STRINGING ALONG THE SONGWRITER: SUCCESSES AND SHORTCOMINGS OF COPYRIGHT POLICY IN TITLE I OF THE MUSIC MODERNIZATION ACT

TARA STEINMETZ*

ABSTRACT

Congress's enactment of the Music Modernization Act ("MMA") in 2018 introduced the most substantial revision to copyright law in two decades and represented a landmark moment for the music industry. Over the prior decade, the rise of music streaming had taken the music business to the brink of disaster, as many of artists' most foundational rights within music copyright law proved fundamentally incongruent with a digital future. Amongst the worst hit were songwriters and composers whose royalties had so drastically declined that many throughout the industry felt it was just a matter of time before the profession ceased to exist.

The MMA—particularly its Title I—sought to revive the industry, and five years on from its passage, music industry leaders and lawmakers on Capitol Hill reopened a conversation around the law's successes and shortcomings given the new era of technological innovation around the corner. Through the lens of music copyright law's three policy goals—access, incentive, and reduction of transaction costs—this Note closely examines Title I's implementation to date. It provides a new analysis of the law's key provisions, including the accomplishments of the Mechanical Licensing Collective and the adoption of a new willing-buyer willing-seller royalty rate setting standard in the most recent Copyright Royalty Board rate proceeding. This Note ultimately argues that Title I of the MMA successfully

* Articles Editor, *Southern California Law Review*, Volume 98; J.D. 2025, University of Southern California Gould School of Law; B.A. 2020, University of California, Los Angeles. Thank you to my advisors, Professors Jonathan Barnett and Emio Zizza, for their support and guidance, and to the members of the *Southern California Law Review* for their hard work and thoughtful suggestions on my Note.

responded to the most immediate challenges in music copyright law, effectively eliminating untenable transaction costs that left an antiquated licensing system nearly nonfunctional. However, it has achieved relatively marginal results for one of its central aspirations and one of the industry's most looming concerns: the hollowing out of the songwriting profession, as artists can no longer afford to create for such little return. The plight of the songwriter thus remains one of the music industry's most fundamental yet unanswered problems in the digital age.

TABLE OF CONTENTS

INTRODUCTION

In June 2023, the Recording Industry Association of America, the nation's leading trade organization for the recording industry, announced that Avicii's 2013 hit song "Wake Me Up" had become the highest-selling dance track in the organization's seventy-year history.[1] Just two months later, that August, the chart-topping track joined the ranks of just over forty songs ever to have reached two billion streams on Spotify.[2] When it was first released over ten years ago, the song quickly rose to become Spotify's then-most streamed song of all time and Pandora's thirteenth most streamed song of all time.[3] However, in November 2014, Aloe Blacc, the now-famous artist who wrote and sang the song's ubiquitous chorus, publicly revealed that the song had made only $12,259 in royalties off of 168 million streams on Pandora's digital streaming platform.[4] From there, the sum was split amongst the song's publishers, Aloe Blacc, and his two other co-writers, leaving Blacc with less than $4,000 made off of the United States' largest music streaming platform at the time.[5]

While Blacc once could have received consistent royalty payments from physical album and digital download sales, an antiquated copyright system controlling songwriters' work left him and other songwriters defenseless in the new music streaming era. Blacc lamented that the digital age presented a disappointing irony that while more people than ever enjoyed widespread access to music and benefited from songwriters' creative labor, songwriters were being paid out by streaming services at "abhorrently low

1. Katie Bain, *Avicii's 'Wake Me Up' Becomes RIAA's Highest Certified Dance Song*, BILLBOARD (Jun. 16, 2023), https://www.billboard.com/music/music-news/avicii-wake-me-up-first-dance-song-riaa-diamond-certification-1235356414 [https://perma.cc/3T5Z-3XHT].

2. Cameron Sunkel, *Avicii's "Wake Me Up" Enters Spotify's Ultra-Exclusive Two-Billion Streams Club*, EDM.COM (Aug. 22, 2023), https://edm.com/news/avicii-wake-me-up-spotify-2-billion-streams-club [https://archive.ph/v1siK].

3. Aloe Blacc, *Aloe Blacc: Streaming Services Need to Pay Songwriters Fairly*, WIRED (Nov. 5, 2014, 6:30 AM), https://www.wired.com/2014/11/aloe-blacc-pay-songwriters [https://archive.ph/u7g5G].

4. *Id.*

5. *Id.*

rates" and struggling to make ends meet.[6] Despite incredible demand for their craft, he said that songwriters like him had "no power" to protect the music they created, signaling to songwriters that their work was not valued.[7]

Blacc's story was a dime a dozen in the 2010s as music streaming services rapidly became the primary mode of music consumption. Kevin Kadish, who wrote Meghan Trainor's 2014 breakout hit "All About the Base," told the House Judiciary Committee in a 2015 roundtable that he had made just $5,679 off of 178 million streams of the song,[8] despite the fact that it had spent eight consecutive weeks at number one on the Billboard Hot 100—the longest of any female artist that year[9]—and was the bestselling song of the decade by any female artist.[10] Kadish was just one of over a hundred testimonies at that roundtable relaying the plight of songwriters in the digital age.[11]

While digital streaming rapidly transformed the music industry, the legal framework for music copyright fell drastically behind. Ad hoc solutions to monopoly and antitrust concerns from eras of long-dead technologies were cemented into the legal regime, saddling musical composition copyrights with an incoherent patchwork of restrictive copyright laws. Songwriters' and composers' most foundational rights thus reflected early twentieth-century problem-solving that was fundamentally incongruent with a digital future.

The shortcomings of the old music copyright landscape became evident throughout the 2010s' massive decline of songwriter remuneration. Songwriters like Blacc and Kadish penned some of the most recognizable songs of the past decade and wrote hits for some of the country's greatest pop stars. Yet still, Kadish asked members of Congress how he was to feed his family, making just $5,600 off about "as big a song as a songwriter can have in their career."[12] Meanwhile, the majority of songwriters, accustomed to a generally middle-class life in their profession before the streaming era,[13]

6. *Id.*
7. *Id.*
8. Nate Rau, *'All About That Bass' Writer Decries Streaming Revenue*, THE TENNESSEAN (Sept. 22, 2015, 7:03 PM), https://www.tennessean.com/story/money/industries/music/2015/09/22/all-bass-writer-decries-streaming-revenue/72570464 [https://perma.cc/594H-59MM]; *see also* Amelia Butterly, *All About That Bass Writer Says He Got $5,679 from 178M Streams*, BBC: NEWS (Sept. 24, 2015), https://www.bbc.com/news/newsbeat-34344619 [https://perma.cc/3L77-B33J].
9. NIELSEN MUSIC, YEAR-END MUSIC REPORT: U.S. 2019 18 (2019).
10. Gary Trust, *Meghan Trainor Tops Hot 100 for Eighth Week, Hozier Hits Top 10*, BILLBOARD (Oct. 29, 2014), https://www.billboard.com/pro/hot-100-meghan-trainor-hozier-top-10 [https://archive.ph/OCs19].
11. Rau, *supra* note 8.
12. *Id.*
13. *See infra* Section I.D.1.

would never write a song with anywhere near this level of success; for them, the situation was even more distressing.

Concurrently, music publishing companies, which often own and manage songwriters' copyrights in whole or in part, encountered financial challenges mirroring those of the songwriters they represented. Even digital streaming providers felt the constraints of working within an outdated legal system, which made it nearly impossible to properly license songwriters' works as required by their business model. Then-fledgling music streaming providers faced a barrage of infringement lawsuits, jeopardizing their ability to grow despite widespread public popularity.

In 2018, Congress enacted the Orrin G. Hatch–Bob Goodlatte Music Modernization Act ("Music Modernization Act" or "MMA"), a major step towards aligning the music industry with modern digital technology.[14] The MMA emerged from a comprehensive negotiation amongst numerous industry players—from publishers and songwriters to record labels and recording artists to fast-growing digital music streaming services. It represented unprecedented consensus across the music industry.

The MMA amended Title 17 of the U.S. Code, also known as the Copyright Act, which, despite two decades of major technological innovation, had not seen any major revision since 1998.[15] Its three titles each aimed to tackle distinct issues in the music copyright landscape. Title I, known more specifically as the Musical Works Modernization Act ("MWMA"), addressed songwriter and publisher concerns emerging from the digital age and is the focus of this Note. Specifically, it redefined the administration of the compulsory mechanical license in response to the incompatibility of interactive streaming services with the old music copyright regime.[16] The remaining two Titles of the MMA addressed copyright concerns for recording artists: Title II, the Classics Protection and Access Act, fixed a gap in prior copyright law by bringing pre-1972 sound recordings under copyright protection, and Title III, the Allocation for Music Producers Act, enables music producers, mixers, and sound engineers to receive royalties on sound recordings.[17]

2023 marked the fifth anniversary of the Music Modernization Act, rekindling conversations around its successes and shortcomings, particularly

14. Kenneth J. Abdo & Jacob M. Abdo, *What You Need to Know About the Music Modernization Act*, 35 ENT. & SPORTS LAW. 1, 2 (2019). *See generally* Orrin G. Hatch–Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (2018).

