RAGE AGAINST THE MACHINE: WHY THE MUSIC MODERNIZATION ACT IS BUT THE FIRST STEP IN MUSICIANS' BATTLE TO RECLAIM THE VALUE OF THEIR WORKS

Abstract: Digital streaming's rise as the primary mode of music consumption revolutionized the music industry. This revolution made it increasingly difficult for musical artists to profit from their work. For years, antiquated music copyright law failed to effectively regulate prominent streaming platforms like Spotify and Apple Music. In 2018, Congress enacted the Music Modernization Act (MMA) to bring copyright law into the twenty-first century. Title I of the MMA instituted a new process for distributing royalties to musicians and created the Mechanical Licensing Collective—an independent nonprofit agency—to administer this process. Although the MMA served as a beneficial compromise between songwriters and streaming services, it fails to adequately safeguard the right of musical artists to profit from their music in the digital era. This Note argues that Congress must amend the MMA to ensure songwriters receive equitable compensation for their creative content.

INTRODUCTION

2017 should have marked the capstone of Nadine Shah's life.[1] The ascending musician's nomination by industry experts for the Mercury Prize, recognizing the United Kingdom album of the year, seemed like the rare, lightning-in-a-bottle event capable of launching a superstar.[2] Instead, the achievement of the British singer-songwriter's lifelong dream coincided with an unexpected event: defaulting on her rent.[3]

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[1] *See* Roisin O'Connor, *Mercury Prize 2018 Shortlist: Lily Allen, Arctic Monkeys and Nadine Shah Contending for Annual Music Prize*, THE INDEPENDENT (Sept. 20, 2018), https://www.independent.co.uk/arts-entertainment/music/news/mercury-prize-2018-shortlist-arctic-monkeys-lily-allen-noel-gallagher-who-win-a8546041.html [https://perma.cc/2V9J-TDNU] (providing that Shah was nominated for the 2018 Mercury Prize in 2017).

[2] *See id.* (stating that Shah's album was nominated for the Mercury Prize); David Sanderson, *Nadine Shah Tells MPs That Music Streaming Leaves Her Unable to Afford Her Rent*, THE TIMES (Nov. 24, 2020), https://www.thetimes.co.uk/article/nadine-shah-tells-mps-that-music-streaming-leaves-her-unable-to-afford-her-rent-0xwqlk9lm [https://perma.cc/4DWK-8QLD] (same). The Mercury Prize recognizes the best album by an Irish or British recording artist as selected by a panel of music industry experts. O'Connor, *supra* note 1.

[3] *See* Sanderson, *supra* note 2 (stating that Shah has admitted her income was insufficient to pay her rent); Ben Sisario, *Musicians Say Streaming Doesn't Pay. Can the Industry Change?*, N.Y. TIMES, https://www.nytimes.com/2021/05/07/arts/music/streaming-music-payments.html [https://perma.cc/6RQP-ZLJ9] (May 10, 2021) (disclosing Shah's serious financial struggles); Mark Sweney, *Nadine Shah: I Can't Pay the Rent on Unfair Music Streaming Revenues*, THE GUARDIAN (Nov. 24, 2020),

Prior to the 2020 COVID-19 pandemic halting her shows, Shah managed to scrape by on live performance income.[4] In 2021, the musician admitted to moving in with her parents at the age of thirty-four because the minimal income received from streaming services for millions of plays of her songs could not cover her living expenses.[5]

In a culture in which the media exhaustively covers the lavish lifestyles of music superstars such as Drake and Jay-Z, Shah's story seems implausible.[6] But the exorbitant wealth of top-selling artists only propagates an illusion that the music business remains lucrative for all artists.[7] In reality, the vast majority of musicians struggle to make a basic living.[8] The reason why a critically acclaimed artist, like Shah, is unable to afford basic necessities lies in muted revenues, outdated regulation, and the inequitable business model dominating today's music industry.[9]

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https://www.theguardian.com/business/2020/nov/24/nadine-shah-i-cant-pay-the-rent-on-unfair-music-streaming-revenues [https://perma.cc/YAP4-YQLP] (explaining that Shah struggled to pay rent with her income from streaming platforms).

[4] *See* Sisario, *supra* note 3 (stating that the pandemic caused Shah to cancel her live shows which previously sustained her financially).

[5] *See id.* (relaying Shah's testimony that her lack of income forced her to move into her parents' home in England); Dylan Smith, *Nadine Shah Says She Can't Pay Rent Despite Having More Than 100,000 Spotify Monthly Listeners*, DIGIT. MUSIC NEWS (Nov. 27, 2020), https://www.digitalmusic news.com/2020/11/27/nadine-shah-spotify-royalties/ [https://perma.cc/HM37-SGMC] (explaining how Nadine Shah's top two tracks on Spotify alone have generated over three million streams).

[6] *See, e.g.*, Travis Lyles, *The Incredibly Successful Life of Drake: The Most Polarizing Figure in Music Who Made a Whopping $40 Million Last Year*, BUS. INSIDER (Oct. 15, 2015), https://www. businessinsider.com/the-fabulous-life-of-drake-2015-10 [https://perma.cc/7M5M-F5YL] (detailing the wealth and expensive lifestyle of Drake); Zack O'Malley Greenburg, *Hip-Hop's Next Billionaires: Richest Rappers 2019*, FORBES (June 13, 2019), https://www.forbes.com/sites/zackomalleygreenburg/ 2019/06/13/hip-hops-next-billionaires-richest-rappers-2019/?sh=2ccc71432edd [https://perma.cc/3F6A-QVW2] (stating that Jay-Z became hip-hop's first billionaire in 2019).

[7] *See* Oisin Lunny, *Record Breaking Revenues in the Music Business, but Are Musicians Getting a Raw Deal?*, FORBES (May 15, 2019), https://www.forbes.com/sites/oisinlunny/2019/05/15/record-breaking-revenues-in-the-music-business-but-are-musicians-getting-a-raw-deal/?sh=7e2ab0397ab4 [https://perma.cc/8HSS-D2RG] (highlighting the income disparity between top musical artists and other musical artists).

[8] *See* Amy X. Wang, *The Median U.S. Musician Is Still Making Under $25,000 a Year*, ROLLING STONE (June 27, 2018), https://www.rollingstone.com/pro/news/the-median-u-s-musician-is-still-making-under-25000-a-year-666833/ [https://perma.cc/CT8V-KXYJ] (stating that the median U.S. musician made just $21,300 off of music in 2018). The music industry's revenue increase in recent years has disproportionately benefited the industry's elite artists, such as Lil Pump who recently received an $8 million record deal. *See id.* (discussing how the top music artists dominate music revenue at the expense of all other artists as exemplified by Lil Pump's recent $8 million record deal).

[9] *See* Jason Koransky, *Digital Dilemmas: The Music Industry Confronts Licensing for On-Demand Streaming Services*, LANDSLIDE, Jan.–Feb. 2016, at 20, 22 (detailing how copyright law improperly regulates music industry licensing which has contributed to decreased musicians' revenue).

Although a variety of factors contribute to the dire state of the music industry's revenue model, streaming services sit at the heart of the problem.[10] Today, streaming is the preeminent form of music consumption as CD sales and permanent music downloads continue to plummet.[11] And although music streaming services rely almost entirely on musical artists' content for profitability, artists see little of this revenue.[12] Even the most financially successful artists today rely very little on streaming for income.[13] For example, in 2017, U2 was the world's highest-paid musical act, garnering $54.4 million in revenue.[14] Fifty-two million dollars, or 95% of the Irish rock band's total revenue, came from touring while album sales and streaming accounted for less than 4% combined.[15]

Even so, top music artists account for the vast majority of total revenue that artists receive for streaming their music.[16] In 2020, just 7,500 Spotify art-

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[10] *See* Randall Roberts, *Does Spotify Pay Artists a Fair Rate? Here's What Musicians, Managers and Apple Music Have to Say*, L.A. TIMES (Apr. 19, 2021), https://www.latimes.com/entertainment-arts/music/story/2021-04-19/spotify-artists-royalty-rate-apple-music [https://perma.cc/DDY5-N4N6] (detailing how streaming services favor record labels and music publishers over recording artists).

[11] *See Distribution of Music Consumption in the United States in 2020, by Genre and Format*, STATISTA (July 20, 2021), https://www.statista.com/statistics/502908/music-consumption-genre-format-usa/ [https://perma.cc/8X4G-M6SR] (illustrating how on-demand audio streams are the preferred mode of music consumption across genres); Felix Richter, *From Tape to Tidal: 4 Decades of U.S. Music Sales*, STATISTA, (https://www.statista.com/chart/17244/us-music-revenue-by-format/ [https://perma.cc/YA4H-XGB3] (June 24, 2022) (providing that CD sales and music downloads have decreased dramatically in recent years). During the "'ownership' era" of music, consumers would obtain ownership of music through CD purchases and digital downloads. Shelley Hepworth, *Streaming Spells the End of the 'Ownership' Era of Music, but Are We Ready to Let Go?*, THE GUARDIAN (Feb. 1, 2020), https://www.theguardian.com/music/2020/feb/02/streaming-spells-the-end-of-the-ownership-era-of-music-but-are-we-ready-to-let-go [https://perma.cc/M473-9HKU]. Conversely, modern streaming services allow consumers to gain access to music by paying an ongoing subscription fee. *See id.* (explaining how streaming services provide access to, rather than ownership of, music).

[12] *See* Ennica Jacob, *How Much Does Spotify Pay per Stream? What You'll Earn per Song, and How to Get Paid More for Your Music*, BUS. INSIDER (Feb. 24, 2021), https://www.businessinsider.com/how-much-does-spotify-pay-per-stream [https://perma.cc/AMB7-HBJL] (revealing that musical artists can make as little as $0.0033 per Spotify stream). Despite the growth in podcasts on music streaming services in recent years, music remains the primary value provider for streaming service users. *See* Bobby Owsinski, *Podcasts May Not Be the Pot of Gold That Streaming Services and Creators Expect*, FORBES (Oct. 31, 2020), https://www.forbes.com/sites/bobbyowsinski/2020/10/31/podcasts-may-not-be-the-pot-of-gold-that-streaming-services-and-creators-expect/?sh=16b3f7012a43 [https://perma.cc/GV2E-3JCG] (explaining why consumers engage more with music than podcasts on streaming services).

[13] *See* Devon Delfino, *How Musicians Really Make Their Money—and It Has Nothing to Do with How Many Times People Listen to Their Songs*, BUS. INSIDER (Oct. 19, 2018), https://www.businessinsider.com/how-do-musicians-make-money-2018-10 [https://perma.cc/M2HX-7E98] (providing that musical artists as a whole receive very little income from streaming).

[14] *Id.*

[15] *See id.* (disclosing the amount of revenue U2 received from touring and music consumption in 2017).

[16] *See* Emily Blake, *Data Shows 90 Percent of Streams Go to the Top 1 Percent of Artists*, ROLLING STONE (Sept. 9, 2020), https://www.rollingstone.com/pro/news/top-1-percent-streaming-1055005/

ists, approximately 0.09% of the total artists on the platform, received over $100,000 from streaming royalties.[17] Revealingly, Spotify lauded this figure as a sign of progress.[18]

Despite the apparently grim outlook for musicians, momentum for positive change exists for the first time in many years.[19] Recording artists and streaming services alike hailed the 2018 Music Modernization Act (MMA) as a momentous turning point for the music industry.[20] Nonetheless, the past few years exposed the limitations of the Act and the need for further reform.[21] Part I of this Note explores the legal background of music copyright law, the music business, and the MMA.[22] Part II discusses the impact of the MMA on the music industry and songwriters.[23] Part III contends that, despite the MMA's beneficial impact on musicians, further legislation is necessary to ensure musical artists receive adequate compensation for the use of their works.[24]

I. WAKE UP: AN OVERVIEW OF THE CONTEMPORARY MUSIC INDUSTRY AND THE MUSIC MODERNIZATION ACT

The Orrin G. Hatch-Bob Goodlatte Music Modernization Act (MMA) revamped previous copyright law to adapt to the rapidly changing music indus-

[https://perma.cc/W98R-G9AE] (describing how the rise of streaming has increased the income disparity among musical artists). In 2020, the top 10% of musical artists accounted for 99.4% of all Spotify streams. *Id.*

[17] *Today's Spotify Stream On Announcements*, SPOTIFY (Feb. 22, 2021), https://newsroom.spotify.com/2021-02-22/todays-spotify-stream-on-announcements/ [https://perma.cc/X3C5-QKPU].

[18] *See id.* (characterizing the fact that 7,500 artists received over $100,000 in 2020 as "progress").

[19] *See* Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), 84 Fed. Reg. 1918, 1918 (Feb. 5, 2019) (to be codified at 37 C.F.R. pt. 385) (announcing a dramatic increase in royalty rates). *See generally* Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (2018) (codified in scattered sections of 17 U.S.C. and 28 U.S.C.) (reforming the music industry in light of technological changes).

[20] *See* Spencer Paveck, *All the Bells and Whistles but the Same Old Song and Dance: A Detailed Critique of Title I of the Music Modernization Act*, 19 VA. SPORTS & ENT. L.J. 74, 75 (2019) (revealing that a variety of musical artists including Kanye West and Kid Rock lauded the passage of the Music Modernization Act (MMA)); *see also* Randall Roberts & Randy Lewis, *Music Industry Hails Passage of the Music Modernization Act*, L.A. TIMES (Oct. 11, 2018), https://www.latimes.com/entertainment/music/la-et-ms-music-modernization-act-20181011-story.html [https://perma.cc/2VC2-696F] (providing that the MMA received widespread praise from songwriters, broadcasters, and music publishers).

[21] *See* Amy Smith, *How Modernized Is the Music Modernization Act? A Review of the Act and Its Impact*, 30 MIDWEST L.J. 49, 76 (2020) (contending that the MMA is a step in the right direction for music copyright law but also leaves music industry issues unresolved); Mariana L. Orbay, Note, *Songwriters v. Spotify: Is Spotify the Problem or a Symptom of the Problem?*, 48 PEPP. L. REV. 785, 828 (2021) (asserting that further legislative reform is necessary to remedy a music copyright system that provides musicians with inadequate compensation for their works).

[22] *See infra* notes 25–133 and accompanying text.

[23] *See infra* notes 134–189 and accompanying text.

