. Kreps, *supra* note 8.

84. *Id.*

85. Robert Levine, *Spotify Settles Class Action Lawsuit Filed by David Lowry and Melissa Ferrick With a \$43.4 Million Fund*, BILLBOARD (May 26, 2017), <https://www.billboard.com/articles/business/7809561/spotify-settles-class-action-lawsuits-filed-by-david-lowry-and-melissa>.

86. *Id.*

paying out sizeable amounts.⁸⁷ While Spotify got most of the attention for on-demand music's infringement troubles, their competitors all dealt with similar accusations and subsequent settlements.⁸⁸ Statutory remedies for copyright infringement are powerful with plaintiffs being entitled of up to \$150,000 for willful infringement.⁸⁹ An on-demand platform that makes a single unlicensed song available could in theory be liable for \$150,000.⁹⁰ Wixen claimed, at the time of filing their suit, that as much as 21% of Spotify's songs may be inadequately licensed.⁹¹ Calculating what these on-demand platforms could potentially be liable for seems laughable as the numbers break into the eleven and twelve-digit numbers.⁹²

So, no one was happy: songwriters weren't getting a fair deal, on-demand was frustrated with the licensing process with these endless lawsuits, and there was no effective avenue to resolve conflicts other than litigation. Hence, the MMA passed the House and Senate unanimously and became law on Oct. 11, 2018.⁹³

C. *The MMA's Reforms*

The term "Modernization" could be considered a misnomer as the Act is more of an attempt to cleverly close a few loopholes in Section 114 and 115 while keeping most of the regulatory structure operating as usual.⁹⁴ The Act is compilation of several different tweaks to different licensing processes with the overall aim being to provide fair compensation to copyright owners and provide them easier avenues to collect royalties from on-demand interactive streaming platforms that may have neglected to maintain adequate licenses.⁹⁵

1. *Section 115 Reform: The Mechanical Licensing Collective*

The most significant change that will be implemented is the establishment of a new administrative board called the Mechanical Licensing Collective (MLC).⁹⁶ Its purpose is to allow interactive streaming platforms to be granted

87. *Id.*; Sarah Perez, *Spotify Settles the \$1.6B Copyright Lawsuit Filed by Music Publisher Wixen*, TC, <https://techcrunch.com/2018/12/20/spotify-settles-the-1-6b-copyright-lawsuit-filed-by-music-publisher-wixen> (last visited Mar. 29, 2019).

88. Daniel Sanchez, *Apple Music Faces a Class Action Lawsuit Over Unpaid Royalties*, DIGITAL MUSIC NEWS (Dec. 18, 2017), <https://www.digitalmusicnews.com/2017/12/18/apple-music-beats-lawsuit/>; Ben Sisario, *Big Labels Take Aim at Pandora on Royalties*, N.Y. TIMES (Apr. 17, 2014), <https://www.nytimes.com/2014/04/18/business/media/lawsuit-against-pandora-seeks-royalties-for-golden-oldies.html>.

89. 17 U.S.C. § 504(c) (2018).

90. *Id.*

91. John Bonazzo, *1.6 Billion Copyright Suit Claims 21% of Spotify Songs Are Unlicensed*, OBSERVER (Jan. 3, 2018), <https://observer.com/2018/01/spotify-hit-with-1-6b-copyright-lawsuit-for-unlicensed-songs>.

92. *See generally id.* (noting that there are 30 million songs on Spotify).

93. Bill Rosenblatt, *Here Are the Loopholes Closed by the Music Modernization Act*, FORBES (Oct. 11, 2018) [hereinafter Rosenblatt II], <https://www.forbes.com/sites/billrosenblatt/2018/10/11/music-modernization-act-now-law-leaves-one-copyright-loophole-unclosed/#1f1de1177272>.

94. *Id.*

95. *Id.*

96. 17 U.S.C. § 115(d) (2018) ("A digital music provider that qualifies for a compulsory license under subsection (a) may . . . obtain a blanket license from copyright owners through the mechanical licensing

blanket mechanical licenses so that they no longer have to negotiate with each individual songwriter/publisher.⁹⁷ The question of whether interactive streaming services require mechanical licenses is counterintuitive considering there is no *actual* copying of the work being done.⁹⁸ This license was implicitly required considering the nature of interactive streaming essentially operates the same as a download.⁹⁹ The MMA states this explicitly and offers the ease of the MLC for these platforms to obtain these mechanical licenses.¹⁰⁰

The MLC will also manage a publicly accessible database that will keep track of songwriters, publishers, and their corresponding copyrights that they own.¹⁰¹ The MLC will be governed by a board mixed with representatives from publishers and independent songwriters.¹⁰² Prior to the MMA, apps like Spotify had to negotiate directly with publishers to obtain a license which was tedious and inefficient.¹⁰³ Songwriters/publishers were disadvantaged because their only avenue of relief was often litigation.¹⁰⁴ The MLC is ideally a compromise. The on-demand streaming services will easily get blanket licenses, but the publishers will largely be able to determine fair royalty rates and administer the process.¹⁰⁵ One of the more attractive components of the MLC will be that its databases will keep track of songs that have yet to be claimed by a songwriter/publisher and provides them an audit right to petition their ownership.¹⁰⁶

In addition to the MLC, Congress has now changed the standard of review the Copyright Royalty Board will use to determine a fair compulsory statutory license for compositions.¹⁰⁷ The Board may now consider “free-market conditions” when valuing the royalty rate for artists who decide to cover or perform certain compositions.¹⁰⁸

2. Section 114 Reform

The MMA also repeals Section 114(i) with the intention that it will lead to more economically accurate performance royalty rates.¹⁰⁹ Performance royalty

collective to make and distribute digital phonorecord deliveries of musical works through one or more covered activities.”).

