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NOTE

HOW TO GET RICH WITHOUT EVEN TRYING: THE MUSIC MODERNIZATION ACT GIVES MUSIC PUBLISHERS AN ADVANTAGE TO UNFAIRLY PROFIT FROM THE WORK OF INDEPENDENT SONGWRITERS

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I. INTRODUCTION

In November 2014, Taylor Swift pulled all of her music from Spotify, save for one song.[1] The move caused a public outcry from many of her fans and from the streaming service itself.[2] "We love Taylor Swift, and our more than 40 million users love her even more—nearly 16 million of them have played her songs[3] in the last 30 days, and she's on over 19 million playlists. We hope she'll change her mind…" Spotify said in a statement.[4] It was not until Swift pulled her music that the public started asking the all-important question: How much do artists actually make from Spotify?[5] At that time, artists were earning less than one cent per play.[6] For Swift's expansive discography, this miniscule rate could easily accrue half a million dollars each month.[7] So why did Swift pull her music?

"It's my opinion that music should not be free," Swift wrote in a Wall Street Journal op-ed.[8] She went on to explain that piracy, file sharing, and streaming were responsible for shrinking the numbers of paid album sales.[9] Thus, Spotify's rate of less than one cent per stream was an insult to the value of music.[10]

A year later, Swift targeted another streaming service, Apple Music.[11] Swift withheld the release of her album *1989* from appearing on the service due to

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1 *See* Jack Linshi, *Here's Why Taylor Swift Pulled Her Music from Spotify*, TIME (Nov. 3, 2014, 1:24 PM), https://time.com/3554468/why-taylor-swift-spotify/ [https://perma.cc/JEY7-UYPG].

2 *See id.*

3 For purposes of this Note, "songs" will encompass musical works both with and without lyrics.

4 *See* Brian Anthony Hernandez, *Taylor Swift Removes All Music from Spotify After '1989' Bickering*, MASHABLE (Nov. 3, 2014), https://mashable.com/archive/taylor-swift-removes-music-spotify [https://perma.cc/Q65G-EML4].

5 *See* Linshi, *supra* note 1.

6 *See id.* (explaining artists earned approximately $0.006 to $0.00084 per play).

7 *See id.*

8 Taylor Swift, *For Taylor Swift, the Future of Music Is a Love Story*, WALL ST. J. (July 7, 2014, 6:39 PM), https://www.wsj.com/articles/for-taylor-swift-the-future-of-music-is-a-love-story-1404763219 [https://perma.cc/P4YY-8QLE].

9 *See id.*

10 *See id.*

11 *See* Andrew Flanagan, *Taylor Swift Returns to Spotify, Amends Her Relationship to Streaming*, NAT'L PUB. RADIO (June 9, 2017, 12:17 PM),

Apple's decision not to pay royalties on music streamed during a three-month free trial of the service.[12] "Three months is a long time to go unpaid, and it is unfair to ask anyone to work for nothing. We don't ask you for free iPhones. Please don't ask us to provide you with our music for no compensation," wrote Swift.[13]

Swift was not the only songwriter unhappy with the freemium[14] streaming and the royalty administration scheme in the United States.[15] In

https://www.npr.org/sections/therecord/2017/06/09/532238490/taylor-swift-returns-to-spotify-amends-her-relationship-to-streaming [https://perma.cc/SBE7-L3WT] (discussing Swift's dispute with Apple Music).

12 No information has been released regarding Apple's justification for its initial business decision not to pay artists during the trial period of Apple Music. Apple later announced that it would abandon the policy via a tweet by Apple Senior Vice President of Internet Software and Services Eddy Cue. *See* @cue, TWITTER (June 21, 2015, 11:29 PM), https://twitter.com/cue/status/612824775220555776?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E612824775220555776%7Ctwgr%5E%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fwww.nbcnews.com%2Ftech%2Fapple%2Fapple-pay-artists-after-taylor-swift-shames-company-letter-n379476 [https://perma.cc/852F-QV5T].

13 *Apple Music Changes Policy After Taylor Swift Stand*, BBC (June 22, 2015), https://www.bbc.com/news/entertainment-arts-33220189 [https://perma.cc/2QBJ-HN3F].

14 *See* Vineet Kumar, *Making "Freemium" Work*, HARV. BUS. REV. (May 2014), https://hbr.org/2014/05/making-freemium-work [https://perma.cc/5588-E8Z9] ("Over the past decade 'freemium'—a combination of 'free' and 'premium'—has become the dominant business model among internet start-ups and smartphone app developers. Users get basic features at no cost and can access richer functionality for a subscription fee.").

15 *See, e.g.*, Kim C., *Artists Against Spotify: Why They Don't Like the Streaming Service?*, MUSIC TIMES (Sept. 5, 2020, 9:59 AM), https://www.musictimes.com/articles/82222/20200905/artists-against-spotify-why-dont-streaming-service.htm [https://perma.cc/J2GF-YM2C] (discussing why various artists have decided to prohibit access to their catalog on Spotify); Paula Mejía, *The Success of Streaming Has Been Great For Some, But Is There A Better Way?*, NAT'L PUB. RADIO (July 22, 2019, 6:00 AM), https://www.npr.org/2019/07/22/743775196/the-success-of-streaming-has-been-great-for-some-but-is-there-a-better-way [https://perma.cc/7ADP-N9Y9] (examining the challenges and positing potential solutions for making music streaming services, including Spotify, more artist-friendly); Charlotte Hassan, *Reasons Why Some Artists Absolutely Hate Spotify…*, DIGIT.

response, the Music Modernization Act ("MMA"), formally referred to as the Orrin G. Hatch-Bob Goodlatte Music Modernization Act, was passed by the United States Congress and signed into law by President Donald Trump on October 11, 2018. [16] The Act became effective on January 1, 2021.[17] The MMA combines three previously introduced bills to address gaps in the music royalty administration scheme.[18] Title I of the MMA, in particular, introduces significant changes to the compulsory licensing scheme for Digital Service Providers ("DSPs") [19] by creating an independent agency—the Mechanical Licensing Collective ("MLC")—to administer a new blanket licensing system.[20] The MLC also takes responsibility for mechanical royalty distribution and maintenance of a public database of musical works and sound recordings.[21]

MUSIC NEWS (Mar. 21, 2016), https://www.digitalmusicnews.com/2016/03/21/why-artists-pull-their-music-from-spotify-but-not-youtube/ [https://perma.cc/KAB5-B6AV] (listing various reasons for musical artists' adverse stance toward Spotify).

16 *See* Matthew Leimkuehler, *President Trump Signs Music Modernization Act, Introducing Landmark Copyright Reform*, FORBES (Oct. 11, 2018), https://www.forbes.com/sites/matthewleimkuehler/2018/10/11/president-trump-signs-music-modernization-act-introducing-landmark-copyright-reform/ [https://perma.cc/J77U-NL4M].

17 The effective date of the MMA is also known as the "license availability date." *See Frequently Asked Questions*, U.S. COPYRIGHT OFF., https://www.copyright.gov/music-modernization/faq.html [https://perma.cc/CQ7G-FUWC].

18 *See* Monique Brown, *The Music Modernization Act*, 55 TENN. BAR J. 22, 23 (2019) (discussing the MMA's consolidation and streamlining of the Classics Protection and Access Act, the Musical Works Modernization Act, and the Allocation for Music Producers Act).

19 A digital service provider may provide one or more of the following user experiences to consumers: interactive streaming, permanent downloads, limited downloads, and non-interactive streaming. Common examples of DSPs include Spotify and Apple Music. *See Frequently Asked Questions: Music Industry Terminology*, MECH. LICENSING COLLECTIVE, https://www.themlc.com/faqs/categories/music-industry-terminology [https://perma.cc/LAX7-6NH3] [hereinafter *Music Industry Terminology*].

20 *See* Brown, *supra* note 18, at 23 (describing the MLC as a newly created nonprofit that can issue blanket licenses for digital musical works).