[24] *See infra* notes 190–223 and accompanying text.

try.[25] To fully understand the changes brought about by this act requires a foundational understanding of music copyright law and the modern music industry.[26] Section A of this Part provides a legal overview of the rights afforded to copyright holders, music licensing, and royalty payments.[27] Section B describes music streaming and assesses its impact on both the music industry and the revenue songwriters receive.[28] Section C examines the MMA and its three titles, with particular focus on Title I which sought to address issues related to musical artist compensation.[29]

A. The Fundamentals of Music Copyright Law

The following subsections provide an overview of music copyright law.[30] Subsection 1 discusses the rights that the law grants to copyright holders.[31] Subsection 2 describes the mechanism by which musicians transfer these rights to third parties.[32]

1. The "Bundle of Rights" of Copyright Holders

Music copyright law provides artists with a series of fundamental rights and protections over their music.[33] One of these is the right to control the use of one's work product.[34] Copyright law protects artistic works that are "fixed in any tangible medium of expression . . . ."[35] The creator of a work protected

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[25] Pub. L. No. 115-264, 132 Stat. 3676 (2018) (codified in scattered sections of 17 U.S.C. and 28 U.S.C.). The MMA's formal name recognizes former Congressman Robert Goodlatte, who introduced the bill to the U.S. House of Representatives and was integral to the MMA's enactment. Paula Parisi, *Music Modernization Act Unanimously Passes House of Representatives*, VARIETY (Apr. 25, 2018), https://variety.com/2018/biz/news/music-modernization-act-unanimously-passes-house-of-representatives-1202787045/ [https://perma.cc/NE8M-D289]. On the day that the House passed the MMA, Goodlatte praised the legislation for "bring[ing] early 20th century music laws for the analog era into the 21st century digital era . . . ." *Id.*

[26] Kenneth J. Abdo & Jacob M. Abdo, *What You Need to Know About the Music Modernization Act*, ENT. & SPORTS LAW., Winter 2019, at 1, 5; *see The Creation of the Music Modernization Act*, U.S. COPYRIGHT OFF., https://www.copyright.gov/music-modernization/creation.html [https://perma.cc/FSR9-Y955] (explaining how the MMA fundamentally responds to a series of technological changes in the music industry).

[27] *See infra* notes 30–74 and accompanying text.

[28] *See infra* notes 75–108 and accompanying text.

[29] *See infra* notes 109–133 and accompanying text.

[30] *See infra* notes 35–74 and accompanying text.

[31] *See infra* notes 35–53 and accompanying text.

[32] *See infra* notes 54–74 and accompanying text.

[33] *See generally* 17 U.S.C. § 106(1)–(6) (listing the exclusive rights of copyright holders).

[34] HARVARD OFF. OF THE GEN. COUNS., COPYRIGHT AND FAIR USE: A GUIDE FOR THE HARVARD COMMUNITY 1 (2016), https://ogc.harvard.edu/files/ogc/files/ogc_copyright_and_fair_use_guide_5-31-16.pdf?m=1464875856 [https://perma.cc/3HFY-CV6G].

[35] *See* 17 U.S.C. § 102 (describing authorship works that receive copyright protection); *see also Copyright*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining copyright as a third party's right to copy an author's original work).

by copyright may file a civil lawsuit and seek an injunction against a party using a copyrighted work without the creator's permission.[36] Under 17 U.S.C. § 102, both musical compositions and sound recordings qualify for copyright protection.[37] Music copyright law is unique in this regard because it provides distinct and separate protection for each of these mediums.[38] For example, the musical and lyrical composition of the song "Let It Be" and the sound recording of the Beatles performing "Let It Be" each receive independent copyright protection.[39]

Because these two copyrights are distinct, they may be—and often are—held by different owners.[40] Record labels typically hold copyrights for sound recordings.[41] Conversely, songwriters usually transfer the copyright of one of their compositions to a publishing company under the terms of a publishing

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[36] *See* 17 U.S.C. § 502 (authorizing courts to grant injunctions to prevent or restrict copyright infringement); *Can I Use Someone Else's Work? Can Someone Else Use Mine?*, U.S. COPYRIGHT OFF., https://www.copyright.gov/help/faq/faq-fairuse.html [https://perma.cc/M5PP-R7UG] (stating that a copyright holder has the right to sue another party that has used his or her copyrighted work without authorization); *see also* Clark D. Asay, Arielle Sloan & Dean Sobczak, *Is Transformative Use Eating the World?*, 61 B.C. L. REV. 905, 914 (2020) (describing how a third party exercising an exclusive copyright right without permission may be sued for copyright infringement).

[37] *See* 17 U.S.C. § 102 (providing a general description of authorship works that receive copyright protection, including musical compositions and sound recordings).

[38] *See* U.S. COPYRIGHT OFF., CIRCULAR 56A, COPYRIGHT REGISTRATION OF MUSICAL COMPOSITIONS AND SOUND RECORDINGS 1–2 (2021), https://www.copyright.gov/circs/circ56a.pdf [https://perma.cc/T2S8-6CFD] (explaining how copyright law provides dual protection for sound recordings and musical compositions); *see also* Buck McKinney, *Creating the Soundtrack of Our Lives: A Practical Overview of Music Licensing*, TEX. J. BUS. L., Spring 2020, at 1, 2 (explaining how one of the foundational principles of music copyright law is the dual protection of compositions and sound recordings).

[39] *See* U.S. COPYRIGHT OFF., *supra* note 38, at 1–2 (stating that the music and lyrics of a song receive copyright protection that is distinct from that same song's sound recording protection). In 1985, Michael Jackson outbid Paul McCartney for control of the ATV publishing company, which held publishing rights to 251 of the Beatles' compositions. *See Michael Jackson Takes Control of the Beatles' Publishing Rights*, HISTORY, https://www.history.com/this-day-in-history/michael-jackson-takes-control-of-the-beatles-publishing-rights [https://perma.cc/GC7S-W4H5] (Aug. 12, 2020) (describing Michael Jackson's takeover of the ATV). Jackson later used his ownership of the Beatles' compositions as collateral to take out a series of substantial personal loans to finance his luxurious lifestyle. *Id.* In 2008, just one year before the pop star's death, Sony obtained ownership of the Beatles' catalog. *Id.*

[40] *See* U.S. COPYRIGHT OFF., MUSICAL WORKS, SOUND RECORDINGS & COPYRIGHT 1–2 (2020), https://www.copyright.gov/music-modernization/sound-recordings-vs-musical-works.pdf [https://perma.cc/TP9D-HMPP] (explaining that sound recordings and compositions are often owned by different copyright holders); *see also* Carly A. Kessler, *NFTs Are Reshaping Artists' IP Rights*, BLOOMBERG L. (Mar. 24, 2021), https://news.bloomberglaw.com/ip-law/nfts-are-reshaping-artists-ip-rights [https://perma.cc/DU4N-GZUD] (same).

[41] *See U.S. Music Streaming Royalties Explained*, MANATT, PHELPS & PHILLIPS, LLP, https://www.manatt.com/Manatt/media/Media/PDF/US-Streaming-Royalties-Explained.pdf [https://perma.cc/ANE6-S5F8] (providing that sound recordings are typically held by record labels but may also be held by individual artists or producers).

agreement.[42] Most of these publishing agreements provide that the publishers collect royalties as compensation for their services and distribute a set share of those royalties to the songwriters.[43]

Composition and sound recording copyright ownership also confers different rights upon their respective holders.[44] The Copyright Act of 1976, for example, grants composition owners the rights to reproduce, create derivative works of, distribute, display, and publicly perform works of music.[45] The owner of a sound recording, conversely, shares the right to reproduce, create derivative works, and distribute but does not possess a right to display.[46]

The copyright owner of a sound recording also possesses a more limited right of public performance compared to the copyright holder of the composition.[47] The right of public performance conferred by the Copyright Act of 1976 entitles copyright holders of compositions to compensation when third parties perform their copyrighted work in public.[48] The owners of sound recordings in contrast only have a narrow right to publicly perform their recordings through digital audio transmissions under the 1995 Digital Performance Right in Sound Recordings Act.[49] This limited right, however, requires streaming services to pay royalties to sound recording copyright holders because such services digitally transmit that audio.[50]

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[42] *See* U.S. COPYRIGHT OFF., *supra* note 38, at 2 (stating that songwriters often transfer the copyright of a song to a publisher in a publishing agreement); Kessler, *supra* note 40 (explaining that the copyright holder of a composition is traditionally a publishing company).

[43] *See* Kessler, *supra* note 40 (detailing the common industry practice of creating a publishing agreement where both the publisher and musical artist are entitled to collect a portion of royalties from a composition).

[44] *See* 17 U.S.C. § 106(1)–(6) (providing the rights of copyright holders of musical compositions); BRIAN T. YEH, CONG. RSCH. SERV., RL33631, COPYRIGHT LICENSING IN MUSIC DISTRIBUTION, REPRODUCTION, AND PUBLIC PERFORMANCE 2 (2015) (describing how copyright holders of musical compositions possess different rights than copyright holders of sound recordings).

[45] *See* 17 U.S.C. § 106 (listing the exclusive rights of copyright holders in general).

[46] U.S. COPYRIGHT OFF., HOW SONGWRITERS, COMPOSERS, AND PERFORMERS GET PAID 3 (2022), https://www.copyright.gov/music-modernization/educational-materials/musicians-income.pdf [https://perma.cc/5MLU-JV73]. The right to display allows musical artists to publicly present their works, such as by displaying their lyrics online. *Id.*

[47] *Id.*

[48] 17 U.S.C. § 106(4); *see* Joseph Dimont, *Royalty Inequity: Why Music Streaming Services Should Switch to a per-Subscriber Model*, 69 HASTINGS L.J. 675, 682 (2018) (explaining how copyright holders should be compensated every time one of their works is performed).

[49] *See* YEH, *supra* note 44, at 3 (providing that copyright holders of sound recordings possess a limited right to public performance). Before the Digital Performance Right in Sound Recordings Act, the owner of a sound recording did not possess any right to publicly perform pursuant to the Copyright Act of 1976. *See* Dimont, *supra* note 48, at 680 (stating that the owner of a sound recording traditionally did not possess the exclusive right of performance).

[50] *See* Dimont, *supra* note 48, at 682 (explaining that a sound recording's public performance right entitles its owner to royalties when their musical work is streamed); *U.S. Music Streaming Royalties Explained*, *supra* note 41 (illustrating how a substantial portion of streaming revenue from Spotify and

Finally, 17 U.S.C. § 106 specifically grants composition copyright owners the right to create and distribute their works through phonorecords.[51] Streaming services use phonorecords to distribute music and therefore cannot distribute music without receiving permission from the composition holder.[52] Music streaming providers typically obtain such permission through licensing.[53]

2. Music Licensing: Transferring the Rights of a Copyright Holder

In addition to granting copyright holders exclusive rights over their works, copyright law permits copyright holders to transfer those rights to third parties through licensing.[54] The two most common music licenses are performance licenses and mechanical licenses.[55] A public performance license permits a third party to publicly perform a composition, including by streaming the work.[56] Songwriters or their publishers usually license public performance rights to performing rights organizations (PROs), such as the American Society of Composers, Authors, and Publishers (ASCAP) and Broadcast Music, Inc. (BMI).[57] PROs then grant blanket licenses authorizing the public performance

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Apple Music goes directly to the copyright holders of sound recordings, which are typically record labels).

[51] 17 U.S.C. § 106(1)–(3). A phonorecord is an object that fixes sound so it can be reproduced or communicated, such as an MP3 file. *See id.* § 101 (defining phonorecord as a material object that fixes sound); *Phonorecord*, BLACK'S LAW DICTIONARY, *supra* note 35 (defining phonorecord as "[a] physical object (such as a phonographic record, cassette tape, or compact disc) from which fixed sounds can be perceived, reproduced, or otherwise communicated directly or with a machine's aid"). An MP3 is "a computer file format for the compression and storage of digital audio data." *MP3*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/MP3 [https://perma.cc/QX7F-ELJ7].

[52] 17 U.S.C. § 106(1)–(3); U.S. COPYRIGHT OFF., CIRCULAR 56, COPYRIGHT REGISTRATION FOR SOUND RECORDINGS 2 (2021), https://www.copyright.gov/circs/circ56.pdf [https://perma.cc/D96G-GCZ8].

[53] *See* HAYLEIGH BOSHER, COPYRIGHT IN THE MUSIC INDUSTRY: A PRACTICAL GUIDE TO EXPLOITING AND ENFORCING RIGHTS 102 (2021) (explaining how licenses permit copyright holders to exchange the right to use their works for the right to receive royalty payments); *see also infra* notes 56–74 (discussing the law and mechanics surrounding music licensing).

[54] *See generally* YEH, *supra* note 44 (providing that the rights of a copyright holder may be transferred through licensing).

[55] Daniel S. Hess, Note, *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, 191.

[56] *See* 17 U.S.C. § 106 (granting a copyright holder the authority to authorize another party's public performance of a work); *Types of Copyright*, BMI, https://www.bmi.com/licensing/entry/types_of_copyrights [https://perma.cc/MXW5-SAAA] (defining a public performance license as "granting the right to perform the work in, or transmit the work to, the public"); *Frequently Asked Questions*, ASCAP, https://www.ascap.com/help/ascap-licensing [https://perma.cc/A4Z8-WLEH] (explaining that a public performance right includes the right to transmit music to the public via internet streaming).

[57] U.S. COPYRIGHT OFF., *supra* note 46, at 4. Performing rights organizations (PROs) can be traced back to 1914, when composers and publishers founded the American Society of Composers, Authors, and Publishers (ASCAP) to protect musicians' rights. *See* CHRISTOPHER S. REED, THE UNREALIZED PROMISE OF THE NEXT GREAT COPYRIGHT ACT 162–63 (2019) (recounting the inception of PROs in the United States). Currently, 850,000 composers, songwriters, and music publishers are members of the ASCAP. *We Are ASCAP*, ASCAP, https://www.ascap.com [https://perma.cc/PYH4-

of all their members' music to third-party organizations.[58] In exchange, PROs receive public performance royalties and distribute a portion of these royalties to their members while retaining the remainder.[59]

A mechanical license, on the other hand, enables a third party to reproduce and distribute the original version of an artist's song.[60] A third party may obtain a mechanical license in two ways.[61] The third party can pursue a voluntary mechanical license by directly negotiating with a copyright holder.[62] On the other hand, a third party can pursue a compulsory mechanical license from the federal compulsory license system.[63] The compulsory mechanical licensing system allows organizations to reproduce and distribute compositions without engaging in tedious license negotiations with individual copyright holders of compositions.[64]

To obtain a compulsory license, a party must: (1) send a notice of intent to the copyright holder or, if it cannot identify the copyright holder, to the U.S. Copyright Office and (2) begin making royalty payments to the identified copyright holder.[65] Compulsory licensing applies only to compositions and does not authorize third-party use of sound recordings.[66]

Compulsory licenses stipulate the exact amount of royalties an artist receives for the recreation and distribution of a copyrighted work.[67] Royalty

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HX8V]. Meanwhile, Broadcast Music, Inc. (BMI) currently represents 1.2 million composers, music publishers, and songwriters. *About*, BMI, https://www.bmi.com/about [https://perma.cc/8TZ6-FDH3].