15. Abdo & Abdo, *supra* note 14, at 1. *See generally* Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998).

16. *See, e.g.*, Abdo & Abdo, *supra* note 14, at 2.

17. *See, e.g.*, *id.* at 3–4.

concerning Title I. This Note will discuss the ways in which the development of Title I of the MMA embodies a classic copyright struggle between incentive, access, and transaction costs, arguing that while it aimed to better address deep transaction cost and incentive gap concerns arising from the streaming industry—and succeeds in doing so where an urgent solution was required—there remain important unresolved tensions in music copyright law for songwriters. The songwriters upon which the music industry is built still insist that their profession is dying, and early indicators suggest that the MMA did not go far enough to fully correct failures of traditional copyright policy goals. Ultimately, Title I of the MMA recalibrated messy transaction costs that became glaringly apparent in the pre-MMA regime, but policymakers have yet to strike the right balance between incentive and access that underlies copyright policy.

I. THE MUSIC COPYRIGHT LANDSCAPE

A. MECHANICS OF MUSIC COPYRIGHT

1. Copyright Basics

Each song you listen to on the radio or stream on Spotify contains two separate copyrights: a copyright to the song's sound recording, known as a master recording or a "master," and a copyright to the underlying musical composition embodied in the sound recording.[18] Thus, the performance and distribution of a song's recordings trigger royalties payable to both the holder of the composition copyright and the sound recording copyright.[19] Sound recording copyrights are held by record labels and artists, while copyrights to musical compositions are held by music publishers, songwriters, and composers.[20] For example, as depicted in Figure 1, SZA's 2022 song "Kill Bill" is copyrighted as a master sound recording and as a musical composition.[21] Use of the sound recording would require royalties to be paid to SZA's record label, Top Dawg RCA, and SZA as the recording artist. Conversely, the song's underlying musical composition and lyrics also have a copyright; royalties for its use would be distributed amongst the three

18. UNITED STATES COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE: A REPORT OF THE REGISTER OF COPYRIGHTS 16 (2015) [hereinafter COPYRIGHT OFFICE MUSIC MARKETPLACE REPORT]; Eric Priest, *The Future of Music Copyright Collectives in the Digital Streaming Age*, 45 COLUM. J.L. & ARTS 1, 6–7 (2021).

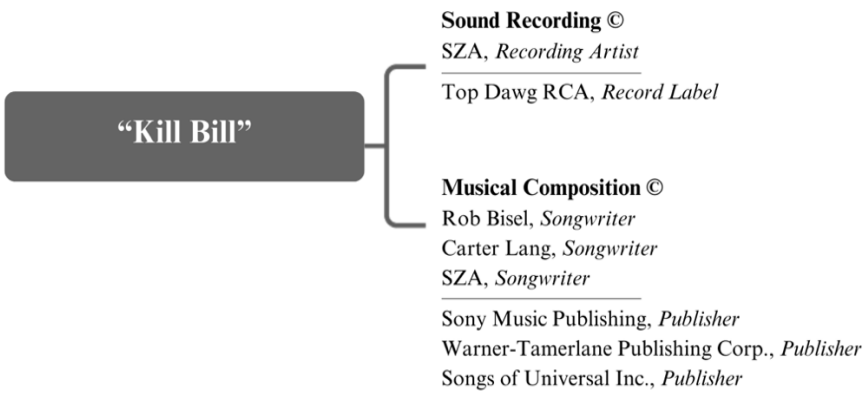
19. Generally, the same royalties are triggered for both parties, with the one major exception being that the holder of a sound recording copyright is not entitled to public performance royalties in non-digital media. *See* 17 U.S.C. § 106(4), (6).

20. DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 213, 215, 225–26 (10th ed. 2019).

21. *See infra* Figure 1.

rights-holding music publishers and three credited songwriters. While these two types of copyrights, in theory, are granted the same exclusive rights, the licensing regimes arising out of these two copyrights have diverged over time, altering how these two categories of rights holders benefit from their exclusive rights. This Note will focus on the copyright licensing regime for music compositions owned by publishers and songwriters, as Title I of the Music Modernization Act introduced a drastic alteration in this licensing landscape.

FIGURE 1. Two Copyrights, One Song



Sources: Adapted from Sarah Jeong, *A $1.6 Billion Spotify Lawsuit Is Based on a Law Made for Player Pianos*, THE VERGE (Mar. 14, 2018, 9:28 AM), https://www.theverge.com/2018/3/14/17117160/spotify-mechanical-license-copyright-wixen-explainer [https://perma.cc/2QHB-DTPY]. Copyright ownership data is from *The MLC Public Work Search*, THE MLC, https://portal.themlc.com/search#work [https://perma.cc/T6LA-4Z6X] (searched under "Work Title" for the song "Kill Bill," added writer name criteria, and searched for Rob Bisel).

Under § 106 of the Copyright Act, copyright holders gain six primary exclusive rights as a result of their copyright including (1) the right to reproduce the copyrighted work; (2) the right to prepare derivative works based upon the work; (3) the right to distribute copies of the work; (4) the right to perform the work publicly; and (5) the right to display the work publicly, a right tending to be less prevalent in music copyright beyond displaying lyrics publicly or online.[22] Copyright holders thus can license

22. 17 U.S.C § 106; PASSMAN, *supra* note 20, at 212–14. Section 106(4) grants the right to perform a work publicly but explicitly excludes sound recordings from that right due to forceful lobbying by terrestrial radio stations in the 1970s. 17 U.S.C § 106(4); PASSMAN, *supra* note 20, at 213. Today, there is a sixth exclusive right in § 106, which grants the right to publicly perform sound recordings via digital

these defined rights to any willing buyer.

The licensing of a musical composition can be broken down into two primary buckets. The right to perform a composition publicly, or a "public performance right," generates what are known as performance royalties any time someone plays a composition copyright holder's song publicly.[23] This right, therefore, is most likely to come into play when a song is played on the radio or performed live (and now, when streamed on demand).[24] These royalties, which will be of limited discussion in this Note, are administered through collective licensing organizations called performing rights organizations, or "PROs." PROs are private, non-governmental entities that work on behalf of songwriters and publishers to license performance rights through "blanket licensing"—a licensing model that allows a licensee to use any works in a PRO's catalog pursuant to the terms of a "blanket" agreement.[25] The second license, called a mechanical license, encompasses the right to "reproduce musical works in formats used for mechanical playback."[26] Money paid to use these licenses is known as a mechanical royalty.[27] Typically, songwriters and composers "sell or license their composition copyrights to publishing companies, which will administer the copyright in return for 25–50% of the proceeds."[28] In such arrangements, licensees pay royalties to the publishers, who take their cut and distribute the remaining funds to the songwriters they represent.[29] As seen in the Figure 1 example, SZA's "Kill Bill" is co-owned by three publishing companies, each of which receives royalties based on an agreed-upon percentage share of ownership in the song. Subsequently, these publishers distribute royalties to the songwriters they represent after taking their cut from the royalty pool.[30]

audio transmissions; however, sound recordings still have no exclusive right to public performance via non-digital transmissions. 17 U.S.C. § 106(6), (4).

23. PASSMAN, *supra* note 20, at 225.

24. *Id.*

25. Priest, *supra* note 18, at 5; *see also* Jacob Noti-Victor, *Copyright's Law of Dissemination*, 44 CARDOZO L. REV. 1769, 1814 (2023).

26. Priest, *supra* note 18, at 3; Copyright Act of 1909, ch. 320, § 1(e), 35 Stat. 1075 (codified as amended at 17 U.S.C. § 1(e)) (securing copyright for "the parts of instruments serving to reproduce mechanically [a] musical work); *see also* PASSMAN, *supra* note 20, at 215. This license essentially bundles the § 106 rights to distribute copies and make derivative works of a copyrighted music composition in a "mechanical" format. *Id.* at 213, 215.

