
THE REAL SLIM SHADY: HOW SPOTIFY AND OTHER MUSIC
STREAMING SERVICES ARE TAKING ADVANTAGE OF THE LOOPHOLES
WITHIN THE MUSIC MODERNIZATION ACT

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I. Introduction

The popularity of MTV in the 1980s is equivalent to the modern esteem of music streaming services.¹ Music streaming services have become the biggest discovery platform for artists due to their role as the primary medium of music consumption.² The

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¹ See *MTV launches*, HISTORY (July 27, 2019), archived at <https://perma.cc/MR6M-X4VV> (claiming that MTV revolutionized the music industry in the 1980s). Artists and record labels capitalized on MTV's popularity and relied on the program as a promotional vehicle for musical works. *Id.*; see also Jamie, *The History Of MTV & Birth Of The First Music Videos*, EVERYTHING 80S PODCAST (Feb. 16, 2019), archived at <https://perma.cc/RKB2-WC82> (explaining artists and record labels in the 80s relied on MTV to connect with and broadcast music to their fans); Amy X. Wang, *Spotify is not just streaming. It's becoming the entire music industry.*, QUARTZ (Oct. 25, 2017), archived at <https://perma.cc/U2FP-V3V7> (noting that Spotify is hoping to be just as successful as MTV was in its' prime).

² See Ethan Jakob Craft, *MILLENNIALS REPORTEDLY LISTEN TO MORE AUDIO THAN ANY OTHER GENERATION*, ADAGE (June 20, 2019), archived at <https://perma.cc/G5SK-7592> (claiming that “[m]illennial audio consumption in the [United States] is booming” due to the increase in streaming’s popularity); Neil Howe, *How Music Streaming Won Over Millennials*, FORBES (Jan. 16, 2019), archived at <https://perma.cc/8T4T-4TZZ> (stating that “[s]treaming is officially the lifeblood of the [United States] music industry”); see also Tori Misrok, *How Playlists Broke the Internet: An Analysis of Copyright in Playlist Ownership*, 40

Recording Industry Association of America (“RIAA”) submitted an annual report in 2019 stating that streaming generates 75 percent of the music industry’s revenue due to generational change and the new-found popularity in music streaming applications.³ This spike in popularity has led to an increase in streaming companies such as Spotify, Apple Music, Tidal, Pandora, and Amazon Music gaining household recognition.⁴ There are non-interactive services, such as Pandora or internet radio stations, that do not allow users to choose the exact song they want to hear; while interactive, on-demand services give users full control of what they listen to.⁵ Spotify is the clear frontrunner for on-demand services, with 87 million paid subscribers and 191 million monthly users as of November 1, 2018.⁶

CARDOZO L. REV. 1411, 1423–24 (2019) (defining music streaming as “listening to music or watching videos in ‘real time,’ as opposed to downloading the music or video file to a computer and listening to or watching it at a later date”). It is likely that audio streaming’s popularity and growth is due to the “convenience of having millions of songs at one’s fingertips, the mobility of the service, or the ability to create playlists . . .” See Misrok, *supra* at 1423; see also Daniel S. Hess, *The Waiting Is The Hardest Part: The Music Modernization Act’s Attempt To Fix Music Licensing*, 2019 U. ILL. J.L. TECH. & POL’Y 187, 189 (2019) (introducing the changes music streaming services have influenced on the commercial landscape of the industry and are the primary source for audio consumption).

³ See Howe, *supra* note 2 (relying on the RIAA’s report to highlight the popularity of music streaming); see also ABOUT RIAA, RIAA (Nov. 2, 2019), archived at <https://perma.cc/4UYK-YRF5> (“The [RIAA] is the trade organization that supports and promotes the creative and financial vitality of the major music companies.”).

⁴ See Matthew Field, *The best music streaming services: Apple Music, Spotify, YouTube Music, and Amazon Music compared*, TELEGRAPH (Apr. 19, 2019), archived at <https://perma.cc/FJ5E-P6H2> (noting the community’s familiarity with streaming apps and explaining the features of each service).

⁵ See Jason Koransky, *Digital Dilemmas: The Music Industry Confronts Licensing for On-Demand Streaming Services*, ABA (Feb. 2016), archived at <https://perma.cc/RDM3-EAWF> (providing the differences between non-interactive and interactive services); see also Misrok, *supra* note 2, at 1425 (explaining that Spotify is an example of an interactive music streaming service because it offers on-demand access to music).

⁶ See Howe, *supra* note 2 (highlighting that each music streaming company offers different plans for their subscribers such as unlimited streaming, listening to songs offline, or streaming music without advertisements). See also Hess, *supra* note 2, at 193 (explaining that audio streaming services are a way for subscribers to sample music from all different genres and artists in a simplified and organized way). Hess specifies that “the subscriber can pick and choose to listen to any song they like as many times as they like.” *Id.* See also Misrok, *supra* note 2, at 1413

Unfortunately, the sudden spike in popularity coupled with the newness of music streaming services created an unorganized and unregulated system dictating how artists and producers collect royalty payments from these companies.⁷

Music streaming services have left the music industry at a crossroads, where more music is at the consumer's fingertips, but less money is earned by artists and producers.⁸ Although Spotify is the

(explaining that subscribers pay to digitally stream music from catalogues and pre-made radio stations in order to make personalized playlists). Subscribers rely on their playlists for use in their daily lives including playing music at their businesses, while riding in the car, or during workouts. *Id.* See Daniel Sanchez, *What Streaming Music Services Pay (Updated for 2019)*, DIGITAL MUSIC NEWS (Dec. 25, 2018), archived at <https://perma.cc/8CJP-VLPJ> (identifying Spotify as the clear frontrunner for music streaming companies because of its large number of subscribers). See, e.g., Koransky, *supra* note 5 (exemplifying the significant role Spotify has played in the growth of on-demand popularity).

For example, in 2011, paid subscriptions in the United States for these services were estimated at approximately 1.8 million. By 2014, paid subscriptions in the United States for on-demand services more than quadrupled, reaching approximately 7.7 million, with paid subscription revenues growing to approximately \$799 million. Significantly, revenues from all streaming services (which would also include noninteractive services like Pandora) accounted for 27 percent of total U.S. music industry revenues in 2014.

Id.

⁷ See Howe, *supra* note 2 (identifying that less money is being earned by artists and streaming companies, despite the programs' growing popularity); see also Koransky, *supra* note 5 (noting the revenue challenges faced by the sudden growth of music streaming). In 2015, the House Judiciary Committee held a roundtable with music industry officials to discuss the issue of artist compensation in regards to the digital music platforms. See Koransky, *supra*. The Nashville roundtable event made international headlines when the co-writer for Meghan Trainor's hit "All About That Bass" claimed that he earned only \$5,679 from the 178 million digital streams of that song. *Id.* Kadish's compensation details that a high number of streams does not necessarily equal large royalty payouts because of the industry's lack of royalty regulations for streaming services. *Id.*

⁸ See Howe, *supra* note 2 (explaining that the music industry is at a crossroads because audio streaming services are so popular yet artists and the companies themselves are having a difficult time profiting); see also Koransky, *supra* note 5 (noting that it is close to impossible to find any source indicating that musicians are overpaid by streaming services). If an artist does not want to go through the risks of losing royalties by having their music on audio streaming services, the artist can simply opt not to sign a license with the service; however, the artist risks less exposure for his/her music. See Koransky, *supra* note 5

most popular service, it is ranked as having one of the worst payouts.⁹ The royalty payout issue amongst the streaming world is complex because songwriters need to be paid more, while streaming services need to increase their profit margin.¹⁰ Congress responded to advocate's complaints on October 11, 2018 by signing into law the Orrin G. Hatch-Bob Goodlatte Music Modernization Act ("MMA").¹¹ The MMA is one of the most significant reforms to the music license industry since the Copyright Act of 1976.¹² The MMA attempts to fix

⁹ See Tim Ingham, *Streaming Platforms are Keeping More Money From Artists than Ever (and Paying Them More, Too)*, ROLLINGSTONE (Apr. 9, 2019), archived at <https://perma.cc/X22X-LSVT> (noting that Warner Music Group discovered that Spotify's royalty rate is around 25%).

¹⁰ See Kory Grow, *Taylor Swift Shuns 'Grand Experiment' of Streaming Music*, ROLLINGSTONE (Nov. 6, 2014), archived at <https://perma.cc/4Y4H-PGDK> (identifying artists and record labels' issues with Spotify). For example, in 2015, Taylor Swift and her record label refused to release her album, *1989*, on Spotify and eventually pulled her entire song catalog from the streaming service. *Id.* Swift commented, "I'm not willing to contribute my life's work to an experiment that I don't feel fairly compensates the writers, producers, artists and creators of this music." *Id.* Swift spoke about the tensions in the music industry stemming from the issues surrounding streaming and copyright law. *Id.*; see also Maya Kosoff, *TAYLOR SWIFT DECLARES WAR ON YOUTUBE*, VANITY FAIR (June 21, 2016), archived at <https://perma.cc/RA9M-BZYY> (detailing that big record labels are revamping their copyright deals with YouTube to please the complaints of artists).

¹¹ See Koransky, *supra* note 5 (emphasizing the need for regulation of compositions and sound recordings in the digital realm). The Copyright Office issued a report, "Copyright and the Music Marketplace", that suggested composers should be allowed to use or withdraw their works from interactive streaming services. *Id.* The Copyright Office noted that such a development in the law would be praised by composers who feel as if they are not being properly compensated for their works. *Id.* See Orrin G. Hatch-Bob Goodlatte Music Modernization Act, 17 U.S.C. § 115 (2018) (stating the updated provisions to United States copyright law, known as the "MMA"); Kevin Chung, *In This Issue, A Law Student's Perspective Music Matters: A Discussion Of Current Legal Issues In The Music Industry*, 35 ENT. & SPORTS L. 78, 78 (2019) (identifying the years and hard work the music industry endured to finally influence Congress to enact the MMA); see also Monique Brown, *Feature Story: The Music Modernization Act: One Giant Leap For Music Copyright Laws*, 55 TENN. BUS. J. 22, 22 (2019) (stating that "[m]usicians and other industry professionals have long called for amending the Copyright Act to address and incorporate new technology and industry trends into antiquated copyright laws.").

¹² See Copyright Act, 17 U.S.C. § 115(c) (1976) (setting the federal standard for royalty payments for copyrighted works, but providing no guide for royalties paid from digital streaming services); see also Ben Sisario, *New Way to Pay*

growing pains inflicted by the application of an arguably obsolete framework, designed for more traditional means of music consumption, to digital streaming.¹³

The MMA appeared to be the necessary solution to fix the royalty payout problems within the music streaming industry.¹⁴ Nevertheless, the MMA contains loopholes which Spotify and other music streaming services are taking advantage of, thus the Act fails to cease royalty-based lawsuits.¹⁵ Additionally, music streaming services

Songwriters and Musicians in the Streaming Age Advances, N.Y. TIMES (June 28, 2018), archived at <https://perma.cc/7J2X-KLZP> (noting that the Copyright Act does not require payments for digital streams of music created before 1972); Geoffrey P. Hull, *Copyright Act of 1976 (1976)*, FIRST AMENDMENT ENCYCLOPEDIA (Nov. 2, 2019), archived at <https://perma.cc/VA7X-DUW8> (defining the Copyright Act of 1976 as the basis of copyright law in the United States that extends to all original works of authorship). See also Hess, *supra* note 2, at 189 (claiming that the MMA is “the most substantial reform to music licensing law since the 1970’s”); Chung, *supra* note 11, at 78 (exploring the relevance of the MMA in the music industry and the changes the Act brought to digital licensing); Brown, *supra* note 11, at 22 (signaling that the MMA was the moment when the Copyright Act entered into the digital world).

¹³ See Hess, *supra* note 2, at 194 (noting that the MMA was created as an attempt to solve the issues of transitioning into an audio streaming system). See Misrok, *supra* note 2, at 1423–24 (confirming that the transition to streaming was imperfect because all players in the music industry had to adjust their practices to ensure that their copyrights, licenses, and royalties were adhered to).

¹⁴ See Bill Rosenblatt, *The Big Push To Reform Music Copyright For The Digital Age*, FORBES (Feb. 25, 2018), archived at <https://perma.cc/DB2J-EZGG> (explaining that the MMA was originally four separate bills whose policies were combined). The four pieces of legislation were “the CLASSICS (Compensating Legacy Artists for their Songs, Service and Important Contributions to Society) Act, the Fair Play Fair Pay Act, the AMP (Allocation for Music Producers) Act and the Music Modernization Act (MMA).” *Id.*

Music creators are paid royalties through an ad-hoc patchwork of laws, industry conventions, and private deals, many of which date back decades. The industry has struggled to adopt, adapt, stretch, and contort these structures as music has transitioned to digital. These four bills are part of that process; collectively, they are the biggest copyright legislative package to reach Congress in decades.

Id.

¹⁵ See Phil Galdston & David Wolfert, *The Music Modernization Act Misses the Mark (Guest Column)*, VARIETY (Mar. 16, 2018), archived at <https://perma.cc/S7WU-3AAR> (hypothesizing that supporters of the MMA claim the new law benefits music creators, but those supporters did not understand the details of the bill or its implication). The authors note that the bill of the MMA was

continued to neglect the proper protocols in obtaining licenses and permissions from copyright owners.¹⁶ In August 2019, Eminem's publishing company, Eight Mile Style, sued Spotify for taking advantage of the loopholes in the MMA, specifically misleading copyright holders and paying them less than what they are owed.¹⁷ The case, *Eight Mile Style v. Spotify*,¹⁸ resultantly further sheds light on the issues that the MMA poses.¹⁹ Succinctly, the MMA needs to be reconsidered and amended by Congress to benefit not only the big

not made public when proponents began to promote the bill in online petitions. *Id.* Further, the organizations that had the most influence in the bill's enactment do not represent the worldwide community of unpaid independent music creators for whom the MMA is supposed to be a solution. *Id.*; see also Christy Cowl, *Alternative Take: Music Modernization Act Database - Landmark or Landmine?*, HYPEBOT (May 22, 2018), archived at <https://perma.cc/JS4H-PW7J> (noting that "the blind support of the MMA without real examples of how the working class majority of music creators, producers, and performers will benefit is a big red flag, and makes us hesitant to ask our community to support it passing in the Senate without significant revision"); Ed Christman, *Music Modernization Act's Next Challenge: How to Implement the Law*, HOLLYWOOD REP. (Oct. 17, 2018), archived at <https://perma.cc/3FR9-KMQ6> (claiming that "[i]f you think by having Trump sign the bill all we now have to do is wave a magic wand to get this done, it's far from over") (quoting a music publishing executive involved in talks on how the law will unfold).