[58] *See, e.g.*, *About*, *supra* note 57 (stating that BMI provides organizations with blanket licenses to publicly perform its members' works).

[59] *See U.S. Music Streaming Royalties Explained*, *supra* note 41 (explaining that PROs take a portion of public performance royalties to pay for their operating expenses and distribute the remaining royalties to songwriters and publishers).

[60] CATHERINE FITTERMAN RADBILL, INTRODUCTION TO THE MUSIC INDUSTRY: AN ENTREPRENEURIAL APPROACH 205 (2d ed. 2017); *see Licensing in a Nutshell*, MUSICIANS INST., https://library.mi.edu/musiccopyright/licensing [https://perma.cc/ZU5K-8XES] (Oct. 18, 2022) (providing that a mechanical license authorizes the use of original recordings of an artist's song).

[61] U.S. COPYRIGHT OFF., CIRCULAR 73, COMPULSORY LICENSE FOR MAKING AND DISTRIBUTING PHONORECORDS 2 (2018), https://www.copyright.gov/circs/circ73.pdf [https://perma.cc/U6YN-AZ46].

[62] *Id.* at 2–3.

[63] *Id.* at 3.

[64] *Id.* at 2.

[65] *See* 17 U.S.C. § 115 (listing the requirements for licensing a copyright holder's right to make and disburse phonorecords of musical works); *id.* § 106 (granting copyright holders the right to reproduce and distribute phonorecords of a work); U.S. COPYRIGHT OFF., *supra* note 61, at 3 (detailing the requirements for obtaining a compulsory license).

[66] *See* U.S. COPYRIGHT OFF., *supra* note 61, at 2 (stating that Congress's compulsory mechanical licensing scheme applies only to compositions and not to sound recordings).

[67] *See* Samantha Handler, *Copyright Panel Rethinking Song Royalties Streamers Pay*, BLOOMBERG L. (Aug. 11, 2021), https://news.bloomberglaw.com/ip-law/copyright-panel-rethinking-song-royalties-streamers-pay [https://perma.cc/4SAJ-DBGX] (providing that a songwriter's compulsory license determines how much that artist receives in royalties for the recreation and distribution of his or her work).

rates received for the recreation and distribution of a permanent download or CD are fixed by 17 U.S.C. § 115; thus, a copyright holder will always receive the same royalty payment for an individual download or CD purchase.[68] The royalty rate for distribution through streaming, however, is set as a percentage of a particular streaming service's total revenue.[69] The Copyright Royalty Board (CRB) sets this percentage rate.[70]

The CRB, created by Congress in the Copyright Royalty and Distribution Reform Act of 2004, is a three-judge panel that establishes royalty rates for statutory licenses every five years.[71] Prior to the MMA, the CRB utilized a four-factor "reasonable rate" test to determine these royalty rates.[72] This "reasonable rate" test consisted of four policy-oriented factors: (1) maximizing public access to creative works; (2) providing the copyright owner and user with a fair profit from their work; (3) reflecting the roles of the copyright holder and user; and (4) limiting music industry disruption.[73] Musical artists condemned this complex, policy-oriented test for failing to ensure fair market value compensation to artists for the use of their works—an issue exacerbated by the rise of music streaming.[74]

B. The Rise of Music Streaming

1. What Is Music Streaming?

Daniel Ek launched Spotify in 2008 in the midst of a music industry reeling from years of declining revenue and music piracy.[75] In the subsequent dec-

[68] *See id.* (stating that permanent download and CD royalty revenue is fixed).

[69] *See id.* (providing that streaming rates are instead set as a percentage of total streaming revenue).

[70] *See Copyright Royalty Board*, FED. REG., https://www.federalregister.gov/agencies/copyright-royalty-board [https://perma.cc/7LT5-7UE7] (explaining that the Copyright Royalty Board (CRB) sets royalty rates related to statutory licenses).

[71] Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No, 108-419, 118 Stat. 2341 (codified as amended in scattered sections of 17 U.S.C.) (establishing the CRB to set statutory royalty rates); *About Us*, COPYRIGHT ROYALTY BD., https://www.crb.gov [https://perma.cc/9RP3-VYVK].

[72] *See* U.S. COPYRIGHT OFF., COPYRIGHT AND THE MUSIC MARKETPLACE 49 (2015), https://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf [https://perma.cc/FV5S-5ZJW] (providing that the CRB previously used a four-factor test under the Digital Performance Right in Sound Recordings Act of 1995).

[73] *Id.* at 29.

[74] *See id.* at 105 (relaying the concerns of songwriters and music publishers that the reasonable rate royalty standard did not adequately consider musical works' fair market value).

[75] *See How Spotify Came to Be Worth Billions,* BBC (Mar. 1, 2018), https://www.bbc.com/news/newsbeat-43240886 [https://perma.cc/BMF2-4BQP] (providing that when Spotify was launched music revenue was down in part due to music piracy costing the music industry millions each year). In particular, Daniel Ek and Martin Lorentzen developed Spotify to create a service that could supplant music piracy and compensate the music industry. *See id.* (explaining how music piracy inspired Spotify's founders to create the streaming service). File-sharing websites such as Napster allowed consumers to obtain music for free. *See id.* (describing the music piracy crisis that the music industry faced in

ade, music streaming technology remodeled the music business.[76] Spotify currently leads the market in music streaming, accounting for 32% of the 487 million worldwide music streaming subscribers in 2021, with Apple Music, Amazon Music, and Tencent accounting for 16%, 13%, and 13%, respectively.[77]

Streaming technology enables users to listen to music over the internet without downloading songs to a personal device.[78] Unlike previous forms of music consumption, users of digital streaming services pay for access to a vast library of music rather than ownership of individual songs or albums.[79] Streaming services obtain revenue from advertisements and monthly subscription fees that users pay to access music catalogs.[80]

2. The Impact of Music Streaming on the Music Industry

Music streaming technology spurred a substantial turnaround in—and perhaps even saved—the music industry.[81] In 1999, fueled by lucrative CD sales numbers, the music business achieved an all-time high revenue of $22.7 billion.[82] In the following years, as consumers began downloading music ra-

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2006). On Napster, music consumers could download complete MP3 files posted by other users on the website. *See* ARAM SINNREICH, THE PIRACY CRUSADE: HOW THE MUSIC INDUSTRY'S WAR ON SHARING DESTROYS MARKETS AND ERODES CIVIL LIBERTIES 74 (2013) (discussing how music consumers used Napster). Due to this unlicensed sharing of copyrighted compositions, courts found Napster guilty of copyright infringement. *See id.* (explaining the legal challenges associated with Napster's business model).

[76] *See* Mark Mulligan, *Spotify Maintains Subscriber Market Share Lead but Amazon, Tencent and Google Made Big Gains,* MIDIA RSCH. (July 9, 2021), https://www.midiaresearch.com/blog/global-music-subscriber-market-shares-q1-2021 [https://perma.cc/3U2Q-68HJ] (illustrating music streaming services' dominance over the modern music industry).

[77] *See id.* (providing the market share of streaming subscribers for each major music streaming service).

[78] *See* Dave Johnson, *The Beginner's Guide to Streaming, Including How It Works, the Pros and Cons, and More*, BUS. INSIDER (Jan. 11, 2021), https://www.businessinsider.com/what-is-streaming [https://perma.cc/88HS-FWVK] (describing how streaming technology works).

[79] *See* SOFIA JOHANSSON, ANN WERNER, PATRIK ÅKER & GREG GOLDENZWAIG, STREAMING MUSIC: PRACTICES, MEDIA, CULTURES 94 (2018) (explaining how streaming services sell music). Spotify does not allow users to keep music from the platform or export it to a location outside of the Spotify app. *What Is Spotify?*, SPOTIFY, https://support.spotify.com/us/article/what-is-spotify/ [https://perma.cc/HJ4Z-R5E2].

[80] *See* JOHANSSON ET AL., *supra* note 79, at 94 (describing how advertisements and subscription fees enable streaming services to profit). In the fourth financial quarter of 2021, premium subscription fees accounted for approximately 85% of Spotify's revenue while advertisement revenue comprised the remaining 15%. *See* Marie Charlotte Götting, *Revenue of Spotify Worldwide from 1st Quarter 2016 to 2nd Quarter 2022, by Segment*, STATISTA, https://www.statista.com/statistics/813835/spotify-revenue-quarterly-by-segment/ [https://perma.cc/FD6V-YD8S] (Aug. 16, 2022) (illustrating the breakdown of Spotify's revenue by financial quarter).

[81] *See* Richter, *supra* note 11 (explaining that the rise of streaming platforms helped the music industry recover after years of declining revenues). Bill Werde, who served as editorial director for *Billboard*, contends that the massive change in annual music industry revenue over the last fifteen years shows that streaming has saved the music business. Roberts, *supra* note 10.

[82] *See* Richter, *supra* note 11 (providing music industry revenue statistics for the past forty years).

ther than purchasing CDs, industry revenue crashed to a $7.3 billion low in 2014.[83] Although it remains far less profitable than the apex of the CD era, the music industry has recovered from that 2014 nadir.[84] In 2020, the United States produced $12.2 billion in total music revenue.[85] Music streaming services drove this growth and had an all-time best year in 2020, generating $10.1 billion in revenue with fifteen million new paid music subscribers.[86]

The dominance of music streaming, however, does not ensure healthy bottom lines for top platforms—Spotify reported an operating loss in fifteen of the last twenty financial quarters.[87] With current unprecedented levels of music consumption, these revenue shortfalls are evidently not attributable to a lack of demand.[88] Rather, they likely arise from Spotify's business model that offers access to vast catalogs of music for just ten dollars per month.[89] Considering that single CDs or permanent album downloads sell for this price or more, the streaming platform's struggle to generate profit is unsurprising.[90]

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[83] *Id.*

[84] *See id.* (providing that total music industry revenue increased by $7.2 billion from 2014 to 2021).

[85] *Id.* This figure constituted a revenue increase of 9.2% from 2019 to 2020, continuing a trend of substantial industry growth from preceding years. JOSEPH P. FRIEDLANDER, RIAA, YEAR-END 2020 RIAA REVENUE STATISTICS 1 (2021) https://www.riaa.com/wp-content/uploads/2021/02/2020-Year-End-Music-Industry-Revenue-Report.pdf [https://perma.cc/5G8M-XSZC].

[86] FRIEDLANDER, *supra* note 85, at 1.

[87] Marie Charlotte Götting, *Operating Income/Loss of Spotify Worldwide from 1st Quarter 2017 to 2nd Quarter 2022*, STATISTA, https://www.statista.com/statistics/1022122/spotify-operating-income-quarterly/ [https://perma.cc/T3HD-VQUW] (Aug. 17, 2022). Spotify's financial struggles are particularly concerning in light of the fact that its operating expenses were much lower than normal during the COVID-19 pandemic. *See id.* (stating that Spotify admitted its operating expenses were lower than expected due to COVID-19).

[88] *See* Hugh McIntyre, *Americans Are Spending More Time Listening to Music Than Ever Before*, FORBES (Nov. 9, 2017), https://www.forbes.com/sites/hughmcintyre/2017/11/09/americans-are-spending-more-time-listening-to-music-than-ever-before/?sh=73fa0fac2f7f [https://perma.cc/S5LB-FAAL] (stating that Americans now listen to approximately a day and a half of music per week which is more than in previous years).

[89] *See Get Premium Free for 1 Month*, SPOTIFY, https://www.spotify.com/us/premium/ [https://perma.cc/QYA3-Q2A8] (offering a Spotify premium subscription for free for one month and $9.99 per month thereafter); Alex Ross, *Reasons to Abandon Spotify That Have Nothing to Do with Joe Rogan*, NEW YORKER (Feb. 2, 2022), https://www.newyorker.com/culture/cultural-comment/imagine-a-world-without-spotify [https://perma.cc/2BUZ-2AWV] (detailing how Spotify's business model and low monthly price has substantially decreased music revenue). Zöe Keating, a cellist who made just $12,231 off of two million streams, attributes the music industry's revenue issues to streaming services "selling subscriptions" and "not music." Victor Luckerson, *Is Spotify's Model Wiping Out Music's Middle Class?*, THE RINGER (Jan. 16, 2019), https://www.theringer.com/tech/2019/1/16/18184314/spotify-music-streaming-service-royalty-payout-model [https://perma.cc/Y3CY-AY9T].

[90] *See* Warren Cohen, *CD Prices on the Rise Again*, ROLLING STONE (May 18, 2004), https://www.rollingstone.com/music/music-news/cd-prices-on-the-rise-again-232601/ [https://perma.cc/S367-DHCA] (stating that in May 2003 the average price for a full-length CD was $13.79); *Apple Rolls Out iTunes Feature to Buy Full Albums at Discount*, MERCURY NEWS (Mar. 29, 2007), https://www.mercurynews.com/2007/03/29/apple-rolls-out-itunes-feature-to-buy-full-albums-at-discount/ [https://perma.cc/72E5-HNJF] (stating that most albums on iTunes cost $9.99).

3. The Impact of Music Streaming on Musicians

Musicians further suffer from a streaming business model that devalues the price of music consumption.[91] Musical artists historically benefited from a mechanical license rate for physical items and permanent downloads fixed at 9.1 cents.[92] Conversely, the current mechanical royalty rate for streaming on Spotify is approximately .33 cents per stream, with other top platforms offering similarly low rates.[93] The result is that musicians today receive just $0.33 in mechanical royalties per $1 of performance income—a far cry from the 1990s CD era in which mechanicals and public performance income were equal.[94] Thus, as music streaming supplanted CDs and permanent downloads, musical artists needed to rely less on mechanical royalty income to make a living.[95] In 2019, a musical artist needed 336,842 Spotify streams per month just to earn the United States monthly minimum wage of $1,472.[96]

For these reasons, musical artists have widely condemned and resisted the dominant role of streaming services in today's music business.[97] Among the

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[91] *See* Tim Ingham, *Streaming Platforms Are Keeping More Money from Artists Than Ever (and Paying Them More, Too)*, ROLLING STONE (Apr. 9, 2019), https://www.rollingstone.com/music/music-features/streaming-platforms-keeping-more-money-from-artists-than-ever-817925/ [https://perma.cc/3ZKE-JLNB] (detailing how, even though streaming enabled the music industry's recovery, musicians are receiving less than their equitable share of streaming revenue).