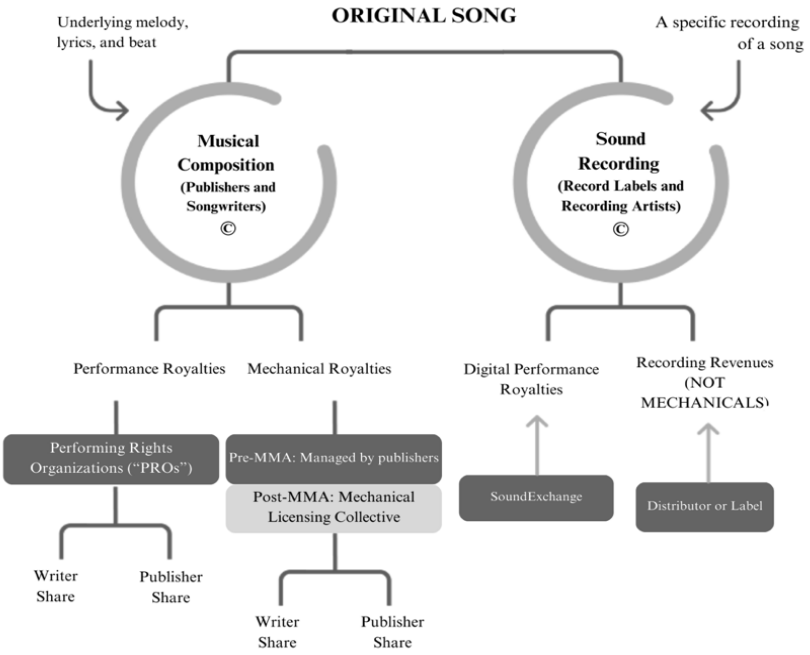
27. PASSMAN, *supra* note 20, at 215.

28. Peter DiCola, *Money from Music: Survey Evidence on Musicians' Revenue and Lessons About Copyright Incentives*, 55 ARIZ. L. REV. 301, 306 (2013).

29. PASSMAN, *supra* note 20, at 220–24.

30. In some scenarios, songwriters may represent themselves directly and manage their own royalty payments, though this is relatively rare. *Id.*

FIGURE 2. Basic Framework of Copyright Royalties Within a Song



Source: Adapted from Ben Lowe, *What Are Music Royalties? The Difference Between Recording and Composition Royalties*, SONGTRUST (Feb. 16, 2023), https://blog.songtrust.com/what-are-music-royalties [https://perma.cc/3E6F-UMA8].

2. Understanding the Compulsory Mechanical License

To understand the mechanical license's original purpose, it is helpful to briefly look at its origin. In 1908, the Supreme Court decision in *White-Smith Music Publishing Co. v. Apollo Co.* held that piano rolls—scrolls of perforated paper used in player piano devices to mechanically operate piano keys—did not infringe upon a composition's copyright because they did not constitute "copies within the meaning of the copyright act."[31] Thus, under *White-Smith*, only traditional copies of sheet music were deemed entitled to protection, and songwriters and composers (or the publishers that represented them) were powerless when others reproduced their music

31. White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 9–18 (1908) ("In no sense can musical sounds which reach us through the sense of hearing be said to be copies as that term is generally understood, and as we believe it was intended to be understood in the statutes under consideration."); *see also* Cherry River Music Co. v. Simitar Ent., Inc., 38 F. Supp. 2d 310, 311–12 (1999) (describing the history of the compulsory mechanical license); Priest, *supra* note 18, at 15 (explaining the mechanical nature of automated player piano technology and its production of music via piano rolls).

mechanically. While the Court hesitated to expand its understanding of composition copyright protection, Congress responded by establishing the mechanical license in the 1909 Copyright Act, mitigating songwriters' and composers' drastic loss of control over their musical compositions.[32] Today, "mechanical" music production is largely gone, making the mechanical license's name and history a cause for confusion when contemplating how such a license might map onto modern technology. Regardless, the mechanical license still refers to the distribution of a piece of music—including on vinyl, CDs, digital downloads, and distribution via streaming services.

While the establishment of a mechanical right brought great relief to music composition copyright holders at the time, it came with one catch—a compulsory licensing requirement.[33] This compulsory license, created under § 115 of the Copyright Act, was the first of its kind in copyright law.[34] It converts the copyright holder's *right* to license into an *obligation* to license, allowing interested licensees to use a copyright holder's composition without permission, provided that they pay a set mechanical royalty fee and comply with a specified list of statutory requirements.[35] Thus, if you wish to cover SZA's song "Kill Bill," you do not need to ask the "Kill Bill" songwriters or their publishers for permission, though you are obligated to pay a royalty fee and adhere to statutory requirements. Similarly, when interactive music streamers like Spotify[36] seek a license to stream "Kill Bill" on their platforms, these companies are not required to ask the songwriters or publishers for permission—they, too, are responsible only for the statutory fee and requirements.[37]

32. Copyright Act of 1909, ch. 320, § 1(e), 35 Stat. 1075 (extending copyright protection to "any form of record in which the thought of an author may be recorded and from which it may be read or reproduced . . . secur[ing a] copyright controlling the parts of instruments serving to reproduce mechanically the musical work."); Jane C. Ginsburg, *Copyright and Control Over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613, 1626–27 (2001).

33. Priest, *supra* note 18, at 15; PASSMAN, *supra* note 20, at 215.

34. COPYRIGHT OFFICE MUSIC MARKETPLACE REPORT, *supra* note 18, at 145. *See generally* 17 U.S.C. § 115.

35. 17 U.S.C. § 115(c); Priest, *supra* note 18, at 5; PASSMAN, *supra* note 20, at 215–16.

36. Throughout this Note, "Spotify" is used as the primary example of an interactive digital streaming provider ("DSP"). Other services such as Apple Music, Amazon Music, Tidal, YouTube Music, Deezer and so forth are several other relevant examples when discussing major companies that are paying royalties as interactive streaming services. However, Spotify is referenced as a primary example, given that since its founding, it has been the most dominant music streaming service in the United States and globally. *See Online Music Services Used Most Frequently in the United States as of January 2024*, STATISTA (Apr. 2024), https://www.statista.com/statistics/816313/online-music-services-popular-usa [https://perma.cc/FH9Z-SSVP]; Tim Ingham, *Why Goldman Sachs Believes that Spotify Will Remain the World's Dominant Music Streaming Service in 2030*, MUSIC BUS. WORLDWIDE (Sept. 7, 2023), https://www.musicbusinessworldwide.com/why-goldman-sachs-believes-that-spotify-will-remain-the-worlds-dominant-music-streaming-service-in-2030 [https://perma.cc/2EHW-UNQT].

37. Note, however, that they must also obtain a performance license for the musical composition

Beyond imposing a compulsory license regime, the Copyright Act set royalty payments at a frozen statutory rate, which was well below market value at a mere two cents per use.[38] This fixed rate's inability to adjust, even in the face of inflation over the next seventy years, led to its significant criticism as an injustice to composition copyright holders.[39] Eventually, the 1976 Copyright Act created a statutory rate-setting entity, the Copyright Royalty Tribunal ("CRT"), to adjust rates at five-year intervals.[40] The tribunal was the predecessor to the current rate-setting entity, the Copyright Royalty Board ("CRB"), established by Congress in 2004.[41]

Before the MMA's enactment, the CRB (and previously, the CRT) was guided by four copyright policy goals defined in 17 U.S.C. § 801(b) to determine adjusted compulsory license royalty rates.[42] These "801(b) [policy] factors," as they came to be known, were intended to "identify the royalty amount that would reward copyright owners and disseminators commensurate to their 'relative roles' in providing the public with access to creative works,"[43] reflecting the standard utilitarian theory of copyright discussed later in this Note.[44]

and will need a license from Top Dawg RCA, SZA's label, to use the sound recording copyright. The nuances of obtaining these licenses are outside the scope of this Note.

38. Jacob Victor, *Reconceptualizing Compulsory Copyright Licenses*, 72 STAN. L. REV. 915, 942–43 (2020).

39. *Id.* at 943; *see* Howard B. Abrams, *Copyright's First Compulsory License*, 26 SANTA CLARA COMPUT. & HIGH TECH. L.J. 215, 234 (2010).

40. Copyright Act of 1976, Pub. L. No. 94-533, §§ 118, 801–10, 90 Stat. 2541, 2566, 2594–98 (1976); Victor, *supra* note 38, at 943–44.

41. Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, § 801,118 Stat. 2341, 2341–45 (codified at 17 U.S.C. § 801) (establishing the Copyright Royalty Board ("CRB")); Natalie Linn, Note, *Mechanical Licenses and the Willing Buyer/Willing Seller Standard: Establishing Royalty Rates in a Vacuum of Knowledge*, 40 CARDOZO ARTS & ENT. 313, 322 (2022). After the mandate for the Copyright Royalty Tribunal ("CRT") expired in 1993, Congress created the Copyright Arbitration Royalty Panel ("CARP"), which carried out a similar function to the CRT under a different name. *Id.* at 332. In 2004, the CRB replaced the CARP system, and, today, is the entity that manages rate-setting proceedings. *Id.*; Victor, *supra* note 38, at 962 n.260.

42. Copyright Act of 1976, Pub. L. No. 94-553, § 801, 90 Stat. 2541, 2594–95 (formerly codified at 17 U.S.C. § 801(b)).

43. Victor, *supra* note 38, at 920–21, 944 (quoting the 801(b) factors as written in the Copyright Act of 1976). The 801(b) factors stated that the purpose of the CRT:

> (A) To maximize the availability of creative works to the public; (B) To afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions; (C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication; [and] (D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

§ 801, 90 Stat. at 2594–95.

44. *Infra* Section I.C.