¹⁶ See *infra* Section II. A–C (exploring the transition to on-demand streaming and its effect on music licensing).

¹⁷ See Eriq Gardner, *Eminem Publisher Sues Spotify Claiming Massive Copyright Breach, "Unconstitutional" Law*, HOLLYWOOD REP. (Aug. 21, 2019), archived at <https://perma.cc/WF2Z-YRSB> (mentioning how Eight Mile Style filed a lawsuit questioning Spotify's compliance with United States copyright laws). See Complaint at 5–6, *Eight Mile Style, LLC, et al. v. Spotify USA, Inc.*, No. 3:19-cv-00736 (M.D. Tenn. Aug. 21, 2019) (alleging that the MMA's elimination of the right for a plaintiff to receive profits sustaining from infringement, statutory damages, and attorneys' fees, is an unconstitutional denial of due process and a taking of vested property rights).

¹⁸ *Eight Mile Style, LLC, et al. v. Spotify USA, Inc.*, No. 3:19-cv-00736 (M.D. Tenn. Aug. 21, 2019).

¹⁹ See Paul Resnikoff, *Surprise! The 'Music Modernization Act' Prohibits Litigation Against Streaming Services*, DIGITAL MUSIC NEWS (Jan. 9, 2018), archived at <https://perma.cc/A93H-FULF> (stating that the MMA was "designed to greatly modernize digital-era royalties and solve a gaggle of previous lawsuits"). However, Spotify and other music streaming services are taking advantage of the litigator provisions in the Act because the MMA provides heavy limitations on litigation that was not filed before January 1, 2018. *Id.* See Orrin G. Hatch-Bob Goodlatte Music Modernization Act, 17 U.S.C. § 115(d)(10) (2018) (setting forth limitations on potential lawsuits not filed before January 1, 2018).

companies, but also the artists and producers who are the reason for the success of music streaming services.²⁰

II. History

A. *The History of Copyright Law in the United States*

For centuries, the printing press was the most viable means for mass producing copies of a work, and a physical copy was necessary to view an author's product.²¹ For example, music was distributed in the form of sheet music where purchasers would follow the notes on the sheet with their own instruments.²² At the start of the twentieth century, music distribution changed and the first methods of playing sound recordings at home were created.²³ By the mid-twentieth century nearly every household had a radio and television set, equipped with audiotape equipment capable of recording music as well as playing pre-recorded tapes.²⁴ Audio streaming through digital

²⁰ See Christman, *supra* note 15 (explaining that the MMA has a huge opportunity to make a significant impact but in order for it to be impactful in the long run there needs to be revisions). See *infra* Section IV (exemplifying the issues in the MMA).

²¹ See JULIE E. COHEN, ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY, 28 (Wolters Kluwer, 4th ed. 2015) (analyzing the ways in which copyrighted work was originally disbursed to the public for their consumption); see generally Wendy J. Gordon, *Excuse and Justification in the Law of Fair Use: Transaction Costs Have Always Been Part of The Story*, 50 J. Copyright Soc. USA 149, 157 (2002) (describing that the Statute of Anne, the first copyright statute in the world, had the same principles as today). In 1710, copyright law governed consumers who paid for an exclusive right to copy works. See Gordon, *supra*.

²² See COHEN, *supra* note 21, at 29 (alleging that sheet music was the only viable means during this time period for artists to distribute music to consumers); Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673, 679 (2003) (highlighting that sheet music was distributed the same as any other copyrighted work, so it made sense to give them the same protection). Copyright owners of musical works had the same rights as any copyright owner which included "the sole right and liberty of printing, reprinting, publishing, and vending" their work. See Loren, *supra*.

²³ See COHEN, *supra* note 21, at 29 (detailing that in the late 1800s and early 1900s, the use of mechanical piano players and motorized players for phonograph records were popular). Then in the 1920s and 1930s came the radio where there were at least 2.3 radio sets per household. *Id.*

²⁴ See *id.* (noting that in 1948 Bing Crosby produced the first professional sound recordings on magnetic audiotape). See generally Stephen Smith, *Radio: The Internet of the 1930s*, AM. RADIOWORKS (Nov. 10, 2014), archived at

technology started in the 1970s, as personal computer systems were soon followed by pre-recorded compact discs, digital audio recording media, digital multimedia technology, and the ability to digitally transmit audio files.²⁵ Consequently, any individual with access to the internet was able to display these recordings for their personal use, thus propelling the need for copyright law to govern these changes.²⁶

The United States copyright law is codified in Title 17 of the United States Code, with its authority deriving from Article I, Section 8 of the Constitution.²⁷ Historically, this provision of the Constitution was known as the Patent and Copyright Clause because the term “intellectual property” did not exist until the twentieth century.²⁸ The

<https://perma.cc/8Z2R-32NX> (detailing that the radio was so popular because it was the first form of nation-wide communication and its technology continued to advance).

²⁵ See COHEN, *supra* note 21, at 30 (explaining that once a work consists of text or sounds it can be transferred in a digital form and reproduced instantly to tape recorders).

²⁶ See *id.* (establishing that the greatest technological advancements were during World War II, where the use of radios and televisions drastically increased); see also Loren, *supra* note 22, at 674 (claiming that the copyright system is broken and it needs to be altered if copyright protections want to survive the digital revolution).

The complexity of copyright law has played a role in changing the ability for digital works to be distributed. See Loren, *supra* at 675. The intertwining of copyright interests has highlighted the flaws in the current digital system. *Id.*

²⁷ See U.S. CONST. art. I, § 8, cl. 8 (“The Congress shall have Power . . . [t]o promote the Progress of Science and useful arts, by securing limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”); see also *General Guide to the Copyright Act of 1976*, U.S. COPYRIGHT OFF. (Sept. 1977), archived at <https://perma.cc/W8ZA-GHJV> [hereinafter *General Guide*] (dating copyright law to England’s Statute of Anne). United States copyright law and its provision in the Constitution was created for the purpose of fostering “the creation and dissemination of intellectual works for the public welfare . . .” See *General Guide, supra*. A secondary purpose of copyright law was to reward creations and people’s contributions to society. *Id.* See also Terry Hart, *Copyright and the Takings Clause*, COPYHYPE (Dec. 10, 2012), archived at <https://perma.cc/E3FJ-J2LD> (providing case law that holds that the Fifth Amendment of the Constitution provides authors with copyright protection by marking it as a private property right).

²⁸ See *Mazer v. Stein*, 347 U.S. 201, 207–08 (1954) (holding that the objective of copyright is not to reward the labor of authors but to promote the progress of science and useful arts in the United States). See COHEN, *supra* note 21, at 4 (identifying that the copyright clause in the Constitution is now known as the “Exclusive Rights Clause” or “Progress Clause” to commentators because it is a

first Copyright Act was enacted in 1790, providing copyright protection to authors of maps, charts, and books.²⁹ Over the next few centuries, the Act was amended multiple times to encompass the ever-changing methods of producing creative works.³⁰

The Copyright Act of 1976 was one of the most significant revisions to United States copyright law.³¹ In addition to the development of new creative expressions, technological advancements transformed the ways in which creative works were produced, distributed, and accessed by the public, resulting in the need for a new federal copyright law.³² The Copyright Act of 1976 completely preempted all versions of copyright law in the United States and

more literal interpretation of the text); *see also* Elizabeth L. Rosenblatt, *Copyright's One-Way Racial Appropriation Ratchet*, 53 U.C. DAVIS L. REV. 591, 601 (2019) (highlighting that copyright law exists as a constitutional right to promote progress and the incentive for authors to create).

²⁹ *See* Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 857 (1987) (claiming that copyright gives authors a property right in their work). *See* Copyrights, ch. 392, 29 Stat. 694 (1867) (codified as amended at 60 Rev. Stat. 3 (1897)) (detailing the first major revision to the United States copyright law to include more creative works than just maps and charts); COHEN, *supra* note 21, at 28 (noting that over the next century the Copyright Act had to be amended because works of authorship grew).

³⁰ *See* Loren, *supra* note 22, at 676 (noting that the revisions to the United States copyright law were to address the innovations of technology particularly in the music industry). *See also* Klementina Milosic, *The Failure Of The Global Repertoire Database*, HYPEBOT (Aug. 31, 2015), archived at <https://perma.cc/D6UP-TQGD> (stating that challenges and delays remain when attempting to bring the music industry fully into the modern digital era).

³¹ *See generally* Copyright Act, 17 U.S.C. §§ 101–1401 (2018) (providing the updated provisions to the United States copyright law). *See General Guide, supra* note 27 (claiming that the other most major revision occurred in 1909); *see also* COHEN, *supra* note 21, at 30 (detailing that in 1909 Congress created a comprehensive revision, the United States copyright law to extend rights to musical compositions by developing compulsory licenses from those individuals who prepared mechanicals in sound recordings of their works).

³² *See* COHEN, *supra* note 21, at 29 (noting that these changes have complicated the task of defining a copyright owner's rights). The last major revision of the copyright law was the Act of 1909. *Id.* This Act was focused on the printing press as the prime avenue to administer information to the public. *Id.* These technologies had no other protections and regulations; thus, the Copyright Act of 1976 was born. *Id.* at 30; *see also* Lydia Pallas Loren, *Copyright Jumps the Shark: The Music Modernization Act*, 99 B.U. L. REV. 2519, 253 (2019) [hereinafter *Copyright Jumps the Shark*] (explaining that the Copyright Act of 1909 involved player piano rolls and, over time, was amended to include sound recordings in vinyl, CDs, and digital copies of sound recordings).

became effective on January 1, 1978.³³ The Act provides statutory control over original works “that are fixed in a tangible medium of expression.”³⁴ Overall, the 1976 Act expanded the subject matter for copyrights, the duration of copyright ownership, the scope of an author’s rights, the copyright registration requirements, and added remedies for infringement.³⁵

B. *Copyright in Music and Royalty Payment Practices*

The music industry had difficulty adapting to the digital era because multiple copyrights are needed for one song.³⁶ A “song” is considered two components, the composition (i.e. the notes and lyrics) and the sound recording.³⁷ The musical composition and sound

³³ See generally Copyright Act, 17 U.S.C. §§ 101–1401 (2018) (outlining the extension provisions to the United States copyright law). See *New York Times Co. v. Tasini*, 533 U.S. 483, 508 (2001) (emphasizing that the Copyright Act of 1976 gave protection to authors that were not given in the 1909 Act).

³⁴ See COHEN, *supra* note 21, at 28 (listing the seven non-exclusive categories for copyright: (1) literary works; (2) musical works; (3) dramatic works; (4) choreographic works; (5) graphic or sculptural works; (6) audiovisual works; and (7) sound recordings); see also STEPHEN M. MCJOHN, *EXAMPLES AND EXPLANATIONS: INTELLECTUAL PROPERTY* 55–56 (Rachel E. Barkow et al. eds., 6th ed. 2019) (noting that these exclusive rights are not absolute and are subject to a number of limitations).

³⁵ See *Copyright Jumps the Shark*, *supra* note 32, at 2526 (establishing that one of the most influential changes to the Act is Section 115, which allows anyone to make copies under certain conditions, including the payment of the compulsory royalty rate); see also COHEN, *supra* note 21, at 4 (identifying that the Copyright Act gives copyright owners the rights to (1) produce works, (2) prepare derivative, and (3) publicly distribute copies).

³⁶ See Heather McDonald, *How to Copyright Your Music and Songs: What All Musicians Should Know*, BALANCE CAREERS (Nov. 27, 2018), archived at <https://perma.cc/CF5N-YB39> (laying out the inexpensive and simple steps to copyright a song). See COHEN, *supra* note 21, at 409 (noting that sound recordings had federal protection in the Sound Recording Act of 1971, but anything created earlier was only protected by state law). Copyrights in sound recordings create a second layer of protections for musical works. *Id.*; see also GLYNN LUNNEY, *COPYRIGHT’S EXCESS: MONEY AND MUSIC IN THE US RECORDING INDUSTRY* 59 (Cambridge U. Press 2018) (emphasizing that copyright in music generally distinguishes between a copy of the song and the song itself, causing there to be multiple copyrights for one piece of work).