[92] *See* 37 C.F.R. § 385.11 (2019) (stating that the mechanical royalty rate for permanent downloads and physical phonorecords is set at 9.1 cents); Handler, *supra* note 67 (providing that the rate to create and distribute works through CDs or permanent downloads is set at 9.1 cents).

[93] Jefri Yonata, *How Much Do Spotify & Other Music Streaming Platforms Pay per Stream*, HEADPHONESTY, https://www.headphonesty.com/2021/11/how-much-does-spotify-pay-per-stream/ [https://perma.cc/9FN2-M4MK] (Sept. 12, 2022). Recall that top streaming services Spotify, Apple Music, and Amazon Music dominate the music streaming market, limiting the options for artists seeking to build an audience for their musical works. *See supra* note 77 and accompanying text.

[94] *See* Daniel Abowd, Note, *Something Old, Something New: Forecasting Willing Buyer/Willing Seller's Impact on Songwriter Royalties,* 31 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 574, 582 (2021) (explaining that, unlike the 1990s when musicians' mechanical royalties and performance income were equivalent, artists' mechanical royalty income is currently equivalent to about one third of their public performance income); Tim Ingham, *US Publishers Pulled in $3.7BN During 2019—Just Over Half What Record Labels Made*, MUSIC BUS. WORLDWIDE (June 11, 2020), https://www.musicbusinessworldwide.com/us-publishers-pulled-in-3-7bn-during-2019-just-over-half-what-record-labels-made/ [https://perma.cc/YXC6-S3NS] (illustrating that public performance was approximately three times greater than mechanical royalty income in 2018 and 2019).

[95] *See* Abowd*, supra* note 94, at 582 (stating that the mechanical license rate for streaming is substantially lower than that for CDs and permanent downloads).

[96] Marie Charlotte Götting, *Number of Music Streams Needed for Artists to Earn the U.S. Monthly Minimum Wage in the United States in 2019*, STATISTA (Dec. 2019) https://www.statista.com/statistics/1100554/music-streams-minimum-wage-artists-us/ [https://perma.cc/ZA44-RTK8] (Dec. 8, 2021).

[97] *See* Hannah Towey, *Taylor Swift Doesn't Need to Earn Streaming Royalties, According to a Former Spotify Boss Who Said the Company Is a Distribution Platform That Wasn't Built to Pay Artists*, BUS. INSIDER (July 6, 2021), https://www.businessinsider.com/taylor-swift-doesnt-need-streaming-royalties-former-spotify-boss-said-2021-7 [https://perma.cc/M76D-4FU4] (relaying the criticisms of musicians Ashley Jana and Taylor Swift regarding streaming services); Ben Beaumont-

most outspoken of such critics is Radiohead lead singer Thom Yorke, who believes that a superior mode of music consumption that pays artists more equitably will supplant Spotify.[98]

Notwithstanding Yorke's characterization of streaming as a transitory evil, musical artists have almost invariably failed to challenge streaming powerhouses.[99] Rapper Jay-Z competed for years against top streaming platforms by holding a majority stake in TIDAL music.[100] TIDAL is a streaming platform designed to better compensate artists by offering higher royalties for the reproduction and distribution of musical works.[101] Despite its admirable aspirations, TIDAL has been wholly unable to compete with top streaming platforms such

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Thomas, *Paul McCartney and Kate Bush Lead Call for Change to Music Streaming Payments*, THE GUARDIAN (Apr. 20, 2021), https://www.theguardian.com/music/2021/apr/20/paul-mccartney-kate-bush-law-change-music-streaming-payment [https://perma.cc/NG96-XEFH] (describing a letter to Boris Johnson signed by 156 British musicians including Paul McCartney, Chris Martin, and Kate Bush demanding better compensation for music streaming). Former Spotify executive Jim Anderson claims that the issues with streaming revenue are attributable to the original purpose of streaming services. Towey, *supra.* Because Spotify was created to combat music piracy by creating a new model of music distribution, Anderson argues that equitably compensating artists has never been the focus of streaming services. *Id.*

[98] Stuart Dredge, *Musician Blasts Spotify, Calling It 'The Last Desperate Fart of a Dying Corpse,'* BUS. INSIDER (Oct. 7, 2013), https://www.businessinsider.com/musician-calls-spotify-last-desperate-fart-of-a-dying-corpse-2013-10 [https://perma.cc/REW3-T6C4] (discussing Thom Yorke's statements that streaming services rely on the support of dying record labels and will eventually be replaced by a better paying mode of music consumption).

[99] *See id.* (providing that Yorke expects streaming powerhouses to eventually be replaced with another mode of music consumption); *see, e.g.*, Rob Bailey-Millado, *Jay-Z Shocks Fans by Returning Music to Spotify on His 50th Birthday*, N.Y. POST (Dec. 4, 2019), https://nypost.com/2019/12/04/jay-z-shocks-fans-by-returning-music-to-spotify-on-his-50th-birthday/ [https://perma.cc/9GH9-U8ZG] (detailing how Jay-Z returned his music to Spotify in 2019 after previously opposing the streaming service). *But see* Tim Ingham, *Kanye West Just Sold 10,000 Stem Players in 3 Days . . . as He Claims He Rejected a $100M Deal from Apple*, MUSIC BUS. WORLDWIDE (Feb. 20, 2022), https://www.musicbusinessworldwide.com/kanye-west-just-sold-10000-stem-players-in-3-days-as-he-claims-he-turned-down-a-100m-deal-from-apple1/ [https://perma.cc/9LB3-FDDQ] (detailing how Kanye West released his new album Donda 2 exclusively on a physical Stem Player and netted over $2 million from Stem Player sales in just a few days). Explaining the reasons for releasing his new Stem Player, West tweeted: "After 10 albums after being under 10 contracts. I turned down a hundred million dollar Apple deal. No one can pay me to be disrespected . . . . Tech companies made music practically free so if you don't do merch sneakers and tours you don't eat." *Id.*

[100] *See* Amelia Butterly, *Jay-Z Says Tidal Is 'Doing Just Fine' with 770k Subscribers*, BBC (Apr. 26, 2015), https://www.bbc.com/news/newsbeat-32475661 [https://perma.cc/BBV4-AFJM] (providing that Jay-Z purchased TIDAL to create a streaming platform that benefited all parties associated with music streaming).

[101] *See* James Cook, *Jay-Z's Music Streaming Site Isn't About Helping Musicians—It's About Making More Money*, BUS. INSIDER (Mar. 31, 2015), https://www.businessinsider.com/jay-z-tidal-relaunch-making-money-spotify-profits-kanye-daft-punk-madonna-2015-3 [https://perma.cc/6674-5SYP] (stating that TIDAL is designed to make artists more money). Several musical artists have spoken out in support of TIDAL's mission, including Madonna, Alicia Keys, and Kanye West—who deemed TIDAL's launch "the beginning of a new world." *See id.* (describing how many artists have publicly supported TIDAL because it offers them an opportunity to realize increased revenue from streaming).

as Spotify and Apple Music.[102] After years of financial difficulties and waning industry support, Jay-Z waved the white flag on the struggling platform in 2021 and sold TIDAL to Jack Dorsey's Square for $350 million.[103]

The lack of better compensating alternative streaming platforms has left artists with few options through which to stream their music.[104] Jay-Z famously removed the majority of his music catalog from Spotify in 2017, only to return his songs to the streaming platform less than two years later.[105] Other prominent artists, including Taylor Swift and the Beatles, took similar stands against Spotify but ended up conceding the right to stream their music back to the platform.[106] Rather than directly oppose streaming services, many artists have recently lobbied for reforms to the current streaming revenue system.[107] Most significantly, musicians played a critical role in the passage of the 2018 Music Modernization Act in the United States.[108]

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[102] *See* Kori Hale, *Jay-Z's Return to Spotify Could Be the Nail in Tidal's Coffin*, FORBES (Dec. 9, 2019), https://www.forbes.com/sites/korihale/2019/12/09/jay-zs-return-to-spotify-could-be-the-nail-in-tidals-coffin/?sh=195bbd926b98 [https://perma.cc/PVF4-4WA6] (stating that TIDAL reportedly has only a few million subscribers and has incurred financial losses for years).

[103] *See* Will Feuer, *Jay-Z Completes Sale of Tidal to Jack Dorsey's Square for Reported $350 Million*, N.Y. POST, https://nypost.com/2021/05/03/jay-z-sells-tidal-to-jack-dorseys-square-for-350-million/ [https://perma.cc/4YRA-L9SP] (May 3, 2021) (detailing Jay-Z's sale of his majority stake in TIDAL to Jack Dorsey's Square).

[104] *See* Eamonn Forde, *Spotify Comfortably Remains the Biggest Streaming Service Despite Its Market Share Being Eaten Into*, FORBES (Jan. 19, 2022), https://www.forbes.com/sites/eamonnforde/2022/01/19/spotify-comfortably-remains-the-biggest-streaming-service-despite-its-market-share-being-eaten-into/?sh=6a67324c3474 [https://perma.cc/263Q-LNQ2] (explaining that music streaming is dominated by a few platforms).

[105] *See* Mark Sweney, *Jay-Z Sells Majority Stake in Tidal Music Streaming Service to Jack Dorsey's Square*, THE GUARDIAN (Mar. 4, 2021), https://www.theguardian.com/business/2021/mar/04/jay-z-sells-majority-stake-in-tidal-music-streaming-service-to-jack-dorseys-square [https://perma.cc/3EQ7-UZ9R] (stating that Jay-Z removed his music from Spotify in 2017 but then added it back to the streaming service in 2019).

[106] *See* Natalie Weiner, *Here Are the Most-Streamed Beatles Songs on Spotify So Far*, BILLBOARD (Dec. 26, 2015), https://www.billboard.com/music/rock/most-streamed-beatles-songs-spotify-6821609/ [https://perma.cc/W33A-59X6] (providing that the Beatles refused to allow their music on Spotify until December of 2015); Hugh McIntyre, *Why Did Taylor Swift Really Rejoin Spotify?*, FORBES (June 27, 2017), https://www.forbes.com/sites/hughmcintyre/2017/06/27/why-did-taylor-swift-really-rejoin-spotify/ [https://perma.cc/AHF4-PLCL] (stating that Taylor Swift returned her music to Spotify in 2017). Taylor Swift penned an essay in the *Wall Street Journal* in 2014, contending that "music should not be free." Towey, *supra* note 97.

[107] *See* Tim Ingham, *The Fight Over Music-Streaming Royalties Misses the Point*, ROLLING STONE (May 18, 2021), https://www.rollingstone.com/pro/features/music-streaming-royalties-artists-spotify-1170352/ [https://perma.cc/C4XR-AWRS] (explaining how musical artists are playing a leading role in pushing streaming services to consider alternative models of royalty payment); Mark Savage, *The Rolling Stones and Tom Jones Call for Streaming Reforms*, BBC (June 7, 2021), https://www.bbc.com/news/entertainment-arts-57382459 [https://perma.cc/36AX-26XM] (discussing how 234 famous U.K. artists signed a letter to Prime Minister Boris Johnson demanding that streaming services change how they compensate artists).

[108] *See* Nikki Schwab, *Smokey Robinson Testifies Before Senate for More Streaming Royalties*, N.Y. POST, https://nypost.com/2018/05/15/smokey-robinson-testifies-before-senate-for-more-streaming-

C. The Music Modernization Act

In 2018, Congress passed the Orrin G. Hatch–Bob Goodlatte Music Modernization Act (MMA).[109] Congress intended this legislation to modernize music copyright law and ensure equity in royalty payments to music artists.[110]

Title I of the MMA, which focused on regulating royalty payments to copyright holders, terminated the prior compulsory licensing system and granted providers of digital music the right to receive a blanket license to distribute digital works.[111] The MMA's new blanket license system obviates the

royalties/ [https://perma.cc/M698-37QC] (May 15, 2018) (providing that songwriters such as Smokey Robinson and Josh Kear testified before a Senate judiciary committee in support of the MMA's enactment); *see also* Amy X. Wang, *Trump to Sign Music Modernization Act Alongside Kid Rock, Kanye West*, ROLLING STONE (Oct. 11, 2018), https://www.rollingstone.com/pro/news/trump-music-modernization-act-kid-rock-kanye-west-736086/ [https://perma.cc/E2DT-7VFE] (providing that Kid Rock and Kanye West were present to support the President's signing of the MMA).

[109] Pub. L. No. 115-264, 132 Stat. 3676 (2018) (codified in scattered sections of 17 U.S.C. and 28 U.S.C.).

[110] *See id.* (describing how the Act was passed to "modernize copyright law, and for other purposes"); *see also* Remarks on Signing the Orrin G. Hatch-Bob Goodlatte Music Modernization Act, 2018 DAILY COMP. PRES. DOC. 2 (Oct. 11, 2018) (providing that the MMA was meant to alter digital royalty law to ensure musical artists receive sufficient payment for the licensing of their music). The MMA is a compilation of three previously introduced music copyright bills and is subdivided into three titles encompassing each of these bills. *See* S. REP. NO. 115-339, at 2 (2018) (stating that each of the MMA's three titles updates a previously introduced bill). Congress began an extensive process of evaluating and updating music copyright law in 2013, when the House of Representatives Committee on the Judiciary began conducting public hearings regarding the modern music industry. *See The Creation of the Music Modernization Act*, *supra* note 26 (tracing the origins of the MMA).