Despite the establishment of policy factors claiming to prioritize "fair return" to creators in consideration of "fair income under existing economic conditions,"[45] the policy-driven statutory rates nonetheless continued to depress mechanical licensing rates by "plac[ing] artificial limits on the free marketplace."[46] Notably, one of the MMA's main goals was to address grievances with the rate-setting process.

B. COMPLICATING THE PICTURE: THE RISE OF STREAMING

For decades, lawmakers dealt with new technologies and the copyright questions they posed by bolstering a "patchwork of laws, industry conventions and private deals."[47] Over time, the music copyright landscape has become increasingly fragmented and complex, contorting to fit each new iteration of technology.[48] This confusing legal scheme ultimately came to a head as digital streaming providers, or "DSPs," began to dominate the music industry.[49]

Imposing mechanical royalty obligations upon discrete products such as CDs or digital downloads ultimately proved relatively straightforward, despite initial backroom quarrels about which exclusive rights were implicated by these technologies.[50] For each record manufactured and distributed or each digital copy downloaded, publishers are paid a set mechanical royalty rate—currently set at twelve cents per copy.[51] Because these are privately owned copies of music, each play is not a public performance, and thus, no performance royalty payment is required.

Ironing out royalty calculations for DSPs was much more complicated. When a listener streams a song aloud, is that a public performance, much like terrestrial radio? Or is it a mechanical reproduction and distribution of a

45. § 801, 90 Stat. at 2595 (formerly codified as 17 U.S.C. § 801(b)(1)(B)).

46. *Music Licensing Reform: The Register of Copyrights Before the Subcomm. Intell. Prop. of the H. Comm. on the Judiciary*, 109th Cong. (2005) [hereinafter *Music Licensing Reform Hearing*] (statement of Marybeth Peters, Register of Copyrights), https://copyright.gov/docs/regstat071205.html [https://perma.cc/9X3E-MX28].

47. Bill Rosenblatt, *The Big Push to Reform Music Copyright for the Digital Age*, FORBES (Feb. 25, 2018, 9:15 AM), https://www.forbes.com/sites/billrosenblatt/2018/02/25/the-big-push-to-reform-music-copyright-for-the-digital-age [https://archive.ph/Stgh8].

48. COPYRIGHT OFFICE MUSIC MARKETPLACE REPORT, *supra* note 18, at 25.

49. *See id.*; Rosenblatt, *supra* note 47.

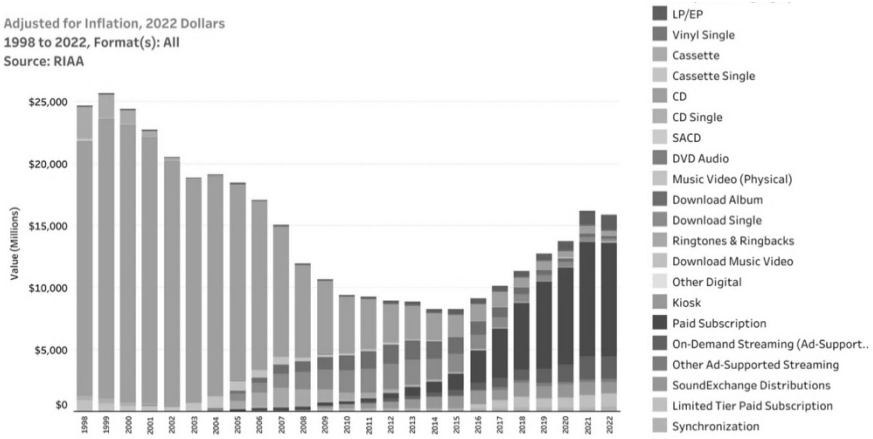
50. *See* Shane Wagman, *I Want My MP3: Legal and Policy Barriers to a Legitimate Digital Music Marketplace*, 17 J. INTELL. PROP. L. 95, 105–07 (2009); PASSMAN, *supra* note 20, at 233–34.

51. PASSMAN, *supra* note 20, at 217, 231; Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords IV), 87 Fed. Reg. 80448, 80449 (Dec. 30, 2022) (to be codified at 37 C.F.R. § 385); COPYRIGHT OFFICE MUSIC MARKETPLACE REPORT, *supra* note 18, at 30; *see also How Much Do Songwriters Make from Mechanical Royalties?*, ROYALTY EXCH. (Apr. 3, 2019), https://www.royaltyexchange.com/blog/how-much-do-songwriters-make-from-mechanical-royalties#sthash.O3tc1o9o.dpbs [https://perma.cc/QXP8-GPHG].

song, like a digital download? Here, the traditional line between a performance and a mechanical distribution is not so clear.[52] To help with this dilemma, DSPs are categorized into two modes of digital music delivery—noninteractive and interactive.[53] Noninteractive streaming services, such as Pandora's traditional genre-based, radio-like streaming platform, "substantially limit user control" of the music they consume, as the platform makes most of the user's listening choices.[54] Since this type of streaming was similar to radio, it was eventually determined that songwriters would only get performance royalties for noninteractive streams, mirroring what a songwriter would receive if the radio played their song on air.[55] In contrast, interactive streaming platforms, such as Spotify, Apple Music, and Amazon Music, allow listeners to stream songs on-demand ("interactively") by selecting and immediately transmitting the music they wish to listen to.[56] These platforms fit neither a radio model nor a CD or download model, and existing law failed to provide guidance for resolving this tension. Thus, as interactive DSPs burst into the industry in the late 2000s, legal disputes broke out between publishers and DSPs to decide whether, upon deep analysis of streaming technology, such streams implicated either performance or mechanical rights.[57]

52. *See* COPYRIGHT OFFICE MUSIC MARKETPLACE REPORT, *supra* note 18, at 25.
53. Priest, *supra* note 18, at 8.
54. *Id.*
55. Anna S. Huffman, Note, *What the Music Modernization Act Missed, and Why Taylor Swift Has the Answer*, 45 J. CORP. L. 101, 104 (2019); Priest, *supra* note 18, at 8.
56. 17 U.S.C. § 114(j)(7) (defining an "interactive service"). Some of these interactive streaming services also bifurcate their services between a free ad-supported service and a paid subscription service, which has controversial implications on mechanical royalty payments not discussed in this Note.
57. Wagman, *supra* note 50, at 106.

FIGURE 3. U.S. Recorded Music Revenues by Format



Source: *U.S. Music Revenue Database*, RECORDING INDUS. ASS'N OF AM., https://www.riaa.com/U-S-SALES-DATABASE [https://perma.cc/2X4U-6EG4] (toggled date range from 1998 onwards and opted to adjust for inflation). It should also be noted that Figure 3 displays the source of *all* revenue in the industry—not just songwriter royalties—to indicate general trends in music consumption. Such revenue streams would be split among composition and sound recording copyright holders, depending on applicable copyrights and contractual agreements.

Publishing companies and songwriters vigorously fought for interactive streaming to encompass both performance and mechanical royalties.[58] Both royalties were two critical "pillars" of income that the industry had relied on for over a century,[59] and the industry worried—with good foresight[60]—that music streaming would eat away at these traditional revenue sources from radio, physical sales, and digital downloads, which it so desperately depended upon for adequate income.[61] DSPs inevitably pushed back, arguing that the publishers' demands that they pay both performance and mechanical royalties for a digital transmission of a single song amounted to "double-dipping."[62]

58. Priest, *supra* note 18, at 11, 13.

59. *Id.* at 13.

60. As shown in Figure 3, this worry came to fruition. The mix of revenue sources in the industry has dramatically changed over the past two decades—evolving from physical copies on CD and vinyl to digital downloads in the early 2000s and shifting drastically towards DSP music consumption in the mid-2010s, with that being the vastly predominant music consumption method today. *See supra Figure 3*.

61. Priest, *supra* note 18, at 11, 13.

62. *Music Licensing Reform Hearing*, *supra* note 46; *see* Wagman, *supra* note 50, at 106; Priest, *supra* note 18, at 11–12.

Ultimately, the DSPs' argument failed, and interactive streaming platforms were deemed to need both a public performance license—reflective of the instantaneous nature of streaming—and a mechanical license—reflective of DSPs' distribution through streaming—to utilize a musical composition.[63] Thus, interactive streaming services, many of which began as small start-ups, had to invest an immense amount of time and money to properly license content from both publishing and sound recording stakeholders. This extraordinarily cumbersome licensing system posed a challenge to the growth of DSPs and, as will be discussed further in Section I.D, created a tension that significantly instigated the enactment of the MMA.[64]

Unlike the simple mechanical rate for CDs and digital downloads, mechanical royalty rates for streams are determined by a complicated rate calculation formula.[65] The rates are calculated using the greater of (a) a designated percentage of a DSP's total revenue, accounting for total earnings through both paid subscription and advertising revenue or (b) a designated percentage of the Total Content Cost ("TCC").[66] TCC represents the total amount that a DSP spends on sound recording and music composition licensing for interactive streaming.[67] For instance, the most recent CRB rate proceeding for 2023 to 2027, Phonorecords IV, held that the DSPs' mechanical royalty rate is the greater of 15.35% of their total revenue or 26.2% of TCC.[68] The rate measurement that is chosen is known as the "headline rate." The amount DSPs pay for performance licenses is subtracted from the total money pool determined by the headline rate.[69] The remaining amount is then compared to a "mechanical floor" rate, calculated by multiplying each paid DSP subscriber by a "per subscriber minimum" mechanical royalty fee.[70] The final mechanical rate is determined by the greater of the original bucket of money or the mechanical floor calculation.