³⁷ See *Music Licensing for Physical, Audio-only Products*, EASY SONG LICENSING (Nov. 6, 2019), archived at <https://perma.cc/4WNY-BJD6> [hereinafter *Music*].

recording are distinct works that require separate copyright registrations.³⁸ Protection for the ownership of a song can require contracts with multiple players in the music industry, but customarily, a contract is set up between a songwriter and music publisher.³⁹ A

Licensing] (explaining that a song consists of multiple components). The composition includes the musical notes and lyrics created by the composers, while the original audio refers to the sound recording created by the artist. *Id.* The first component of a song is the composition, also referred to as the mechanical or synchronization rights. *Id.* The composition is the music notes and lyrics that define a song with the rights usually owned by the composer or their publisher. *Id.* Permission to obtain these rights is usually through a mechanical license (audio-only) or synchronization license (video). *Id.* The second component is the recording or master rights. *Id.* This is a recorded performance of the song, with its rights usually owned by the artist or record label. *See Music Licensing, supra.* Permission to use this component is obtained through a master license. *Id.*

³⁸ *See Copyright Registration of Musical Compositions and Sound Recordings*, U.S. COPYRIGHT OFF. (Mar. 2019), *archived at* <https://perma.cc/66W9-W5PU> [hereinafter *Copyright Registration*] (determining the standard practice of registration for a composition and sound recording). However, you may use one standard application to register a sound recording and an underlying musical composition when (1) the musical composition and sound recording are embodied in the same phonorecord and (2) the claimant for both the musical composition and sound recording are the same. *Id.*

³⁹ *See MUSIC PUBLISHING 101*, TUNECORE (Nov. 13, 2019), *archived at* <https://perma.cc/3SE3-3EX5> (defining a music publisher as a “publishing administrator”). The copyright owner and songwriter are owed royalties when their music is used commercially (i.e. sold, licensed, or publicly performed). *Id.* A publisher administers the copyright to grant the song protection and collects the royalties from that use. *Id.* Publishers can also be involved in the creative side where they license copyrights for the song to be used in films, TV, ads, and video games. *Id.* This individual can either promote an artist’s work or make a sales pitch to the artist to record work specific to the product. *Id.* Overall, the artist still owns their song but the publisher is rewarded for their licensing work, sales pitching, and other tasks that create a revenue for the artist. *Id.* *See Hess, supra* note 2, at 190 (explaining the complications that songwriters endure when trying to get copyright protection for their work). “Music licensing is a unique branch of copyright law” because a song has a “dual system” of ownership: protecting the owner of the composition and the owner of the sound recording. *Id.* Originally, an artist who composes a song owns two copyrights, one in the composition and the other in the sound recording. *Id.* The artist who composes the song has a copyright in the written composition while a record company owns a copyright in the recording that is then promoted and sold. *Id.* The performing artist and composer can be the same person, but there are still two separate copyrights in each piece. *Id.* *See, e.g., Sarah Jeong, A \$1.6 BILLION SPOTIFY LAWSUIT IS BASED ON A LAW MADE FOR PLAYER PIANOS*, VERGE (Mar. 14, 2018), *archived at* <https://perma.cc/U32M-WZTQ> (explaining the complexity of music copyright law,

music publisher acts as the middleman between the songwriter and other music professionals; coordinating the purchase of a license in the songwriter's compositions.⁴⁰ A record company, the entity creating sound recordings, is another middleman for artists.⁴¹ The record company works with the artist to produce, distribute, and promote the artist's song through sales of physical copies or creating licenses to stream the sound recording.⁴²

In order for radio stations or internet streaming services to play an artist's music they need permission from the people who own a copyright in the song.⁴³ The publisher or record company are assigned the copyright of a sound recording in exchange for a percentage of

where one song could have multiple copyright owners). Music copyright ownership can be complicated when the artist and songwriter are different people. *Id.* For example, for the song "Girls Just Want To Have Fun" the sound recording belongs to Cyndi Lauper, the artist, and the composition belongs to Robert Hazard, the songwriter. *Id.* From there, Hazard can sell his ownership to other people within the music industry so him and Lauper can profit off of their work. *Id.*

⁴⁰ See COHEN, *supra* note 21, at 411 (noting that an artist does not need to work with a publisher, but the publisher usually knows the business better than the songwriter so the publisher is a significant asset to the songwriter's success).

⁴¹ See *id.* (asserting that an artist assigns all title, interests, and rights to the recording company); see also Heather McDonald, *The Record Label's Role in the Music Industry*, BALANCE CAREERS (Oct. 28, 2019), archived at <https://perma.cc/H3L9-Y62N> (explaining that a record company is important for controlling an artist's brand awareness and media such as CD artwork, music videos, appearances, etc.).

⁴² See COHEN, *supra* note 21, at 411 (indicating that if a songwriter has not contracted with a music publisher, artists seeking to record the songwriter's work must obtain the songwriter's permission). See Loren, *supra* note 22, at 686 n.58 (describing the record companies known as the "big five" as Universal Music Group, Sony Music Entertainment, EMI Group, Warner Brothers Music, and BMG Entertainment). Majority of music publishers and record companies work with The Harry Fox Agency to assist with the licensing process to stream music. *Id.* at 711. Record companies work with businesses like The Harry Fox Agency because they were nervous that consumers would purchase less music and CDs due to the prominence of streaming services. *Id.* at 688.

⁴³ See COHEN, *supra* note 21, at 411–12 (claiming that radio stations and Internet streaming services are publicly performing copyrighted work). In order to obtain permission to play each song, it would result in hundreds of individual transactions, so collective rights organizations, like SoundExchange, were created to administer blanket licenses and distribute the royalties. *Id.*

various royalties and licenses.⁴⁴ For physical products, such as a CD, royalties are paid directly to the copyright holders for every copy sold.⁴⁵ The sale of a CD poses limited issue because the copyright owners are easily determinable in the album's liner note.⁴⁶ Contrarily, royalty payments are complicated when it comes to digital music streaming.⁴⁷

⁴⁴ See Copyright Act, 17 U.S.C. § 101 (2010) (defining sound recordings as “works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work”); MCJOHN, *supra* note 33, at 55 (describing that the author of a sound recording is the person who makes the “creative choices” about the content and making of the recording); see also Hess, *supra* note 2, at 190 (noting the tradition of a songwriter to assign their copyright ownership to a publisher in order to obtain licensing and commercial business for their work). A music publisher is an essential player to facilitate royalty agreements, performance licenses, and mechanical licenses for the songwriter. See Hess, *supra* note 2, at 190. Traditionally, the publisher was assigned the ownership of the composition—leading to the need for two copyrights to receive two licenses. *Id.*; see also COHEN, *supra* note 21, at 411 (emphasizing that royalties are either a 50/50 split or are considered a work made for hire with the split determined through a written contract).

⁴⁵ See Kyle Boreing, *CD'S VS STREAMING (PART ONE) – SHORT-TERM GAIN, LONG TERM LOSS?*, MUSICSCRIBE (Feb. 23, 2019), archived at <https://perma.cc/3S6K-P6Y9> (comparing the costs of streams to CD purchases). The average CD costs around \$12, which is equal to around 200 streams. *Id.* See also *Copyright Notice*, U.S. COPYRIGHT OFF. (Mar. 2019), archived at <https://perma.cc/AV2K-JQW2> (explaining the requirements and practices regarding copyright notice). “Copyright notice is a statement placed on copies or phonorecords of a work to inform the public that a copyright owner is claiming ownership of it.” *Id.* A copyright notice consists of three elements: “[t]he copyright symbol © (or for phonorecords, the symbol Ⓗ); the word “copyright”; or the abbreviation “copr.”; the year of first publication of the work; and the name of the copyright owner.” *Id.*

⁴⁶ See *Liner Notes*, Merriam-Webster Dictionary, <https://perma.cc/FL8V-72XE> (last visited Sept. 14, 2020) (defining liner notes as “comments or explanatory notes about a recording printed on the jacket or an insert”); see *Music: CD Packaging*, VLAA (Nov. 7, 2019), archived at <https://perma.cc/P6JZ-JCF3> (claiming that it is common practice to include the following statement on a liner note: “[t]his work is protected under the copyright laws and any unauthorized duplication or distribution is prohibited by law.”).

⁴⁷ See COHEN, *supra* note 21, at 413–16 (going through the licensing provisions in § 114 and § 115 of the United States copyright law); Molly Hogan, *The Upstream Effects of The Streaming Revolution: A Look Into The Law And Economics of a Spotify-Dominated Music Industry*, 14 COLO. TECH. L. J. 131, 133 (2015) (noting the “method for calculating one’s royalties is a combined result of business decisions and existing federal copyright law, which was not written with today’s digital music landscape in mind.”).

1. Streaming is More Beneficial to Companies like Spotify

Technology has visibly changed the music economy as evidenced through on-demand streaming becoming the most widely used music platform, foregoing CD sales.⁴⁸ However, the transition to on-demand streaming complicated the process in which music professionals were able to gain royalties for their work.⁴⁹ Music streaming may be a convenient technological advancement for consumers, but it harms the earning capacity of music professionals.⁵⁰ On average, Spotify pays \$0.00437 per average play, meaning that an artist will need roughly 336,842 total plays to earn \$1,472.⁵¹ While in comparison, Spotify has an annual revenue of \$4.99 billion through its

⁴⁸ See Misrok, *supra* note 2, at 1412 (stating that “for the first time in American history, these services have overtaken the majority of both digital sales and the manner in which music is consumed and purchased”). For example, Kayne West’s album “The Life of Pablo” was the first U.S. album to go platinum through streaming services alone. *Id.* This album was streamed more than 1.5 billion times, illustrating the impact and reach that streaming services have on consumers. *Id.*

⁴⁹ See Nilay Patel, *How the Music Modernization Act will help artists get paid more from streaming*, VERGE (Oct. 3, 2018), archived at <https://perma.cc/8MG4-DDQ9> (observing that Spotify took advantage of the unregulated licensing system). Spotify developed a deep catalog of music as quickly as possible and without obtaining the proper licenses to do so. *Id.* Spotify was so financially successful that they were not concerned about the repercussions for failing to obtain licenses and pay artists for their work. *Id.*; see also Hess, *supra* note 2, at 194 (stating that “on-demand music subscriptions are more valuable the more content they provide.”). Spotify became the leader in the streaming industry because the company was able to provide more music early-on than its competitors. See Hess, *supra* note 2, at 194.

⁵⁰ See Aoife Coffey, *The Impact that Music Streaming Services Such as Spotify, Tidal and Apple Music have had on Consumers, Artists and the Music Industry Itself*, 30 (May 13, 2016) (Unpublished Masters of Science Research Paper, University of Dublin) (on file with Trinity College Library) (noting that the relationship between music professionals and streaming services are fragile).

⁵¹ See Sanchez, *supra* note 6 (claiming that Spotify is typically labelled as the streaming service with the worst payouts); see also Adams Hayes, *How Does Spotify Make Money?*, INVESTOPEDIA (Sept. 24, 2019), archived at <https://perma.cc/5RAB-FF3T> (revealing that Spotify only pays record labels “a fraction of a penny,” while the artists themselves receive even less in revenue).

paid subscribers.⁵² As seen from this significant difference in revenue, Spotify is profiting off of music streaming significantly more than artists.⁵³

2. The Issue with Music Licensing

In order to make a song available for streaming, a streaming company only needs a mechanical license.⁵⁴ Traditionally, a streaming company contracted with the individual record company to obtain a mechanical license.⁵⁵ The Copyright Royalty Board requires every

⁵² See Hayes, *supra* note 51 (identifying that only 70% of Spotify's revenue is given back to artists, record labels, and publishers resulting in a \$460 million loss for the company).

⁵³ See Mike LaSusa, *Spotify Can't Shake Or Move Eminem Copyright Suit*, LAW360 (Apr. 2, 2020), archived at <https://perma.cc/472P-CR5T> (noting that Spotify gains a huge financial benefit from the tens of millions of Eminem fans that use and subscribe to the platform). See Hess, *supra* note 2, at 194 (highlighting that the value of streaming services is in direct correlation with the content they provide).

⁵⁴ See Koransky, *supra* note 5 (explaining a mechanical license).

Mechanical licenses are statutory licenses obtained from separate organizations—such as the Harry Fox Agency—that administer the compulsory licenses set forth in 17 U.S.C. § 115. Under the statutory mechanical license framework in the Copyright Act, once a composition has been distributed in the United States, another party may distribute and make a copy of this composition, so long as it follows the procedures to obtain a compulsory mechanical license. An on-demand music service must obtain a mechanical license for a composition because streaming services make copies of the compositions on their servers in order to provide the works to listeners.

Id.; see also Hess, *supra* note 2, at 190 (claiming that “[o]n-demand (aka interactive streaming) music platforms are unique in how they interact with both the composition and sound recording copyright owners”). A mechanical license is a mandatory license that permits the recording and distribution of a song. See Hess, *supra* note 2, at 191; see also 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, 27 (2018) (noting that the practice of obtaining a mechanical license has been unchanged for “over one hundred years”).

⁵⁵ See Hess, *supra* note 2, at 190 (noting the complications in music copyrights and how multiple players are involved in the process). Streaming's biggest expenditures are paying and negotiating for mechanical licenses. *Id.* at 193. “For example, in 2017 Spotify alone spent \$3.9 billion of its \$4.9 billion revenue on buying licenses. These costs are so expensive because streaming companies are

song in a streaming service catalogue to be licensed, or the company, like Spotify, is liable for infringement.⁵⁶ Nonetheless, during the race to industry domination, Spotify and other companies, streamed a majority of their content without obtaining mechanical licenses.⁵⁷ The sudden rise in the popularity of music streaming, and the drive for companies to have a diverse digital catalogue, made it impossible for individuals to know if streaming services went through the proper

required to negotiate deals with music publishers, record labels, and PROs.” *Id.* It was easy to obtain mechanical licenses prior to the MMA because the audio streaming service only needed to contract with the record label. *Id.* at 192. In its beginning, Spotify was famous for contracting with some of the music industry’s biggest record labels, including Universal, Sony, and Warner Music Group. *Id.* at 192. *See, e.g.,* Jeong, *supra* note 39 (illustrating the rights for the song “Girls Just Want To Have Fun” and how streaming services require mechanical licenses in order to add the song to their catalog). *See* Mansoor Iqbal, *Spotify Usage and Revenue Statistics (2019)*, BUS. APPS (May 10, 2019), *archived at* <https://perma.cc/6WKT-5WKG> (identifying that Spotify is a leader in its industry due to the “50 million tracks available” on the system). By obtaining more mechanical licenses, the audio streaming service was able to dominate the race for obtaining the largest catalogue of music within their system. *Id.* *See also* Koransky, *supra* note 5 (noting that the rate of mechanical licenses is set pursuant to chapter 8 of the Copyright Act and was historically set too low).

⁵⁶ *See* MCJOHN, *supra* note 34, at 169 (establishing that an infringement cause of action must satisfy two elements: (1) ownership of a valid copyright and (2) copying original elements of the work); *see also* *About Us*, U.S. COPYRIGHT ROYALTY BOARD (Oct. 14, 2019), *archived at* <https://perma.cc/KA2Z-YX6G> (detailing that “[t]he Copyright Royalty Judges (Judges) oversee the copyright law’s statutory licenses, which permit qualified parties to use multiple copyrighted works without obtaining separate licenses from each copyright owner”); Hess, *supra* note 2, at 194 (noting the role of the Copyright Royalty Board was created under Section 114 of the Copyright Act); *see also* *Copyright Act*, U.S. COPYRIGHT ROYALTY BOARD (Oct. 14, 2019), *archived at* <https://perma.cc/ZNA9-UN8S> (identifying where the authority of the Copyright Royalty Board derives from).