97. Goldsmith, *supra* note 41.

98. Todd Larson, *Don't Believe the Hype: Spotify Is Right to Challenge Mechanical License Demands for Interactive Streaming*, 94 PAT., TRADEMARK & COPYRIGHT J. 1466, 1469 (2017) (“[T]here is no full-song copy accessible to the user after the stream unless the user actively initiates a download.”).

99. See *MGM Studios, Inc. v. Grokster, Ltd.*, 454 F. Supp. 2d 966, 998 (C.D. Cal. 2006) (pointing out that conventional music downloads are “uncontroversially” subject to mechanical licenses).

100. 17 U.S.C. § 115(d) (2018).

101. Goldsmith, *supra* note 41.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. 17 U.S.C. § 115(d)(3)(C)(i)(V) (2018) (authorizing MLC to administer “a process by which royalties for works for which the owner is not identified or located are equitably distributed to known copyright owners”).

107. Kevin Hickey, *The Music Modernization Act: Extending Copyright Protection to Pre-1972 Sound Recordings*, CONG. RES. SERV. (Oct. 15, 2018), <https://fas.org/sgp/crs/misc/LSB10181.pdf>.

108. *Id.*

109. *Id.*

rates are determined by the Copyright Office who assigns federal judges in the Southern District of New York jurisdiction over any disputes.¹¹⁰ Prior to the MMA, these appointed judges would hear arguments from publishers and the PROs to determine a fair rate that radio stations, like Pandora, would pay to broadcast music that belonged to the PROs catalogue.¹¹¹ Section 114(i) forbid both publishers and the PROs from submitting evidence regarding sound recording royalty rates to help these judges determine a fair performance rate.¹¹² The purpose of this statute was to avoid songwriter/publishers from “double dipping” by getting a high royalty from song sales and a high royalty from radio plays,¹¹³ creating a “positive feedback loop” where increases in one rate would increase the other and vice versa.¹¹⁴ But the industry realized—and the MMA recognized—that this logic only makes sense if the radio listen and the song sale are different transactions so to speak.¹¹⁵ On-demand platforms interactive streaming count as both a public performance and, in theory, sales of music.¹¹⁶ Recognizing this economic reality, the MMA repealed 114(i) and now both publisher and PROs can argue a fair performance royalty rate more holistically.

In addition to 114(i) repeal, the MMA will now assign federal judges on a rotating basis to settle disputes between publishers and the PROs.¹¹⁷ Congress believed that this would foster more confidence and credibility in the courts decisions since every rotated judge would be reviewing the facts of each dispute fresh.¹¹⁸ Since ASCAP and BMI are constantly arguing their case for certain performance rates, they enjoy the concept of a fresh judicial review.¹¹⁹

3. *Protection for Pre-1972 Sound Recordings*

One of the last major changes enacted by the MMA was to grant record labels performance rights in sound recordings made before 1972.¹²⁰ Numerous

110. *ASCAP-BMI Consent Decrees*, FUTURE OF MUSIC COALITION (Aug. 4, 2016), <https://futureofmusic.org/article/fact-sheet/ascap-bmi-consent-decrees> (explaining that the Southern District of New York is given jurisdiction by the Register of Copyright to handle disputes between the PROs and music providers because of the historic antitrust/competition law concerns that accompanied the federal consent decrees that allowed the PRO's to distribute blanket performance licenses).

111. Andrew Flanagan, *A Music Industry Peace Treaty Passes Unanimously Through Congress*, NPR (Sept. 19, 2018, 5:17 PM), <https://www.npr.org/2018/09/19/649611777/a-music-industry-peace-treaty-passes-unanimously-through-congress>.

112. 17 U.S.C. § 114(i) (2012) (repealed 2018).

113. *Id.* (“It is the intent of Congress that royalties payable to copyright owners of musical works for the public performance of their works shall not be diminished in any respect as a result of the rights granted by section 106(6).”).

114. Flanagan, *supra* note 111.

115. *See id.* (noting the purpose of MMA).

116. 17 U.S.C. § 112 (e) (2018) (indicating that Congress has decided to deem interactive streams as akin to “downloads”). Even though there is no copying of the music, the song track is essentially given to the consumer for unlimited listens that effectively reproduces and distributes the song. *See also* Tyler Ochoa, *An Analysis of Title I and Title III of The Music Modernization Act, Part 1 of 2 (Guest Blog Post)*, TECH. & MKTG. L. BLOG (Jan. 22, 2019), <https://blog.ericgoldman.org/archives/2019/01/an-analysis-of-title-i-and-title-iii-of-the-music-modernization-act-part-1-of-2-guest-blog-post.htm> (describing the rationales behind the legislation).