21 *See Designation of Mechanical Licensing Collective and Digital Licensee Coordinator*, U.S. COPYRIGHT OFF.,

Although Title I intended to provide fair compensation for songwriters,[22] it falls short of its goals by establishing an unequal power dynamic between independent songwriters[23] and music publishing companies.[24] This Note will begin by considering how copyright law has been amended to adapt to technological advancements in the music industry.[25] Additionally, an overview of the major players in the music industry will be provided.[26]

Next, this Note will identify the problem the MMA was enacted to solve and give a broad overview of the amendments made to § 115.[27] Further, this Note will illustrate the structural pitfalls of the MLC which impede fair compensation for songwriters.[28] First, the Board of Directors is run by a supermajority[29] of music publishers who oversee all committee selections and operations of the MLC.[30] Second, music publishers stand to substantially profit from unmatched and unclaimed royalties owed to independent songwriters.[31] Third, the MLC is

https://www.copyright.gov/rulemaking/mma-designations [https://perma.cc/D86A-MCXW] (describing the role of the MLC).

22 For purposes of this Note, "songwriter" will encompass composers of musical works both with and without lyrics.

23 For purposes of this Note, "independent songwriters" are those songwriters that are self-published, meaning they do not align themselves with a music publishing company.

24 *See The Creation of the Music Modernization Act*, U.S. COPYRIGHT OFF., https://www.copyright.gov/music-modernization/creation.html [https://perma.cc/V2AK-6ANH] (explaining that changes in music technology have left gaps in protection and compensation for some creators).

25 *See infra* Section II.0.

26 *See infra* Section II.B.

27 *See infra* Section II.C.

28 *See infra* Section II.D.

29 *See Supermajority*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/supermajority [https://perma.cc/TC3J-3TKM] (defining supermajority as "a majority (such as two-thirds or three-fifths) that is greater than a simple majority").

30 *See infra* Section II.D.2.a.

31 *See infra* Section II.D.2.b.

immune from liability unless a songwriter can overcome the high bar for gross negligence.[32]

Finally, this Note will explore three solutions to rebalance the power dynamic of the MLC between independent songwriters and music publishers.[33] First, to ensure the interests of songwriters are adequately represented, Congress should restructure the MLC Board of Directors to split power evenly between independent songwriters and music publishers.[34] Second, to prevent unjust overcompensation of music publishers, Congress should alter the unclaimed royalty procedures to allocate 50% of the royalties according to current market share procedures and the other 50% to a fund for the purpose of incentivizing creation.[35] Third, to improve accountability, Congress should authorize the U.S. Copyright Office to approve the auditor for the MLC.[36]

In sum, despite the MMA's intent to reform the music industry's longstanding issue with fair compensation, it gives music publishers an advantage to unfairly profit from the work of independent songwriters. Therefore, in order to properly address the issue of fair compensation, the Congress should pass legislation to balance the MLC's predominant governing power of music publishers with that of independent songwriters.

II. BACKGROUND

This Part begins by considering how copyright law has been amended to adapt to technological advancements in the music industry. Second, an overview of the parties involved in rights management and songwriter compensation is provided. Third, the problem the MMA was enacted to solve is identified, along with a broad overview of the amendments made to § 115. Finally, this Part concludes by illustrating how the governance of the MLC, unmatched and unclaimed royalty procedures, and audit procedures impede fair compensation for songwriters.

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32 *See infra* Section II.D.2.c.

33 *See infra* Part III.

34 *See infra* Section III.A.

35 *See infra* Section III.B.

36 *See infra* Section III.C.

A. A BRIEF HISTORY OF COPYRIGHT LAW: ADAPTING TO TECHNOLOGICAL ADVANCEMENTS IN THE MUSIC INDUSTRY

The Constitution grants Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[37] This power authorized Congress to pass the Copyright Act, under which protection applies to "original works of authorship fixed in any tangible medium."[38] This section illustrates Congress's long standing recognition that our copyright laws must be amended to account for technological advancements—especially in the realm of music.

1. A Weak Foundation: Initial Protection for Musical Works

Initially, under the Copyright Act of 1790, musical compositions were protected as literary works, i.e., books.[39] Express protection of music technologies did not begin until 1831 when Congress added "musical works" under the definition of "works of authorship."[40] This amendment gave copyright owners the exclusive right to distribute and reproduce their musical compositions in written form, i.e., sheet music. [41] During this time, copyright owners had no exclusive right to public performance as such performances were considered a marketing tool for the sale of sheet music.[42] It was not until 1897 that Congress gave copyright owners an exclusive right of public performance over live performances.[43]

In the late 19th century, the United States saw many advancements in music reproduction technology. [44] Songs began to be reproduced through

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37 U.S. CONST. art. I, § 8, cl. 8.

38 17 U.S.C. § 102.

39 *See* Jui Uday Dongare & Tulika Kaul, *Music Modernization Act in the United States*, 6 CT. UNCOURT 2, 3 (2019) (noting that musical compositions were originally registered as books).

40 *See* 17 U.S.C. § 102.

41 *See* Dongare & Kaul, *supra* note 39, at 3 (noting the 1831 amendment granted individuals the right to print and sell sheet music).

42 *See* U.S. COPYRIGHT OFF., COPYRIGHT AND THE MUSIC MARKETPLACE 17 (2015) (noting performances were viewed as a "vehicle by which to spur the sale of sheet music").

43 *See id.*

44 *See* Kaitlin Chandler, Comment, *The Times They Are a Changin': The Music Modernization Act and the Future of Music Copyright Law*, 21 TUL. J. TECH. &

mechanical means, such as piano rolls,[45] which greatly diminished the value of copyright in musical compositions.[46] The Supreme Court in *White-Smith Music Publishing Co. v. Apollo Co.* held that piano rolls—as well as records—were not "copies" within the meaning of the Copyright Act because "[t]hey are not made to be addressed to the eye as sheet music" and are instead "a mechanical invention made for the sole purpose of performing tunes mechanically upon a musical instrument."[47] The Court's decision meant songwriters would continue to only be compensated for the sale of sheet music and not for devices[48] which performed the work.[49]

INTELL. PROP. 53, 55 (2019) (discussing a number of advances in technology in the music industry in the late 1800s and early 1900s, such as mechanical reproduction of compositions).

45 Piano rolls are the equivalent of sheet music for player pianos, consisting of tightly-would, perforated sheets of paper. As the sheets are unrolled, a mechanism in the player piano recognizes the perforations and plays the corresponding note. This technology changed the way people consumed music. Individuals could simply purchase a player piano and corresponding roll to listen to a song instead of seeking out a learned musician equipped with the sheet music. *See* Spencer Paveck, Note, *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, 80 (2019).

46 *See* Chandler, *supra* note 44, at 55 (discussing the effects of advances in musical reproduction technology in the late 1800s which decreased the value of copyright in musical compositions at the time).

47 *See* White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 12 (1908).

48 *See id.* at 18 ("Also it may be noted in this connection that if the broad construction of publishing and copying contended for by the appellants is to be given to this statute it would seem equally applicable to the cylinder of a music box, with its mechanical arrangement for the reproduction of melodious sounds, or the record of the graphophone, or to the pipe organ operated by devices similar to those in use in the pianola . . . . These perforated rolls are parts of a machine which, when duly applied and properly operated in connection with the mechanism to which they are adapted, produce musical tones in harmonious combination.").

49 *See id.* at 12 (detailing the means by which devices played the mechanical rolls as a type of performance, supporting the author's assertion that these devices did indeed perform the copyrighted works in one sense).

Following *White-Smith*, songwriters began lobbying Congress for the right to authorize mechanical reproductions of their songs.[50] In response, Congress passed the Copyright Act of 1909 which granted copyright owners an exclusive mechanical right and implemented a compulsory license[51] over the mechanical reproduction of songs.[52] The Act, however, failed to establish sound recordings as a distinct class of musical works protected by copyright law.[53]

2. *100 Years Too Late: The Sound Recording Amendment of 1971*

The Sound Recording Amendment of 1971 marked the first instance of legislation aimed at protecting the rights of publishers and songwriters alike.[54] Passed almost 100 years after the invention of the phonograph, "sound

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50 *See Section 115 of the Copyright Act: In Need of an Update?: Hearing Before the Subcomm. on Cts., the Internet, & Intell. Prop. of the H. Comm. on the Judiciary*, 108th Cong. 6 (2004) [hereinafter *Section 115 Hearings*] (statement of Marybeth Peters, Register of Copyrights of the United States) (explaining the timeline of the authorization of legislative changes granting exclusive rights of mechanical reproduction to copyright owners around the holding of *White-Smith*).

51 Compulsory license means that the copyright owner *must* issue a license to someone who wants to use the work without exception. *See* DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 229 (9th ed. 2015).