63. *See* Priest, *supra* note 18, at 11–12. *See generally* Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, 73 Fed. Reg. 57033 (Oct. 1, 2008).

64. Wagman, *supra* note 50, at 108; Priest, *supra* note 18, at 12.

65. Ed Christman, *Why Spotify's Appeal of the CRB Rate Decision Is a Huge Deal for Songwriters and Publishers*, BILLBOARD (Mar. 15, 2019), https://www.billboard.com/pro/why-spotify-appeal-crb-rate-decision-huge-deal-songwriters-publishers [https://archive.ph/QjroX]; *see* PASSMAN, *supra* note 20, at 235.

66. PASSMAN, *supra* note 20, at 235; Daniel Abowd, Comment, *Something Old, Something New: Forecasting Willing Buyer/Willing Seller's Impact on Songwriter Royalties*, 31 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 574, 594 (2021).

67. PASSMAN, *supra* note 20, at 235.

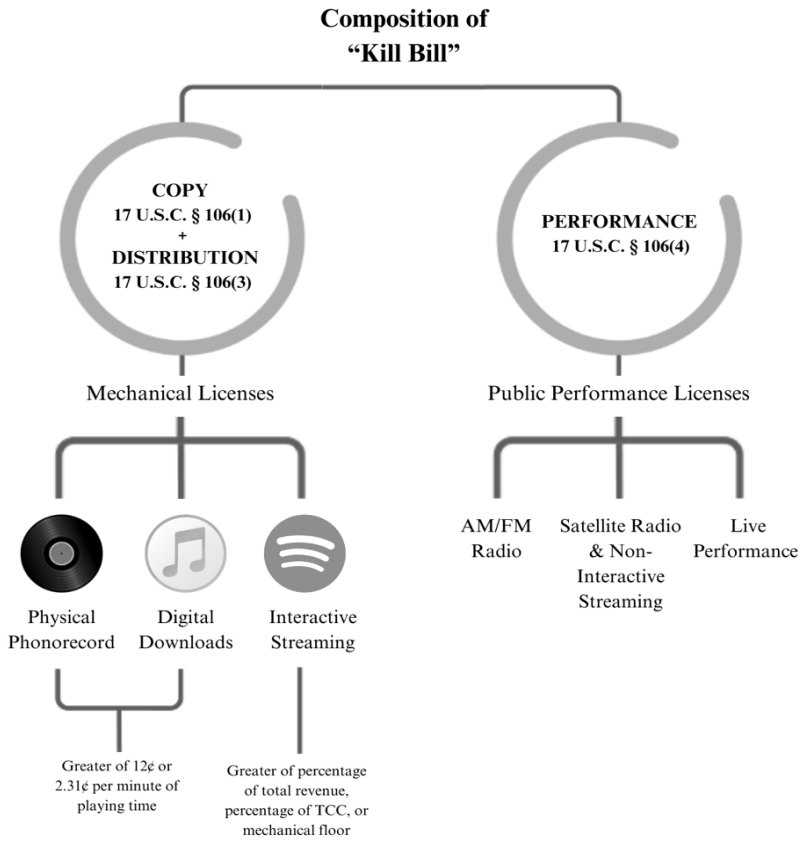
68. Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords IV), 87 Fed. Reg. 80448, 80458 (Dec. 30, 2022) (to be codified at 37 C.F.R. § 385).

69. PASSMAN, *supra* note 20, at 235.

70. *Id.* at 236; Christman, *supra* note 65. Phonorecords IV has set this mechanical floor at sixty cents per subscriber. Phonorecords IV, 87 Fed. Reg. at 80458.

This summary merely offers a high-level overview of a complex calculation, highlighting the music copyright system's intricate and often inaccessible nature when applied to digital streaming.

FIGURE 4. Summary of a Musical Composition Copyright



Source: Adapted from Jeong, *supra* Figure 1.

C. THE UNDERLYING THEORY: ACCESS, INCENTIVES, AND TRANSACTION COSTS

The patchwork of laws and licenses that make up the music industry, in theory, serve to honor very fundamental policy goals that lie at the heart of all copyright law. For music, in particular, policy is triangulated around three concerns: incentive, access, and transaction costs.

1. Balancing Incentive and Access

In the American free market, intellectual property presents a rare occasion in which the state grants a monopoly—albeit a limited one—to incentivize innovation. The Constitution outlines that from the outset of the country's establishment, the United States sought to protect creators via the "promot[ion of] the Progress of Science and useful Arts . . . securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[71]

Simply put by music attorney Donald Passman, it is entirely understandable that "if you created something and everybody had the right to use it without paying you, not very many people would go through the trouble of creating anything."[72] However, while a monopoly over one's creation drives an incentive to produce and innovate, it equally presents the risk that rights holders may place exorbitantly high prices on their works, blocking the public from accessing the "science and useful arts" the Constitution aimed to protect in the first place. Thus, under the predominant utilitarian theory of copyright, the story of intellectual property law is an "'access versus incentives' tradeoff"—a balancing game between maximizing incentive for creators while tempering the scope of their exclusive rights so that consumers can still access and benefit from their work.[73] This tension repeatedly comes to the forefront during the proliferation of new dissemination technologies—from the advent of the piano roll to digital downloads to modern streaming services. Each technological inflection point has illustrated that the balance between access and incentive—and between control held by users and creators—is in constant flux.[74]

The introduction of the compulsory mechanical license marked the beginning of numerous legislative decisions in the music regulatory regime that aimed to "recalibrate the balance between creators' financial incentives and public access to expressive works" when rights holders' exclusive control over their copyright and ability to pursue "free market licensing"

71. U.S. CONST. art. I, § 8.

72. PASSMAN, *supra* note 20, at 211.

73. *See* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 20–21 (2003) ("Unless there is power to exclude, the incentive to create intellectual property in the first place may be impaired. Socially desirable investments . . . may be deterred if the creators of intellectual property cannot recoup their sunk costs. . . . [T]he result is the 'access versus incentives' tradeoff: charging a price for a public good reduces access to it (a social cost), making it artificially scarce . . . but increases the incentive to create it in the first place, which is a possibly offsetting social benefit.").

74. Ginsburg, *supra* note 32, at 1613–14.

would cause a failure of the copyright equilibrium.[75] When Congress crafted the 1909 Copyright Act in response to the *White-Smith* decision,[76] it hesitated to restore music composition copyright holders' full exclusive rights.[77] It feared that doing so within the new mechanical licensing regime would allow copyright holders to "monopolize the business of [music] manufacturing" and prevent the growth of the piano player, a new music distribution technology with vast potential to increase the public's access to music.[78] Thus, the compulsory license provided a new legal solution to the incentive-access tension; in exchange for continued compensation, composition copyright holders—songwriters, composers, and music publishers—have been forced to sacrifice the control over their copyright and their right to freely negotiate prices on an open market.

This policy objectively appears to honor a balance between incentive and access; however, the strict pre-MMA rate-setting mechanisms rarely resulted in adjustments to royalty rates over time,[79] raising questions as to whether the "incentive" provided by these statutory rates was able to respond to songwriters' and composers' shifting real-world incentives (or lack thereof). Notably, the prevailing utilitarian theory of copyright policy does not center artists and their incentives to create but rather views supporting artists with an incentive as a means to an end, with the goal of stimulating creation and idea production.[80] However, if copyright policy ignores artists and fails to truly consider whether it grants them adequate incentives, the access-incentive equilibrium will ultimately fail.

To properly gauge the effectiveness of the access-incentive equilibrium for artists, artists' incentives must be examined within the industry structure in which they operate. In constructing the copyright system, Congress contemplated that creators would contract with corporate intermediaries such as record labels and publishers, transferring their copyrights in exchange for commercial distribution of their work.[81] Thus, copyright incentive theory generally accounts for providing incentives to both

75. Victor, *supra* note 38, at 915, 918.
76. *See supra* Section I.A.2.
77. Ginsburg, *supra* note 32, at 1626–27.
78. *Id.*
79. *See supra* Section I.A.2.
80. *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 546 (1985); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.").
81. DiCola, *supra* note 28, at 306.

economic actors—creators and intermediaries.[82] Incentive theory "assumes a chain of value" in which money trickles down from listeners and music distributors to intermediaries and finally to the creators.[83] While creators sit furthest in the chain from any source of financial remuneration, they are the source of the creative work that copyright policy hopes to incentivize. Ultimately, one will not know if this "quid pro quo" between incentive and access is working unless one "know[s] how much the creators are getting from the bargain."[84] Therefore, even though artist incentive is not the sole purpose of copyright policy, this Note frequently homes in on the growing disincentive to create in the songwriting field, both pre- and post-MMA, which jeopardizes the songwriting profession and the basic copyright equilibrium.