117. Flanagan, *supra* note 111.

118. *Id.*

119. *Id.*

120. Rosenblatt II, *supra* note 93.

artists from the 1950s and 60s have loathed that digital radio platforms have been able to broadcast their sound recordings without having to pay the sound recording performance license.¹²¹ The CLASSICS Act was incorporated into the MMA to retroactively grant this protection, forcing platforms like SiriusXM and Pandora to pay the licenses.¹²² With high profile artist support—and a nostalgia inducing title—the Act is being celebrated by performers.¹²³ The CLASSICS Act does not implicate terrestrial radio broadcasts who can still perform any sound recordings without securing either composition or sound recording performance licenses. This arguable preferential treatment is much to the ire of the digital radio platforms.¹²⁴

Licensing requirements treat traditional terrestrial radio platforms and digital radio platforms differently.¹²⁵ FM Radio only needs performance license from the composition owner—easily obtained via one of the PROs.¹²⁶ However, under federal law no one needed a license from the sound recording owner for any music recorded prior to February 15, 1972.¹²⁷ Many artists argued this was a major loophole that disadvantaged older recordings and inspired numerous amicus brief filings and petitions to Congress from various artists.¹²⁸

Copyright ownership for sound recordings did not exist until 1972—setting the official “start date” of protection at February 15, 1972—and the current dual system of copyright ownership developed from there.¹²⁹ The MMA grants performance rights in sound recordings made between January 1, 1923, and February 15, 1972, providing them 95 years of protection from the date of the recordings first publication.¹³⁰ This was a provision under the CLASSICS Act that was compiled along with the legislation umbrellaed under the MMA passed on October 11, 2018.¹³¹ Prior to the MMA, these sound recordings were sometimes protected by state laws, but those protections have now been declared preempted.¹³² Proponents of the CLASSICS Act—including Carole King, John Densmore from the Doors, The Beatles corp., Grateful Dead Productions, and the estates of Judy Garland and Hank Williams—argue that it’s simply a matter of fairness that they get paid the same as anyone who recorded on February 16,

121. Billboard Staff, *Bette Midler, Jason Isbell Join Statement to Congress Urging CLASSICS Act Passage*, BILLBOARD (Dec. 20, 2017), <https://www.billboard.com/articles/business/8077748/classics-act-letter-pre-1972-royalties>.

122. *Id.*

123. *Id.*

124. Jim Meyer, *SiriusXM CEO Jim Meyer Explains the Trouble With The Music Modernization Act (Guest Op-Ed)*, BILLBOARD (Aug. 23, 2018), <https://www.billboard.com/articles/business/8471802/siriusxm-ceo-jim-meyer-music-modernization-act-op-ed>.

125. *Id.*

126. *Id.*

127. *Id.*

128. Billboard Staff, *supra* note 121; Robert Levine, *Legacy Artists File Brief in Lawsuit Against Pandora Over Pre-72 Recordings*, BILLBOARD (Jan. 14, 2018), <https://www.billboard.com/articles/news/8094250/pandora-lawsuit-pre-72-recordings-artists-brief>.

129. *Id.*

130. 17 U.S.C. § 114 (2018).

131. Hickey, *supra* note 107.

132. *Id.*

1972 and beyond.¹³³ Critics of this legislation argue serious concerns about undermining the public domain and other constitutional questions.¹³⁴

III. ANALYSIS

The MMA is a curious piece of legislation given that it deals with issues that have plagued the music industry for decades with every viable attempt at reform being shot down.¹³⁵ Yet, it passed unanimously both houses of Congress and became law relatively quickly in the fall of 2018.¹³⁶ The following analysis will first discuss how the MMA affects power dynamics among major industry players, highlight the ambiguity of the new Music Licensing Collective, and discuss the MMA's economic rationales.

A. *The MMA's Current Impact on the Industry*

1. *On-Demand Platforms*

If there is a clear “winner” when analyzing the MMA it is most likely the on-demand music services that championed the legislation.¹³⁷ The interactive streaming services: Spotify, Apple Music, Google Play etc., come out victorious for both reducing their liability and streamlining their licensing efforts.¹³⁸ A once decentralized mechanical licensing process is now centralized under the MLC.¹³⁹ Even though digital streaming services will bankroll most of the MLC's operations, they are more than happy to do so.¹⁴⁰ Services like Spotify add tens of thousands of new tracks to their catalogs every day and a single error used to mean they were opening themselves up to section 504(c) liability.¹⁴¹ The MLC is a huge victory for interactive streaming providing them administrative ease.

The on-demand services also implanted an immunity provision for themselves that they could not be found liable for copyright infringement for any failure to obtain a license after the date of January 1, 2018.¹⁴² This is why Wixen Publishing filed their \$1.6 billion lawsuit against Spotify on December 31, 2017, as they were vigilant enough to see their window of opportunity may be closed forever.¹⁴³ The Wixen suit was settled in December of 2018 but the

133. Robert Levine, *Legacy Artists File Brief in Lawsuit Against Pandora Over Pre-'72 Recordings*, BILLBOARD (Jan. 14, 2018), <https://www.billboard.com/articles/news/8094250/-pandora-lawsuit-pre-72-recordings-artists-brief> (“‘It’s basically simple,’ Jefferson Airplane singer Grace Slick told veteran music writer Steve Hochman . . . ‘If you are making bucks off of my stuff, guess what? I deserve a portion of it.’”).

134. Hickey, *supra* note 107.

135. See Issa & Grimm, *supra* note 11 (citing past attempts at reform).

136. Wang, *supra* note 12.

137. *Id.*

138. Bill Rosenblatt, *Music Modernization Act Loses Opportunity to Clean Up Music Industry Data*, COPYRIGHT & TECH. (Oct. 1, 2018) [hereinafter Rosenblatt III], <https://copyrightandtechnology.com/2018/10/01/music-modernization-act-loses-opportunity-to-clean-up-music-industry-data>.

139. *Id.*

140. Wang, *supra* note 12; 17 U.S.C. § 115 (d)(7) (2018).

141. 17 U.S.C. § 504 (c) (2018).