52 Language was included in the 1909 Act that prevented anyone from taking advantage of the compulsory license "until the copyright owner had authorized the first mechanical reproduction" of the song in order to safeguard against monopolies. *See Section 115 Hearings*, *supra* note 50, at 6 (statement of Marybeth Peters, Register of Copyrights of the United States) (detailing the timeline of the authorization of legislative changes granting exclusive rights of mechanical reproduction to copyright owners around the holding of *White-Smith*).

53 *See* COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 42, at 17 (noting Congress did not establish sound recordings as a distinct class of musical works protected by copyright law until 1971).

54 *See* Chandler, *supra* note 44, at 56 (stating 1971 was the first time songwriters and publishers were granted copyright protection); *see also* discussion *infra* Section II.B.2 (explaining the distinction between music publishers and songwriters).

recordings" finally became their own class of protectable "works of authorship."[55] The Amendment demonstrated Congress's awareness of the growing concern surrounding recording piracy.[56] However, the amended protection was limited to recordings created "on or after February 15, 1972" and notably lacked an exclusive right to public performance.[57]

The 1971 Amendment left much to be desired by songwriters. Given that the exclusive right to public performance remained limited to live performances, songwriters were placed at a significant disadvantage in the radio dominated market.[58] The public was only exposed to sound recordings that were selected for radio airtime and, therefore, only bought copies of the records they heard.[59] Additionally, songwriters saw no profit from radio play of their songs because

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55 *See* Chandler, *supra* note 44, at 56.

56 *See* Flo & Eddie, Inc. v. Sirius XM Radio, Inc., 70 N.E.3d 936, 940 (N.Y. 2016) ("With the Sound Recording Amendment of 1971, a limited copyright in the reproduction of sound recordings was established in an effort to combat recording piracy. However, there was still no right to public performance of that sound recording. Therefore, while playing a compact disc recording of [a particular song] in a concert hall for the paying public would still enrich [the composer's assignee], the person or company that owned the copyright *on the CD recording* of the music would earn no renumeration beyond the proceeds from the original sale of the recording. . . ."); *see also* Megan Garber, *At the CES of 1970, Piracy Was a Selling Point*, THE ATLANTIC (Jan. 8, 2014), https://www.theatlantic.com/technology/archive/2014/01/at-the-ces-of-1970-piracy-was-a-selling-point/282900/ [https://perma.cc/DB27-4R2L] ("Cassettes were useful not just for listening to sounds, though; they were also useful for recording them—and manufacturers, apparently, were eager to sell that capability to the public. Take the DynaSound division of the Data Packaging Corporation, one of [the Consumer Electronics Show]'s 1970 exhibitors. The company's spokesman extolled the virtues of its blank cassette tape like so: The tape's quality, he said, is 'good enough for your kid to pirate music off the air and sell it to his friends.'").

57 Songwriters were only granted exclusive rights to reproduction, distribution, and preparation of derivative works. *See Flo & Eddie*, 70 N.E.3d at 592; *see also* COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 42, at 18.

58 *See* Chandler, *supra* note 44, at 57 (discussing the ways in which radio broadcasters abused lack of public performance protections).

59 *See id.* (discussing that radio broadcasters and record companies had a "give and take relationship" where broadcasters would play a record and the public would then purchase it).

terrestrial broadcasting was not considered a live performance.[60] Yet, songwriters had no choice other than to allow radio stations to play their songs in order to promote their albums and turn any sort of a profit.[61]

3. The Digital Age: Gaps in the Compulsory Licensing Scheme

It was not until the Digital Performance Right in Sound Recordings Act ("DPSRA") of 1995 that a limited public performance right in sound recordings was established.[62] The scope of the compulsory license was expanded to include "the making and distribution of a digital phonorecord" which granted an exclusive public performance right over digital audio transmissions.[63] However, non-interactive, non-subscription broadcast transmissions and retransmissions were excluded from the Act's protection, meaning that terrestrial radio stations need not pay royalties on the sound recordings they play.[64]

Additionally, concern surrounded the difficulties licensors faced when trying to identify which reproductions were subject to compensation under DPSRA.[65] Copyright owners of reproductions subject to compensation were required to grant licenses to eligible subscription services[66] at a mutually agreed on royalty rate.[67] Disputes over royalty rates were to be determined through an

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60 *See id.*

61 *See id.* (stating that radio broadcasters used the lack of a public performance right to their benefit).

62 *See* COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 42, at 17–18.

63 *See id.*

64 Although terrestrial broadcasts are not required to pay royalties on sound recordings, they must pay royalties on the underlying musical work. In cases where the performer on a sound recording is different from the songwriter, only the songwriter will receive compensation for terrestrial broadcasts. *See* 17 U.S.C. § 114(d)(1) ("The performance of a sound recording publicly by means of a digital audio transmission, other than as a part of an interactive service, is not an infringement of section 106(6) if the performance is part of—(A) a nonsubscription broadcast transmission.").

65 *See Section 115 Hearings*, *supra* note 50, at 14 (statement of Marybeth Peters, Register of Copyrights of the United States) (noting what is needed to determine which musical productions are subject to compensation and presenting multiple legislative solutions).

66 *See* 17 U.S.C. § 114(d)(2).

67 *See id.* § 114(e)(1).

arbitration mechanism outlined in the DPSRA.[68] However, the negotiation process was often brought to a halt due to debate over whether the reproduction in question was subject to the scope of the compulsory license in the first place.[69]

Following the DPSRA, the United States was swept up in what marked the beginning of the online streaming era.[70] Congress once again expanded the scope of compulsory licensing to include webcasting.[71] The Digital Millennium Copyright Act ("DMCA") of 1998 required that "under certain conditions . . . the owner of the recording *must* allow its performance for a set fee."[72] However, this requirement only applied to digital broadcasts that were provided through non-interactive services, like Sirius XM and retransmissions of FCC-licensed radio stations on the internet.[73] Broadcasts from DSPs, like Spotify, did not qualify for this compulsory license due to their interactive nature and were instead free to set their own rates per play.[74] Consequently, copyright owners were forced to either accept the DSP's set rate or prohibit their work from being streamed through such services.[75]

B. MAJOR PLAYERS IN THE MUSIC INDUSTRY

The music industry—and the MMA—is centered around two separately copyrightable works: musical works and sound recordings. The creation,

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[68] Digital Performance Right in Sound Recordings Act of 1995 (DPRSRA), Pub. L. No. 104-39, § 3, 109 Stat. 336, 341 (1995) (stating that the Copyright Office was authorized to "convene a copyright arbitration royalty panel to arbitrate licensing rates").

[69] *See Section 115 Hearings*, *supra* note 50, at 11 (statement of Marybeth Peters, Register of Copyrights of the United States) ("[I]t became apparent that industry representatives found it difficult, if not impossible, to negotiate a rate for the incidental DPD category, as required by law, when no one knew which types of prerecorded music were to be included in this category.").

[70] *See* Stephen Dowling, *Napster turns 20: How it changed the music industry*, BBC (May 31, 2019), https://www.bbc.com/culture/article/20190531-napster-turns-20-how-it-changed-the-music-industry [https://perma.cc/S23U-UJ32] (noting that shortly following the DPSRA, online downloads and streaming through Napster changed the way the public consumes music).

[71] *See* PASSMAN, *supra* note 51, at 347.

[72] *See id.* (emphasis added).

[73] *See id.*

[74] *See id.*

[75] *See id.*

ownership, and management of these works are handled by multiple entities within the industry. This section describes the parties involved in rights management and songwriter compensation.

1. Musical Works Versus Sound Recordings

Musical recordings are comprised of two distinct works of authorship—musical works and sound recordings—each with a separate set of exclusive rights.[76] A musical work is "the underlying composition created by the songwriter" which includes both the instrumental and lyrical elements.[77] For example, the music, lyrics, and arrangement of Taylor Swift's song "Bad Blood" collectively make up musical work. A sound recording is the "particular performance of the musical work that has been fixed in a recording medium such as a CD or digital file."[78] Swift created a sound recording when she recorded "Bad Blood" for her album 1989. The overlap between the two often creates confusion for the public, resulting in the terms being incorrectly used in an interchangeable manner.[79] The MLC deals with royalties related to musical works.[80]

2. A Traditionally Symbiotic Relationship: Songwriters and Music Publishers

The line between songwriters and music publishers can be easily drawn as a boundary between the creative and business sides of the music industry.[81] Songwriters are the creators of musical works, including composers and lyricists.[82] Traditionally, songwriters have had a symbiotic relationship with music publishers.[83] The songwriter writes the song and then assigns a portion of that

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[76] *See* 17 U.S.C. §§ 101–02; COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 42, at 18.