[111] *See The Creation of the Music Modernization Act*, *supra* note 26 (stating that certain digital music providers may receive a blanket license from the Mechanical Licensing Collective (MLC)); *Musical Works Modernization Act*, U.S. COPYRIGHT OFF., https://www.copyright.gov/music-modernization/115/ [https://perma.cc/6SJ3-LPSH] (explaining how Title I of the MMA established a new system for the payment of music royalties); *supra* notes 60–64 and accompanying text (explaining the prior compulsory licensing system). Because the MMA grants a blanket license to digital music providers, distributors of CDs and other physical reproductions of music still must obtain mechanical licenses on a song-by-song basis. *See* Reed, *supra* note 57, at 162 (describing how the MMA's blanket license scheme does not apply to distributors of physical reproductions of music). Title I is the lengthiest of the MMA's three titles because it addresses the convoluted issues associated with compensating artists for the digital streaming of their works. *See generally* Remarks on Signing the Orrin G. Hatch-Bob Goodlatte Music Modernization Act, *supra* note 110 (providing that the MMA was meant to alter digital royalty law to ensure musical artists receive sufficient payment for the licensing of their music); *see also Musical Works Modernization Act*, *supra* (explaining that Title I makes it easier for musical artists to collect royalties); Lydia Pallas Loren, *Copyright Jumps the Shark: The Music Modernization Act*, 99 B.U. L. REV. 2519, 2525 (2019) (stating that Title I is the lengthiest of the MMA's three titles). Title I accounts for 18,500 of the 24,072 words added to the Copyright Act by the MMA. Loren, *supra*, at 2525. In contrast, Titles II and III focus on the more narrow issues of providing copyright protection for pre-1972 works and compensating studio professionals, respectively. *See* Ervin Cohen & Jessup LLP, *A Brief Summary of the Music Modernization Act*, JD SUPRA (Oct. 25, 2018), https://www.jdsupra.com/legalnews/a-brief-summary-of-the-music-95047/ [https://perma.cc/7887-2Z7V] (discussing the purposes behind the MMA's three titles and how Title I is likely the most significant). This Note focuses on Title I of the Act, which music industry stakeholders have challenged extensively since the MMA's passage. *See, e.g.*, U.S. COPYRIGHT OFF., UNCLAIMED ROYALTIES: BEST PRAC-

need for streaming services to obtain licenses on a song-by-song basis from individual copyright holders and instead enables streaming services to stream all copyrighted musical works, provided that they pay the required royalties.[112]

To administer this new licensing system, Congress created the Mechanical Licensing Collective (MLC).[113] The MLC is an independent nonprofit agency governed by fourteen directors, of which ten represent music publishers and four represent songwriters.[114] Title I delegates to the MLC a variety of powers in administering the licensing system.[115]

First, the MMA authorizes the MLC to collect royalties from digital music providers, including streaming platforms, and transfer those royalties to recording artists.[116] If the MLC cannot identify the copyright holder of a particular composition, the nonprofit entity must hold all royalties associated with this composition in an interest account.[117] The MLC then has three years to allocate the royalties to the appropriate copyright holder.[118] If the MLC fails to find a copyright holder after three years, it must distribute these royalties to music publishing organizations by market share.[119] To facilitate the efficient distribution of royalties to copyright holders, the MMA tasks the MLC with

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TICE RECOMMENDATIONS FOR THE MECHANICAL LICENSING COLLECTIVE 91 (2021), https://www.copyright.gov/policy/unclaimed-royalties/unclaimed-royalties-final-report.pdf [https://perma.cc/WD56-W4R4] (recommending modification to the MMA's regulation of the MLC).

[112] *See* MARY LAFRANCE, COPYRIGHT LAW IN A NUTSHELL 292 (4th ed. 2022) (comparing the previous process, where music providers would negotiate with individual copyright holders, with the MMA's new blanket license system); *see also supra* notes 62–72 and accompanying text (discussing mechanical licenses and how parties acquire them).

[113] *See Musical Works Modernization Act*, *supra* note 111 (explaining that the MMA provided for the establishment of the MLC to administer blanket licenses).

[114] *See* 17 U.S.C. § 115(d)(3)(D) (establishing an MLC board of directors composed of fourteen voting members); DANA A. SCHERER, CONG. RSCH. SERV., R43984, MONEY FOR SOMETHING: MUSIC LICENSING IN THE 21ST CENTURY 16 (2021), https://sgp.fas.org/crs/misc/R43984.pdf [https://perma.cc/8LNC-BJU5] (explaining that the MLC is a nonprofit organization made up of ten experts representing music publishers and four representing musicians). The MLC also has three non-voting members. 17 U.S.C. § 115(d)(3)(D). Because the MLC is a nonprofit entity, Congress required that providers of digital music fund the organization. *See id.* § 115(d)(7) (requiring providers of digital music to contribute funds to cover the operational costs of the MLC).

[115] *See* 17 U.S.C. § 115(d)(3)(C) (listing the functions that Title I of the MMA authorizes the MLC to perform).

[116] *See id.* § 115(d)(3)(C)(i)(II) (granting the MLC the authority to collect and disburse royalties). Digital music providers must pay and report royalties to the MLC each month pursuant to their blanket licenses. *Id.* § 115(d)(4)(A)(i). The MLC must then distribute these royalties to copyright owners. *Id.* § 115(d)(3)(G)(i)(II).

[117] *Id.* § 115(d)(3)(G)(i)(III).

[118] *Id.* § 115(d)(3)(J)(i).

[119] *See id.* (stating that the MLC should distribute royalties that have remained unclaimed for three years to publishing companies based on market share).

creating and maintaining a public database that matches copyright holders to compositions.[120]

Title I of the MMA also replaced the CRB's "reasonable rate" standard for determining mechanical royalty rates with a new "willing-buyer" standard.[121] This new standard requires the CRB to consider a variety of factors to determine the fair market value of royalties and set royalty rates accordingly.[122] For example, the statute requires the board to consider factors such as "economic, competitive, and programming information" in determining the appropriate royalty rate.[123]

Finally, Title I of the MMA limits the liability of streaming services that engage in a good-faith effort to match songwriters and publishers to a composition.[124] Under this provision, a copyright holder that brings suit against a streaming service for copyright infringement can only obtain the limited remedy of the royalty due as determined by the CRB.[125]

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[120] *Id.* § 115(d)(3)(E)(i). The MLC must include compositions without a known copyright holder in this database. *See id.* § 115(d)(3)(E)(iii) (providing that the MLC's database should provide information about unmatched compositions in its licensing database).

[121] *See* U.S. COPYRIGHT OFF., *supra* note 72, at 29 (explaining how the CRB previously employed a "four-factor test"); 17 U.S.C § 115(c)(1)(F) (providing that the CRB must set royalty rates according to fair market value). The MMA's new standard requires that the CRB judges set mechanical royalty rates reflecting "the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller." 17 U.S.C § 115(c)(1)(F).

[122] 17 U.S.C § 115(c)(1)(F).

[123] *Id.*

[124] *Id.* § 115(d)(10). Limiting liability under this section of the MMA has been viewed as controversial by some scholars. *See, e.g.*, Monique Brown, *The Music Modernization Act: One Giant Leap for Music Copyright Laws*, TENN. BAR J., Nov. 2019, at 22, 25 (explaining that this safe harbor provision is controversial because it is arguably unconstitutional). Observers, however, debate the utility of this provision when compared to its costs. *Compare* Bronté Story, Streaming into the Twenty-First Century: An Evaluation of the Music Modernization Act 39 (2019) (unpublished comment), https://cpb-us-w2.wpmucdn.com/smulawjournals.org/dist/8/7/files/2018/11/Streaming-into-the-Twenty-First-Century-An-Evaluation-of-the-Music-Modernization-Act_BronteStory_Optimized.pdf [https://perma.cc/SD6G-QAN3] (asserting that the MMA's limitation on streaming liability is beneficial because it adheres to the MMA's objective to promote efficiency), *with* Paul Resnikoff, *Spotify Is About to Receive a Giant Gift from Congress. Which Might Explain Their Latest Acquisition*, DIGIT. MUSIC NEWS (Apr. 12, 2018), https://www.digitalmusicnews.com/2018/04/12/spotify-loudr-music-modernization-act/ [https://perma.cc/ZEK5-KK6Y] (contending that the MMA inequitably pardons Spotify for years of copyright infringement).

[125] *See* 17 U.S.C. § 115(d)(10) (providing that the only remedy a copyright holder can obtain against a streaming service meeting the MMA's limited liability requirements is the statutory royalty due); Music Modernization Act Transition Period Transfer and Reporting of Royalties to the Mechanical Licensing Collective, 86 Fed. Reg. 2176, 2176 (Jan. 11, 2021) (to be codified at 37 C.F.R. pt. 210) (stating that the MMA limits the recovery in lawsuits against streaming services beginning on or after January 1, 2018 "to the statutory royalty that would be due"). A copyright holder that brings suit against a protected streaming service can only recover a royalty prescribed by the MMA and cannot collect statutory damages or attorney's fees. *See* Abdo & Abdo, *supra* note 26, at 3 (explaining the MMA's streaming service liability limitation provision).

Title II of the MMA provides for the copyright protection of sound recordings created before 1972.[126] Because federal copyright law did not protect sound recordings until the introduction of the Sound Recording Act in 1971, sound recordings predating this Act previously received no federal copyright protection.[127] Title II fills this federal protection gap by providing limited copyright protection to pre-1972 works.[128] This protection expires ninety-five years after the work's original publication, at which point the work will become part of the public domain.[129]

Title III of the MMA ensures that studio professionals such as mixers, music producers, and sound engineers receive compensation for their contributions to a used sound recording.[130] It is common music industry practice for a musician's payee to send a "letter of direction" advising payers to distribute a portion of sound recording royalties directly to studio professionals.[131] Title III codifies this practice and affords studio professionals the right to collect royalties as agreed upon in a letter of direction.[132] Additionally, for musical works created before November of 1995, Title III requires royalty distributions to studio professionals that attempted, but were unable, to obtain letters of direction.[133]

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[126] *See Classics Protection and Access Act*, U.S. COPYRIGHT OFF., https://www.copyright.gov/music-modernization/pre1972-soundrecordings/ [https://perma.cc/5KZ3-HMMH] (providing that Title II of the MMA permits remedies for the infringement of pre-1972 sound recordings). Title II's copyright protections are limited by previous copyright doctrines under Title 17 like fair use and first sales. *Id.*

[127] *See* Sound Recording Act of 1971, 17 U.S.C. § 101 (1971) (establishing federal copyright protection for sound recordings beginning on February 15, 1972).

[128] *See* U.S. COPYRIGHT OFF., *supra* note 126 (stating that the MMA provides limited federal copyright protection for musical works before 1972).

[129] *See* 17 U.S.C. § 1401(a)(2) (providing that the protection of pre-1972 works applies only within ninety-five years of a work's original publication date).

[130] *See Allocations for Music Producers*, U.S. COPYRIGHT OFF., https://www.copyright.gov/music-modernization/amp/ [https://perma.cc/2A6R-PLN3] (stating that the Allocation for Music Producers (AMP) Act grants music producers, sound engineers, and mixers the right to receive royalties in association with a sound recording's use). Each of the MMA's three titles updates a previously introduced bill. S. REP. NO. 115-339, at 2 (2018). Title III of the MMA updates the AMP Act. *Id.*

[131] *See Allocation for Music Producers (AMP) Act*, SOUNDEXCHANGE, https://www.soundexchange.com/wp-content/uploads/2016/09/AMP-Act-One-Pager_11.17.17.pdf [https://perma.cc/7E3P-WFKC] (explaining that the AMP Act effectively codifies a well-established music industry practice); *Music Modernization: Frequently Asked Questions*, U.S. COPYRIGHT OFF., https://www.copyright.gov/music-modernization/faq.html [https://perma.cc/7HMJ-J6MV] (explaining that a "letter of direction" is sent from a musical artist's payee to a party paying royalties and requests the direct payment of royalties to studio professionals).

[132] *See* 17 U.S.C. § 114(g)(5)(A) (requiring the Copyright Royalty Judges to designate a nonprofit organization to distribute royalties to studio professionals under a letter of direction); *The Allocation for Music Producers Act (AMP Act)*, RECORDING ACAD., https://www.recordingacademy.com/advocacy/issues-policy/studio-professionals [https://perma.cc/YQP4-64YY] (discussing how the AMP Act grants studio professionals the right to collect royalties agreed upon in a letter of direction).

[133] *See* 17 U.S.C. § 114(g)(6)(A)(i) (establishing the requirements for a studio professional to receive royalties in association with a work fixed before November 1995).

II. SETTLE FOR NOTHING: THE MUSIC MODERNIZATION ACT IN ACTION

Improved regulation of the music industry brought on by the Music Modernization Act (MMA) benefited the music industry in a number of ways.[134] Both musical artists and publishing companies alike praised the historic increase in mechanical royalty rates by the Copyright Royalty Board (CRB) following the MMA's passage.[135]

Nonetheless, not all parties believe the enactment effectively solved the industry's most glaring problem: an inability to equitably compensate artists.[136] Following the MMA's enactment, streaming services challenged the new royalty rates set by the CRB as well as the Mechanical Licensing Collective's (MLC) leadership structure.[137] The lawsuit filed by music studio Eight Mile Style against Spotify also comprised an early red flag regarding the MMA's efficacy.[138] This Part explores criticisms of and legal challenges to the MMA.[139] Section A details legal challenges to the CRB's mechanical royalty rate increase.[140] Section B examines music industry stakeholder criticisms about the MLC.[141] Section C explores the music studio Eight Mile Style's lawsuit against Spotify.[142]

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[134] *See* E. MAXWELL, MODERNIZATION OF MUSIC 82 (2020) (arguing that the Music Modernization Act (MMA) has provided a better future for songwriters); Doug Collins, *The Music Modernization Act Will Provide a Needed Update to Copyright Laws*, THE HILL (Jan. 10, 2018), https://thehill.com/blogs/congress-blog/technology/368385-the-music-modernization-act-will-provide-a-needed-update-to [https://perma.cc/EC7A-QB46] (praising the MMA for ameliorating an outdated system of music copyright law).

[135] *See* Paula Parisi, *Copyright Royalty Board Boosts Songwriters' Streaming Pay Nearly 50%*, VARIETY (Jan. 27, 2018), https://variety.com/2018/biz/news/copyright-royalty-board-boosts-songwriters-streaming-pay-nearly-50-1202679118/ [https://perma.cc/BFH7-SFRX] (characterizing the CRB's new rate determinations as a "significant victory" for songwriters). In response to the CRB's rate determination announcement, Sony CEO Martin Bandier stated that "[a]s the leading music publisher, we believe that overall this is a very positive ruling by the CRB as it will deliver an unprecedented topline rate increase for songwriters . . . ." *Id.*

[136] *See* Richard Busch, *I'm One of the Attorneys Suing Spotify. And Here's Why the 'Music Modernization Act' Makes Little Sense*, DIGIT. MUSIC NEWS (Jan. 19, 2018), https://www.digitalmusicnews.com/2018/01/19/spotify-music-modernization-act/ [https://perma.cc/DD5H-H6PK] (asserting that the MMA cannot fix the systemic issues that deprive artists of adequate compensation from music streaming services).

[137] *See id.* (criticizing the MLC's governance structure and process for distributing royalties to copyright holders); Johnson v. Copyright Royalty Bd., 969 F.3d 363, 367 (D.C. Cir. 2020) (explaining the court's procedural grounds for vacating and remanding the CRB's royalty rate determinations).