⁵⁷ *See* Jeong, *supra* note 39 (noting the difference between iTunes and Spotify and how Spotify contracts directly with the owners of the sound recording and composition). *See, e.g.,* Complaint, *supra* note 17, at 4 (arguing that Spotify has continuously failed to obtain licenses or pay royalties on time). The Complaint in *Eight Mile Style v. Spotify USA* provides examples of the *Lowery* and *Ferrick* class action lawsuits and Spotify’s settlement with the National Music Publishers’ Association to illustrate how Spotify built its billion-dollar empire on willfully infringing copyrights. *Id.* Spotify failed to ensure that songs appearing on their service were properly licensed or that royalties were paid in compliance with the United States Copyright Act. *Id.*

avenues to obtain mechanical licenses.⁵⁸ This resulted in streaming services robbing artists of their royalties without facing any repercussions for their illegal actions.⁵⁹ At this time, the copyright law in the United States failed to address the myriad of licensing issues involved with on-demand music streaming.⁶⁰

C. *The Enactment of the Music Modernization Act*

With copyright laws not addressing these licensing issues, artists and publishers were not receiving royalty payments and streaming services had no need to comply with the licensing process.⁶¹ As a response, Congress unanimously passed the MMA on October 11, 2018 as a hopeful means to resolve the royalty and licensing conflicts.⁶² The MMA is the most significant adjustment to United

⁵⁸ See John Paul Titlow, *Why Can't Spotify Stop Getting Sued? It's More Complex Than It Sounds*, FAST CO. (July 25, 2019), archived at <https://perma.cc/SK25-EB98> (affirming that lawsuits ensued because Spotify failed to obtain mechanical licenses).

⁵⁹ See Peggy Keene, *Is the MMA Unconstitutional? Eminem's Publisher Sues Spotify*, KLEMCHUK LLP (Sept. 4, 2019), archived at <https://perma.cc/4JXA-ASKF> (identifying that streaming services would argue that the lack of a centralized database made it burdensome for services to track down copyright owners, thus defending their actions).

⁶⁰ See Misrok, *supra* note 2, at 1423–24 (proclaiming that the current copyright law in the United States exacerbates ownership issues because it does not address this matter); see also Paul Resnikoff, *Global Repertoire Database Declared a Global Failure*, DIGITAL MUSIC NEWS (July 10, 2014), archived at <https://perma.cc/4Z2F-6963> [hereinafter *Global Repertoire Database Declared a Global Failure*] (identifying the complexity of digital licensing, but stressing that these issues can be resolved if participants want them to be).

⁶¹ See Koransky, *supra* note 5 (explaining that the current copyright law in the United States “was not written to address the myriad licensing issues involved with on-demand digital music services”); see also Hess, *supra* note 2, at 195 (labeling the people in the music industry as unhappy and frustrated with the numerous royalty litigation lawsuits and highlighting that litigation has been the only available resolution tactic).

⁶² See *Orrin G. Hatch-Bob Goodlatte Music Modernization Act*, U.S. COPYRIGHT OFF. (Oct. 6, 2019), archived at <https://perma.cc/LU8Z-FL63> [hereinafter *Orrin G. Hatch*] (explaining the Music Modernization Act); see also *Summary of H.R. 1551, the Music Modernization Act (MMA)*, COPYRIGHT ALLIANCE (Oct. 6, 2019), archived at <https://perma.cc/24LS-UBXF> [hereinafter *Summary of H.R. 1551*] (providing a summary of the Music Modernization Act); see also *Copyright Jumps the Shark*, *supra* note 32, at 2522 (claiming that the MMA is the most recent and extensive amendment to the United States Copyright Act). See Paul Resnikoff, *Is*

States copyright law because it reflects the modern preferences and technological developments that affect the music industry.⁶³ Congress implemented the MMA to create an organizational format for licenses and royalty payments specifically in digital streaming.⁶⁴

1. Title I: The Music Licensing Modernization Act

Title I of the MMA covers blanket licenses and the need for a mechanical license coordinator.⁶⁵ This system replaces the original

the Music Modernization Act Enabling 'Legal Theft' Against Smaller Artists?, DIGITAL MUSIC NEWS (May 7, 2018), archived at <https://perma.cc/88XX-PZ3J> [hereinafter *Is the Music Modernization Act Enabling 'Legal Theft' Against Smaller Artists?*] (noting that the MMA was a “result of an unprecedented level of cooperation between the tech, songwriting, and publishing communities”).

⁶³ See Hess, *supra* note 2, at 194 (describing the unanimous passing of the MMA); *Summary of H.R. 1551*, *supra* note 62 (discussing the unanimity of the MMA and how it was aimed to help players in the music industry make a living); see also Eamonn Forde, *ROYALTY ASSENT: IS THE MUSIC MODERNIZATION ACT GOING TO BE A SONGWRITER PANACEA?*, SYNCHTANK (Dec. 4, 2018), archived at <https://perma.cc/222E-JAY3> (hailing the MMA as adapting the law to the same speed as the country’s technological and societal changes).

⁶⁴ See ANANDASHANKAR MAZUMDAR, SPOTIFY USA: TO PAY \$113MM TO SETTLE COPYRIGHT CLASS ACTION (Class Action Rep. 2018) (reporting the significance the MMA has on licensing practices); see also Christopher R. Sabbagh, *Envisioning A Compulsory-Licensing System For Digital Samples Through Emergent Technologies*, 69 Duke L. J. 231, 255 (2019) (claiming “the MMA was designed to bridge the continually widening gap between music-copyright law and music-industry practices”). See *Summary of H.R. 1551*, *supra* note 62 (detailing the goals of the MMA). The goals of the MMA are to (1) improve compensation for songwriters and streamline the practice of music licensing; (2) allow legacy artists to be paid for when their music is streamed or played on the radio; and (3) provide a consistent legal process for music professionals to receive proper royalties. *Id.* To implement these goals, the MMA is divided into three titles: Title I: The Music Licensing Modernization Act; Title II: The Classic Protection and Access Act; and Title III: The Allocation for Music Producers Act. *Id.* See also Dae Bogan, *5 Ways The Music Modernization Act Could Be Fairer To ALL Music Creators*, DAE BOGAN MUSIC (Apr. 25, 2019), archived at <https://perma.cc/P7CU-Y5QH> (calling the MMA a “mega bill” because it’s a bundle of multiple titles that were all independently proposed to Congress).

⁶⁵ See Orrin G. Hatch-Bob Goodlatte Music Modernization Act, 17 U.S.C. § 115(d)(1) (2018) (explaining blanket licenses); see also Mazumdar, *supra* note 64 (summarizing the purpose of the MMA, to “create an organization to give out blanket licenses and collect and distribute royalties, effectively ironing out the difficulties between copyright holders and streaming services”). See *Summary of*

song-by-song licensing structure and creates a new blanket license with a rate that is determined through a market-base standard.⁶⁶ Title I also created a Mechanical Licensing Coordinator (“MLC”) to administer the blanket licenses and supervise royalty payments.⁶⁷ On July 8, 2019, the United States Copyright Office named Mechanical Licensing Collective, Inc. as the MLC under the MMA.⁶⁸ The MLC

H.R. 1551, *supra* note 62 (noting that blanket licenses are important for audio streaming services to have permission to distribute digital phonorecord deliveries (i.e. permanent downloads, limited downloads, and interactive streams)). *See Copyright Jumps the Shark*, *supra* note 32, at 2527 (identifying that a “blanket license does not authorize public performance of musical works”). Under the Copyright Act digital streaming is considered a public performance; however, blanket licenses are still necessary to stream music. *Id.* Typically, a blanket license only applies to musical works, not the sound recording, but digital streaming involves sound recording that embody musical works. *Id.* Therefore, streaming services are required to obtain authorization and pay royalties for using these sound recordings. *Id.*

⁶⁶ *See Summary of H.R. 1551*, *supra* note 62 (elaborating on how blanket licenses serve to replace song-by-song licensing). *See Chung*, *supra* note 11, at 78 (defining the “Notice of Intent” and its traditional use). Originally, the song-by-song licensing structure required the purchaser to serve a Notice of Intent (“NOI”) on the copyright owner or the U.S. Copyright Office if the owner was unknown. *Id.* Now the blanket license will replace the NOI for streaming uses and will get rid of the need for streaming companies to contract with both the composition and sound recording copyright owners. *Id.* *See Orrin G. Hatch-Bob Goodlatte Music Modernization Act*, 17 U.S.C. § 115(d)(2)(A) (explaining the procedure to obtain a blanket license). *See also Hess*, *supra* note 2, at 195–96 (claiming the “purpose is to allow interactive streaming platforms to be granted blanket mechanical licenses so that they no longer have to negotiate with each individual songwriter/publisher.”). It is questionable as to whether digital streaming requires mechanical licenses because there is no actual copying of the work; however, the MMA requires a mechanical license because streaming operates essentially the same as a download. *Id.*

⁶⁷ *See Orrin G. Hatch-Bob Goodlatte Music Modernization Act*, 17 U.S.C. § 115(d)(3)(A) (explaining the mechanical licensing collective); *Summary of H.R. 1551*, *supra* note 62 (identifying Title I’s most impressive feature – the creation of the Mechanical Licensing Collective).

⁶⁸ *See Federal Register, Designation of Music Licensing Collective and Digital Licensee Coordinator*, U.S. COPYRIGHT OFF. (July 8, 2019), *archived at* <https://perma.cc/TM7U-EZHZ> (releasing a publication regarding the creation of the MLC). *See Summary of H.R. 1551*, *supra* note 62 (claiming that the MLC’s purpose is to collect, distribute, and audit the royalties generated from mechanical licenses). The group also creates and maintains a public database that identifies musical works with their proper owners. *Id.* The MLC is required to hold unclaimed royalties for at least three years before distributing them on a “market-

board is comprised of a mix between publishers and songwriters who regulate the blanket license process and determine fair royalty rates through their public database.⁶⁹ In situations where the MLC is unable to recognize the copyright owner of a work, the board contacts the streaming service company and compares their records of ownership.⁷⁰ Furthermore, the MLC provides an audit right for artists and publishers to petition their ownership of a copyrighted work.⁷¹

share basis” to the copyright owners. *Id.* The MLC is funded by an “administrative assessment fee” from the blanket and non-blanketed licenses. *Id.* The MLC’s operational fees are paid by “digital musical providers” through voluntary contributions and an administrative assessment set by the Copyright Royalty Judges. *Id.*; *see also Music Licensing Modernization Act*, U.S. COPYRIGHT OFF. (Oct. 12, 2019), *archived at* <https://perma.cc/E5NN-888K> (detailing the tasks of the MLC and the source of the operational costs of how the MLC is able to set forth these provisions).

⁶⁹ *See* Orrin G. Hatch-Bob Goodlatte Music Modernization Act, 17 U.S.C. § 115(d)(3)(E)(v) (stating that the MLC database is available to the public for free in a searchable online platform); *see also* Hess, *supra* note 2, at 196 (stipulating that prior to the MLC Spotify had to deal directly with publishers which was “tedious and inefficient”); Federal Register, *supra* note 68 (explaining the administrative layout of the MLC). The MLC will consist of 14 voting members and 3 non-voting members that are from the music industry. *See* Federal Register, *supra* note 68. It is required that at least 4 of the voting members are professional songwriters. *Id.* *See* Chung, *supra* note 11, at 79 (noting that one non-voting member is required to be a member from a non-profit trade associate, another from a digital music service sector, and another from a nonprofit advocacy group that works on behalf of the American songwriters).

⁷⁰ *See* Orrin G. Hatch-Bob Goodlatte Music Modernization Act, 17 U.S.C. § 115(d)(3)(E)(iii) (2018) (explaining what to do with unmatched works and what information will be available in the MLC database); *Orrin G. Hatch*, *supra* note 62 (explaining the ability for the MLC to have the means to locate unclaimed works in their database so artists and publishers can claim their royalties); *see also Summary of H.R. 1551*, *supra* note 62 (asserting that the MLC will hold unclaimed royalties in their database for three years).

⁷¹ *See* Hess, *supra* note 2, at 205 (detailing the audit process, which is the most significant aspect of the MLC database for artists and publishers to reclaim royalties). When artists or publishers believe that they are missing royalty payments from a streaming service, the MLC determines the proper recourse. *Id.* at 199. Indie publishers and songwriters were initially thrilled when this provision was enacted to the MMA because they have had the biggest issues obtaining royalties due to their lack of popularity. *Id.* at 201. It is hoped that the MLC audit service will provide them a more attainable way to collect their royalty payments. *Id.* at 204. *See* Larry Fitzmaurice, *17 Indie Artists on Their Oddest Odd Jobs That Pay the Bills When Music Doesn’t*, VULTURE (Apr. 8, 2019), *archived at*

2. Title II: The Classics Protection and Access Act

Title II provides exclusive federal rights for songs created before February 15, 1972 (“pre-72 works”) through the Classics Protection and Access Act (“Classics Act”).⁷² Prior to the MMA, any work produced before 1972 had zero protection under federal copyright law.⁷³ In general, the Classics Act ensures that pre-72 works that are streamed receive 50 percent of payments via SoundExchange.⁷⁴ SoundExchange is an entity that collects and distributes royalties through technological solutions that have analyzed large amounts of streaming data to create accurate revenue for artists.⁷⁵ If any recordings are streamed without authorization from SoundExchange or the copyright owner, it is considered infringement.⁷⁶ The Classics Act also contains other detailed

<https://perma.cc/B92S-HA4Q> (revealing that most indie artists need to find multiple sources of income because their music career is not enough to pay bills); see also *Summary of H.R. 1551*, *supra* note 62 (describing that the MMA will help people in the music industry to make a living).