[77] *See* COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 42, at 18.

[78] *See id.*

[79] *See id.*

[80] *See* discussion *infra* Section II.D.

[81] *See* PASSMAN, *supra* note 51, at 235.

[82] *See* COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 42, at 18.

[83] There are three "major" music publishers which control over 60% of the publishing market: Sony/ATV Music Publishing ("Sony/ATV"), Warner/Chappell Music, and Universal Music Publishing Group ("UMG"). The other 40% of the market is made up of midsized publishers, such as Kobalt Music Group, and thousands of smaller music publishers and

song's copyright to a publisher.[84] In exchange, the publisher promotes and licenses the song to third parties and collects royalties on the songwriter's behalf.[85] The publisher receives a royalty share proportionate to the ownership share of the copyright they were assigned by the songwriter.[86] Publishers may also act as a liaison between their songwriters and encourage collaboration.[87] However, the rise of digital streaming has been accompanied by a rise of independent songwriters.[88] Both songwriters and publishers are directly affected by the operations of the MLC.[89]

3. The Distinction Between Record Labels and Music Publishers

Larger corporations, like Sony Music Group—owned by Sony Entertainment—house both music publishers and record labels.[90] This often leads the general public to believe publishers and record labels are the same thing. However, they are separate entities with separate duties.[91] The distinction lies with the copyrightable work each entity deals with. Record labels handle the creation, marketing and sales of sound recordings, while publishers focus on the creation

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independent songwriters. *See* COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 42, at 19.

84 Usually, the portion of a song assigned to the publisher amounts to 50% or less. *See id.*

85 *See id.*

86 *See* PASSMAN, *supra* note 51, at 236 (explaining that apportionment of royalty share is done via contract).

87 *See id.* at 238 (discussing how publishers match writers with other writers and artists, which supports the author's asserting that some publishers act as a liaison between their songwriters).

88 *See* Tim Ingham, *A New Report Says Independent Artists Could Generate More Than $2 Billion in 2020*, ROLLING STONE (Mar. 16, 2020, 10:00 AM), https://www.rollingstone.com/pro/features/raine-group-independent-artists-2-billion-in-2020-967138/ [https://perma.cc/ADF2-REP4].

89 *See* discussion *infra* Section II.D.

90 *See Sony Music Group*, MUSIC BUS. WORLDWIDE, https://www.musicbusinessworldwide.com/companies/sony/sony-music-group/ [https://perma.cc/7J84-446K].

91 *See generally* PASSMAN, *supra* note 51, at 65 (discussing the different roles of the different parts of large music companies).

and administration of the musical works those recordings are based upon.[92] Record labels engage in a wide variety of functions including new artist recruitment and development, sales, marketing, promotion, product management, catalog and synchronization, production, business affairs and legal, and international outreach.[93] Because record labels do not deal with the rights administration of musical works, they are not involved in the operations of the MLC.[94]

4. Performing Rights Organizations

Performing rights organizations ("PROs") are another major component of the music industry.[95] PROs are responsible for licensing public performance rights for songwriters and publishers.[96] The American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI") are the two largest PROs.[97] Both operate on a not-for-profit basis and are subject to antitrust consent decrees "that impose constraints on their membership and licensing practices."[98] Additionally, there are two smaller, for-profit PROs—SESAC, Inc. and Global Music Rights ("GMR")—who are not subject to antitrust consent decrees.[99] PROs deal only with public performance rights and are, therefore, not involved in the operations of the MLC.

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92 *See generally id.* (discussing how record labels and their distinct parts work in the process of selling music).

93 *See id.* at 65–66.

94 *Frequently Asked Questions: Categories*, MECH. LICENSING COLLECTIVE, https://www.themlc.com/faqs/categories/mlc [https://perma.cc/5ZFL-FHLJ] [hereinafter *Categories*] (noting the reason for the MLC being DSPs licensing music with mechanical royalties and administration of the music).

95 *See* COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 42, at 20 (discussing the prevalence of PROs in the music industry).

96 *See id.*

97 Together ASCAP and BMI represent over 90% of songs available for licensing in the United States. *See* PASSMAN, *supra* note 51, at 241.

98 These decrees prohibit ASCAP and BMI from excluding potential members who meet the minimum criteria. *See* COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 42, at 20.

99 These PROs add members by invitation only. *See id.*

C. TITLE I OF THE MMA: REVAMPING THE COMPULSORY LICENSING SCHEME

Title I of the MMA amended § 115 of the Copyright Act by implementing a blanket mechanical license and establishing the MLC. These changes affect both music publishers and songwriters, while the roles of record labels and PROs remain unchanged. This section identifies the problem the MMA was enacted to solve and gives a broad overview of the amendments made to § 115.

1. The Rise of Interactive Streaming and Unpaid Royalties.

Although the DMCA was a necessary step in the right direction for the modernization of music licensing, it was not without its faults. At the time of the DMCA's signing, interactive streaming had yet to take the world by storm.[100] Thus, the DMCA only targeted non-interactive webcasters and radio services.[101] It was not until the release of Napster in 1999—and later YouTube in 2005—that songwriters began to fear the effects of streaming on the music industry.[102] Under the DMCA, DSPs did not qualify for compulsory licenses.[103] Therefore, copyright owners were paid per stream at whatever price they could extract from the service provider.[104] The copyright owner could either accept the money offered or remove their music from the service entirely, resulting in no profit at all.[105]

As interactive streaming rose in popularity, gaping holes in the DMCA's licensing scheme became apparent.[106] While DSPs had created a new stream of

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100 *See* PASSMAN, *supra* note 51, at 347.

101 *See id.*

102 *See* Laura Sydell, *Napster: The File-Sharing Service That Started It All?*, NAT'L PUB. RADIO (Dec. 21, 2009, 12:00 AM), https://www.npr.org/2009/12/21/121690908/napster-the-file-sharing-service-that-started-it-all [https://perma.cc/B48B-BN62]; Eliot Van Buskirk, *Is YouTube Bad for* Music, WIRED (Jan. 21, 2011, 10:41 AM), https://www.wired.com/2011/01/is-youtube-bad-for-music/ [https://perma.cc/B2J5-XHJD].

103 *See* discussion *supra* Section II.0.3.

104 PASSMAN, *supra* note 51, at 347.

105 *See* discussion *supra* Section II.0.3.

106 From 2000 to 2015 the recorded music business saw a general decline in sales. *See* William B. Colitre, *Take the Tempo Up*, 42 L.A. LAW. 32, 34–35 (2019); Dongare & Kaul, *supra* note 39, at 4 (identifying a gap between the compensation for artists and their play counts in digital music streaming).

revenue for copyright owners, they had simultaneously created a new system of licensing that the industry was unequipped to handle.[107] Under this system, physical albums were licensed from record labels, but streaming rights were obtained via music publishers.[108] Additionally, publishers, labels, and DSPs established a handshake agreement that the compulsory mechanical license available under § 115 of the Copyright Act should apply to digital streams.[109] This licensing scheme was entirely dependent upon DSPs successfully completing two tasks: The DSP had to (1) correctly identify each song, in every recording, streamed across the particular platform, and (2) supply at least one copyright co-owner with a written notice of intention ("NOI") to obtain a compulsory license.[110] However, this handshake licensing scheme never had the force of law.[111]

As DSP catalogs grew, they were unable to keep up with their responsibility of identifying songs and copyright owners.[112] DSPs chose to outsource the task of copyright owner identification to the Harry Fox Agency[113] and Music Reports Inc.[114] If the relevant songwriter was identified, a NOI was sent to the songwriter.[115] However, this NOI system was dependent on records kept by the Copyright Office, which often lacked information on independent songwriters' current addresses.[116] Thus, in such instances where the address was unknown,

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107 *See* Colitre, *supra* note 106, at 35.

108 *See id*

109 *See id.*

110 *Id*.

111 *See id.*

112 *See id.*

113 *See FAQs*, THE HARRY FOX AGENCY, https://www.harryfox.com/#/faq [https://perma.cc/K52R-GJ5U] ("[The Harry Fox Agency ('HFA')] is the leading provider of rights administration, licensing, and royalty services in the U.S. music industry. HFA administers the largest number of physical product licenses in the U.S. and handles royalty payments to music publishers for over 100,000 catalogs.").