[138] *See* SCHERER, *supra* note 114, at 17 (detailing how Eminem's music publisher Eight Mile Style filed a lawsuit that brings into question the constitutionality and fairness of the MMA's limitation on streaming service liability); Complaint at 1, Eight Mile Style, LLC v. Spotify USA Inc., 535 F. Supp. 3d 738 (M.D. Tenn. 2021) (No. 19-CV-00736) (accusing Spotify of copyright infringement).

[139] *See infra* notes 143–189 and accompanying text.

[140] *See infra* notes 143–156 and accompanying text.

[141] *See infra* notes 157–172 and accompanying text.

[142] *See infra* notes 173–189 and accompanying text.

A. The Copyright Royalty Board's New Mechanical Royalty Rates and Resulting Litigation by Streaming Services

In the wake of the MMA's enactment, the CRB employed the newly minted willing buyer/willing seller standard and implemented a historic forty-four percent increase in mechanical royalty rates for 2018 through 2022.[143] This royalty rate increase would gradually increase songwriters' percentage share of total streaming revenue from 10.5% to 15.1% over the five-year period.[144] In response to the rate increase, streaming service companies Amazon, Google, Pandora, and Spotify in 2020 challenged the CRB's rate determination by appealing to the U.S. Court of Appeals for the D.C. Circuit.[145] This filing drew the ire of music industry stakeholders.[146] For example, Apple Music criticized Spotify for trying to "squeeze" artists and over ninety songwriters signed a letter demanding that Spotify drop its lawsuit.[147]

In 2020, the D.C. Circuit ruled on procedural grounds in favor of the streaming services that brought suit.[148] Specifically, the court determined that the CRB failed to (1) provide fair notice to the streaming services of its new

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[143] *See* Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), 84 Fed. Reg. 1918, 1918 (Feb. 5, 2019) (to be codified at 37 C.F.R. pt. 385) (announcing the CRB's mechanical royalty rates for the period 2018 through 2022); *see also infra* notes 123–125 and accompanying text (discussing the new "willing-buyer" standard established by the MMA).

[144] Handler, *supra* note 67. After the CRB announced this historic increase in mechanical royalty rates, David Israelite, the CEO of the National Music Publishers Association (NMPA) warned that streaming services could "declare war" on songwriters and appeal these rates. Murray Stassen, *Songwriters Dealt Blow in Spotify Royalty Rate Battle as Streaming Platforms Are Granted 'Procedural Victory' in US Appeals Court*, MUSIC BUS. WORLDWIDE (Aug. 11, 2020), https://www.musicbusinessworldwide.com/songwriters-dealt-blow-in-spotify-royalty-rate-battle-as-streaming-platforms-claim-procedural-victory-in-us-appeals-court/ [https://perma.cc/39HB-F4FR].

[145] Johnson v. Copyright Royalty Bd., 969 F.3d 363, 367 (D.C. Cir. 2020); *see You Might Have Heard About the Streaming Industry's CRB Appeal—Here's What You Need to Know*, SPOTIFY (Mar. 11, 2019), https://artists.spotify.com/en/blog/you-might-have-heard-about-the-streaming-industry%27s-crb-appeal-here%27s-what [https://perma.cc/S4VY-XR65] (explaining to Spotify artists the streaming service's decision to appeal the CRB's royalty rates). The CRB's rate determinations may be appealed to the U.S. Court of Appeals for the D.C. Circuit by a party that "fully participated in the proceeding and who would be bound by the determination." 17 U.S.C. § 803(d)(1).

[146] *See* Jem Aswad, *Hit Songwriters Slam Spotify's Attempt to Lower Royalties: 'You Have Used Us,'* VARIETY (Apr. 9, 2019), https://variety.com/2019/biz/news/spotify-secret-genius-songwriters-lower-royalties-1203184870/ [https://perma.cc/9BS2-GBTB] (describing songwriters' letter to Spotify CEO Daniel Ek).

[147] *See Addressing Spotify's Claims*, APPLE (Mar. 14, 2019), https://www.apple.com/newsroom/2019/03/addressing-spotifys-claims/ [https://perma.cc/H8QW-2VMR] (characterizing Spotify's decision to sue music creators as a "damaging step backwards for the music industry"); Aswad, *supra* note 146 (describing songwriters' letter to Spotify CEO Daniel Ek). The songwriters' letter accused Spotify of engaging in disingenuous "songwriter outreach" as a means to create division among musicians. Aswad, *supra* note 146.

[148] *See Johnson*, 969 F.3d at 367 (explaining the court's procedural grounds for vacating and remanding the CRB's royalty rate determinations).

rate structure; (2) adequately explain its rejection of previous mechanical royalties calculations; and (3) rationalize its new system for calculating service revenue.[149] Accordingly, the D.C. Circuit vacated and remanded in part the CRB's rate determinations.[150] Although the court ultimately ruled for streaming services, it expressed sympathy for the plight of songwriters and found that substantial evidence supported the CRB's contention that a royalty rate increase was necessary to protect the financial viability of musicians.[151]

In July of 2022, the CRB affirmed its forty-four percent increase in mechanical royalties—six months into the final year of the 2018–2022 rate determination period.[152] Prior to this decision, streaming services were free to pay the 2017 mechanical royalty rate equal to 10.5% of streaming service revenue to compensate songwriters.[153] The MLC requested that the CRB set an interim mechanical royalty rate to apply during its remand proceedings, but the CRB ultimately declined.[154]

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[149] *Id.* at 367; *see* Blake Brittain, *Streaming Music Services Win Redo of Royalty Rate Rule (1)*, BLOOMBERG L., https://news.bloomberglaw.com/ip-law/major-streaming-music-services-win-challenge-to-royalty-rates [https://perma.cc/US4W-SGY3] (Aug. 12, 2020) (explaining the CRB's procedural violations that enabled streaming services to prevail in their challenge of the CRB's rate determinations).

[150] *Johnson*, 969 F.3d at 397.

[151] *Id.* at 397–98.

[152] Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), 84 Fed. Reg. at 1918; Jem Aswad, *Copyright Royalty Board Confirms Streaming Royalty Raise for Publishers and Songwriters*, VARIETY (July 1, 2022), https://variety.com/2022/digital/news/copyright-royalty-board-streaming-royalty-publishers-songwriters-1235308088/ [https://perma.cc/5F5R-BJYA].

[153] *See* Chris Castle, *Are You Tired of Winning Yet? The Legal Bill for the Phonorecords III Remand and Other Stories*, ARTISTS RTS. WATCH (Mar. 27, 2022), https://artistrightswatch.com/2022/03/27/are-you-tired-of-winning-yet-the-legal-bill-for-the-phonorecords-iii-remand-and-other-stories/ [https://perma.cc/L529-HWQE] (explaining that the CRB is still in the process of setting mechanical royalty rates for 2018–2022); *NMPA CEO David Israelite Discusses Music Royalties During the Pandemic, the Latest on Copyright Royalty Board Hearings, and the Growth of TikTok and Other Income Streams*, NMPA (Jan. 26, 2022), https://www.nmpa.org/nmpa-ceo-david-israelite-discusses-music-royalties-during-the-pandemic-the-latest-on-copyright-royalty-board-hearings-and-the-growth-of-tiktok-and-other-income-streams/ [https://perma.cc/U85Z-F7VY] (explaining that streaming services will pay mechanical royalties under the 2017 rate until the CRB updates its rate determinations); Murray Stassen, *Here's Exactly What Spotify, Apple and Other Streaming Services Want to Pay Songwriters from 2023 Onwards*, MUSIC BUS. WORLDWIDE (Oct. 26, 2021), https://www.musicbusinessworldwide.com/heres-exactly-what-spotify-apple-and-other-streaming-services-want-to-pay-songwriters-from-2023-onwards/ [https://perma.cc/2A46-JLS9] (stating that the CRB's mechanical royalty rate in 2017 was set at 10.5% of a streaming service's revenue).

[154] *See What's Happening with Mechanical Royalty Rates?*, ROYALTY EXCH., https://www.royaltyexchange.com/blog/whats-happening-with-mechanical-royalty-rates [https://perma.cc/VD3D-LN5Q] (Jan. 7, 2021) (providing that the CRB declined the MLC's request to set a temporary mechanical royalty rate). This convoluted process compelled CEO of the NMPA David Israelite to label the CRB's process broken. *NMPA CEO David Israelite Discusses Music Royalties During the Pandemic, the Latest on Copyright Royalty Board Hearings, and the Growth of TikTok and Other Income Streams*, *supra* note 153.

Rate determinations are retroactive, so streaming services will now have to pay artists the difference between the 2017 rate and the CRB's updated rate.[155] Nonetheless, the disruptive legal battle waged by streaming services against increased royalty rates appears to be just beginning—Spotify, Amazon, and others have already submitted proposals asking the CRB to lower mechanical royalty rates in the 2023–2027 term.[156]

B. Critiques of the Mechanical Licensing Collective

Another prevalent critique of the MMA questions whether the MLC will be able to effectively match compositions and distribute royalties to copyright holders.[157] In April 2021, the MLC announced the completion of its first month of royalty distributions.[158] The nonprofit agency reported that it successfully matched approximately 80% of the royalties received to compositions registered in its public database but was unable to distribute the remaining $11 million in unmatched royalties to copyright holders.[159]

Streaming services also turned over $424 million in accrued royalties in 2021 from compositions not yet matched to copyright holders that the MLC will attempt to allocate to owners in the coming years.[160] This payment marked a historic victory for songwriters who had previously been denied an equitable process for locating the owners of unmatched compositions.[161] Despite the

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[155] *See Announcement Concerning Interim Mechanical Royalty Rates Pending the Outcome of Copyright Royalty Board Remand Proceeding in Phonorecords III*, MECH. LICENSING COLLECTIVE (Jan. 13, 2021), https://www.themlc.com/press/announcement-concerning-interim-mechanical-royalty-rates-pending-outcome-copyright-royalty [https://perma.cc/J9SW-V3HN] (explaining that the CRB's final rate determinations from the remand determination will apply retroactively).

[156] *See* Stassen, *supra* note 153 (stating that multiple streaming services have submitted proposals advocating the CRB to lower mechanical royalty rates). Alternatively, the NMPA is lobbying for the CRB to increase mechanical royalty rates. *See id.* (stating that the NMPA proposed that the CRB increase mechanical royalty rates to 20% of the revenue generated by streaming services).

[157] *See* U.S. COPYRIGHT OFF., *supra* note 111, at 91 (arguing that the MMA provides an insufficient time period for the MLC to match compositions with copyright holders); *see also* Daniel Sanchez, *3 Major Problems with the Music Modernization Act*, DIGIT. MUSIC NEWS (Feb. 27, 2018), https://www.digitalmusicnews.com/2018/02/27/music-modernization-act-major-problems/ [https://perma.cc/NHR4-FU65] (arguing that the MLC's governance structure is imbalanced and should be altered).

[158] *See The Mechanical Licensing Collective Completes First Royalty Distribution*, MECH. LICENSING COLLECTIVE (Apr. 19, 2021), https://www.themlc.com/press/mechanical-licensing-collective-completes-first-royalty-distribution [https://perma.cc/W8ES-LKLA] (providing the MLC's announcement of its first collection and distribution of royalty payments).

[159] *Id.*

[160] Cathy Applefeld Olson, *Apple, Spotify and Other DSPs Pay $424 Million in Unmatched Royalties for Publishers, Songwriters*, FORBES (Feb. 16, 2021), https://www.forbes.com/sites/cathyolson/2021/02/16/apple-spotify-and-other-dsps-pay-424m-in-historical-unmatched-royalties-for-publishers-songwriters/ [https://perma.cc/3GS4-MQWA]; *see* 17 U.S.C. § 115(d)(3)(G)(i)(II) (stating that the MLC shall distribute royalties received from digital music providers to copyright holders).

[161] *See* Jem Aswad, *$424 Million up for Grabs as Music Streaming Services Fill MLC's Black Box with Unmatched Royalty Payments*, VARIETY (Feb. 16, 2021), https://variety.com/2021/music/

MLC's progress, however, numerous concerns remain regarding its matching and distribution process.[162]

First, some songwriters fear that the MMA and the MLC board structure improperly incentivize the music publisher representatives to constrain the matching of compositions.[163] The MLC must redistribute any unmatched composition royalties to the very publishing companies that these directors represent at the conclusion of the MLC's three-year window to match compositions to copyright holders.[164] Thus, the majority of the MLC's board has a substantial financial incentive to prevent, or at least not proactively support, the successful matching of compositions to copyright holders.[165]

Second, some industry experts believe that the MMA's three-year window for the MLC to match royalties is an unrealistic timeframe.[166] The U.S. Copyright Office, in a 2021 report advising the MLC on royalty distribution, recommended that the MLC not distribute unmatched composition royalties to publishing companies for at least five years.[167] The Copyright Office reasoned that the MLC needed more time to (1) find copyright holders; (2) create a portal for claiming royalties; and (3) educate the public about the need to register

news/spotify-apple-425-million-royalties-1234908957/ [https://perma.cc/28HA-TD4N] (stating that an inability to distribute revenue to owners of unmatched compositions was a major music industry issue before the MLC's creation). Prominent music industry figures, including Songwriters of North America Executive Director Michelle Lewis and NMPA president David Israelite, lauded the MLC collecting unmatched royalties from streaming services. *See id.* (relaying the opinions of Michelle Lewis and David Israelite on streaming services turning over unmatched royalty revenue to the MLC).

[162] *See infra* notes 163–172 and accompanying text (highlighting some concerns related to the MLC).

[163] *See* Adam Gorgoni, *The Music Modernization Act: A Songwriter's Perspective*, *in* THE OXFORD HANDBOOK OF MUSIC LAW AND POLICY (Sean M. O'Connor ed., 2021) (ebook) (describing how songwriters fear that the power imbalance on the MLC's board could inhibit the successful matching of compositions to copyright holders). Recall that the MLC's board of directors is majority composed of music publisher representatives. *See supra* note 114 and accompanying text (discussing the composition of the MLC's board of directors).

[164] *See* 17 U.S.C. § 115(d)(3)(J)(i) (stating that the MLC should distribute royalties that have remained unclaimed for three years to publishing companies based on market share).

[165] *See id.* (providing a potential financial benefit for music publishers on the MLC board that are unable to match compositions to copyright holders); Gorgoni, *supra* note 163, at 25 (detailing how the MLC board's makeup could inhibit the process of matching compositions to copyright holders).