⁷² See *Summary of H.R. 1551*, *supra* note 62 (stating that pre-72 works were not protected under federal copyright law prior to the MMA). See Brown, *supra* note 11, at 23 (noting that popular artists, like Smokey Robinson, will have federal copyright protection for their pre-72 recordings). Smokey Robinson testified before the Senate Judiciary Committee and he highlighted the disparity between his hits recorded pre-72 and those recorded post-72. *Id.* at 22–23.

Some great parts of my own career happened before 1972
So, as the law stands, SiriusXM pays me when they play my solo hits ‘Cruisin’ or ‘Being with You’ from 1979 and 1981 -- but under the federal law, they don’t have to pay me or my brothers in the Miracles when they play any of our records.

Id.

⁷³ See Mazumdar, *supra* note 64 (noting that pre-72 works were only governed by state law if available).

⁷⁴ See *Summary of H.R. 1551*, *supra* note 62 (noting that SoundExchange is the entity that controls the distribution of royalties for the copyright owners of sound recordings); see also *About, SOUNDEXCHANGE* (Nov. 4, 2019), *archived at* <https://perma.cc/GT8C-YUTM> (explaining that SoundExchange provides royalty solutions and serves as a “critical backbone to today’s digital music industry”).

⁷⁵ See *About*, *supra* note 74 (highlighting that SoundExchange has paid out more than \$6 billion in royalties with assistance from Music Data Exchange (MDX), International Standard Recording Codes (ISRC) Search, and the Notice of Intention to Use (NOI) Lookup).

⁷⁶ See SOUNDEXCHANGE SOUND RECORDING RIGHTS OWNER MEMBERSHIP AGREEMENT, SOUNDEXCHANGE (Apr. 10, 2015), *archived at* <https://perma.cc/8FRK-929M> [hereinafter MEMBERSHIP AGREEMENT]

provisions regarding public performances and the duration of protection for pre-72 works.⁷⁷ These provisions include the ability to publicly perform pre-72 works via digital transmissions and that works between 1956 and 1972 will be protected until 2067.⁷⁸

3. Title III: The Allocation for Music Producers Act

Lastly, Title III set up the Allocation for Music Producers Act (“AMP”), which assists producers and sound engineers in receiving royalty payments for songs that they helped create.⁷⁹ This provision requires SoundExchange to receive instructions, called “letters of direction,” from artists who have made agreements regarding royalty distribution.⁸⁰ AMP also permits a two percent royalty payment on

(detailing SoundExchange’s role in filing infringement suits). Per the Membership agreement, SoundExchange is permitted to commence litigation, to collect damages arising from infringement cases, join other members who may be a plaintiff or defendant in any litigation, and can arbitrate any claims involving infringement matters in the same manner as any Member would. *Id.*

⁷⁷ See COHEN, *supra* note 21, at 409 (mentioning that the Sound Recording Act of 1971 granted federal protection for songs, which is why any songs produced before that date only had state protection). As a result, many of the state laws did not provide remedies for infringement. *Id.* See also Chung, *supra* note 11, at 79 (noting that one exception to the infringement provision is that the recordings are used for noncommercial purposes).

⁷⁸ See Chung, *supra* note 11, at 79 (identifying that protection for works between 1956 and 1972 will end in February 2067, but works before 1923 will be maintained until 2021); see, e.g., Rosenblatt, *supra* note 28, at 614–15 (exemplifying that many pre-72 ethnographic recordings of Native American ceremonies are used by museums and universities, but now under the MMA the original author can object to this non-commercial use).

⁷⁹ See Chung, *supra* note 11, at 79–80 (claiming that prior to AMP, SoundExchange could not pay studio professionals directly). The AMP provision is important for producers and artists because it provides a process for these people to go back to their older records and ask for permission to receive royalties, when they historically were being forgotten. *Id.*

⁸⁰ See *Guide to Featured Artist Letters of Direction (LOD)*, SOUNDEXCHANGE (Oct. 2014), archived at <https://perma.cc/V88H-ZDC2> (identifying a letter of direction as “a document . . . by which a Featured Artist directs SoundExchange to pay a portion of [their] sound recording performance royalties to a participant involved in the creative process—producers, engineers, mixers, re-mixers, etc.”); see also *Summary of H.R. 1551*, *supra* note 62 (distinguishing that letters of direction are agreements that typically involve provisions that govern royalty payments to every individual who was involved in the creative process of the song,

sound recordings made prior to November 1, 1995, even in the absence of a letter of direction.⁸¹ Originally, SoundExchange was required to distribute royalties directly to individuals on a good faith basis, but the AMP makes letters of direction required by law, to ensure that these professionals are paid properly.⁸²

III. Premise

It is important to note that the catalogue of music offered by streaming services is not just limited to American artists.⁸³ As a result, protection for artists who digitally stream their music is a pressing topic globally.⁸⁴ Countries are struggling to blend modern

such as the publisher and producer); *see also* Brown, *supra* note 11, at 24 (defining SoundExchange as “a nonprofit collective rights management organization designated by Congress to collect and distribute digital performance royalties for sound recordings”).

⁸¹ *See The Allocation for Music Producers (AMP) Act*, COPYRIGHT ALLIANCE (Nov. 4, 2019), *archived at* <https://perma.cc/6VWT-3GVC> (noting that the two percent royalty payment will be produced only if specific requirements are met). When a letter of direction is absent, a producer is permitted to receive royalty payments for works made prior to November 1, 1995 *only if* (1) the producer has made a reasonable attempt to contact and request a letter of direction from the featured artist; (2) SoundExchange has attempted to contact the recording artist and notify them of the producer’s certification; and (3) SoundExchange has not received an objection by the recording artist within ten business days of the first distribution of the royalties to the producer. *Id.*

⁸² *See* MEMBERSHIP AGREEMENT, *supra* note 76 (setting forth a good faith basis policy for SoundExchange and its members in the event that there are undistributed royalties). If SoundExchange does not distribute a Member’s share of royalties, then the company keeps the royalties and makes sufficient efforts to locate the Member as set forth in SoundExchange’s policies. *Id.* SoundExchange will keep these royalties and continue their efforts to locate the Member for three years. *Id.* Once the three years have passed, SoundExchange can extend this holding period up to its discretion, or SoundExchange will obtain all rights, title, and interests to such royalties. *Id.* SoundExchange is not permitted to claim these royalties any earlier than this time period. *Id.* *See also* Chung, *supra* note 11, at 80 (noting that letters of direction were prescribed into law in order to raise the level of certainty for royalty payments).

⁸³ *See* Parker Hall & Quentyn Kennemer, *The best music streaming services*, DIGITAL TRENDS (Mar. 31, 2020), *archived at* <https://perma.cc/A2QR-WQBM> (acknowledging Spotify’s Swedish origin and the 30 million songs that have been added to the catalogue since the service’s creation); Hogan, *supra* note 47, at 139 (noting that Spotify did not hit the American market until 2011).

⁸⁴ *See* Hogan, *supra* note 47, at 142 (highlighting that Swede Daniel Ek created Spotify to tackle the piracy issues in Sweden).

technological advances and their local copyright laws, while ensuring that streaming services are not abusing their ever-growing power.⁸⁵

A. *Copyright in the Digital Sector is a Global Issue*

Global lawmakers have tried to solve the issues with mechanical licenses, but were unsuccessful in their attempts.⁸⁶ For example, in September 2008, the European Union's ("EU") Commissioner started the Global Repertoire Database Working Group, which sought to create a digital website that was very similar to the MLC's audit database.⁸⁷ The framers for the Global Repertoire Database ("GRD") spent at least four years discussing the legal, administrative, and technological barriers that this type of forum would face.⁸⁸ Neelie Kroes, the head of the GRD Working Group,

⁸⁵ See Milosic, *supra* note 30 (emphasizing that the digital era has made it extremely difficult for people to obtain information regarding copyright ownership for musical works). "It would seem that the availability of a multinational music rights database would reduce transactional costs and generate much more business for the industry . . . [b]ut the challenge remains and delays bringing the music trade fully into the modern digital age." *Id.*

⁸⁶ See Milosic, *supra* note 30 (identifying other mechanical license databases in the world). One mechanical license database is the International Music Joint Venture (IMJV) which was formed in 2000. *Id.* The IMJV includes the American society ASCAP, the UK's PRS (formerly MCPS-PRS Alliance), Canadian SOCAN and the World Intellectual Property Organization. *Id.* All of these programs began with great promise, but ultimately failed or have been radio silent in their success. *Id.*

⁸⁷ See Forde, *supra* note 63 (remembering the last attempt to create a system similar to the MLC's audit website); see also *Global Repertoire Database Declared a Global Failure*, *supra* note 60 (explaining that the Global Repertoire Database aimed to facilitate easy licensing and payments for all musical works by including information pertaining to the publishers, artists, labels, administrators, and collection societies).

⁸⁸ See Milosic, *supra* note 30 (detailing who was part of the discussion groups for the Global Repertoire Database). The Global Repertoire Database was initially comprised of groups such as Universal and EMI Music Publishing, tech companies like Apple, Nokia, and Amazon, and collections organizations like PRS for Music, STIM (Sweden) and SACEM (France). *Id.* The International Confederation of Societies of Composers and Authors (CISAC), the European Composer and Songwriter Alliance (ECSA), the International Confederation of Music Publishers (ICMP), Omnifone, and Google also joined the group months later. *Id.* The Global Database Repertoire Working Group also relied on the International Copyright Enterprise to consult with Deloitte as an effort to manage and build the group. *Id.*

hosted several roundtable discussions and spent years lobbying for the database's creation.⁸⁹ The group's discussions involved talks of the potential benefits and funding for the database, however the creators realized that a website of this magnitude was largely impossible.⁹⁰ There are too many varieties of music around the world and digital streaming is too complex for a website of this caliber to work.⁹¹ As a result, the GRD was shut down shortly after it was developed and the EU's music industry took a \$13.7 million financial hit.⁹² Nevertheless, the GRD was a prime learning tool for other lawmakers to consider.⁹³

Deloitte held a study to discuss the goals for the database where over eighty organizations and more than 450 individuals, including representing publishers, authors, societies, music service providers, consumers, recording artists, managers, record companies, legislative bodies, and information management companies, participated. *Id.*

⁸⁹ *See id.* (going through significant dates where the discussion group implemented new changes). In April 2010, the discussion group requested information from more than eighty organizations to solidify their ideas for the project. *Id.* In July and December that same year, the discussion group issued proposals and recommendations for the group to consider. *Id.* These recommendations included the authority, information, availability, and the potential users of the Global Repertoire Database. *Id.*

⁹⁰ *See id.* (providing detailed provisions going over the benefits of the Global Repertoire Database as well as the players who will fund this program). *See also* Chris Cooke, *PRS confirms Global Repertoire Database "cannot" move forward, pledges to find "alternative ways,"* COMPLETE MUSIC UPDATE (July 10, 2014), archived at <https://perma.cc/ELZ3-VU9F> (noting that there is no statutory obligation to register copyright works, which makes distributing royalties tricky because there is no way to make a complete database that identifies all copyright owners).

⁹¹ *See* Milosic, *supra* note 30 (stating that the goal of the U.S. Copyright Office is to create a comprehensive database because their past attempts were inaccurate and inaccessible to the public); *see also* *Global Repertoire Database Declared a Global Failure?*, *supra* note 60 (claiming that "searching, finding, and paying for the use of a song worldwide will remain a hopelessly complicated, nearly-impossible headache"). The vision of the Global Repertoire Database was simple but extremely complex. *Id.*

⁹² *See* Milosic, *supra* note 30 (noting that the money lost is somewhere in the music industry world because the contributions from the collection societies and publishers did not ever materialize).

⁹³ *See id.* ("[T]here remains a fairly wide consensus in the music business that a better system of rights ownership information management is crucial to the developing digital music industry, and, despite the failures of previous attempts, a global database still seems like the best system to pursue."). There are already a number of groups who have started to focus on combining all of the world's database attempts, but have been unsuccessful. *Id.*

B. Congress Rushed the Enactment of the MMA

The United States did not learn from their global counterparts.⁹⁴ The MMA was held in office for 37 days and aimed to implement 20 years of technological advancement into the current copyright law.⁹⁵ There were no formal conferences to discuss the new changes to the Copyright Act, such as the role of the MLC and the new audit database.⁹⁶ The MMA was the first bill in United States history that passed unanimously because the only players that were involved in the enactment process were Congress and some of the wealthiest people in the music industry.⁹⁷ The public, along with artists and small publishing companies, were given zero ability to object or voice their concerns for the Act, instead they merely received a report from the House Committee on the Judiciary.⁹⁸

⁹⁴ See *Music Modernization Act Signed Into Law*, AM. SONGWRITER (Oct. 11, 2018), archived at <https://perma.cc/T2XN-B2GT> (praising the music and tech industries for working together to create the MMA, but not mentioning any global involvement in its development). David Israelite, the president of the National Music Publishers Association, claims that this is the first time in history for these issues to be addressed and solved. *Id.*

⁹⁵ See generally Copyright Act, 17 U.S.C. §§ 101–1401 (2018) (providing that the most significant amendment to the Copyright Act of 1976, prior to the MMA, was called the Digital Millennium Copyright Act (DMCA)). See *Copyright Jumps the Shark*, *supra* note 32, at 2525 (acknowledging that the MMA added 24,072 words to the Copyright Act of 1976, making it the lengthiest addition to copyright law to date). The DMCA was less than 22,500 words, which is 2,000 fewer words than the MMA. *Id.* at 2525. See Copyright Act, 17 U.S.C. §§ 103, 202 (proving that, unlike the MMA, the DMCA focused on providing safe harbors from copyright infringement liability for online service providers and created new chapters for protection for copyrighted work). See Litman, *supra* note 29, at 862 (detailing that legislators typically negotiated among various representatives when past amendments to the copyright statute were initiated).

⁹⁶ See *Copyright Jumps the Shark*, *supra* note 32, at 2522 n.11 (indicating that the dates of the bill going through the House and then through the Senate were not far apart, so there was no time for a formal conference to be held in-between).