142. 17 U.S.C. § 115 (d)(10)(A) (2018).

143. Kreps, *supra* note 8.

full terms of the settlement deal remain unknown.¹⁴⁴ Unsurprisingly, there are still publishers and songwriters upset with interactive streaming services and felt the \$43 million class action settlement wasn't enough to forgive the streaming industry for their past infringement actions.¹⁴⁵ This immunity provision may appear to publishers as a "get of jail free card" for the on-demand music services. However, the provision is theoretically justified because the establishment of the MLC provides composition owners an avenue of recourse to retroactively obtain royalties from the digital services streams.¹⁴⁶ Without this immunity publishers would have the option of pursuing statutory damages for infringement or obtaining compensation at the royalty rate set by the MLC.¹⁴⁷ This would possibly lead to a collapse of faith/reliance in the MLC; on-demand services won't bankroll the agencies function if they could still be sued for infringement regardless.¹⁴⁸ Additionally, songwriters/publishers may be inclined to assess their risks and pursue an infringement remedy and ignore the MLC process all together.¹⁴⁹

With newly granted immunity from infringement litigation and a new ease of obtaining blanket mechanical licenses, the streaming industry won serious victories in the MMA. A strong indication that the hype may be true that they will be the primary source of music consumption for the foreseeable future.¹⁵⁰

2. *Publishers & Songwriters*

Publishers and songwriters will essentially control the MLC allowing them the power to determine fair royalty rates for compulsory blanket mechanical license for composition owners.¹⁵¹ But will this administrative control be worth it? Or will the various publishing companies long for the days they could negotiate their mechanical licenses freely? It may still be a little too early to tell exactly how the various sized publishers will enjoy the post MMA world, it appears that they likely stand to benefit as a whole.¹⁵²

The largest publishing companies include Warner Chappel, Universal, and Sony/ATV making up about two-thirds of the market and independent publishers control the remaining third.¹⁵³ Predictions suggest that these major

144. Paul Resnikoff, *Wixen Music Publishing Settles Its Monster \$1.6 Billion Lawsuit Against Spotify*, DIGITAL MUSIC NEWS (Dec. 20, 2018), <https://www.digitalmusicnews.com/2018/12/20/wixen-music-publishing-billion-spotify>.

145. *Id.*

146. Rosenplatt, *supra* note 138.

147. *Id.*

148. *Id.*

149. *Id.*

150. See Oberoi, *supra* note 72 ("Forecasts suggest that 55.8% of the entire U.S. population, which somewhere accounts to 68.4% of the U.S. internet users will have become online music streaming service users by 2018.")

151. 17 U.S.C. § 115(e)(1)(D)–(F).

152. Rosenplatt, *supra* note 138.

153. *Revenue Market Share of the Largest Music Publishers Worldwide from 2007 to 2016*, STATISTA, <https://www.statista.com/statistics/272520/market-share-of-the-largest-music-publishers-worldwide> (last visited Mar. 29, 2019).

publishers will reap early benefits once the MLC is truly enacted.¹⁵⁴ On-demand services will hand over all the money in unclaimed mechanical royalties to the MLC who will then distribute most of it back to these three publishers estimated at roughly \$1.5 billion.¹⁵⁵ The reasoning being that unclaimed royalties should be “fairly” distributed proportionally with the publishers with corresponding market shares.¹⁵⁶ Essentially, both publishers and on-demand services will start with a “clean slate”: paying for blanket licenses from the MLC who will then facilitate royalty payments to the designated composition owners.¹⁵⁷ There are obvious concerns about this \$ 1.5 billion windfall in unclaimed royalties and the three major publisher’s trustworthiness to distribute them “correctly”.¹⁵⁸ This topic and the MLC’s three-year holding period concerns will be discussed further on.

Indie publishers and indie songwriters will now have an approachable means to collect royalties for their mechanical licenses via the MLC’s audit service.¹⁵⁹ The on-demand music services have to set aside royalty payments for any songs they make available that do not have a designated songwriter on record.¹⁶⁰ The songwriter essentially petitions the MLC that they are in fact the songwriter and the MLC will distribute the due royalty payments.¹⁶¹ Michael Eames, President of the Association of Independent Music Publishers are pleased as it “ensur[es] that the independent publishing community and songwriters are represented fairly in the implementation and enforcement of the MMA.”¹⁶²

3. *Digital Radio Providers*

If there are any arguable “losers” with the passing of the MMA it is likely digital radio providers.¹⁶³ Popular online radio include Pandora (non-interactive service), SiriusXM Radio, and iHeart Radio.¹⁶⁴ The retroactive grant of copyright protection for sound recordings made between 1923–1972 now requires these radio stations to pay a mechanical license for any songs they play

154. Paul Resnikoff, *Major Publishers Will Receive an Estimated \$1.5 billion in the First Year After the Music Modernization Act Passes, Sources Say*, DIGITAL MUSIC NEWS (Sept. 12, 2018), <https://www.digitalmusicnews.com/2018/09/12/music-publishers-1-5-billion-music-modernization-act>.

155. *Id.*; see also 17 U.S.C. § 115(d)(3)(J) (describing the distribution process).

156. See Resnikoff, *supra* note 154 (highlighting how this is one of the most controversial elements of the MMA).

157. John Miranda, *The Music Modernization Act Will Create a New Copyright Licensing Organization Called the ‘MLC’. What Will it Look Like?*, DIGITAL MUSIC NEWS (May 6, 2018), <https://www.digitalmusicnews.com/2018/05/06/music-modernization-act-mma-mechanical-licensing-collective-mlc>.