[166] *See, e.g.*, Emily Bullis & Daniel Klaeren, *Copyright Office Releases Post-MMA Report on Unclaimed Royalties*, JD SUPRA (Sept. 1, 2021), https://www.jdsupra.com/legalnews/copyright-office-releases-post-mma-4749086/ [https://perma.cc/W459-PBR5] (discussing the U.S. Copyright Office's advice to the MLC to adopt a substantially longer period for matching unclaimed royalties).

[167] U.S. COPYRIGHT OFF., *supra* note 111, at 91. The MMA required the U.S. Copyright Office to conduct research on the MLC and issue a report advising the MLC. *See* Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676, 3722–3723 (2018) (codified in scattered sections of 17 U.S.C. and 28 U.S.C.) (providing that the U.S. Copyright Office shall submit a report recommending best practices for the MLC). In accordance with this provision, the U.S. Copyright Office issued its best practices report on July 8, 2021. Bullis & Klaeren, *supra* note 166.

with the MLC.[168] A 2021 survey further supports the Copyright Office's concern that additional artist education regarding the registration process is necessary.[169] In the survey, just 6.67% of the 120 songwriters polled responded that they had successfully registered with the MLC.[170]

Such failures in MLC awareness and registration by artists perhaps highlight another criticism of the MLC: that the MMA should have tasked the MLC rather than individual artists with registering their works.[171] The MMA's decision to impose responsibility on songwriters, who lack expertise in music licensing, rather than the MLC to register musical works may at the very least be exacerbating the early challenges posed by the act.[172]

C. Eight Mile Style v. Spotify *Litigation and Critique of the Streaming Service Safe Harbor Provision*

Critics also target the MMA's limitation on streaming services' liability for copyright infringement as another shortcoming of the act.[173] Perhaps the most public critique of this provision has come from Eight Mile Style—the music publisher of rapper Eminem.[174] In 2019, Eight Mile Style launched a

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[168] *See* Bullis & Klaeren, *supra* note 166 (providing the Copyright Office's rationale for recommending an extended time period to match royalties).

[169] *See* Chris Castle, *Results and Recommendations of the Artist Rights Watch MLC Awareness Survey*, THE TRICHORDIST (Jan. 31, 2021), https://thetrichordist.com/2021/01/31/results-and-recommendations-of-the-artist-rights-watch-mlc-awareness-survey/ [https://perma.cc/8NKH-HPSX] (detailing the results of a 2021 MLC awareness survey conducted by Artist Rights Watch). Artists Rights Watch is a news source focused on advocating for musicians' rights. *See About*, ARTISTS RTS. WATCH, https://artistrightswatch.com/about/about-2/ [https://perma.cc/YRR7-RZTB] (explaining the mission of Artists Rights Watch). Artists Rights Watch polled 120 musicians attending a webinar on the MLC. Castle, *supra*.

[170] *See* Castle, *supra* note 169 (stating that 6.67% of musical artists that took the Artist Rights Watch survey had successfully registered with the MLC). Although few artists indicated that they had successfully registered with the MLC, an encouraging 63% of artists were familiar with the MLC. *Id.*

[171] *See* Abdo & Abdo, *supra* note 26, at 4 (providing that the opponents to the MMA have criticized the significant burden the legislation places on songwriters and publishers to register their music with the MLC).

[172] *See id.* (explaining that MMA critics question the Act's requirement to make songwriters and publishers responsible for registering their works); *see also* Castle, *supra* note 169 (revealing that very few surveyed artists were successfully registered with the MLC).

[173] *See* Richard Busch, *Music Modernization Act Is Certainly Not Fair for Everyone*, THE TENNESSEAN, https://www.tennessean.com/story/opinion/2018/02/17/music-modernization-act-certainly-not-fair-everyone/338787002/ [https://perma.cc/QW64-AN5H] (Feb. 18, 2018) (criticizing the MMA's limitation on streaming service liability). *But see* Abdo & Abdo, *supra* note 26, at 4 (characterizing the MMA's limitation on streaming service liability as an important compromise and means to reduce "legal uncertainty" for streaming services).

[174] *See* SCHERER, *supra* note 114, at 17 (stating that Eminem's music publisher Eight Mile Style is challenging the constitutionality of the MMA's limitation on streaming service liability in a lawsuit against Spotify). Marshall Mathers—more famously known as Eminem—is not personally involved in the Eight Mile Style lawsuit and was not informed of the litigation until after the music publishing company filed suit. *See* Murray Stassen, *Eminem's Publisher Sues Spotify (but Eminem Didn't Know*

significant legal attack on both Spotify and the MMA.[175] The music publisher's lawsuit alleged copyright infringement against Spotify, demanding over thirty-six million dollars in unpaid royalty revenue arising from the use of approximately 250 Eminem songs.[176] Eight Mile Style and Spotify have not yet resolved this case through trial or settlement.[177]

Eight Mile Style contended that Spotify lacked mechanical licenses authorizing the reproduction and distribution of Eminem's music.[178] The complaint also asserted that Spotify engaged in a joint scheme with the Harry Fox Agency (HFA), a mechanical licensing organization, to falsely represent that Spotify possessed such licenses.[179] Most strikingly, Eight Mile Style alleged that Spotify and the HFA designated the song "Lose Yourself"—a number one hit with over one billion plays on Spotify—as a song with an unknown copy-

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Anything About It), MUSIC BUS. WORLDWIDE (Aug. 22, 2019), https://www.musicbusinessworldwide.com/eminems-publisher-sues-spotify-but-eminem-I-know-anything-about-it/ [https://perma.cc/D9YE-859V] (clarifying that Eminem was not aware of the Eight Mile Style lawsuit until it was announced).

[175] Eight Mile Style, LLC v. Spotify USA Inc., No. 3:19-CV-0736, 2020 WL 1640425, at *1 (M.D. Tenn. Apr. 2, 2020); *see* Nick Statt, *Eminem's Publisher Sues Spotify for Copyright Infringement Over 'Lose Yourself' and Other Tracks*, THE VERGE (Aug. 21, 2019), https://www.theverge.com/2019/8/21/20827358/eminem-eight-mile-style-suing-spotify-lawsut-copyright-infringement-lose-yourself [https://perma.cc/68NA-B5CA] (describing Eight Mile Style's copyright infringement lawsuit against Spotify); Isaac Feldberg, *Eminem's Publisher Sues Spotify for Copyright Infringement*, FORTUNE (Aug. 22, 2019), https://fortune.com/2019/08/22/eminem-lawsuit-spotify-lose-yourself/ [https://perma.cc/NEQ8-XPFL] (explaining how Eight Mile Style's lawsuit accuses Spotify of copyright infringement and asserts that the MMA is unconstitutional).

[176] *See Eight Mile Style, LLC*, 2020 WL 1640425, at *1 (providing that Eight Mile Style is alleging copyright infringement of over 250 Eminem songs against Spotify); Dylan Smith, *Preliminary Schedule Set in Eminem Publisher's Unpaid-Royalties Lawsuit Against Spotify*, DIGIT. MUSIC NEWS (Feb. 1, 2021), https://www.digitalmusicnews.com/2021/02/01/eminem-publisher-spotify-lawsuit/ [https://perma.cc/THV7-5GX9] (explaining that Eight Mile Style alleged copyright infringement against Spotify and demanded $36.45 million in damages for unpaid royalties).

[177] *See* Ben Barlow, *Who's Really Shady? The Eminem vs. Spotify Copyright Battle Continues in Nashville*, JD SUPRA (Oct. 22, 2022), https://www.jdsupra.com/legalnews/who-s-really-shady-the-eminem-vs-2184762/ [https://perma.cc/7WDC-Z7T4] (stating that the legal battle between Eight Mile Style and Spotify is still in the "early stages").

[178] Complaint at 3, Eight Mile Style, LLC v. Spotify USA Inc., 535 F. Supp. 3d 738 (M.D. Tenn. 2021) (No. 19-CV-00736).

[179] *Id.* Eight Mile Style accused the Harry Fox Agency (HFA) of sending out fraudulent mechanical royalty statements indicating that Spotify possessed the mechanical licenses to reproduce and distribute Eight Mile Style's compositions. *Id.* The publishing company's complaint characterizes these royalty statements as "knowing and purposeful misrepresentations." *Id.* The HFA is a music rights management organization that used to be a primary distributor of mechanical royalties to copyright holders. *FAQ: What Does the Harry Fox Agency ('HFA') Do?*, HARRY FOX AGENCY, https://www.harryfox.com/faq [https://perma.cc/NWA6-C6L6]. Spotify hired the HFA to assist it in identifying copyright holders and distributing mechanical royalties. Serona Elton, *Mechanical Licensing Before and After the Music Modernization Act*, 19 J. MUSIC & ENT. INDUS. EDUCATORS ASS'N 13, 21 (2019). The MLC has now replaced the HFA as the primary distributor of mechanical royalties. Ari Herstand, *The MLC Is Sitting on $423 Million, How Songwriters Can Claim It*, ARI'S TAKE, https://aristake.com/songwriters-claim-mlc-money/ [https://perma.cc/QJB7-RYZD] (Aug. 24, 2021).

right holder.[180] Eight Mile Style characterized this designation as proof of the parties' dishonesty given the success of the hip-hop song.[181]

Recall that streaming services can only qualify for the MMA's liability limitation protection if they engage in a good-faith effort to match compositions to songwriters and publishers.[182] Eight Mile Style argued that Spotify did not engage in a good-faith effort in locating copyright holders by actively avoiding matching Eminem's songs with Eight Mile Style.[183] As such, Eight Mile Style argued that Spotify did not qualify for the MMA's limitation on liability for music streaming services and may be liable for damages over the statutory royalty rates.[184]

In addition to arguing against Spotify's qualification for MMA protection, Eight Mile Style argued that the MMA's liability limitation provision was an unconstitutional taking.[185] In 1984, in *Ruckelshaus v. Monsanto Co.*, the Supreme Court held that the Takings Clause protection applies to intellectual property.[186] Because copyright infringement creates a claim for infringement on a vested property right, Eight Mile Style asserted that the MMA's retroactive ban on the recovery of profits, statutory damages, and attorney fees in successful copyright infringement claims comprised an unconstitutional taking.[187]

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[180] Complaint, *supra* note 178, at 5; *see Spotify Sued Over 'Billions of Eminem Streams*,*'* BBC (Aug. 22, 2019), https://www.bbc.com/news/technology-49436077 [https://perma.cc/4NRU-7GF4] (stating that Eight Mile Style is alleging that Spotify listed "Lose Yourself" as a song without a known copyright holder). "Lose Yourself" was the first rap song to win an Academy Award. *Spotify Sued Over 'Billions of Eminem Streams*,*' supra*. The HFA placed "Lose Yourself" in the "Copyright Control" category, which is reserved for songs with a copyright holder whose identity the HFA cannot ascertain. *See* Complaint, *supra* note 178, at 5 (accusing Spotify of placing "Lose Yourself" in "Copyright Control" to falsely indicate that the song had an unknown copyright holder).

[181] *See* Complaint, *supra* note 178, at 5 (arguing that Spotify's placement of one of music's best-known songs in "Copyright Control" is "objective evidence" of the streaming service's guilt); Michelle M. Wu, *The Corruption of Copyright and Returning It to Its Original Purposes*, 40 LEGAL REFERENCE SERVS. Q. 113, 136 (2021) (emphasizing that it seems dubious that Spotify could not identify the copyright holder of an award-winning song).

[182] *See supra* notes 124–125 and accompanying text (discussing Title I of the MMA's limited liability protections for streaming services).

[183] *See* Complaint, *supra* note 178, at 10–11 (asserting that Spotify did not engage in a reasonable effort to ascertain the copyright holder of Eminem's music).

[184] *See id.* (contending that the MMA limitation on streaming services does not apply to Spotify); 17 U.S.C. § 115(d)(10) (limiting the liability of streaming services that engage in a good-faith effort to match compositions to songwriters and publishers).

[185] *See* Complaint, *supra* note 178, at 15 (arguing that the MMA violates substantive and procedural due process and permits unconstitutional takings of the vested property rights of music copyright holders). Under the Fifth Amendment's Takings Clause the government may not obtain possession of private property without equitable compensation. *See* U.S. CONST. amend. V (stating that "nor shall private property be taken for public use, without just compensation").

[186] *See* 467 U.S. 986, 1003 (1984) (providing that the Takings Clause applies to trade secrets and other forms of intangible property).

[187] *See* Complaint, *supra* note 178, at 15 (claiming that the MMA deprives artists of their vested property right to bring a copyright infringement claim by preventing copyright holders from recovering profits, statutory damages, and attorney fees in copyright infringement suits). *But see* Matthew

MMA critics assert that avoiding costly litigation and settlements was one primary motive for streaming services in supporting the MMA and speaks to its shortcomings.[188] Yet this provision limiting the liability of streaming services for copyright infringement was essential to ensuring support for the legislation's passage.[189]

III. TAKE THE POWER BACK: AMELIORATING THE MMA TO RECLAIM MUSICIANS' CONTROL OVER THEIR WORKS

As the first major piece of music copyright legislation since 1995, the Music Modernization Act (MMA) brought much needed change to the music industry.[190] Nonetheless, it is time to accept the Act for what it is: a band-aid.[191] The MMA does not cure the fundamental issues plaguing the music business, including an immense power imbalance between streaming, publishing, and record companies on one side and musical artists on the other, as well as a business model that fails to equitably compensate songwriters.[192]

In fact, the MMA itself is largely a reflection of the music industry's unequal power balance.[193] The Mechanical Licensing Collective (MLC) board,

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Pangle & Christopher Cotropia, *Can IP Rights Be Reconceived Via Music Modernization Act?*, LAW360 (Apr. 21, 2020), https://www.law360.com/articles/1254622 [https://perma.cc/5QBD-22SK] (asserting that the MMA's deprivation of Eight Mile Style's right to sue streaming services does not constitute an unconstitutional taking).

[188] Gorgoni, *supra* note 163, at 17 (stating that streaming services' primary focus in agreeing to the MMA was eliminating lawsuits for past copyright infringement).

[189] *See* H.R. REP. NO. 115-651, at 13 (providing that the limitation on liability provision was a "key component that was necessary to bring the various parties together in an effort to reach common ground").

[190] *See* William B. Colitre, *The Architecture of Compromise: Constructing the Music Modernization Act*, 2019 BUS. L. NEWS, no. 1, at 22, 22 (stating that the MMA was the most substantial reform to the Copyright Act since the Digital Millennium Copyright Act); *The Creation of the Music Modernization Act*, *supra* note 26 (describing how the MMA brought together the music industry in a collaborative effort); Gorgoni, *supra* note 163, at 15 (claiming that songwriters came together in an unprecedented way to influence the MMA).