2. Reducing Transaction Costs

For nearly all copyright interests in the American "free market licensing" system, "creators of . . . copyrighted works . . . are free to choose their licensees and negotiate royalties."[85] This free-market commitment falls away in a limited number of exceptions; only five categories of compulsory licenses exist—*three* of which are implemented within the music copyright regime, with the most obtrusive and well-known being the compulsory mechanical license.[86] What makes music different? Given that the incentive-access trade-off underlies all areas of copyright law, it cannot be the sole explanation for singling out songwriters to be subjected to a compulsory license.

Theorists widely believe that the strongest explanation for the compulsory license is that it not only balances incentive and access but also serves to "remedy market failures related to transaction costs by allowing licensees to bypass costly or unfeasible negotiations."[87] When the cost of a licensing regime to the parties is "substantial and logistically difficult," transaction costs associated with licensing become prohibitively high and deter dissemination of copyrighted work.[88] This concern of prohibitively high transaction costs is specific to music due to how music is inherently accessed and consumed by the public; unlike other forms of copyrightable

82. *Id.* at 305.
83. *Id.* at 306.
84. *Id.* at 301.
85. Victor, *supra* note 38, at 915, 918.
86. PASSMAN, *supra* note 20, at 214–15.
87. Victor, *supra* note 38, at 919; *see also* Kristelia A. García, *Penalty Default Licenses: A Case for Uncertainty*, 89 N.Y.U. L. REV. 1117, 1127 (2014).
88. Ginsburg, *supra* note 32, at 1616 n.12 (quoting Robert Cassler, *Copyright Compulsory Licenses—Are They Coming or Going?*, 37 J. COPYRIGHT SOC'Y USA 231, 249 (1990)).

works, it is comprised of numerous little pieces of content, all of which must be individually negotiated and licensed in order to be distributed as a larger catalog.[89] The compulsory license thus aims to eliminate, or at least reduce, the cost of licensing negotiations. Although transaction costs have become the predominant explanation for the persistence of the mechanical license today, some caution that this justification has also been overstated.[90] For example, on the public performance side of music composition copyright, PROs issue blanket licenses[91] that similarly function to reduce transaction costs that arise from licensing each discrete piece of music.

Access, incentive, and transaction costs cannot, on their own, explain the logic of copyright policy. However, together, this triad of policy considerations is an essential framework to consider when assessing the legal landscape before the MMA's enactment to explain its aims and determine the overall efficacy of the legislation post-MMA.

D. FRAMING THE ISSUE: WHERE ARE WE BEFORE THE MMA?

The challenge underlying copyright law is finding an equilibrium at which the three competing policy goals can coexist. The Music Modernization Act emerged from a rising tension between what publishers and songwriters felt was a desperate imbalance between the incentives provided to them by the music copyright system and the public's unprecedented and increased access to their work via modern music streaming services. If more people were listening to music than ever before thanks to the mass proliferation of DSPs, why weren't creators and their intermediaries sharing in that success?[92] This tension was most acutely felt by songwriters, who sit at the bottom of the copyright "chain of value" and whose livelihoods were increasingly at risk due to the diminishing return for their creative works.[93] Publishers, as corporate entities, suffered less financially overall than individual songwriters but were still concerned about their decline in revenue at the hands of the music streaming landscape. Publishers, represented by the National Music Publishers Association ("NMPA"), became a major lobbying force for change and ultimately were

89. *See* Victor, *supra* note 38, at 919–20; García, *supra* note 87, at 1127.

90. Noti-Victor, *supra* note 25, at 1814.

91. *See supra* Section I.A.1.

92. Hugh McIntyre, *Americans Are Spending More Time Listening to Music than Ever Before*, FORBES (Nov. 9, 2017, 1:35 PM), https://www.forbes.com/sites/hughmcintyre/2017/11/09/americans-are-spending-more-time-listening-to-music-than-ever-before/?sh=14ac1d772f7f [https://perma.cc/W9KS-GUJR]; COPYRIGHT OFFICE MUSIC MARKETPLACE REPORT, *supra* note 18, at 74 ("[T]echnological developments have significantly increased the use of musical works, yet significantly decreased the income earned by songwriters.").

93. *See supra* Section I.C.1.

key negotiators in drafting the MMA.

Recording artists and record labels had similar grievances with DSPs, although to a lesser degree, due to less government interference and noticeably higher royalties granted to sound recording copyright holders. Further, recording artists could earn revenue through concert ticket sales to help buffer some of the DSP-era royalty losses.[94] Concerts were potentially a substantial source of income for successful artists—and a source of income not available to songwriters. Nonetheless, mounting concerns around the evolving music industry also drew in the Recording Industry Association of America ("RIAA") as another key player in crafting the MMA.

1. Compulsory Mechanical License Causes Drastic Disincentive

Musical composition copyright holders were particularly at a detriment prior to the MMA, given the limitations imposed on their copyrights by extensive governmental regulation, including compulsory mechanical licenses and restrictive consent decrees imposed on PROs.[95] Further, DSPs and composition copyright holders alike found that the compulsory mechanical license did not sufficiently reduce transaction costs, as the mechanical licensing regime prior to the MMA proved far too cumbersome to allow for streamlined payments to rights holders. In 2015, in response to mounting dissatisfaction with the convoluted music copyright regime, the U.S. Copyright Office released a comprehensive 245-page report (hereinafter referred to as the Copyright Office Music Marketplace Report), studying the landscape and proposing changes that would "promote greater fairness, efficiency, consistency, and transparency."[96]

The Copyright Office Music Marketplace Report admitted that "[v]iewed in the abstract, it is almost hard to believe that the U.S. government sets prices for music. In today's world, there is virtually no equivalent for this type of federal intervention."[97] For composition copyright holders, the singling out of their works to be placed under a restrictive,

94. John Seabrook, *Will Streaming Music Kill Songwriting?*, THE NEW YORKER (Feb. 8, 2016), https://www.newyorker.com/business/currency/will-streaming-music-kill-songwriting [https://archive.ph/pNtX4].

95. *See supra* Section I.A. On the public performance side, consent decrees additionally contributed to the lack of return songwriters were seeing in their income amidst the increased popularity of streaming. Consent decrees are antitrust-related governmental restrictions on the two dominant PROs (ASCAP and BMI) that require them to license the music in their catalogs and restrict their negotiating power. PASSMAN, *supra* note 20, at 230. Unlike the compulsory license, consent decrees do not set licensing rates, but if the parties cannot agree on a rate, they are sent to a rate court where a judge will decide the rate. *Id.*

96. Victor, *supra* note 38, at 960. *See generally* COPYRIGHT OFFICE MUSIC MARKETPLACE REPORT, *supra* note 18.

97. COPYRIGHT OFFICE MUSIC MARKETPLACE REPORT, *supra* note 18, at 145.

involuntary licensing regime has caused deep frustration, as the mechanical compulsory license left them subject to rates far below free-market compensation. To be clear, songwriters and publishers *are* free to negotiate with mechanical licensees—and they often do. However, as mentioned in Section I.A, the pre-MMA statutory rates set by the Copyright Royalty Board (and its prior equivalent, the Copyright Royalty Tribunal) prevented free market rates from being achieved; even though licensees rarely paid the bare minimum statutory rate, the low statutory rate tethered negotiations to a lower price window.[98] CRB has openly acknowledged that their rates "have considerable impact on the private agreements that enable copyright users to clear the rights for reproduction and distribution of musical works."[99]

As such, publishers and songwriters were left with no real leverage when attempting to negotiate against licensees who knew that if publishers or songwriters defected from a negotiation, the licensee could just go get the license using the compulsory rate. To illustrate the extent to which the compulsory license depresses profits earned by songwriters, one can look at the overall split of Spotify revenue in 2016: for every dollar of revenue earned on Spotify, 58.5 cents went to the owner of a song's sound recording (a record label or the artist), 29.38 cents stayed with Spotify as profit, 6.12 cents went to the composition rights holder to cover performance royalties, and 6 cents went to the composition rights holder to cover mechanical royalties.[100] Apple Music's revenue distribution did not look all that different, though it paid about 6.75 cents on mechanicals and 6.75 cents on performance rights per dollar of revenue.[101] While this is framed in terms of revenue split per dollar, each stream produces just a fraction of a cent for a songwriter, requiring approximately 1,000 streams for composition copyright holders to earn a single dollar.[102] Each royalty paid for the use of

98. Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, 74 Fed. Reg. 4510, 4513 (Jan. 26, 2009) (codified at 37 C.F.R. § 385). As a 2009 CRB rate proceeding described, "virtually no one uses section 115 to license reproductions . . . [but] despite its disuse, the section 115 license exerts a ghost-in-the-attic like effect on all those who live below it." *Id.*