158. See Resnikoff, *supra* note 154. (stating that Senator Dianne Feinstein pointed out the lack of incentive the publishers may have to make sure that they are distributed to the right owners).

159. Marc Schneider, *‘Truly a Historic Moment’: Music Business Reacts to Music Modernization Act Becoming Law*, BILLBOARD (Oct. 11, 2018), <https://www.billboard.com/articles/business/8479469/music-business-reactions-music-modernisation-act-law-signing>.

160. *Id.*

161. *Id.*

162. American Songwriter, *Music Modernization Act Signed into Law*, AM. SONGWRITER (Oct. 11, 2018), <https://americansongwriter.com/2018/10/music-modernization-act-signed-law>.

163. Meyer, *supra* note 124.

164. *Id.*

from this era.¹⁶⁵ These stations already purchase these licenses for post-1972 recordings via either the compulsory license administered by the Copyright Office or via SoundExchange.¹⁶⁶ This doesn't add any "new" procedures for these services but it will impact their yearly expenses to a significant degree.¹⁶⁷ SiriusXM opposed the MMA for burdening digital radio services with paying mechanical and performance licenses yet traditional broadcast radio still only needs to secure performance licenses from the PROs.¹⁶⁸ SiriusXM CEO Jim Meyer argues that SoundExchange studies find over \$200 million are "lost" annually because traditional radio doesn't need to pay sound recording licenses.¹⁶⁹ The CLASSICS Act (imbedded in the MMA) doesn't address this loophole; but digital radio services will now be liable to pay for all sound recordings.¹⁷⁰

The root of Meyer's argument stems from challenging the paradigm that radio broadcasts are advertisements to promote the sale of sound recordings.¹⁷¹ Therefore, terrestrial radio need only compensate the songwriter because the sound recording artists (record label) would be compensated later.¹⁷² Meyer's argument is that we should stop this practice all together; make every radio station pay sound recording licenses so that way performing artists, engineers, and those who work in the studio are compensated.¹⁷³ This was the primary goal of the Fair Pay Act, one of the major pieces of music copyright reform that the MMA chose *not* to adopt.¹⁷⁴ The MMA chose to include a provision guaranteeing sound recording license payments would be split 50-50 between record labels and performing artists.¹⁷⁵

B. *The Music Licensing Collective*

The Music Licensing Collective is no-doubt the most significant change that the MMA brings to the music industry. It will be a brand-new administrative agency that acts as an independent third-party with government oversight.¹⁷⁶ 270 days from the date the MMA was enacted (July 8, 2019), the Register of Copyrights will propose the first members of the MLC's board of directors and make their names available for notice and comment.¹⁷⁷ The Board

165. *Id.*

166. *Id.*

167. *Id.*

168. Meyer, *supra* note 124.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. Meyer, *supra* note 124.

174. Marc Schneider, *Legislators Re-Introduce Bill to Make Radio Stations Pay For Music*, BILLBOARD (Mar. 30, 2017), <https://www.billboard.com/articles/business/7744254/fair-play-fair-pay-bill-congress-radio-pay-artists>; H.R.1836 – Fair Play Fair Pay Act of 2017 115th Congress (2017-18); Ed Christman, *Music Modernization Act Passed Thanks to Last-Minute Sirius XM Compromise: Sources*, BILLBOARD (Sept. 18, 2018), <https://www.billboard.com/articles/business/8475890/music-modernization-act-passed-siriusxm-compromise>.

175. Christman, *supra* note 174.

176. 17 U.S.C. § 115(d)(3) (2018).

177. 17 U.S.C. § 115(d)(3)(B) (2018).

will be made up of 14 voting members and 3 nonvoting members from the music publishing industry.¹⁷⁸ At least four voting members shall be professional songwriters, one nonvoting member from a non-profit trade association of music publishers, one nonvoting member from a digital music service sector, and one nonvoting member from a nonprofit advocacy group on behalf of American songwriters.¹⁷⁹

As much as the MMA promises a streamlined process there are three major concerns that the legislation does not provide the clearest guidance. First, if the MLC has adequate safeguards to ensure it maintains an effective database of music composition owners; second, reassurance that unclaimed royalties will not be allocated incorrectly; and third, whether the Collective will be able to adapt to future changes in the music industry and set royalty rates appropriately.

1. *MLC Incentive to Maintain an Efficient Database*

The MLC is tasked with managing an up-to-date, publicly available, and accurate database containing information designating songwriter/publisher with the sound recording tracks uploaded by interactive streaming services.¹⁸⁰ A task like this leaves many wondering: “why didn’t Congress just give the PROs or the HFA this responsibility?”¹⁸¹ The PROs already deal with publishers, music services, radio services and are predominantly viewed among the industry as an efficient intermediary.¹⁸² All Congress would have had to do was lift a 1942 consent decree from the Department of Justice that banned the PROs from distributing mechanical licenses.¹⁸³ These consent decrees were passed due to antitrust law concerns.¹⁸⁴ But this makes no rational sense now considering that Congress just created an independent “monopoly” in the MLC to distribute blanket mechanical licenses.¹⁸⁵

The need to maintain a high-quality database is crucial to the MLC’s success: it will allow the best royalty determinations, allow songwriters to audit accurately, and ensure cohesion among the industry.¹⁸⁶ Confidence may readily have been found in the existing PROs as opposed to a new agency. There are several ambiguities within the new Section 115 that could use some further

178. 17 U.S.C. § 115(d)(3)(D) (2018).