114 *See* Colitre, *supra* note 106, at 35 ("[Music Rights, Inc. is] a music rights administration technology company, which operates Songdex®, the world's largest database of music rights information.").

115 *See* Paveck, *supra* note 45, at 82.

116 Songwriters signed to music publishers do not encounter this problem given it is part of the music publisher's job to ensure the artists' information is correctly listed in all necessary databases. *See id.*

DSPs were permitted to issue the NOI to the Copyright Office itself and refrain from paying the royalties rightfully owed to songwriters.[117]

The end result was that DSPs continued to expand their catalogs while songwriters went unpaid and unaware they were owed any royalties at all.[118] By 2015, several class action lawsuits were filed by music publishers against DSPs for damages in the billions.[119] However, unlike publisher-backed songwriters like Taylor Swift,[120] independent songwriters lacked the financial ability to bring forth similar suits.[121] Thus, independent songwriters were backed into a metaphorical corner—either allow DSPs to continue streaming their music with the risk of never seeing profit or remove their music and detrimentally limit their exposure to the public.[122] Recognizing this, Title I of the MMA focuses on improving how and at what rate songwriters are compensated when their songs are streamed through DSPs.[123]

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117 *See id.* (noting the Copyright Office could claim Address Unknown and refrain from paying royalties).

118 *See id.*

119 *See* Colitre, *supra* note 106, at 35.

120 *See* Hillary Hoffower & Taylor Nicole Rogers, *Taylor Swift dropped two surprise albums in 2020—take a look at how the pop superstar makes and spends her $365 million fortune*, BUS. INSIDER (Dec. 14, 2020, 11:34 AM), https://www.businessinsider.com/taylor-swift-net-worth-spending-2018-8 [https://perma.cc/JL9H-BYLZ] ("Swift's net worth is an estimated $365 million, and she's one of the world's highest-paid celebrities.").

121 Independent songwriters often work two jobs to make ends meet, leaving little cash flow to spend on legal action, assistance with monitoring what royalties they are owed, etc. *See* Dongare & Kaul, *supra* note 39, at 4; Larry Fitzmaurice, *17 Indie Artists on Their Oddest Odd Jobs That Pay the Bills When Music Doesn't*, VULTURE (Apr. 8, 2019), https://www.vulture.com/2019/04/how-indie-artists-actually-make-money-in-2019.html [https://perma.cc/6CUJ-HJG9] ("The truth is that most indie artists . . . rely on multiple sources of income outside of their music career to pay the bills and put food on the table.").

122 *See* Dongare & Kaul, *supra* note 39, at 4. ("However, songwriters and recording artists still could not make a living under this [old legal] framework.").

123 Today, DSPs are responsible for over 61% of all U.S. music industry revenue with catalogs averaging 50 million recordings. *See* KEVIN J. HICKEY, CONG. RSCH. SERV., LBS10181, THE MUSIC MODERNIZATION ACT: EXTENDING COPYRIGHT PROTECTION TO PRE-1972 SOUND RECORDINGS 2 (2018); *see also* Dan

2. Amendments to § 115 of the Copyright Act

Section 115 of the Copyright Act defines the scope of exclusive rights in nondramatic musical works and mandates compulsory licenses for making and distributing phonorecords.[124] Title I of the MMA makes four principle changes to this Section.[125] First, the MMA establishes a blanket mechanical license for qualified DSPs.[126] Second, the Act establishes the MLC to oversee administration of this new license and create a public database for improved copyright holder identification.[127] Third, the statutory rate standard from § 801(b) has been changed to the "willing buyer/willing seller standard."[128] Fourth, the Act creates a Digital Licensee Coordinator who "will work in conjunction with the MLC and [] copyright royalty judges."[129]

This Note is primarily concerned with the changes involving blanket mechanical licensing and the administrative tasks of the MLC. By obtaining a single blanket license, DSPs are able to use all of the songs subject to the licenses on their service.[130] This blanket license applies to DSPs when performing

Rys, *US Recorded Music Revenue Reaches $11.1 Billion in 2019, 79% from Streaming: RIAA*, BILLBOARD (Feb. 25, 2020), https://www.billboard.com/articles/business/8551881/riaa-music-industry-2019-revenue-streaming-vinyl-digital-physical [https://perma.cc/P2FL-VCJ4].

124 *See* 17 U.S.C. § 115.

125 *See* Chandler, *supra* note 44, at 61–62.

126 "The blanket license that is administered by the MLC is a compulsory license that allows DSPs to make and distribute digital phonorecords of every musical work that is eligible for a compulsory mechanical license, provided that the DSP pays royalties for its uses of musical works and complies with various requirements, such as to report detailed information on what works were used. A DSP only needs to secure one license, the blanket license, instead of securing a license on a musical work share-by-share basis." *See Categories*, *supra* note 94.

127 *See* Brown, *supra* note 18.

128 *See* 17 U.S.C. § 801(b)(1) (establishing determination of rates and rate adjustments for royalty payments as functions of Copyright Royalty Judges); Chandler, *supra* note 44, at 61.

129 Chandler, *supra* note 44, at 61.

130 *See* Brown, *supra* note 18 (describing the nature of blanket licenses as opposed to mechanical licenses).

interactive streaming, permanent downloads, and limited downloads.[131] Broadly, the MLC is tasked with issuing and administering this blanket license.[132] The following section breaks this broad task down into four main components and provides an overview of the MLC's structural pitfalls.

D. THE MECHANICAL LICENSING COLLECTIVE

Title I of the MMA disproportionately benefits music publishers over independent songwriters. This section illustrates how the governance of the MLC, unmatched and unclaimed royalty procedures, and audit procedures impede fair compensation for songwriters.

1. The Purpose Behind the MLC: Fair Compensation for Songwriters

As one of the changes to § 115 of the Copyright Act, the MMA authorizes the Register of Copyrights to create the MLC.[133] As of January 1, 2021, the MLC functions as an independent non-profit organization comprised of copyright owners and exists to oversee the new blanket licensing scheme.[134] The MLC's duties can be broken down into four main components, each intended to streamline the mechanical royalty process in order to fairly compensate all copyright owners. First, the MLC collects, distributes, and audits royalties generated from the blanket licenses.[135] Second, with the help of major music publishers, the MLC maintains a public database which identifies songs and their respective owners.[136] Third, the MLC assists in matching musical works with their

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131 *See Music Industry Terminology*, *supra* note 19 (explaining DSPs for non-interactive services are not covered by the MMA).

132 *See* 17 U.S.C. §§ 115(d)(3)(A)(i)–(iii) (discussing the duties of the MLC).

133 *See* 17 U.S.C. § 115(d)(3)(A)(iv).

134 *See* 17 U.S.C. § 115(d)(3)(C)(i) (listing the duties of the MLC).

135 DSPs shall report and pay royalties to the MLC under the blanket license on a monthly basis. The DSP will provide usage data for musical works used under the blanket license which will be used by the MLC to divide the licensing fee properly among members. Additionally, every five years the MLC will undergo an audit. *See* 17 U.S.C. §§ 115(d)(3)(C)(i)(III)–(IV); *see also* 17 U.S.C. § 115(d)(4)(A) (listing requirements for blanket licenses).

136 The public musical works database is available online via themlc.com. The database lists the title of the musical work, ownership percentage of both known and unknown copyright owners, and identifying information for sound recordings in which the work is embodied. *See* 17 U.S.C.

respective sound recordings.[137] Fourth, the MLC keeps unmatched[138] and unclaimed[139] royalties for at least three years before distributing them based on market share.[140]

To give the job of the MLC a real-world application, let us turn back to Taylor Swift and Spotify. Swift's publisher will register with the MLC and make sure all the data pertaining to her music is consistent across their records, Spotify's database, and the MLC's database in order to properly identify when Swift's songs are streamed. Next, the MLC collects the blanket license fee and streaming data from Spotify. The MLC then takes that streaming data and determines how many times Taylor Swift's music has been streamed on Spotify. Finally, the MLC distributes the proper amount of royalties to Swift's publisher based on the determined number of streams. The publisher in turn pays Swift based on the percentage of royalties she is contractually entitled to.

2. Structural Pitfalls of the MLC

This Section illustrates the structural pitfalls of the MLC which impede fair compensation for songwriters. First, the Board of Directors is run by a supermajority of music publishers who oversee all committee selections and operations of the MLC. Second, music publishers stand to substantially profit from unmatched and unclaimed royalties owed to independent songwriters. Third, the

§ 115(d)(3)(C)(i)(V); *see also* 17 U.S.C. § 115(d)(3)(E) (listing requirements for items on the musical works database).