[191] *See* Orbay, *supra* note 21, at 828 (arguing that further legislative action is necessary to ensure adequate compensation for musicians); Jillian J. Dahrooge, Note, *The Real Slim Shady: How Spotify and Other Music Streaming Services Are Taking Advantage of the Loopholes Within the Music Modernization Act*, 21 J. HIGH TECH. L. 199, 240 (2021) (contending that the MMA is a step in the right direction but fails to adequately safeguard musicians' rights).

[192] *Compare* Götting, *supra* note 80 (illustrating that the Warner Music Group obtained record revenue of $5.3 billion in 2021), *and* Ron Knox, *Big Music Needs to Be Broken up to Save the Industry*, WIRED (Mar. 16, 2021), https://www.wired.com/story/opinion-big-music-needs-to-be-broken-up-to-save-the-industry/ [https://perma.cc/EY53-GT87] (asserting that the dominance of the major record labels over the modern music industry is dangerous), *with* Götting, *supra* note 96 (providing that a musical artist would need 336,842 Spotify streams to obtain royalty revenue equivalent to the U.S. monthly minimum wage), *and Today's Spotify Stream On Announcements*, *supra* note 17 (stating that in 2020 just 7,500 musical artists received more than $100,000 from their Spotify catalogs).

[193] *See* Tonya M. Evans, *Blockchain and the Disintermediation of Music*, *in* THE OXFORD HANDBOOK OF MUSIC LAW AND POLICY, *supra* note 163 (arguing that the MMA supports a music industry

although tasked with providing equitable licensing for *music artists*, consists of ten directors representing music publishing companies and only four representing songwriters.[194] The MMA further restricts the right of struggling musicians to sue streaming services for copyright infringement, thus limiting a potential source of revenue for some artists.[195]

The MMA may be a compromise, but it was born out of a substantial leverage disparity at the negotiation table.[196] Legislative reform can create a more equitable system for compensating musicians within the constraints of the modern music streaming business model.[197] Accordingly, this Part recommends three specific reforms to the MMA that would achieve a more equitable compensation structure.[198] Section A of this Part contends that Congress should revise the MLC's governance structure.[199] Section B then asserts that Congress should require the Copyright Royalty Board (CRB) to set an interim royalty rate to take effect during the pendency of a rate determination appeal.[200] Section C argues that Congress should repeal the MMA's limitation on streaming service liability.[201]

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in which intermediaries thrive); Gorgoni, *supra* note 163, at 25 (describing how songwriters fear that the power imbalance on the MLC's board could inhibit the successful matching of compositions to copyright holders); Busch, *supra* note 173 (arguing that the MMA favors streaming services and publishing companies over songwriters).

[194] *See* 17 U.S.C. § 115(d)(3)(D) (establishing an MLC board of directors composed of fourteen voting members, with four representing songwriters and ten representing music publishing companies); Kaitlin Chandler, Note, *The Times They Are a Changin': The Music Modernization Act and the Future of Music Copyright Law*, 21 TUL. J. TECH. & INTELL. PROP. 53, 68 (2019) (explaining how the MLC's current board structure may lead to songwriters' voices being overpowered); Parisi, *supra* note 25 (stating that reforming the mechanical licensing system to deliver more equitable royalties to artists was one of the primary aims of the MMA).

[195] *See* 17 U.S.C. § 115(d)(10) (limiting the liability of streaming services that engage in a good-faith effort to match compositions to songwriters and publishers).

[196] *See* Michael Whalen, *The Music Modernization Act's Failure*, MEDIUM (Oct. 14, 2018), https://michaeljwhalen.medium.com/the-music-modernization-acts-failure-1332ac7a8520 [https://perma.cc/74BQ-J2FE] (contending that the desperation of musicians for even sparse legal protection compelled them to agree to an MMA that inadequately safeguarded their rights); Busch, *supra* note 136 (asserting that the MMA is largely a reflection of technology companies lobbying Congress); Paveck, *supra* note 20, at 96 (asserting that Title I of the MMA favors streaming services and publishing companies over songwriters).

[197] *See* Hess, *supra* note 55, at 206 (proposing further reform to remedy issues with the MMA); Smith, *supra* note 21, at 76 (arguing that the MMA leaves several significant music industry issues untouched).

[198] *See infra* notes 202–223 and accompanying text.

[199] *See infra* notes 202–211 and accompanying text.

[200] *See infra* notes 212–217 and accompanying text.

[201] *See infra* notes 218–223 and accompanying text.

A. Restructuring the MLC Board

The MMA's creation of the MLC as a centralized organization tasked with equitable licensing was a preeminent reform.[202] The MLC's governance structure, however, requires reform to ensure that the MMA delivers its laudable goal of ensuring that copyright holders receive adequate compensation.[203] As such, Congress should adopt a new MLC board structure with an equal number of representatives for songwriters and music publishing companies.[204]

One of the MLC's primary goals is to locate copyright holders of unmatched compositions to ensure they receive fair compensation.[205] This inherently requires effective collaboration between the MLC and musicians, which necessitates adequate songwriter representation on the board of the MLC.[206] With inadequate songwriter representation on the board and with publishing company representatives dominating the current governance structure, the present struggles of musicians to register with the MLC are wholly unsurprising.[207]

The current governance structure of the MLC also creates an improper conflict of interest for publishing companies.[208] As the law stands currently, any unmatched royalties are distributed to publishing companies after three

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[202] *See NMPA CEO David Israelite Discusses Music Royalties During the Pandemic, the Latest on Copyright Royalty Board Hearings, and the Growth of TikTok and Other Income Streams*, *supra* note 153 (praising the establishment of the MLC).

[203] *See* Sanchez, *supra* note 157 (arguing that the MLC's governance structure is imbalanced and should be altered); Busch, *supra* note 136 (arguing that the MLC's governance inadequately represents musicians).

[204] *See* 17 U.S.C. § 115(d)(3)(D) (establishing an MLC board of directors composed of fourteen voting members, with four representing songwriters and ten representing music publishing companies); Jimi Jones, The Mechanical Licensing Collective: What It Is and Who Is Running the Show (Apr. 12, 2019) (M.M. research paper, University of Miami), https://www.academia.edu/41356361/The_Mechanical_Licensing_Collective_What_it_is_and_Who_is_Running_the_Show [https://perma.cc/D34B-2NG4] (providing the opinion of MMA critics that the MLC's governance structure inequitably favors major publishing companies).

[205] *See* 17 U.S.C. § 115(d)(3)(C) (listing identifying and locating musical works' copyright owners as one of the primary functions of the MLC).

[206] *See* U.S. COPYRIGHT OFF., *supra* note 111, at 91 (explaining that the MLC will need sufficient time to educate songwriters before creating an effective database to match compositions with copyright holders); Gorgoni, *supra* note 163, at 25 (detailing how the lack of musician representatives on MLC board could inhibit the process of matching compositions with copyright holders).

[207] *See* 17 U.S.C. § 115(d)(3)(D) (establishing an MLC board of directors composed of fourteen voting members, with four representing songwriters and ten representing music publishing companies); Castle, *supra* note 169 (describing survey results indicating that very few musicians had successfully registered with the MLC).

[208] *See* 17 U.S.C. § 115(d)(3)(J)(i) (stating that the MLC should distribute royalties that have remained unclaimed for three years to publishing companies based on market share); Paul Resnikoff, *An Insanely Detailed Discussion About the Music Modernization Act*, DIGIT. MUSIC NEWS (Oct. 17, 2018), https://www.digitalmusicnews.com/2018/10/17/music-modernization-act-details/ [https://perma.cc/GTY9-8V6J] (arguing that the current composition of the MLC board creates a dangerous potential conflict of interest for directors).

years.[209] In other words, the MMA lucratively rewards the parties whom the majority of the MLC board represents for failing to achieve the organization's primary purpose: locating copyright holders and distributing their earned royalties.[210] An equal structure will ensure adequate representation of songwriters to better protect their interests and safeguard against potential malevolent motives by MLC publishing representatives.[211]

B. Protecting the Copyright Royalty Board's Rate Process

Congress should also enact legislation requiring the CRB to set an interim mechanical royalty rate in the event of rate determination appeals.[212] It took years after the CRB announced historic mechanical royalty rate increases for songwriters to realize a long-overdue increase in pay because of an appeal by streaming services.[213] This drawn-out process highlights the need for an interim mechanical royalty rate in the likely event of an appeal since streaming services currently have no incentive to avoid appealing the CRB's rates.[214] Requiring the CRB to set an interim mechanical royalty rate during rate determination appeals would ensure that songwriters receive a fair mechanical royalty rate in the likely event streaming services delay the CRB's process through appeals.[215] Notably, the MLC advocated for such an interim rate during the

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[209] 17 U.S.C. § 115(d)(3)(J)(i).

[210] *See Frequently Asked Questions*, MECH. LICENSING COLLECTIVE, https://www.themlc.com/faqs/categories/mlc [https://perma.cc/9Q56-LMGA] (providing that the MMA created the MLC to facilitate the proper distribution of royalties to copyright holders); Zachary Shufro, Note, *Distribution of Unmatched Accrued Royalties Under the Music Licensing Modernization Act of 2018*, 22 WAKE FOREST J. BUS. & INTELL. PROP. L. 1, 15 (2021) (criticizing the MMA's method of distributing unmatched royalties to publishing companies on a pro-rata basis as inequitable).

[211] *See* Busch, *supra* note 136 (arguing that the MLC's governance structure inadequately represents musicians); Paveck, *supra* note 20, at 94 (asserting that Congress should adopt a new MLC board structure to ensure adequate songwriter representation).

[212] *See NMPA CEO David Israelite Discusses Music Royalties During the Pandemic, the Latest on Copyright Royalty Board Hearings, and the Growth of TikTok and Other Income Streams*, *supra* note 153 (describing the current CRB royalty rate process as broken due to streaming services appeals).

[213] *See* Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), 84 Fed. Reg. 1918, 1918 (Feb. 5, 2019) (to be codified at 37 C.F.R. pt. 385) (announcing the CRB's final determination for mechanical royalty rates for the period 2018 through 2022); Johnson v. Copyright Royalty Bd., 969 F.3d 363, 367 (D.C. Cir. 2020) (explaining the court's procedural grounds for vacating and remanding the CRB's royalty rate determinations).

[214] *See* Castle, *supra* note 153 (predicting that a second appeal of the CRB's mechanical royalty rate determinations for 2018–2022 is likely); Stassen, *supra* note 153 (stating that multiple streaming services have submitted proposals advising the CRB to lower mechanical royalty rates); *What's Happening with Mechanical Royalty Rates?*, *supra* note 154 (discussing how the remand of the CRB's rate determinations has created uncertainty for mechanical royalty collectors).

[215] *See What's Happening with Mechanical Royalty Rates?*, *supra* note 154 (detailing how the MLC advised the CRB to set an interim royalty rate to apply during Spotify's appeal but the CRB declined).

first appeal to better compensate songwriters as the CRB considers its rates.[216] Such a requirement would also deter rate determination appeals because litigation would no longer enable streaming services to maintain their current costs by deferring the rate increase through appeal.[217]

C. Repealing the Limitation on Streaming Service Liability

Finally, Congress should remove the MMA's limitation on copyright infringement liability for streaming services.[218] Setting aside potential constitutional concerns related to the Takings Clause, the MMA unduly burdens struggling musicians while privileging the streaming companies that hold disproportionate power over the music industry.[219]

Congress enacted the MMA to empower musical artists struggling with outdated regulation that advantaged streaming services.[220] The limited liability provision—strong-armed into the MMA by streaming services—violates this purpose by depriving musicians of their ability to hold streaming services accountable for past inadequate compensation.[221] In addition, reinstating the threat of monetary damages for failing to lawfully compensate copyright holders would incentivize streaming services to comply with the MMA's beneficial reforms.[222] If the MMA genuinely seeks to ensure a good-faith effort on the part of

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[216] *Id.*

[217] *See NMPA CEO David Israelite Discusses Music Royalties During the Pandemic, the Latest on Copyright Royalty Board Hearings, and the Growth of TikTok and Other Income Streams*, *supra* note 153 (explaining that streaming services will pay mechanical royalties under the 2017 rate until the CRB updates its rate determinations).

[218] *See* 17 U.S.C. § 115(d)(10) (limiting the liability of streaming services that engage in a good-faith effort to match compositions to songwriters and publishers); Busch, *supra* note 173 (criticizing the MMA's limitation on streaming service liability).

[219] *See* Complaint, *supra* note 178, at 15 (accusing streaming services of lobbying for the MMA's liability limitation provision to obtain private financial gain at the expense of musical artists); Friedlander, *supra* note 85 (providing that United States music industry streaming revenue rose to $10.1 billion in 2020); Resnikoff, supra note 124 (arguing that the MMA's limitation on liability inequitably pardons powerful streaming companies for years of past copyright infringement).

[220] *See* Collins, *supra* note 134 (stating that the MMA functions to remedy the issue of digital music companies failing to equitably compensate musical artists for streaming services' use of their works).

[221] *See id.* (explaining how the MMA seeks to increase the compensation musicians receive from streaming services); Busch, *supra* note 136 (asserting that the MMA is largely a reflection of technology companies lobbying Congress); Gorgoni, *supra* note 163, at 17 (stating that streaming services' primary focus in agreeing to the MMA was eliminating lawsuits for past copyright infringement); H.R. REP. NO. 115-651, at 13 (describing the limitation on liability provision as a "key component that was necessary to bring the various parties together in an effort to reach common ground").

[222] *See* Busch, *supra* note 173 (condemning the limitation on liability provision for contravening the MMA's goals).

streaming services to match compositions to copyright holders, it should hold streaming services financially accountable when they fail to do so.[223]

CONCLUSION

The Music Modernization Act (MMA) marks an inflection point in music history. The legislation provided critical updates to music licensing and royalty payment calculations that supplied long-overdue relief for struggling musicians. Within a streaming business model and music industry that devalues artists and favors powerful intermediaries, protecting musicians' copyrights and access to adequate compensation is of the utmost importance. Despite Congress's purported goal of providing such protection through the MMA, the legislation ultimately failed in this regard. Instead, the MMA reflects the music industry's longstanding power imbalance that prioritizes streaming services, music publishers, and record labels at the expense of musicians. To remedy this failure, Congress should adopt a new MLC governance structure, implement interim royalty rates if the CRB's rate determination is appealed by streaming services, and repeal the MMA's liability limitation provision. In doing so, Congress would fulfill the MMA's promise of protecting musicians by finally providing them the tools for equitable compensation.

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[223] *See id.* (criticizing the MMA's decision to pardon top streaming services after years of infringement).