179. *Id.*

180. 17 U.S.C. § 115(d)(3)(C)(1) (2018).

181. See Issa & Grimm, *supra* note 11, at 29 (highlighting how Europe lets their PROs handle this task); Chris Castle, *Will Music Modernization Act Precipitate the Decline of BMI, ASCAP, SESAC?*, HYPEBOT.COM (Feb. 1, 2019), <http://www.hypebot.com/hypebot/2018/02/is-the-music-modernization-act-a-harbinger-of-performance-rights-societies-decline-in-the-us.html>.

182. Liane Bonin Starr, *ASCAP, BMI, SESAC: The Guide to PROs*, SONGTRUST (May 3, 2018), <https://blog.songtrust.com/songwriting-tips/pros-whats-the-difference> (explaining that Performing Rights Organizations (PROs) handle the affairs of songwriters, including protection against piracy).

183. Bruce H. Kobayashi, *Opening Pandora’s Black Box: A Coasian 1937 View of Performance Rights Organizations in 2014*, 22 GEO. MASON. L. REV. 925, 941–42 (2015).

184. *Id.* at 942.

185. Bill Rosenblatt, *Music Modernization Act Draws Concerns About Mechanical Licensing Agency*, COPYRIGHT & TECH. (June 13, 2018) [hereinafter Rosenblatt II], <https://copyrightandtechnology.com/2018/06/13/music-modernization-act-draws-concerns-about-mechanical-licensing-agency>.

186. *Id.*

attention.¹⁸⁷ Currently, Section 115(d) provides that the MLC is responsible for identifying each musical work and providing its title, copyright owner (or percentage share), the owners contact information, and information on any sound recordings where the work is embodied: including the featured artist, sound recording owner, producer, and any other relevant information to assist in identify the work.¹⁸⁸ The digital music services are required to assist them to a reasonable degree as well.¹⁸⁹ This is exactly what the industry needs but it's unclear how rigorous the MLC's efforts to locate the information must be.¹⁹⁰

The Act creates a laundry list of information sought but ambiguous guidance as to what happens if a work remains unmatched with a copyright owner. There are macro level review safeguards, such as the mandatory audit of the agency to be conducted every five years¹⁹¹, but this is infrequent and likely won't remedy the fact that there is not a clear articulation of a minimum standard of effort. New tracks will pour in every day from digital music providers, but the law doesn't clearly articulate how much time/effort the MLC needs to invest in matching all of these works. We can assumingly infer that under a "reasonableness" standard, the MLC will have to implement practices that ensures diligence in finding this information, but commentators like Rosenblatt argue this only "has incentive to do the job well enough that no one complains too much."¹⁹² The complaints from the big publishers presumably taking precedence over complaints from an independent songwriter.

If the MLC can't find a match for a musical work, accrued royalties go into a holding account (that gains interest) that can be claimed if the copyright owner petitions for it.¹⁹³ If three years pass from the date royalties were received from digital services and the musical work is still unclaimed the royalties will be paid out to the big publishers (the justification for this remaining fairly elusive.)¹⁹⁴ Galdston and Wolfert—who are independent songwriters themselves—argue that this policy adds responsibilities on independent songwriters that previously never existed.¹⁹⁵ Most young musicians will not have the resources or knowledge to handle this registration process; leaving the big publishing companies cashing in the unclaimed royalties.¹⁹⁶ If the MLC insists on releasing unclaimed royalties from their control they should implement internal policies

187. *Id.*

188. 17 U.S.C. § 115 (d) (E) (ii) (I)–(V) (2018).

189. *See generally* 17 U.S.C. § 115(d)(3)(E)(iii) (explaining how MLC's can use music services in matching unmatched works).

190. Rosenblatt II, *supra* note 185.

191. 17 U.S.C. § 115 (ix)(II) (2018).

192. Rosenblatt II, *supra* note 185.

193. 17 U.S.C. § 115 (d)(G); (D)(3)(D)(v) (2018) ("The unclaimed royalties oversight committee established under subparagraph (D)(v) shall establish policies and procedures for the distribution of unclaimed accrued royalties and accrued interest in accordance with this subparagraph, including the provision of usage data to copyright owners to allocate payments and credits to songwriters pursuant to clause (iv), subject to the approval of the board of directors of the mechanical licensing collective.")

194. *See* Phil Gladston & David Wolfert, *The Music Modernization Act Misses the Mark*, VARIETY (Mar. 16, 2018), <http://variety.com/2018/biz/news/the-music-modernization-act-misses-the-mark-guest-column-1202728994> (criticizing the expansion of influence the MMA will provide big publishing companies and disadvantage independent songwriters ability to collect due royalties).

195. *Id.*

196. *Id.*

that mandate a final search for the songwriter with an accompanied report of their efforts. The Register of Copyright should proscribe regulations to see that this process does not carelessly hand accrued royalties over to major music publishers without giving songwriters fair notice and opportunities.