137 The matching process is facilitated using the data provided by DSPs to the MLC. Additionally, songwriter members can search the public database and submit claims for unmatched songs that belong to them. *See* 17 U.S.C. §§ 115(d)(3)(C)(i)(V), 115(d)(3)(E).

138 The term "unmatched" indicates that the copyright owner of the song has not been identified or located.

139 The term "unclaimed" indicates that the accrued mechanical royalties are eligible for distribution under § 115, but the copyright owner is not a member of the MLC and therefore has not claimed the royalties.

140 Unclaimed royalties will be held in an interest-bearing account until expiration of the holding period. The first distribution of unclaimed royalties will occur "on or after January 1 of the second full calendar year to commence after the license availability date, with not less than 1 such distribution to take place during each calendar year thereafter." *See* 17 U.S.C. §§ 115(d)(3)(H)–(J).

MLC is immune from liability unless a songwriter can overcome the high bar for gross negligence.

a. The Board of Directors has unequal power.

The MLC is governed by a board of seventeen directors (the "Board").[141] The fourteen voting members of the Board are dominated by a supermajority of ten music publishers and four professional songwriters "who retain and exercise exclusive rights of reproduction and distribution with respect to covered activities with respect to musical works they have authored."[142] No two of these members may be affiliated with the same music publisher or ownership.[143] The Board also includes three non-voting members who represent trade organizations for songwriters, music publishers, and digital music providers, respectively.[144]

Additionally, the Board receives input from three advisory committees as prescribed by the MMA: (1) the Unclaimed Royalties Oversight Committee, (2) the Dispute Resolution Committee, and (3) the Operations Advisory Committee.[145] Each committee is composed either of an equal number of songwriters and representatives of music publishers or representatives of digital music providers and representatives of music publishers.[146]

The inaugural members of the Board and Advisory Committees were selected through an open selection process overseen by a neutral advisory panel of "respected members of the [music] industry."[147] Songwriter members were selected by panels comprised entirely of songwriters, and music publishers were

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141 *See* 17 U.S.C. § 115(d)(3)(D)(i).

142 *See id.*

143 *See* 17 U.S.C. § 115(d)(3)(D)(i)(I)(bb).

144 *See* 17 U.S.C. §§ 115(d)(3)(D)(i)(III)–(V).

145 *See* 17 U.S.C. §§ 115(d)(3)(D)(iv)–(vi).

146 *See id.* (explaining the Unclaimed Royalties Oversight Committee is comprised of five songwriters and five representatives of music publishers. The Dispute Resolution Committee is comprised of five songwriters and five representatives of music publishers. The Operations Advisory Committee is comprised of six representatives of music publishers and six representatives of digital music providers).

147 *See About: Governance and Bylaws*, MECH. LICENSING COLLECTIVE, https://themlc.com/governance [https://perma.cc/6WZC-4VSX] (the cited MLC bylaws are up to date as of January 18, 2022).

selected by panels comprised entirely of music publishers.[148] In the future, songwriter members will continue to be chosen by songwriters, and publisher members by music publishers.[149] However, the structure of the Board will allow music publishers to play a significant role in the candidate selection for songwriter members.

With regard to songwriter board-member selection, the MLC bylaws dictate that a Songwriter Nomination Committee must also be established by the Board.[150] The Songwriter Nomination Committee will assist in identifying songwriter candidates for the Board, the Unclaimed Royalties Oversight Committee, and the Dispute Resolution Committee as seats become available.[151] The bylaws state that the Songwriter Nomination Committee will be comprised of at least three members appointed by "nationally or regionally recognized not-for-profit organizations that have songwriter representation or advocacy as a significant portion of the mission and operations."[152] These organizations shall be selected by the Board and may be removed and replaced by the Board at any time.[153] Additionally, the Committee will have two members who shall be appointed by the Songwriter Directors of the Board.[154] These members may be removed or replaced at any time by the Songwriter Directors either by a plurality vote at any Board meeting or unanimous written consent of all Songwriter Directors delivered to the full Board.[155] As it stands, music publishers have significant influence over every aspect of the MLC's governing structure.[156]

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148 *See id.*

149 *See id.*

150 MECH. LICENSING COLLECTIVE, BYLAWS OF THE MECHANICAL LICENSING COLLECTIVE 15 (2020) [hereinafter MLC BYLAWS].

151 *See id.* at 16 (describing the processes for creating advisory committees).

152 *See id.* at 15.

153 *See id.*

154 *See id.*

155 *See id.* (discussing the removal methods for certain members).

156 *See* 17 U.S.C. § 115 (d)(3)(D) (showing that ten of the fourteen voting members are music publishers); MLC BYLAWS, *supra* note 150, at 15 (showing influence of musical publishers on board).

b. Unmatched and unclaimed royalties are distributed based on market share.

As mentioned, prior to the MMA, DSPs were responsible for identifying and serving NOIs to songwriters in order to notify them that their compositions were being streamed on the services and were therefore due royalties.[157] However, DSPs relied on the public records kept by the Copyright Office which were woefully incomplete and out of date.[158] Should the DSP be unable to locate the rightful royalty owner, they were permitted to issue the NOI to the Copyright Office itself and pocket the royalties owed.[159] To remedy this, Title I of the MMA authorizes the MLC to collect all mechanical royalties directly from DSPs and distribute them to the appropriate copyright owners.[160]

In the interest of appropriately administering the new blanket license, the MLC is tasked with maintaining an up-to-date, publicly available database complete with information about the songs being streamed by DSPs, rightful owners, and whether a song is "unmatched" or the royalties are "unclaimed."[161] In the case of unmatched or unclaimed royalties, the MLC will place any accrued royalties in an interest-bearing account for three years while they search for the copyright owner.[162] However, if, after those three years expire, the song remains unmatched those royalties will distributed to members of the MLC "based on the relative market shares of such copyright owners."[163] The same goes for royalties that have been matched to a songwriter, but that songwriter is not a member of the MLC, leaving the royalties unclaimed.[164]

It is nearly impossible that any of the unmatched or unclaimed royalties will be the works of songwriters aligned with music publishers. One of the primary functions of a music publisher is to ensure that those songwriters aligned with the publisher are properly paid by DSPs.[165] Therefore, it stands to reason that

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157 *See* discussion *supra* Section II.C.1.

158 *See id.*

159 *See id.*

160 17 U.S.C. § 115(d)(3)I.

161 *See* 17 U.S.C. § 115(d)(3)(E).

162 *See* 17 U.S.C. § 115(d)(3)(H).

163 *See* 17 U.S.C. §§ 115(d)(3)(H)(i), 115(d)(3)(J)(i)(II).

164 *See* 17 U.S.C. §§ 115(d)(3)(H)(i), 115(d)(3)(J)(ii).

165 *See generally* Todd Brabec & Jeff Brabec, *Music Publishers and What They Do*, ASCAP (2007), https://www.ascap.com/help/career-development/corner1

all the unmatched and unclaimed royalties will owe their origins to the works of independent songwriters. Nevertheless, independent songwriters will see the least amount of profit from the distribution of said royalties because they make up the smallest amount of the market share.[166]

c. Immunity from liability: there is a high bar for gross negligence.

Beginning in 2025, the MLC will be audited every five years.[167] The auditor is tasked with three responsibilities: (1) examining the books, records, and operations of the MLC, (2) preparing a report for the Board, and (3) delivering said report no later than December 31 of the year in which the auditor was retained.[168] Each report shall address the implementation and efficacy of the MLC procedures regarding royalties, use of funds, and confidential information.[169] Additionally, the auditor is chosen by the Board themselves.[170]

Under the current framework, the MLC is immune from liability so long any disputed conduct does not amount to gross negligence.[171] Should a suit be brought, it is likely that the Board will rely on some variation of the business judgement rule ("BJR").[172] The BJR "is a presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[173] The determination of whether the directors acted on an "informed basis" turns on whether they exercised their due diligence to inform themselves of

[https://perma.cc/A7AM-GY3Y] (noting publishers collect money from those who use the songs).

166 Major music publishers make up 60% of the market, while the remaining 40% is divided between mid-size and small publishers, and independent songwriters. *See* COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 42, at 19 (explaining the market share breakdown).

167 *See* 17 U.S.C. § 115(d)(3)(D)(ix)(II)(aa).