⁹⁷ See Forde, *supra* note 63 (noting David Israelite’s comments regarding the MMA as “a milestone” because of the bills “smooth sailing” through the House and Senate). Legislators worked “hand in hand” with the people who will benefit the most from this Act, including three of the largest paying members of the National Music Publishers Association (“NMPA”) who own large equity in Spotify and had the biggest influence in drafting the MMA. *Id.*

⁹⁸ See *Is the Music Modernization Act Enabling ‘Legal Theft’ Against Smaller Artists?*, *supra* note 62 (hypothesizing that some Congressmen voted for the MMA

C. *The Popularity of Infringement Litigation*

Many artists and publishers have turned to litigation as a means to collect their unpaid royalties.⁹⁹ There have been endless infringement lawsuits between streaming services, artists, and publishers.¹⁰⁰ The majority of these lawsuits have resulted in settlements because companies, like Spotify, know that they cannot get away with their actions in court under the current copyright laws.¹⁰¹ However, the MMA changed this.¹⁰² Once the MMA was enacted, all

without fully understanding copyright law and the Act's effect). Dae Bogan, a music licensing expert, tried to meet with government officials to share his expertise but his efforts were ignored. *Id.* See also Bogan, *supra* note 64 (identifying that sixteen House representatives abstained from voting on the bill). The MMA was widely praised by the biggest rights organizations in the music industry, such as NMPA, RIAA, and DiMA. *Id.* See also Music Modernization Act of 2018, H.R. 1551, 115th Cong. (2018) (providing a public statement of the MMA's goal). See Complaint, *supra* note 17, at 5 (claiming that the waiver of the right to sue for statutory damages appears to be a strategic attempt for Spotify to eliminate their liability for willful infringement). The elimination of statutory rights for willful infringement benefits individuals like the NMPA investors because Spotify is no longer required to pay damages for not obtaining mechanical licenses; thus, keeping money in their pockets and proving that the MMA was enacted to benefit these powerful players. *Id.*

⁹⁹ See Keene, *supra* note 59 (noting prior to the MMA digital streaming services faced numerous allegations that they were failing to pay royalties); Alex Young, *Thom Yorke: Spotify is "the last desperate fart of a dying corpse,"* COS (Oct. 3, 2013), archived at <https://perma.cc/9MKK-3BRC> (stating artist's discontent with Spotify's unfair royalty payments). See, e.g., Forde, *supra* note 63 (providing that in the last two years Spotify has paid \$30 million in settlements to NMPA and \$43 million in settlements to songwriters). See also Copyright Act, 17 U.S.C. §§ 501–513 (2018) (providing guidance on obtaining remedies for copyright infringement claims).

¹⁰⁰ See Hess, *supra* note 2, at 194–95 (identifying the endless lawsuits due to the lack of an effective remedy for settling issues between artists, producers, and streaming companies); see also Keene, *supra* note 59 (highlighting that infringement lawsuits typically end in a settlement).

¹⁰¹ See Jeong, *supra* note 39 (explaining a notable lawsuit, *Wixon v. Spotify*, centered on Spotify's failure to pay proper royalties). See, e.g., *Bluewater Music Servs. Corp. v. Spotify United States Inc.*, 2018 U.S. Dist. LEXIS 173064, 1–6 (W.D. Tenn. Sept. 29, 2018) (detailing an action for copyright infringement for Spotify's failure to obtain proper licenses to stream Bluewater's music).

¹⁰² See Complaint, *supra* note 17, at 5 (exemplifying that the update to the copyright law took away the right to statutory damages). Any copyright infringement case would be eliminated due to the penny rate per streams and the removal of statutory damages and attorneys' fees. *Id.* at 10. Overall, a plaintiff would spend more money pursuing an action than recovering on that action. *Id.*

potential legal claims on unpaid royalties were shut down.¹⁰³ Due to the new provisions in the MMA, if the lawsuit was not filed by December 31, 2017, then plaintiffs could not receive profits deriving from willful infringement, along with statutory damages or attorneys' fees—instead receiving only the royalty fees they are owed.¹⁰⁴ This provision was created with the objective to modernize the process for royalty payments and clear the courts of voluminous royalty-based litigation.¹⁰⁵

D. *Eight Mile Style v. Spotify*

The enactment of the MMA did not cease royalty-based lawsuits as much as supporters had hoped.¹⁰⁶ One of the first high-

¹⁰³ See Music Modernization Act, *supra* note 11 (describing that for alleged infringement activities between January 18, 2018 and January 1, 2021 the “sole and exclusive remedy” for artists and publishers is limited to royalties for digital phonorecord deliveries determined by the Copyright Royalty Judges); *see also* Resnikoff, *supra* note 19 (quoting Wixen which claims that this provision gives companies like Spotify a “get-out-of-jail-free card”). In *Wixen*, instead of Spotify paying the owners the \$1.6 billion in damages for their actions, Spotify owes \$0. *See* Resnikoff, *supra* note 19. Simplistically, if an artist or publishing company wanted to sue Spotify for unpaid royalties, a court will automatically throw the lawsuit out because there are limited remedies available for the plaintiff. *Id.* *See Music Publisher Sues For \$1.6 Billion For Unpaid Songwriter Royalties*, 19 MEALEY'S LIT. REP. 11 (2018) (explaining the lawsuit *Wixen Music Publ. Inc. v. Spotify USA, Inc.*).

¹⁰⁴ *See* Jose Landivar, *THE MUSIC MODERNIZATION ACT: A PRIMER FOR COPYRIGHT HOLDERS*, LADAS & PARRY LLP (Sept. 9, 2019), *archived at* <https://perma.cc/DRB3-3X42> (explaining that “[t]he MMA provision was originally included as part of a compromise to secure the cooperation of the streaming services in paying for the setup and operation of the Mechanical Licensing Collective”). *See* Complaint, *supra* note 17, at 6 (detailing that under the MMA a copyright owner can commence an action for unauthorized reproduction or distribution of musical works prior to the license availability date, January 1, 2021).

¹⁰⁵ *See* Resnikoff, *supra* note 19 (noting that Wixen filed their lawsuit before January 1, 2018 so they would not have to follow the MMA).

¹⁰⁶ *See* Jessica Meiselman, *Ask A Lawyer: What's Going on With Eminem's Spotify Lawsuit?*, VICE (Aug. 29, 2019), *archived at* <https://perma.cc/CYR7-ASM9> (implying that although Spotify has historically been sued for unpaid royalties, lawsuits occurring after the passing of the MMA are significant). “[S]ince 2011, Spotify has racked up between \$60-120 million dollars in unpaid songwriter royalties due to artists from all across the music spectrum.” *Id.* *See* Legal

profile legal challenges to the MMA was raised in a lawsuit from rapper Eminem's publisher, Eight Mile Style, against Spotify and The Henry Fox Agency ("HFA").¹⁰⁷ Eight Mile Style asserts that Spotify, along with the help from HFA, has been streaming Eminem's music without paying them the royalties.¹⁰⁸ Eight Mile Style further argues that Spotify took bad faith steps in locating the rightsholders to Eminem's works and streamed his work without obtaining the proper licenses.¹⁰⁹

In accordance with the MMA, streaming services must obtain a mechanical license for every work digitally streamed.¹¹⁰ However, Spotify did not comply with this requirement, and instead identified

Entertainment, *Spotify Settles \$43 Million Class Action Copyright Lawsuit*, FORBES (June 1, 2017), archived at <https://perma.cc/799H-5Y7A> (establishing the significance of Spotify's \$43.4 million settlement in a 2015 class action). This large settlement was a result of a year-and-a-half-long legal battle and began as a combination of two copyright infringement cases against Spotify. *Id.*; see, e.g., Ferrick, et al. v. Spotify USA Inc., et al., No. 16-cv-8412 (AJN), 2018 U.S. Dist. LEXIS 86083 (S.D.N.Y. May 22, 2018) (ending in a "win" for Spotify, with a settlement of \$43 million and a dismissal of the lawsuit); Bluewater Music Servs. Corp. v. Spotify United States Inc., No. 3:17-cv-01051-JPM, 2018 U.S. Dist. LEXIS 173064, at 2 (W.D. Tenn. Sept. 28, 2018) (alleging Spotify infringed on 2,142 copyrighted works which resulted in a settlement); Lauren Berg, *Spotify Settles \$1.6B IP Suit Brought by Tom Petty's Publisher*, LAW360 (Dec. 20, 2018), archived at <https://perma.cc/4LUS-8NXS> (detailing another \$1.6 billion copyright infringement case against Spotify).

¹⁰⁷ See Complaint, *supra* note 17, at 1 (setting forth the action for willful copyright infringement brought by Eight Mile Style against Spotify USA Inc. for their unlawful use of Eight Mile Style's musical compositions and disregard for the ownership of these works).

¹⁰⁸ See First Amended Complaint at 1–2, Eight Mile Style, LLC, et al. v. Spotify USA, Inc., No. 3:19-cv-00736 (M.D. Tenn. Aug. 21, 2019) (adding HFA as a defendant for their contribution to Spotify's infringement); *Spotify Infringed Eminem's "Lose Yourself" Other Tracks: Suit*, LAW360 (Aug. 21, 2019), archived at <https://perma.cc/P4LB-GSPT> [hereinafter LAW360] (noting that Spotify is required to make account statements and pay copyright owners once they are identified).

¹⁰⁹ See Meiselman, *supra* note 106 (noting "streaming platforms are obligated to undertake 'commercially reasonable efforts' (a legal standard that sets a low-ish bar in terms of effort) to locate the owner of the composition").

¹¹⁰ See Orrin G. Hatch-Bob Goodlatte Music Modernization Act, 17 U.S.C. § 115(d) (2018) (outlining the mechanical license requirement and the switch to blanket licenses).

Eminem's works under the MMA's copyright control provision.¹¹¹ This categorized Eminem's songs as having no known owner, thus allowing Spotify to keep the royalties from these songs after three years.¹¹² Eight Mile Style claims that Spotify has made intentional efforts to withhold payments, and that the company knew of their ownership in Eminem's songs.¹¹³

According to Eight Mile Style, Spotify is taking advantage of the loopholes in the MMA because they are continuing their illegal operations without any punishment.¹¹⁴ Besides failing to pay royalties, Spotify also did not meet the requirements laid out in the MMA's liability provision.¹¹⁵ This liability provision requires streaming services to make "commercially reasonable efforts" to locate copyright owners no later than 30 days from originally streaming the music in question.¹¹⁶ Eight Mile Style's Complaint states, "Spotify made the

¹¹¹ See Complaint, *supra* note 17, at 3 (defining copyright control as "a category reserved for songs for which the copyright owner is not known so the song cannot be licensed").

¹¹² See Orrin G. Hatch-Bob Goodlatte Music Modernization Act, 17 U.S.C. § 115(3)(H)–(J) (setting forth the three-year holding period and how royalties will be distributed to copyright owners). The Act fails to establish a protocol for the distribution of royalties that do not have any ownership after the three-year period. *Id.* See Complaint, *supra* note 17, at 3 (attaching Exhibit A to the Complaint which contains a list of all the music owned by Eight Mile Style that has been streamed on Spotify and did not receive full compensation for the total number of streams).

¹¹³ See Meiselman, *supra* note 106 (identifying that anyone is able to go research the song "Lose Yourself" and discover that 90% of the publishing rights to the song belong to Eight Mile Style).

¹¹⁴ See Hess, *supra* note 2, at 195 (clarifying that the MMA was an attempt to close loopholes within the current United States copyright law and licensing regulations).

¹¹⁵ See Complaint, *supra* note 17, at 4 (explaining that Spotify's failure to send NOI's for "Lose Yourself" indicates Spotify's attempt to mislead Eight Mile Style into believing they had a compulsory license). "In fact, the sending of these NOI's now actually represents an admission by Spotify that it knows it was not licensed and has committed willful copyright infringement." *Id.* See Verónica Rodríguez Arguijo, *The first Spotify Awards and the role played by streaming services in access to digital content*, NEWSTEX BLOGS (Jan. 3, 2020), archived at <https://perma.cc/9XAG-YHKX> (noting that digital music providers are required to identify and locate the copyright owners of the musical works in their platform).

¹¹⁶ See Orrin G. Hatch-Bob Goodlatte Music Modernization Act, 17 U.S.C. § 115(10)(B) (setting forth the liability requirements).

Not later than 30 calendar days after first making a particular sound recording of a musical work available through its service via one or more covered activities, or 30 calendar days after the enactment date, whichever

deliberate decision to distribute sound recordings without building any internal infrastructure to license compositions properly or comply with the requirements of Section 115 of the Copyright Act.”¹¹⁷ The Complaint further asserts that Spotify’s business model from the beginning was to commit copyright infringement and offer cheap settlements whenever a plaintiff identified their wrongdoings.¹¹⁸ This lawsuit illustrates that the enactment of the MMA has not stopped streaming services from continuing their unlawful actions, thus signifying that the MMA needs to be amended to ensure stricter liability.¹¹⁹

IV. Analysis

A. *The Glaring Issues with Blanket Licenses and the MLC Database*

The process of amending the Copyright Act is not new to lawmakers, but the subject of digital licensing is novel in the United States.¹²⁰ Title I of the MMA attempts to tackle the beast of digital licensing with an extensive and complicated blanket licensing

occurs later, a digital music provider shall engage in good-faith, commercially reasonable efforts to identify and locate each copyright owner of such musical work (or share thereof).

Id.

¹¹⁷ See Complaint, *supra* note 17, at 59 (blaming Spotify’s goal to dominate the digital streaming industry as the drive for their noncompliance of Section 115).

¹¹⁸ See *id.* at 6 (“Spotify built its behemoth by willfully infringing on the copyrights of creators of music worldwide without building the infrastructure needed to ensure that songs appearing on the Spotify service were properly licensed or that appropriate royalties were paid on time (or at all) in compliance [with the Act]”); see also Sanchez, *supra* note 6 (noting that Spotify is a clear frontrunner for streaming services despite their low royalty payouts). Per each user, Spotify only loses \$2.68 because its royalty payouts are so low, thus building a profitable business on unfairness. See Sanchez, *supra* note 6.