Critics highlight this concern that the day-to-day thoroughness of the MLC owner-matching practice may not have been the case if the PROs were given this responsibility.¹⁹⁷ In theory, their competition amongst one another would have encouraged internal incentives to create the most helpful database.¹⁹⁸ But Congress decided that collecting this information under one umbrella was preferable and only time will tell if these efficiency concerns prove true.¹⁹⁹

2. *The MLC's Multiple Audit Proceedings*

In pursuit of the goal of transparency, Congress has provided copyright owners the ability to conduct an audit of the MLC's operations in order to verify the accuracy of the licensing process.²⁰⁰ The copyright owner submits a notice of audit to the Register of Copyrights and the MLC will allow the private auditor to review all of their data for the designated royalty payment.²⁰¹ The copyright owner is limited to one audit per year and can only review the prior three years of royalty payments.²⁰² The copyright owner hires their own "qualified auditor,"²⁰³ who then submits their assessment to the MLC that has the opportunity to correct any errors and propose an offer to remedy the dispute.²⁰⁴ Final determinations of these audits are left to a dispute resolution committee created by the MLC board of directors.²⁰⁵ The MLC will then credit or debit the owner's royalty payments accordingly.²⁰⁶ Copyright owners did enjoy a broader agency to negotiate the rates of their mechanical licenses prior to the MMA, but this provision ensures they will be able to keep the MLC honest and accurate in their royalty calculations.

On the other end, the MLC will have the power to audit the digital music services to ensure that they are paying an appropriate amount for their blanket licenses.²⁰⁷ This will operate almost identically to the previously discussed audit process;²⁰⁸ the only differences being that the digital music service will be liable for the audit cost if they are found to have underpaid more than ten percent of the royalties due and no statute of limitations defense may be invoked.²⁰⁹

197. Rosenplatt II, *supra* note 185.

198. *Id.*

199. See generally 17 U.S.C. § 115(d) (2018) (explaining how Congress placed the responsibility entirely with the MLC).

200. 17 U.S.C. § 115 (d)(L) (2018).

201. 17 U.S.C. § 115 (d)(L) (2018).

202. 17 U.S.C. § 115 (d)(3)(L)(i)(I) (2018).

203. 17 U.S.C. § 115(e)(25) ("The term 'qualified auditor' means an independent, certified public accountant with experience performing music royalty audits.").

204. 17 U.S.C. § 115 (d)(3)(L)(i)(V).

205. 17 U.S.C. § 115 (d)(3)(D)(vi).

206. 17 U.S.C. § 115 (d)(3)(G)(i).

207. 17 U.S.C. § 115 (d)(4)(D).

208. 17 U.S.C. § 115 (d)(4)(D).

209. 17 U.S.C. § 115 (d)(3)(D)(vi).

However, there remains little guidance within Section 115 guiding the MLC's discretion to bring these audits.²¹⁰ This could all balance out as copyright owners pressure the MLC, who then pressure the digital services; yet this is another area where the Register of Copyright's regulations could provide further instruction to ensure the MLC does not sleep on this audit right.

Arguably deserving the most attention is Section 115's requirement that the MLC conduct an internal audit of its own practices every five years.²¹¹ This audit is supposed to assess the agency's management of royalty payments, security measures, and overall administrative effectiveness.²¹² This oversight is undoubtedly welcomed but little clarity is provided as to the rigor and credibility of this review. The MLC will select—and pay for—its own qualified auditor with no designated budget or requirement that a thorough conflict check be done.²¹³ Commentators like Rosenblatt argue that “the MLC will be motivated to spend as little money as possible for an audit that's as toothless as possible.”²¹⁴ Additionally, if most of the audit procedures from copyright owners and digital service operate on a three year review timeline,²¹⁵ why is the internal audit every five years? If any substantive errors in the MLC practices were discovered, they may have missed their window of opportunity to audit the digital services and remedy the deficiency. This may be a mere bureaucratic inevitable reality but, keeping industry faith in the MLC is extremely important.²¹⁶ It truly is a “peace-treaty” between digital providers and the publishing industry.²¹⁷ Most vulnerable are the smaller indie songwriters and publishers;²¹⁸ they will not have the resources to audit the MLC effectively, which could perpetuate their neglect to advocate against digital services on indie songwriters' behalf.²¹⁹

IV. RECOMMENDATION

At the time of writing this Note, the MMA has not taken any significant effect: the Register of Copyright has not identified members that will make up the board of directors of the MLC, nor have any substantial regulations been promulgated for notice and comment. I propose two recommendations of regulations that would assist in the music industry's adoption of the MMA: First, a regulation further specifying and staggering the MLC process of locating unmatched musical works; and second, requiring collaboration with other mechanical license brokering agencies to assist in the audit of the MLC.

210. Rosenblatt I, *supra* note 138.

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. 17 U.S.C. § 115 (d)(3)(D)(vii).

216. Andrew Flanagan, *A Music Industry Peace Treaty Passes Unanimously Through Congress*, NPR (Sept. 19, 2018, 5:17 PM), <https://www.npr.org/2018/09/19/649611777/a-music-industry-peace-treaty-passes-unanimously-through-congress>.

217. *Id.*

218. Daniel Sanchez, *3 Major Problems with the Music Modernization Act*, DIGITAL MUSIC NEWS (Feb. 27, 2018), <https://www.digitalmusicnews.com/2018/02/27/music-modernization-act-major-problems>.