168 *See id.*

169 *See* 17 U.S.C. § 115(d)(3)(D)(ix)(II)(bb).

170 *See* 17 U.S.C. § 115(d)(3)(D)(ix)(II)(aa).

171 *See* 17 U.S.C. § 115(d)(11)(D).

172 *See* Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985); Paveck, *supra* note 45, at 94.

173 *See Smith*, 488 A.2d at 872.

all material information reasonably available to them.[174] In other words, the Board must act with "due care and prudence."[175] As explained by the Supreme Court of Delaware in *Smith v. Van Gorkom*, the BJR "exists to protect and promote the full and free exercise of the managerial power granted" to corporate boards of directors.[176] Therefore, absent evidence of fraud or illegality, the Board will be assumed to have acted in good faith.[177]

Let us consider how this would affect independent songwriters: Joe is an amateur independent songwriter who lacks Taylor Swift's powerhouse backing. He works a full-time day job and spends months working on his first album. Joe pays for the studio time to record out of his own pocket and places his music on Spotify, Apple Music, and Amazon Music. However, the metadata—the information identifying Joe as the album's owner—is not consistent across each of the platforms. The MLC receives the data from each of the streaming services and marks some of Joe's songs as "unmatched" in the public database. Joe registers with the MLC, but lacks the time, resources, and experience of Swift's music publishing team to comb through the public database and ensure he is properly matched with his songs.

For the next three years, Joe is never matched to the songs and thus never sees a cent of the royalties owed to him. After three years, the MLC takes those royalties—which are rightfully Joe's—and splits 60% of them between the three biggest music publishers.[178] The other 40% are divided among thousands of small to midsized publishers and independent songwriters registered with the MLC. Joe could file a suit against the MLC, but his lawyer advises him not to because it is unlikely a single songwriter could overcome the bar for "gross negligence." The following sections of this Note explore the many factors that contributed to Joe not receiving the money he is owed and possible solutions to ensure his fair compensation.

III. ANALYSIS

Interactive streaming has changed the landscape of the music industry and created a new stream of revenue for copyright owners of musical works.

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174 *See id.*

175 *See id*. at 871.

176 *See id*. at 872.

177 *See id*. at 873.

178 The three biggest music publishers are Sony/ATV Music Publishing ("Sony/ATV"), Warner/Chappell Music, and Universal Music Publishing Group ("UMG"). *See* PASSMAN, *supra* note 51, at 239.

Although Congress has attempted to improve the compulsory licensing scheme for mechanical royalties to ensure fair compensation, the MMA is in need of further amendments to balance power between independent songwriters and music publishers. This Note has explored the structural pitfalls of the MLC, revealing the clear advantage music publishers have to unfairly profit from the work of independent songwriters.[179] This section analyzes three possible solutions to rectify those pitfalls by amending § 115 of the Copyright Act to provide equal representation, improve the allocation procedures for unmatched and unclaimed royalties, and increase accountability within the MLC.

A. TO ENSURE THE INTERESTS OF SONGWRITERS ARE ADEQUATELY REPRESENTED, THERE SHOULD BE EQUAL REPRESENTATION ON THE MLC BOARD OF DIRECTORS

The MLC is tasked with collecting mechanical royalties from DSPs and distributing them to the appropriate copyright holder.[180] Copyrights in songs are typically held by a combination of music publishing companies and songwriters.[181] It is not necessary that DSPs be represented on the Board given that their business with the MLC is limited to paying the blanket licensing fee and providing monthly song usage reports.[182] Additionally, as mentioned, record labels and PROs are not affected by the MLC's operations.[183] Because publishers and songwriters are the only parties directly affected by the duties of the MLC, it is logical that they should make up the Board.[184]

At issue is the fact that music publishers represent a supermajority on the Board with approximately 71% of voting power.[185] The Board is responsible for governing all of the MLC's mandated tasks, including the collection and distribution of royalties, creation of the database for unmatched works, and performing good faith searches to match copyright owners with their works.[186] However, by allowing the music publishers to control the Board, the MMA has created an opportunity for publishers to stack the votes against the interests of

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179 *See* discussion *supra* Section II.D.2.

180 *See* 17 U.S.C. §§ 115(d)(3)(A)(III)–(IV).

181 *See* COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 42, at 19.

182 *See* 17 U.S.C. § 115(d)(4)(A).

183 *See* discussion *supra* Sections II.B.3–4.

184 *See* 17 U.S.C. § 115(d)(3)(D)(i).

185 *See id.*

186 *See* 17 U.S.C. § 115(d)(3)(C).

small independent songwriters, like Joe.[187] By weaponizing their Board seats, publishers could hamper the creation and operation of the public database, which in turn would impede matching songwriters with royalties they are rightfully owed.[188] As mentioned, all of the unmatched and unclaimed royalties will owe their origins to independent songwriters.[189] Thus, publishers stand to profit handsomely from the work of independent songwriters should a larger portion of royalties remain unmatched or unclaimed after the expiration of the three-year holding period.[190]

Although members of the Board and advisory committees were initially selected through a neutral process—songwriters voted on by songwriters, and publishers voted on by publishers—future available songwriter seats in the MLC governance will be heavily influenced by music publishers. The music publisher-controlled Board has the authority to choose which not-for-profit organizations are represented on the Songwriter Nomination Committee.[191] Presumably, the music publishers will be able to cast their influence over what songwriters are nominated, thus limiting the pool of candidates to songwriters which have their stamp of approval for whatever reason.[192] Thus, it cannot be said that the selection

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187 *See supra* Section II.D.2.c.

188 At the time of this Note's publication, the MLC has been operational for approximately a year and two months. Although, there is no evidence that the Board is yet acting in this manner, music publishers, like other businesses, prioritize profit. When smaller songwriters sign with publishers it is entirely possible their contracts will bear no profit. Songwriters have complained that after signing, the publisher practically forgot about them and their contract, instead giving preference to songwriters with more public draw. This sort of behavior disincentivizes creation and is contrary to the goals of copyright law in the United States. Therefore, it is not a big leap to say music publishers would prioritize personal profit over fair compensation for songwriters. *See, e.g.*, Patrick McGuire, *The Pros and Cons of Signing With a Big Music Publisher*, TUNEREGISTRY (Jan. 9, 2018), https://www.tuneregistry.com/blog/the-pros-and-cons-of-signing-with-a-big-music-publisher [https://perma.cc/7AWA-K663]; Cliff Goldmacher, *The Pros & Cons of Signing a Publishing Deal*, BMI (May 25, 2010), https://www.bmi.com/news/entry/the_pros_cons_of_signing_a_publishing_deal [https://perma.cc/6KJC-FC2N].

189 *See* discussion *supra* Section II.D.2.b.

190 *See* 17 U.S.C. §§ 115(d)(3)(H)(i), 115(d)(3)(J)(i)(II).

191 *See* MLC BYLAWS, *supra* note 150.

192 *Id*.

process will continue to be neutral. Independent songwriters, like Joe, may cast the final vote, but only on candidates which are previously approved by the music publishers. This power disparity is particularly concerning when taking into consideration the MMA's purpose: to fairly compensate songwriters for their creations.[193]

To adequately represent the interests of songwriters, there should be equal representation on the Board. Congress should amend § 115(d)(3)(D)(i) of the Copyright Act to rebalance the Board so it consists of seven music publishers and seven songwriters. By doing so, candidates selected for vacant Board seats will be chosen through a sufficiently neutral process in which both parties affected by the MLC are fairly represented. Further, if the Board cannot reach a consensus on an issue in the future, it stands to reason that the Register of Copyrights would cast the deciding vote given that the MMA authorized her to create the MLC in the first place.[194]

B. TO PREVENT UNJUST OVERCOMPENSATION OF MUSIC PUBLISHERS, A FUND TO INCENTIVIZE CREATION AMONG SONGWRITERS SHOULD BE CREATED WITH UNMATCHED & UNCLAIMED ROYALTIES

Additionally, as mentioned, streaming revenue accounts for more than half of all U.S. music industry revenue, with that percentage rising every year.[195] The MLC is tasked with "engag[ing] in diligent, good-faith efforts" to match independent artists with their unmatched works.[196] However, much of the responsibility falls to independent songwriters, like Joe, many of whom rely on

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193 *See The Creation of the Music Modernization Act*, U.S. COPYRIGHT OFF., https://www.copyright.gov/music-modernization/creation.html [https://perma.cc/V2AK-6ANH] (quoting Senator Orrin G. Hatch, saying "[the MMA is] a tremendous approach towards the music industry and songwriters are being treated fair for the first time," and Representative Bob Goodlatte saying "the Music Modernization Act treats various sectors of the music industry, our creative artists and songwriters and others in a much more fair way in terms of sharing the rewards for the creativity that takes place in the industry").