99. *Id.*

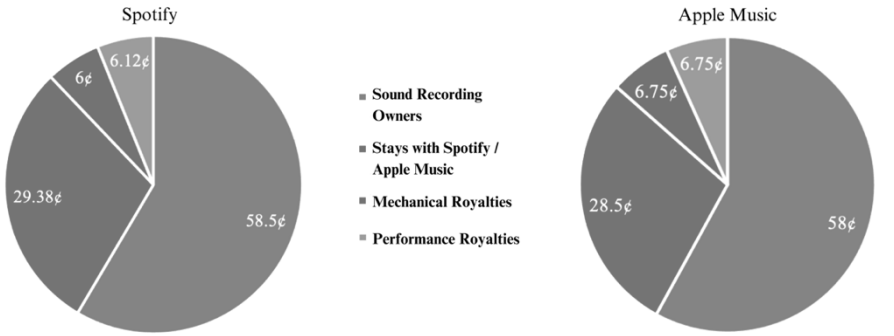
100. Travis M. Andrews, *In the Spotify Era, Many Musicians Struggle to Make a Living*, WASH. POST (Feb. 4, 2023, 6:00 AM), https://www.washingtonpost.com/arts-entertainment/2023/02/04/spotify-grammys-songwriters-payment-musicians [https://archive.ph/Rwxmz]; *How Does Music Streaming Generate Money?*, MANATT, PHELPS & PHILLIPS, LLP (Oct. 12, 2016), https://www.manatt.com/insights/news/2016/how-does-music-streaming-generate-money [https://perma.cc/4GD9-ZRQ6]. The rate for performance rights royalties is equally low here, which reflects that performance rights licensing is also constrained by governmental regulation—PROs are bound by consent decrees that restrain their negotiation power. *See* PASSMAN, *supra* note 20, at 230.

101. MANATT, PHELPS & PHILLIPS, *supra* note 100.

102. ROYALTY EXCH., *supra* note 51. While this statistic is from 2019, not much has changed since then, as the same royalty rates were used between 2018 and 2022. *See* Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), 88 Fed. Reg. 54406, 54408 (Aug. 10, 2023) (codified at 37 C.F.R. § 385).

a musical composition is even further divided amongst the publisher and the songwriters who worked on the composition.

FIGURE 5. What Happened to a Dollar of Revenue on Spotify and Apple Music (in 2016)



Source: Adapted from MANATT, PHELPS & PHILLIPS, *supra* note 100.

Overall, streaming represented a shift toward listening behaviors that do not "generate significant income for artists."[103] Streaming ushered in an overall increase in performance royalties earned; however, this slight increase in revenue—at royalty rates already persistently lower than publishers or songwriters would like—was unable to make up for the significant "downward spiral of record sales and therefore artist and mechanical royalties."[104] Many songwriters at the time reported " 'a reduction of 60 to 70% or more' in mechanical royalties" since the introduction of streaming services onto the music market, noting that their amount of mechanical royalties only continued to decrease rapidly.[105]

The below-market statutory rate for mechanical royalties and the shift in revenue sources gradually diminished the overall incentive for songwriters to write music in the pre-MMA market.[106] By the time the MMA was enacted in 2018, it had been years since songwriters felt they could make a living off songwriting as they had before the era of streaming services. In 2014, Nashville Songwriters Association International reported that Nashville, a well-known national hub for songwriters, saw an 80% decrease between

103. COPYRIGHT OFFICE MUSIC MARKETPLACE REPORT, *supra* note 18, at 74.
104. *Id.*
105. *Id.* at 72.
106. Further governmental restrictions on the public performance side of royalties also contributed to diminishing incentive to create, though this is beyond the scope of this Note. *Id.*

2001 and 2014 in individuals claiming songwriting as a full-time occupation, lamenting that many songwriters have been "forced out of the profession" in the wake of digital streaming.[107] In 2016, acclaimed music attorney Dina LaPolt told one songwriter client, who was shocked by her measly royalty check after achieving a hit song, that "unless streaming rates [] changed and the music-licensing system [was] overhauled for the digital age, the profession of songwriting was on its way to extinction."[108]

By applying the incentive theory of copyright to examine the music industry's structure, one can see the creator and intermediary dynamic at play, such that even though publishers decried their diminishing incentives to administer the copyrights they held, even less remuneration trickled down to the creative mind whose work copyright policy seeks to encourage.[109] While publishers' services are an essential part of the music industry, the incentive problem was exacerbated by the degree to which the publisher's share of royalties also diminishes a songwriter's return for their efforts, as they stand last in line for compensation.

It has often been asserted that when the compulsory license forces rights holders to give up control over otherwise exclusive intellectual property rights, the expected trade-off is, at the very least, an assurance of payment to copyright owners—this is what makes the license work within the balance of copyright policy goals.[110] In reality, this guarantee of payment meant little in the way of incentives once DSPs became the primary mode of music consumption, and the royalty system no longer matched the predominant music technology of the day. While testifying in front of the Senate Judiciary Committee in favor of passing the MMA, Grammy-award-winning songwriter Josh Kear said of his community of songwriters in Nashville, "we have lost our entire middle class of songwriters—they're gone."[111] Grammy-nominated artist Will Sheff affirmed this sentiment, telling the Washington Post that " '[a]round 2011, the bottom fell out,' . . . [marking] the beginning of the end of a 'musical middle class.' "[112]

107. Comments from Bart Herbison, Executive Director, Nashville Songwriters Association International, on "Review of ASCAP and BMI Consent Decrees" to the U.S. Dept. of Just. Antitrust Div. 1 (Aug. 5, 2014), https://www.justice.gov/sites/default/files/atr/legacy/2014/08/13/307686.pdf [https://perma.cc/B7RA-7ZWH].

108. Seabrook, *supra* note 94.

109. *See* DiCola, *supra* note 28, at 305.

110. *See* Ginsburg, *supra* note 32, at 1626.

111. *Protecting and Promoting Music Creation for the 21st Century: Hearing Before the S. Comm. on the Judiciary*, 115th Cong., at 1:36:20 (May 15, 2018) [hereinafter *Music Creation for the 21st Century Hearing*] (statement of Josh Kear, Songwriter), https://www.judiciary.senate.gov/committee-activity/hearings/protecting-and-promoting-music-creation-for-the-21st-century [https://perma.cc/L3KQ-YU38].

112. Andrews, *supra* note 100.

While copyright policy does not center incentives to artists, the Supreme Court has acknowledged that, at a minimum, "[t]he rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors."[113] The bounds of such a "fair return" may be debated; however, when incentive dissipated and songwriters left the profession en masse, something was surely off in the copyright access-incentive equilibrium. Ultimately, in the context of a new digital age, the pre-MMA legal regime failed to maintain an adequate incentivization system as had been a pillar of copyright law.[114]

2. Compulsory Mechanical License Overflows with Transaction Costs

In addition to songwriter grievances, the pre-MMA system also strained the growth and capabilities of DSPs. Streaming companies were immediately overwhelmed by the licensing demands of their business model as they attempted to manage a catalog of tens of millions of songs and an untenable amount of data.[115] Further, many of the song files that record labels shared with DSPs for upload onto their services had missing songwriter identification in their metadata, meaning that DSPs often had no idea to whom they owed money on the publishing and songwriter side.[116] Due to a simultaneous inundation of information and a lack of information, unpaid mechanical royalties began to pile up.

In the pre-MMA legal regime, section 115 of the Copyright Act allowed DSPs to file a "Notice of Intent" ("NOI") with the Copyright Office for each song it intended to use.[117] By declaring their intent to use a copyrighted musical composition via an NOI, DSPs were granted legal immunity from copyright infringement "until and if the songwriter or their publisher could be identified."[118] DSPs filed NOIs by the tens of thousands, but without the infrastructure to locate rights holders, NOIs essentially enabled DSPs to use copyrighted material without being held accountable for finding and paying rights holders. At the same time, the Copyright Office did not review notices for "legal sufficiency" or errors[119] and was overwhelmed by the massive volume of notices submitted by DSPs.[120]

113. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 546 (1985).
114. *See* Ginsburg, *supra* note 32, at 1626.
115. PASSMAN, *supra* note 20, at 239–40.
116. Ethan Smith, *Songwriters Lose Out on Royalties*, WALL ST. J. (Oct. 14, 2015), https://www.wsj.com/articles/songwriters-lose-out-on-royalties-1444864895 [https://archive.ph/WPtG4].
117. *See* 37 C.F.R. § 201.18(f) (2013).
118. Abdo & Abdo, *supra* note 14, at 2; *see* 37 C.F.R. § 201.18(f) (2013).
119. 37 C.F.R. § 201.18(g) (2013).
120. Abdo & Abdo, *supra* note 14, at 2.