219. *Id.*

A. *Staggered Review to Locate Unmatched Works*

One of the biggest issues plaguing the music industry is the “data problem:” keeping track of the tens of thousands of new tracks and their copyright owners on a day-to-day basis.²²⁰ Many independent songwriters are unsure if the organization is going to be able to operate appropriately in their interests as opposed to the big publishers.²²¹ If we can ensure that the MLC works to the best of their abilities to match musical works with their owners, most major disputes can be avoided.²²² My recommendation is that regulations require a staggered reporting of the agency’s songwriter search efforts throughout the “Unclaimed Royalty” three-year grace period.²²³

A formal report detailing the MLC efforts to locate a songwriter would be documented (and made publicly available)²²⁴ at three distinct times: first, when the song/track is first provided to the agency; second, 18 months after this date; and third, 6 months prior to the end of the third year the song has gone unmatched. The goal of staggering these search efforts is to ensure the MLC does not conduct a reasonable search when first presented with a new track, fail to locate the songwriter, and then sleep on its responsibility until the three-year time limit expires. Each of these three search reports being made available to the public serves as an internal check on the MLC and provides more transparency to songwriters that reasonable efforts were made to find them. If the MLC fails to conduct these staggered search reports then a songwriter may have the right to claim due royalties regardless of the three-year holding period. This will put added pressure on the MLC to conduct thorough searches or risk being liable for royalties they’ve already handed over to publishers.

For added security, a provision could require that the final search report (six months prior to the end of three-year holding period) instruct the MLC to send out notices to whomever they find likely able to notify the songwriter that their unclaimed royalties will soon be distributed if unclaimed.²²⁵ This may just be the digital music provider who may have learned new information in the past two-and-a-half years and can forward that information back to the MLC. Mandatory staggered search reports would force communication and provide the MLC the necessary credibility that it is working diligent to keep an accurate songwriter database.

220. Rosenblatt II, *supra* note 185.

221. See Matt Fitzgibbons, *The Devil in the Details of the Music Modernization Act*, MORNING CONSULT (Sept. 7, 2018), <https://morningconsult.com/opinions/devil-details-music-modernization-act> (arguing that currently the MMA will be more concerned with financial protectionism of bigger businesses).

222. *Id.*

223. Henry Gradstein, *How the Music Modernization Act Takes Royalties from DIY Songwriters and Gives Them to the Major Publishers*, BILLBOARD (Mar. 3, 2018), <https://www.billboard.com/articles/business/8225293/music-modernization-act-royalties-diy-songwriters-henry-gradstein>.

224. In lieu of being able to provide the actual songwriter information.

225. See generally Gradstein, *supra* note 223 (describing the three-year holding period).

B. Collaborative Audit of the MLC

My second recommendation seeks to remedy the worry that self-governance and monopoly power of the MLC will lead to laziness and bureaucratic apathy. First, I recommend that Section 115 be amended to reflect that another government body (even one as close as the Register of Copyright) be given power to designate the auditor that will review the MLC every five years. This will also require the auditor to be appropriately screened for conflicts of interest (which the current legislation does not have). This will theoretically inspire a more credible and thorough review of the agency's efficiency.

In addition to a more independent audit, the MLC should be subject to mandated collaboration with the mechanical license brokers that already exist. Senator Ted Cruz opined months ago that the MMA should have provided means of competition by allowing companies like the HFA, Music Report Inc., and MediaNet to distribute blanket mechanical licenses in addition to the MLC.²²⁶ While this was not adopted, there is still a potential to involve these private actors to help ensure the MLC operates effectively. As Senator Cruz points out, these mechanical license brokers already have experience handling this process and the MMA is threatening their decline.²²⁷ My proposal is that these private organizations have representation and input into the auditing process of the MLC. If the auditor had to consult several representatives from these brokers, they would be able to assist in the assessment of the MLC's royalty calculations and database maintenance.

But these private mechanical license brokers could also be proscribed means to audit the MLC themselves (similar to copyright owners). The HFA could request an audit on certain royalty calculations done by the MLC and argue they were in error. With the right balance of limitations and auditing power, these private brokers could serve as another watchdog to ensure the MLC is calculating fair royalty rates. Since the MLC is the only entity allowed to distribute blanket mechanical licenses, this audit power of private brokers could stave off the "monopoly" fears discussed by Senator Cruz.²²⁸ It has already been predicted that some music publishers will hire them anyway to help determine if they should exercise their audit power,²²⁹ so let them be involved in the supervision. This regime may also encourage further collaboration between the organizations to assist in matching unclaimed recordings with songwriters.

The overall aim of these two recommendations is to encourage communication, further checks and balances, and ease of transition into a new mechanical licensing regime.

226. Ed Christman, *As the Clock Ticks, New Hurdles Mount Against the Music Modernization Act*, BILLBOARD (Aug. 16, 2018), <https://www.billboard.com/articles/business/8465684/music-modernization-act-senate-hurdles-against-vote>.

227. *Id.*

228. *Id.*

229. Ed Christman, *President Trump Signs Music Modernization Act into Law with Kid Rock, Sam Moore As Witnesses*, BILLBOARD (Oct. 11, 2018), <https://www.billboard.com/articles/business/8479476/president-trump-signs-music-modernization-act-law-bill-signing>.

V. CONCLUSION

Mechanical licenses for compositions became the law of the land in 1909 because songwriters were upset they were not receiving royalties for player piano rolls.²³⁰ 110 years later, Congress believes the Music Modernization Act is the key to make these laws work effectively in the world of digital streaming and countless other ways people now listen to music. The Act's overwhelming support is a testament to its necessity. Everyone hopes it fulfills its noble intent: to ensure that those who invest in the creation of new music are valued for their contributions. This Note provided background on the major legislative changes the MMA imposed, analyzed several provisions to highlight areas of needed attention, and sought to propose viable solutions to ease the transition into a new licensing regime. The hardest part is over, here is hoping the Act brings us *The Best of Everything* that the industry hopes for.²³¹

230. Jeong, *supra* note 7.

231. TOM PETTY & THE HEARTBREAKERS, *Best of Everything*, on SOUTHERN ACCENTS (MCA 1985).