194 *See* 17 U.S.C. § 115(d)(3)(A).

195 In 2020, the music industry was valued at $11.1 billion dollars and $1.5 billion of that number was attributed to unmatched and unclaimed streaming royalties. *See* discussion *supra* Section II.C.1; *see also* Rys, *supra* note 123.

196 17 U.S.C. § 115(d)(3)(J)(iii).

multiple sources of income, thus drawing their attention away from the MLC's operations.[197]

In order for an independent songwriter to claim royalties that are rightfully theirs, they must register with the MLC.[198] Should they not register, even royalties matched to their name will fall into the "unclaimed" category and be distributed based on market share after three years in the pot.[199] Additionally, songwriters must also be registered to file a claim for any royalties that may be rightfully theirs should they discover the discrepancy through their own research.[200] This process disproportionately affects independent songwriters, many of whom have never even heard of the MLC nor recognize that registration is a necessity in order to see profit.[201] Moreover, music publishers stand to make the greatest profit from these royalties upon distribution according to market share.[202]

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197 *See generally* Fitzmaurice, *supra* note 121 (presenting accounts from a variety of songwriters which illustrate their need for multiple sources of income).

198 *See* 17 U.S.C. §§ 115(b), 115(c)(1)(A).

199 *See* 17 U.S.C. § 115(d)(3)(J)(i)(II) ("Copyright owners' payment shares for unclaimed accrued royalties for particular reporting periods shall be determined in a transparent and equitable manner based on data indicating the relative market shares of such copyright owners as reflected in reports of usage provided by digital music providers for covered activities for the periods in question . . . .").

200 *See How It Works*, MECH. LICENSING COLLECTIVE, https://www.themlc.com/how-it-works [https://perma.cc/7QFU-XX69].

201 Songwriters aligned with music publishers do not face these same issues because the publisher has the resources to dedicate a team to double checking MLC databases and ensuring payment. It is estimated that 25–35% of all songwriting copyrights will not be registered through either the MLC or the U.S. Copyright Office given that the only requirement for protection is fixation. *See* Fitzmaurice, *supra* note 121 (demonstrating how few songwriters seem to realize the role the MLC can play in their earnings); *see also* Paul Resnikoff, *Is the Music Modernization Act Enabling 'Legal Theft' Against Smaller Artists?*, DIGIT. MUSIC NEWS (May 7, 2018), https://www.digitalmusicnews.com/2018/05/07/music-modernization-act-mma-legal-theft/ [https://perma.cc/Y4HD-2XDJ].

202 In 2018, it was estimated that the amount of unclaimed royalties was approximately $1.5 billion. For the sake of this hypothetical, assume that the number of unclaimed royalties remains the same in 2024. The big three publishing companies, which make up 60% of the market share, would make approximately $900 million in profit from said royalties. The

Instead of dividing 100% of the unmatched and unclaimed royalties between MLC members based on market share, Congress should amend § 115(d)(3)(J)(i) of the Copyright Act to distribute unmatched and unclaimed royalties as follows: 50% of the royalties will be divided according to market share, as originally dictated by the MMA, and the other 50% will be placed into a fund for the purpose of incentivizing creation. This split strikes an equal balance between benefiting both songwriters and publishers. All members of the MLC will still see a profit increase related to their market share and a major goal of the U.S. copyright system—to incentivize creation—is furthered, thus more adequately benefiting independent songwriters.

In response to this new royalty split, the Board of Directors should create a Grant Committee consisting of six songwriters for the purpose of reallocating 50% of the unmatched and unclaimed royalties to causes that incentivize creation.[203] Candidates for position on this committee will be selected by the Songwriter Nomination Committee and voted on by the MLC's songwriter members. Members of the Grant Committee will review petitions for the money that has been placed into the fund and allocate grants to causes they believe are worthy of funding.[204] By establishing this framework, Congress shall give songwriters the opportunity to decide what happens to money that rightfully belongs to the songwriting community which is an essential step in modernizing both the U.S. copyright system and music industry as a whole.

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remaining $600 million would be split up between thousands of smaller music publishing companies and, finally, independent songwriters, who account for the smallest market share. *See* Resnikoff, *supra* note 201; *see also* COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 42, at 19.

[203] What causes fit into this category are up to the discretion of the Grant Committee. Examples may include, but are not limited to, cultural programs, music education initiatives, scholarship funds, etc.

[204] Programs such as this have had great success in Europe. For example, the European Union established Creative Europe and allocated a budget of €1.46 billion for the 2014–2020 period. Cultural organizations applied for grants from Creative Europe and, as a result, tens of thousands of artists were supported during that six-year period. *See, e.g.*, *Culture and Creativity*, EUROPEAN COMM'N, https://ec.europa.eu/programmes/creative-europe/ [https://perma.cc/3DAU-PSDY].

C. TO IMPROVE ACCOUNTABILITY, THE COPYRIGHT OFFICE SHOULD BE AUTHORIZED TO APPROVE THE CHOSEN AUDITOR

As mentioned, the MLC will be audited every five years, beginning in 2025.[205] Additionally, the auditor is chosen by the Board.[206] This audit procedure significantly lacks accountability because the Board is essentially auditing themselves.[207] Further, under the current framework, songwriters will have difficultly holding the MLC accountable for its actions due to the "gross negligence" standard for liability[208] and the Board's likely reliance on the BJR.[209]

While most companies rely on their board of directors to choose auditors, the MLC is significantly different from that of a typical corporation. In a typical corporation, the board has a common financial interest, but the MLC is in a constant power struggle between what is best for publishers and what is best for songwriters. Therefore, Congress should amend § 115(d)(3)(D)(ix)(II) of the Copyright Act to give the Copyright Office final approval on the chosen auditor. Should it be determined that the auditor has a conflicting bias (e.g., has had previous business interactions with music publishers, friend or familial relations to a member of the Board, is a songwriter themselves, etc.), the Copyright Office would be permitted to deny the Board's choice of auditor and require a new auditor be submitted for approval.[210] In doing so, the risk of harm posed by conflicts of interest in the audit proceedings are minimized.

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205 *See* discussion *supra* Section II.D.2.c.

206 17 U.S.C. § 115(d)(3)(D)(ix)(II)(aa).

207 *See id* (directing the Board to retain an auditor who then reports his or her findings to the Board itself).

208 *See* 17 U.S.C. § 115(d)(11)(D).

209 *See* discussion *supra* Section II.D.2.c.

210 In 2017, the SEC released a pamphlet pertaining to audit committees and auditor independence. It highlights that auditors with both direct and material indirect business relationships are prohibited. Additionally, auditors with certain financial relationships between themselves and the company are prohibited. The conflicts of inference idea presented in this Note is drawn from a similar vein. Given the personal nature of the unclaimed royalties being linked to works of authorship, it makes logical sense to expand relationships beyond just business into the personal sphere as well. *See, e.g.*, *Audit Committees and Auditor Independence*, OFF. OF THE CHIEF ACCT, SEC (May 7, 2007),

IV. CONCLUSION

Under the current framework of the MMA, music publishers have a clear advantage to unfairly profit from the work of independent songwriters. As it stands, music publishers control a supermajority of the MLC's voting power and, coupled with the current procedures for unmatched and unclaimed royalties, stand to profit handsomely from the work of independent songwriters, like Joe. The best method to ensure fair compensation for songwriters involves amending § 115 of the Copyright Act to balance power evenly between independent songwriters and music publishers. By restructuring the MLC's Board of Directors to feature an even number of songwriters and publishers, Congress may ensure that Joe is given the opportunity to vote for a candidate through a truly neutral selection process. By amending the unmatched and unclaimed royalty procedures to allocate 50% to MLC members based on market share and the other 50% toward a fund which incentivizes creation among songwriters, Joe's unmatched royalties will be paid forward to benefit other independent songwriters. Finally, by giving the U.S. Copyright Office final say in the chosen auditor, conflicts of interest in the audit proceedings will be minimized. Overall, these steps are necessary to modernize the current copyright scheme for music and ensure fair compensation for independent songwriters.

https://www.sec.gov/info/accountants/audit042707.htm [https://perma.cc/R2VL-3JR7].