¹¹⁹ See Forde, *supra* note 63 (emphasizing that even the biggest supporters of the MMA realize that there is so much work to do in regards to digital licensing).

¹²⁰ See COHEN, *supra* note 21, at 28 (going through each amendment to the Copyright Act). See also *supra* Section II.A–B (detailing the history of copyright law in the United States and its numerous revisions due to the country’s technological advancements).

agreement.¹²¹ The blanket licenses and the role of the MLC eliminates the need to purchase multiple licenses, instead utilizing one mechanical license.¹²² On paper this sounds great, however the mechanics of how this process would realistically function were not entertained by the drafters.¹²³

To start, streaming services are not putting in reasonable commercial efforts to purchase blanket licenses and are continuing to freely stream copyrighted works.¹²⁴ This practice affects copyright owners significantly as they are not paid for their works.¹²⁵ Streaming services are essentially turning a blind eye to the mechanics of

¹²¹ See Orrin G. Hatch-Bob Goodlatte Music Modernization Act, 17 U.S.C. § 115(d)(1) (2018) (providing long and extensive provisions regarding mechanical licensing that is not in layman's terms). See Christman, *supra* note 15 (explaining that the MMA has a huge opportunity to make a significant impact but in order for it to be impactful in the long run there needs to be revisions). See Gardner, *supra* note 17 (claiming that the MMA "was intended to make life easier for tech companies and to get songwriters paid"). The MMA was hailed by multiple powerful players, such as President Trump, National Music Publishers Association's president David Israelite, and Spotify's general counsel Horacio Gutierrez. *Id.*

¹²² See *Copyright Jumps the Shark*, *supra* note 32, at 2528 (explaining that a blanket license reduces transaction costs in having to purchase individual licensing for each work). Professor Wendy Gordon claims that the multiple transactions costs were one of the primary reasons for market failure in copyright law. *Id.* See Hess, *supra* note 2, at 204 (stating that the MMA "creates a laundry list of information sought but ambiguous guidance as to what happens if a work remains unmatched with a copyright owner").

¹²³ See Litman, *supra* note 29, at 870 (highlighting that the enactment of a statute usually involves "negotiation, brokering and compromise"). Also, there is high participation from industry representatives who vigorously lobby for the statute's enactment. *Id.* at 870–71. See Sabbagh, *supra* note 64, at 257 (emphasizing that the MLC "has the monumental task of creating and populating the database"). See Gardner, *supra* note 17 ("Streamers may have thought their copyright troubles were ending, but that sentiment might have been both optimistic and premature.").

¹²⁴ See Orrin G. Hatch-Bob Goodlatte Music Modernization Act, 17 U.S.C. § 115(10)(B) (setting forth the "reasonable commercial efforts" standard); Meiselman, *supra* note 106 (highlighting that "commercially reasonable efforts" is a low legal standard).

¹²⁵ See Coffey, *supra* note 50, at 30 ("Many artists state that they do not receive as much royalties as they would from an album sale and as a result, do not wish to be involved with music streaming services."); Hayes, *supra* note 51 (noting the extremely low payouts from streaming services, thus highlighting the artist's need for every penny).

copyright law with no ramifications.¹²⁶ Also, as the MLC database will not be available until January 1, 2021, artists or publishers must endure a significant time lapse before submitting a royalty claim.¹²⁷ This delay is leaving ample room for streaming services to continue their wrongdoings without any true incentive to change their habits.¹²⁸

It is clear that the MLC needs time to develop their database; nevertheless, there are some solutions that can be implemented to make blanket licenses user friendly and efficient once the system is up and running.¹²⁹ First, the MLC audit database should be a clear and modernized website, located in an area that is easily accessible through a simple internet search.¹³⁰ This will make it straightforward for artists and publishing companies of all calibers to update their ownership for specific works while eliminating the due diligence process that

¹²⁶ See *supra* Section III.C (explaining that historically the majority of the royalty lawsuits ended in settlements). Most importantly, there is a stretch of time where artists are not able to sue streaming services, thus not holding these companies accountable for their unlawful actions. *Id.*

¹²⁷ See Chung, *supra* note 11, at 80 (noting that it is not until February 2021 where the DMPs will transfer royalties for unmatched works to the MLC). Furthermore, the MLC will not distribute unmatched royalties to their copyright owners until 2023. *Id.* at 80. See also Hess, *supra* note 2, at 200–01 (identifying that the largest publishing companies, including Warner Chappel, Universal, and Sony/ATV, will reap early benefits once the MLC is running).

¹²⁸ See Hess, *supra* note 2, at 201 (noting the concerns of publishers' trustworthiness to distribute royalties correctly). Critics note that under a reasonableness standard, the MLC will only have an incentive to do their job well enough so there are minimal complaints. *Id.* at 204.

¹²⁹ See *Copyright Jumps the Shark*, *supra* note 32, at 2522 (claiming that the MMA falls short of its initial aspirations); see also Loren, *supra* note 22, at 698 (highlighting that there are numerous players with vested rights in copyrighted music and the United States copyright law needs to properly and clearly govern this).

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 But this makes no rational sense now considering that Congress just created an independent "monopoly" in the MLC to distribute blanket mechanical licenses.

See Loren, *supra* note 22, at 698.

¹³⁰ See Hess, *supra* note 2, at 203 (posing the concern as to why lawmakers created the MLC instead of allowing The Henry Fox Agency to run the audit database since they already work directly with artists and publishers in obtaining licenses and royalties). See also *Music Licensing Modernization Act*, *supra* note 68 (implying that the MLC will work closely with the United States Copyright Office and the audit database will be overseen by this department).

streaming services are currently foregoing.¹³¹ Second, when new music is released and uploaded to a streaming service, there should be a requirement to provide an accurate record of ownership.¹³² For example, an artist uploading via a publishing company, such as Tunecore, Symphonic Distribution, CD Baby or oneRPM, could supply all of the necessary personal information with their digital music file so every copyright owner is properly identified.¹³³ Having a clear record of ownership will assist streaming services in identifying who the copyright owners are for the content they stream and what parties they should be paying royalties to—a win for all.¹³⁴ The arguments proposed in *Eight Mile Style v. Spotify* illustrate that it is essential for the MLC and streaming companies to implement organizational tools to ensure a successful transition under the MMA.¹³⁵

¹³¹ See Hess, *supra* note 2, at 204 (emphasizing that there are only minimal safeguards to ensure that royalties are distributed accurately). The MMA provides provisions for the MLC to ensure that their matching is accurate. *Id.* at 206. First, the MMA contains “macro level review safeguards, such as the mandatory audit of the agency to be conducted every five years.” *Id.* at 204. However, even this is concerning because this infrequent check “won’t remedy the fact that there is not a clear articulation of a minimum standard of effort.” *Id.* New music accumulates every day, but as the law stands, it doesn’t indicate how much effort or time the MLC will need to contribute. *Id.*

¹³² See *Is the Music Modernization Act Enabling ‘Legal Theft’ Against Smaller Artists?*, *supra* note 62 (mandating that record companies should “provide complete and accurate (at the time of release) publishing information for each track within the metadata delivered to distributors/aggregators, and that the latter provides that information to DSPs”). See Chung, *supra* note 1212, at 78 (praising that the MMA “creates new section 115 blanket licenses for digital uses, changes section 115 rate-setting standard, changes rate-setting rules for performing rights organizations (“PROs”), federalizes pre-1972 sound recordings through the Classics Act, and allows SoundExchange to pay producers directly through the AMP Act”).

¹³³ See *Is the Music Modernization Act Enabling ‘Legal Theft’ Against Smaller Artists?*, *supra* note 62 (emphasizing that critics of the MMA are concerned that major publishers like the NMPA will fight to keep the Act the way it is).

¹³⁴ See *id.* (noting that a tracker would make it less likely that streaming companies will collect money that is not theirs).

¹³⁵ See Complaint, *supra* note 17, at 16–28 (providing examples of how a system without blanket licenses and the MLC database is not conducive).

B. *Congress Needs to Reevaluate the MMA*

Eight Mile Style v. Spotify is publicly demonstrating how the MMA and its provisions are riddled with imperfections.¹³⁶ Through Eight Mile Style's allegations it is clear that Congress rushed the enactment of the MMA and did not properly explore the effects of its provisions.¹³⁷ The framers' first mistake was that the bill was held in Congress for only 37 days, making it unlikely that 20 years of technological changes were appropriately implemented into the law.¹³⁸ Their second mistake was creating the bill's provisions solely from the opinions of the music industry's most powerful players.¹³⁹ In comparison, lawmakers for the EU's GRD spent four years in discussion groups, with artists and publishers of all sizes, to determine how to implement their audit system seamlessly.¹⁴⁰ The GRD's failure signifies that the EU's music industry and copyright lawmakers were unprepared for the vast difficulties that this type of system would face—even with meticulous precautions—and that United States

¹³⁶ See Hogan, *supra* note 47, at 151 (identifying that the last major publicized distrust for Spotify was when Taylor Swift removed her album "1989" from Spotify's catalogue in 2015). Swift's removal of her work inspired conversations among music fans, industry leaders, and critics about the true impacts that streaming services are having on artists' works. *Id.* Swift's public statement pleaded for the ability to make music available to the masses but ensure that copyright holders are getting a reasonable return for doing so. *Id.*

¹³⁷ See *Copyright Jumps the Shark*, *supra* note 32, at 2522 (noting that the enactment of the MMA illustrates a broken legislative system because it highlights how Congress ignored the fundamental themes of copyright law). See also *supra* Section III.A (explaining the detailed steps that other lawmakers went through when they altered their digital copyright laws).

¹³⁸ See Chung, *supra* note 11, at 80 (claiming that the passage of the MMA was a result of years of struggles and difficulties in the music industry); see also Hess, *supra* note 2, at 199 (inferring that it's a surprise that the MMA came into law so quickly because it's a complex piece of legislation).

¹³⁹ See Chung, *supra* note 11, at 78 (noting that Sarah Rosenbaum, music counsel for Google and YouTube, was one of the legal leads in advocating for the MMA). Rosenbaum's career focuses on music rights and administers companies that work with streaming services in their practices of obtaining licenses. *Id.* But see *id.* (emphasizing that Rosenbaum used her own opinions when advocating for the MMA and not the opinions from the organizations that she works with).

¹⁴⁰ See Milosic, *supra* note 30 (identifying the failures of the GRD and some solutions to the problems it faced).

lawmakers were even further behind in their preparations.¹⁴¹ The MMA framers did not organize a thorough investigation—no detailed research was conducted nor did any group discussions occur prior to implementing the Act.¹⁴²

The MMA was executed with blind support and minimal exploration whereas the music industry, along with lawmakers, should have learned from the mistakes of the GRD.¹⁴³ Lawmakers and music professionals should be identifying the continuing problems created by digital streaming and ultimately collaborate with EU leaders.¹⁴⁴ It seems more beneficial to combine resources to create a global digital streaming solution, than for separate lawmakers to repeatedly fail in confronting the same issue.¹⁴⁵

¹⁴¹ See *id.* (detailing that the lawmakers for the GRD were a diverse group of people who spent years combining their resources to develop a helpful database); see also Cooke, *supra* note 90 (claiming that the GRD failed because they missed internal deadlines despite being supported by successful publishing companies); see also Sabbagh, *supra* note 64, at 255 (identifying that databases can be seen as “archaic and obsolete technology” thus creating a concern for their success).

¹⁴² See *supra* Section III.A–B (comparing the processes between the development of the GRD and the MMA). The MMA was developed with significantly less research and discussion than the GRD, which paves a problematic future for the success of this Act. *Id.* The MMA was also only held in Congress for 37 days, which seems like too little of time to adapt 1970s law to these modern advancements. *Id.*

¹⁴³ See Cowl, *supra* note 15 (noting that “the blind support of the MMA without real examples of how the working-class majority of music creators, producers, and performers will benefit is a big red flag, and makes us hesitant to ask our community to support it passing in the Senate without significant revision”). See *Copyright Jumps the Shark*, *supra* note 32, at 2522 (coining the term “jumped the shark” to illustrate that the MMA was rushed into practice and complicated licensing agreements). A person or object is said to have “jumped the shark” when it has reached its peak and begun a downhill movement to mediocrity. *Id.*

¹⁴⁴ See Milosic, *supra* note 30 (claiming that these databases fail due to the loss of funding, disputes over control of the database, and having the daunting task of making all of the owners of copyrighted works identifiable). *Contra* Forde, *supra* note 63 (admitting that any effects of the MLC’s impact will not happen until at least 2021).

¹⁴⁵ See Christman, *supra* note 15 (explaining that the MMA has a huge opportunity to make a significant impact but in order for it to be impactful in the long run there needs to be revisions).

C. *Streaming Services are Overextending the Copyright Control Provision*

Streaming services are overextending the copyright control provision in the MMA and using it to justify their actions of freely streaming copyrighted works.¹⁴⁶ *Eight Mile Style v. Spotify* stems from Spotify's clear misuse of this provision and Spotify's misrepresentation of their relationship with Eight Mile Style.¹⁴⁷ Unbeknownst from Spotify's actions, these parties have an extensive professional history.¹⁴⁸ Spotify knew that Eight Mile Style was the owner of Eminem's music because, in the past, they paid Eight Mile Style royalties for his work.¹⁴⁹ Once the MMA was enacted, the royalty payments to Eight Mile Style stopped, even though Spotify continued to stream Eminem's music.¹⁵⁰ It is evident that Spotify is not complying with the requirements set forth in the MMA, but the company has faced zero repercussions for doing so.¹⁵¹ Spotify has historically relied on settlements to pay their way out of their misconduct and no sanctions have been developed to hold them

¹⁴⁶ See Brown, *supra* note 11, at 24–25 (supporting that this provision in the MMA is unconstitutional). The lack of infringement lawsuits “puts songwriters in a vulnerable place against the large, digital streaming giants.” *Id.* at 25; see also McJohn, *supra* note 34, at 144 (identifying that copyrights are governed by property law). See Complaint, *supra* note 17, at 10 (“It is settled law that an infringement claim is a property right that vests in a plaintiff the moment the infringement occurs.”). See Keene, *supra* note 59 (explaining that a copyrighted work can lose its protection when it enters the public domain; thus, anyone can profit off of the use of the work).

¹⁴⁷ See Complaint, *supra* note 17, at 10 (asserting that Spotify's actions are an unconstitutional taking because the use of Eminem's music was for private financial gain).

¹⁴⁸ See *id.* at 6 (highlighting that prior to the MMA Spotify had matched the Eight Mile compositions without owning these specific sound recordings).

¹⁴⁹ See *id.* at 3–4 (providing an Exhibit that details Eight Mile Style and Spotify's extensive relationship). Exhibit A of the Complaint illustrates all of Eminem's songs that Spotify has previously paid Eight Mile Style for. *Id.*

¹⁵⁰ See Keene, *supra* note 59 (warning that streaming services are continuing to rely on the MMA's safe harbor provision).

¹⁵¹ See Complaint, *supra* note 17, at 3 (alleging that “[o]n information and belief, the ‘Lose Yourself’ musical composition had been matched to its sound recordings on Spotify, but Spotify simply committed willful copyright infringement and did not pay for the vast majority of the more than billion unlicensed streams of one of the most well-known songs in history.”).

accountable, thus Spotify uses their wealth as a crutch to continue their wrongful acts.¹⁵²

D. *The Elimination of Copyright Liability is Unlawful*

The remedies for infringement were included in the Copyright Act to ensure that copyright owners were not only being legally protected, but were also being motivated to creatively contribute to society.¹⁵³ However, these provisions were wrongly removed when the MMA was enacted.¹⁵⁴ Questionably, the MMA removed a plaintiff's right to statutory damages, impoundment, attorney's fees, criminal sanctions, and declaratory judgments.¹⁵⁵ Instead, a plaintiff is only entitled to the royalty payments that they are owed.¹⁵⁶ However, this amount is insignificant and may deter plaintiffs from filing a lawsuit because the litigation process is more of a financial burden for plaintiffs rather than a true reward.¹⁵⁷ It seems clear that

¹⁵² See LAW360, *supra* note 108 (alleging that Spotify greatly benefits from their deceptive acts). “Through this deception, Eight Mile said Spotify gained the financial benefit of tens of millions of Eminem fans using and subscribing to Spotify, the value of which exceeds \$2.5 billion, along with its listing in the stock market that places Spotify’s market cap at about \$26 million.” *Id.*

¹⁵³ See MCJOHN, *supra* note 34, at 243–45 (describing infringement remedies for a plaintiff as indicated in United States copyright law as of 2018). The copyright statute permitted plaintiffs to receive an injunction, actual damages, statutory damages, impoundment, attorney’s fees, criminal sanctions, and declaratory judgements for any copyright infringement and unpaid royalty claims. *Id.*

¹⁵⁴ See Hogan, *supra* note 47, at 132 (“[I]t is in our nature to expect the market system to reward hard, creative work, and many who are creating this musical product and benefitting [sic] consumers are not receiving the profits they believe they are owed.”).

¹⁵⁵ Compare Copyright Act, 17 U.S.C. § 115 (1976), with Orrin G. Hatch-Bob Goodlatte Music Modernization Act, 17 U.S.C. § 115 (2018) (highlighting that the MMA, enacted in 2018, removed the liabilities that were permitted under the 1976 Copyright Act). The MMA indicates that a copyright owner that commences an infringement litigation against a digital music provider on or after January 1, 2018 will only have the “sole and exclusive remedy” of recovering the missing royalty payments. See Orrin G. Hatch-Bob Goodlatte Music Modernization Act, 17 U.S.C. § 115(10)(A), *supra*. Overall, all limitations on liability do not apply to these situations. *Id.*

¹⁵⁶ See Orrin G. Hatch-Bob Goodlatte Music Modernization Act, 17 U.S.C. § 115(10)(A) (stating that plaintiffs are entitled to their missing royalty payments only—nothing more).

¹⁵⁷ See Sanchez, *supra* note 6 (detailing the significance of a high stream-rate for an artist to make any substantial profit from streaming their music).

the removal of these remedies was solely to increase the private gains for streaming companies and other large players in the music industry, and they are thriving off of these limitations.¹⁵⁸ Streaming companies are so focused on financial domination that they are using the MMA's loopholes to take advantage of artists' contributions to their services.¹⁵⁹

Further, even if an artist or publisher has a valid infringement claim, they were not allowed to initiate a suit after December 31, 2017.¹⁶⁰ It was understood that this elimination of liability was to clear courtrooms and pave a useful path for the MLC, but plaintiffs are left with minimal legal remedy until the MLC database is active in January 2021.¹⁶¹ If streaming services continue to stream unlicensed work or

¹⁵⁸ See Galdston & Wolfert, *supra* note 15 (hypothesizing that the biggest supporters of the MMA are big music creators and the bill is biased to benefit them). The organizations that had the most influence in the bill's enactment do not represent the "worldwide community of unpaid independent music creators for whom the MMA is supposed to be a solution." *Id.* See also Complaint, *supra* note 17, at 10 (alleging that the removal of liability was an overall scheme to benefit music industry's biggest controllers).

Given the penny rate for streaming paid to songwriters, the elimination of the combination of profits attributable to infringement, statutory damages and attorneys' fees would essentially eliminate any copyright infringement case as it would make the filing of any such action cost prohibitive, and ensure that any plaintiff would spend more pursuing the action than their recovery would be. In addition, with the removal of these remedies, it cleared the last hurdle for Spotify to go public, thereby reaping its equity owner's tens of billions of dollars. The unconstitutional taking of Eight Mile's and others vested property right was not for public use but instead for the private gain of private companies.

Id.

¹⁵⁹ See Hess, *supra* note 2, at 199 ("If there is a clear 'winner' when analyzing the MMA, it is most likely the on-demand music services that championed the legislation"). Streaming services are victorious because they eliminated their liability. *Id.*

¹⁶⁰ See *id.* (stating "[t]his 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"); see also Gardner, *supra* note 17 (emphasizing the significance of Wixen's choice of filing a suit against Spotify on New Year's Eve 2017).

¹⁶¹ See Rosenblatt, *supra* note 28, at 600 (highlighting that the law was created to provide recourse for plaintiffs and give them a voice for social unfairness); see also Brown, *supra* note 11, at 24 (stating that this provision is extremely concerning

fail to pay artists their royalties between 2018 and 2021, plaintiffs may be barred from any remedies because the statute of limitations for copyright infringement is only three years.¹⁶² *Eight Mile Style v. Spotify* is the first lawsuit that was filed after the cutoff date, publicizing the ignorance of such a deadline.¹⁶³ If *Eight Mile Style* wins, it will be pivotal for all artists and publishers because it will show support for rights to infringement damages in spite of the MMA.¹⁶⁴

E. *The MMA is Harming Less Popular Artists*

The MMA is harming artists who do not have the same fame and notoriety as those on the top charts.¹⁶⁵ In reality, the MMA is extremely unfair to tens of thousands of music creators, particularly in terms of obtaining their royalties.¹⁶⁶ For example, it is unlikely that a struggling rapper from an inner city will ever receive their royalty money.¹⁶⁷ The current system takes advantage of the new or less-popular artists' inexperience because they usually cannot afford

because "it bans suits that could have occurred prior to the MMA being signed into law"). See *supra* Section IV.A (describing that the MLC database will not exist until January 2021, thus leaving no recourse for musicians in the meantime).

¹⁶² See Copyright Act, 17 U.S.C. § 507(b) (1998) ("No civil action shall be maintained under the [Act] unless it is commenced within three years after the claim accrued."); Orrin G. Hatch-Bob Goodlatte Music Modernization Act, 17 U.S.C. § 115(10)(C) (2018) (applying §507(b) to musical works). See Complaint, *supra* note 17, at 4 (asserting that the MMA is a regulation that gets music industry leaders "off the hook scot-free").

¹⁶³ See Complaint, *supra* note 17, at 31 (initiating a lawsuit against Spotify on August 2019).

¹⁶⁴ See Gardner, *supra* note 17 (supporting *Eight Mile Styles'* allegation that the MMA attempted to "retroactively wipe out a copyright holder's ability to recover profits, statutory damages, and attorney's fees"). In essence, the MMA is essentially unconstitutional under the Fifth Amendment's Taking Clause. *Id.*

¹⁶⁵ See *Is the Music Modernization Act Enabling 'Legal Theft' Against Smaller Artists?*, *supra* note 62 (identifying that companies like Spotify understand that the MMA is harming smaller artists, but the way the law is now gets these companies out of billions of potential damages).

¹⁶⁶ See *id.* (citing that "25-35% of all of the mechanicals won't get registered").

¹⁶⁷ See Rosenblatt, *supra* note 28, at 597 (specifying that copyright laws already "manipulate value and power" and "contains structural elements that disproportionately reward the already-privileged and disproportionately burden the already-oppressed").

publishers or attorneys to fight to receive their royalty payments.¹⁶⁸ Moreover, these artists are under the time constraints of the three-year repayment term.¹⁶⁹ Three years is not enough time for artists to get their finances in order to figure out how to fight the corrupt system.¹⁷⁰ Overall, if Eminem is not getting paid the proper royalties then neither are less popular artists, but this issue is not as publicized.¹⁷¹

As a possible solution, the MLC board should not be comprised of only publishers or other big-name music companies.¹⁷² Rather it should be equally split between the number of publishers and songwriters so voices from different levels in the music industry are being heard.¹⁷³ The MLC should also contain a customer service

¹⁶⁸ See Hess, *supra* note 2, at 203 (highlighting that there is little guidance on how an artist or publisher is able to petition for their royalties). Most importantly, the individual will be allowed only one private audit a year and will be required to hire a “qualified auditor” to submit their assessment to the MLC. *Id.* at 205; *contra id.* at 201 (claiming that the MLC audit database will provide an approachable and affordable means for smaller artists to collect royalties).

¹⁶⁹ See Music Modernization Act of 2018, H.R. 1551, 115th Congr. (2018) (setting forth the three-year term for the MLC to match unclaimed songs). See also *Is the Music Modernization Act Enabling ‘Legal Theft’ Against Smaller Artists?*, *supra* note 62 (emphasizing that once the three-year term is up, there is no way for artists to receive their royalties).

¹⁷⁰ See Complaint, *supra* note 17, at 3 (identifying that meanwhile Spotify is continuing to benefit from their wrongful actions with millions of fans becoming users and subscribers). The value of Spotify subscribers exceeds \$2.5 billion leading to a market share increase of approximately \$26 billion. *Id.* at 3–4. The windfall of this money has made its way into the pockets of Spotify’s equity holders who chose to operate with unlicensed work in a rush to get their company financial success and failed to pay publishing companies like Eight Mile Style. *Id.*

¹⁷¹ See *id.* at 27 (symbolizing “Lose Yourself” as an example to show how if this song isn’t getting paid then other lesser known songs are likely not getting paid either); see also Meiselman, *supra* note 106 (identifying the probability that smaller artists are rarely paid by interactive streaming companies). “Eight Mile insists that it is standing up for smaller artists, it remains to be seen whether such an outcome will open any doors for artists who don’t have hit singles or powerful legal teams.” *Id.*

¹⁷² See Bogan, *supra* note 64 (identifying that the MLC board currently consists of ten publishers and four songwriters from major publishers that helped write the MMA).

¹⁷³ See *id.* (providing a solution of including at least one unsigned songwriter on the board, such as Chance the Rapper). See also *Music Modernization Act Signed Into Law*, *supra* note 94 (ensuring that indie artists and smaller publishing companies will be involved with the mechanical licensing collective). *Contra* Hess, *supra* note 2, at 203 (praising that the current MLC board is made up of 14 voting

center for artists and publishing companies to seek advice or help.¹⁷⁴ It is likely that artists and publishing companies will need help navigating this new system because they may not fully understand how to obtain their royalties from the streaming companies.¹⁷⁵ Although most musicians and performing rights organizations have expressed their support for the MMA, it is evident that this Act was not the clear-cut solution that these people had hoped for and is filled with imperfections.¹⁷⁶

V. Conclusion

The MMA is praised because it is the first piece of legislation enacted to tackle the copyright issues arising from digital streaming. On its face, the MMA created significant improvements to the inadequate copyright laws regarding digital streaming. The MMA's implementation helps players in the music industry get paid in the digital era that we live in, provides legacy artists with federal copyright protection, and codifies the process for producers and recording companies to receive royalties. Nevertheless, problems persist and are hidden within the details of the MMA. Realistically, the MMA is only a stepping stone in the direction that the music industry needs to go in. This Act is not focused on the music creators themselves, but rather, the people who are profiting off of the creative works. The lawsuit

members and 3 nonvoting members). The MLC Board currently consists of four voting "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." *Id.*

¹⁷⁴ See Milosic, *supra* note 30 (noting that the United States only has three performance rights organizations that are able to assist artists and publishers in the collection process, while the EU had one organization for each territory). The collection societies in the EU also have a different role than the United States collection groups. *Id.* The United States groups are only responsible for managing public performance rights, while the EU collection societies manage public performance rights and mechanical rights. *Id.* See also *supra* Section III.B (highlighting that throughout this change, smaller artists and publishers had trouble publicizing their concerns and the music industry needs to ensure that these people are getting the attention that they deserve).

¹⁷⁵ See Hess, *supra* note 2, at 201 (claiming that the MLC database will be approachable for artists to use, but this is a hopeful conclusion).

¹⁷⁶ See Chung, *supra* note 11, at 80 (noting that there is still a lot of work to do to get the results that were intended by the creation of the MMA).

between Eight Mile Style and Spotify highlights the mistakes in the MMA. Most importantly, the case's outcome will determine if artists can prevail over the power of the music industry's biggest controllers. Regardless of a win or loss for Eight Mile Style, the case exemplifies that music owners deserve more rights in this digital age.