Further, rights holders bore the burden of claiming their royalties yet had no way of knowing when they went missing nor an understanding of how to claim them in a convoluted and complex system.[121] This burden created yet another layer of transaction costs on the rights holders' side; not only would it take immense time and effort on the part of the rights holder to navigate an impossibly complex web of mechanical licenses, but it also required cultivating a copyright licensing expertise that many creatives in the music industry simply did not have. Very frequently, this hurt independent songwriters the most, as they had little business or legal savviness to understand how and why they needed to assert their copyright ownership.

The mechanical licensing system quickly proved inefficient, burdensome, and unaccountable to rights holders in the context of the streaming business model. As NMPA President and CEO David Israelite pointed out in the MMA's Senate Judiciary Committee hearing, the music industry was relying on "a [licensing] system that was built for licensing individual albums—ten at a time, twelve at a time—and using it to try to empower digital companies to put up 40 million songs overnight"; he asserted bluntly, "It doesn't work."[122] By 2015, an estimated $50 to $75 million dollars sat unmatched and unpaid by DSPs.[123] The music industry thus dubbed these unmatched royalties "black box royalties." This problem came to a head as publishing companies began launching lawsuits against the DSPs for, in essence, operating their businesses under a model that relied on copyright infringement, even if unintentionally.[124] In interviews, Israelite estimated that for roughly twenty-five percent of all streams, composition copyright owners were not properly identified, and "as much as 25 percent of royalty payments [were] not being paid to publishers, or [were] being distributed to the wrong entities."[125] DSPs, daunted by lawsuits and claiming they wanted to "pay every penny," began calling on the industry to work with them to develop a transparent and accountable way to manage publishing rights.[126]

121. *Id.*

122. *Music Creation for the 21st Century Hearing*, *supra* note 111, at 1:40:02 (statement of David Israelite, President & CEO, NMPA).

123. Smith, *supra* note 116; Ed Christman, *Publishers Said to Be Missing as Much as 25 Percent of Streaming Royalties*, BILLBOARD (Oct. 20, 2015), https://www.billboard.com/pro/publishers-songwriters-streaming-25-percent-royalties [https://archive.ph/ZigRq].

124. Priest, *supra* note 18, at 12.

125. Christman, *supra* note 123.

126. Smith, *supra* note 116.

Here, the problem pre-MMA was twofold. First, the compulsory mechanical license was no longer serving its purpose of reducing the burden of transaction costs because while licensing negotiations were feasible due to the compulsory license, the DSPs' task of complying with licensing obligations was still near logistically impossible—DSPs simply could not figure out who to pay. Rather than prohibiting the DSPs from operating, the pre-MMA licensing regime compelled DSPs to function on an "infringement model," which was damning to the legitimacy of music's copyright laws. While the compulsory mechanical license may have once been an effective mechanism to constrain transaction costs, when imposed upon streaming technology, the transaction costs of mechanical licensing had shifted and were ultimately too high. Secondly, this issue further harmed the already-diminished incentive for songwriters to create because even as they produced work, it took ages to see that money return to their pockets—if it ever did.[127]

Amongst the triad of copyright policy goals, it at least seemed that access to music was at an all-time high. Subscribers to DSPs only continued to increase, and Americans were listening to more music than ever. However, increased access cannot be considered without its tether to copyright's countervailing need to incentivize creation. Rapidly decreasing songwriter incentive to create, coupled with the public's disproportionate new-found access to music, likely signaled that the pre-MMA access-incentive trade-off was sorely out of balance.

Additionally, as publishers and songwriters fought to increase royalty rates, the DSPs had their own impending "access" problem looming over them. Since its invention in the mid-2000s, music streaming had never been profitable; even the major DSPs consistently operated at a loss since their founding.[128] Though the DSPs' business models ushered in a new level of public access to music, it remained a concern that these tides could turn. For how long could DSPs continue providing such a high level of access if their business model did not turn a profit? This long-term concern made DSPs fearful that royalty rate increases would stifle company revenue and further challenge the DSPs' business model.

127. Andrews, *supra* note 100.

128. Amy X. Wang, *Spotify Hits 180 Million Users–and Loses Even More Money*, ROLLING STONE (July 26, 2018), https://www.rollingstone.com/pro/news/spotify-hits-180-million-users-and-loses-even-more-money-703781 [https://archive.ph/DBNmJ].

TABLE 1. Pre-MMA Policy Concerns

Policy Goal	*Score*
Incentives	Incentive for songwriters is *LOW*, as attributable to a minimal statutory royalty rate, governmental restrictions on *both* types of songwriters' royalties, and industry structure providing equal payout between publishers and songwriters.
Transaction Costs	Transaction costs are *HIGH*. While the compulsory license reduces transaction costs of licensing negotiation, matching royalties to songwriters imposes high transaction costs for DSPs and songwriters alike.
Access	Access is *HIGH* in the short term with concern that this variable may shift if DSPs continue operating at a deficit.

II. SHIFTS UNDER TITLE I OF THE MUSIC MODERNIZATION ACT

The MMA passed the House and Senate unanimously in 2018 and received unprecedented support from a multitude of players in the music industry. It signified the culmination of years of negotiation and bargaining between music publishers, songwriters, and DSPs, which legislators facilitated in a moment when the parties' interests were at last relatively aligned.[129] DSPs, faced with a wave of crushing infringement lawsuits, had a major incentive to support the passage of an act that would accommodate their business model and protect them from future liability.[130] Songwriters and publishers, on the other hand, were desperate for a legal solution that would restore the value of their mechanical rights to something comparable to those before the streaming age or that, at the very least, resulted in a fairer system than the one they had been operating in for nearly a decade.[131] Signed into law on October 11, 2018, the Music Modernization Act was the most substantial revision to copyright law in two decades.[132] Title I of the MMA, known as the Musical Works Modernization Act, not only endeavored to

129. 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, 83 (2019).

130. Priest, *supra* note 18, at 13.

131. *Id.*

132. *See also* Abdo & Abdo, *supra* note 14, at 1. *See generally* Orrin G. Hatch–Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (2018); Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998).

adapt the Copyright Act's musical composition provisions to better accommodate streaming technology, but it also tweaked aspects of the musical composition copyright in ways that bettered the position of publishers and songwriters overall to counter issues raised by the streaming model.

At a high level, Title I of the MMA implemented three primary changes to improve how songwriters received their royalties and the standard for calculating them. First, it allowed DSPs to obtain a blanket mechanical compulsory license specifically for streaming mechanicals that would cover all musical compositions held in a licensor's catalog, much like the blanket license used for granting public performance rights.[133] In conjunction, Title I also established the Mechanical Licensing Collective ("MLC"), a non-governmental, non-profit entity authorized to "offer and administer blanket licenses" to DSPs, "[c]ollect and distribute royalties from digital music providers," and maintain a "musical works database" to track information about licensing and ownership of mechanical rights.[134] These first two major changes enacted in Title I were designed to resolve "long-festering pain points" between publishers and DSPs due to the DSPs' inability to pay out licensing obligations under the pre-MMA legal regime.[135] As discussed further in the next subsection, these two additions to music copyright law aimed to address head-on the mechanical license's growing transaction cost problem that emerged from DSPs' massive streaming catalogs. Lastly, Title I imposed alterations to the royalty tribunal procedures, "direct[ing] the Copyright Royalty Board (CRB) . . . to employ a 'willing buyer, willing seller' standard to reduce the potential for compulsory licenses to undervalue the mechanical right."[136] Ultimately, Title I of the MMA represents an acknowledgment that the fundamental balance of interests demanded by copyright policy was no longer in check.

A. ADDRESSING THE BLACK BOX ROYALTY PROBLEM

1. The MMA's Solution: Creating the MLC

Three years prior to the passage of the MMA, the Copyright Office Music Marketplace Report had concluded that a centralized, comprehensive database of mechanical copyright ownership "would substantially enhance transparency in the music licensing system, reduce transaction costs, and

133. Music Modernization Act § 102; *see supra* Section I.A.
134. Music Modernization Act § 102(d)(3)(c).
135. Priest, *supra* note 18, at 11.
136. *Id.* at 14.

facilitate direct licensing through private negotiation in the open market."[137] Other music licensing regimes, such as public performance licensing, successfully used the combination of a collective licensing organization and a blanket license to streamline similar transaction cost issues, providing a potential model for success.[138] Thus, throughout discussions about the MMA, the concept of a responsible collective licensing body was highly supported across the industry. The entity that was created, the MLC, serves the primary role of administering the new blanket licenses and royalties and maintaining a comprehensive database of mechanical copyright holders.

Under the MMA, DSPs also agreed to pay all costs associated with this new licensing entity.[139] Unlike any other existing licensing collective, the MLC does not take a commission from the royalty pool before distributing royalties, ensuring that composition rights holders retain one hundred percent of all royalties passed through the MLC and that their royalty money is not further diminished through the new collective licensing agency's establishment.[140] In exchange, when DSPs obtain a blanket mechanical license from the MLC, they are broadly shielded from extremely costly infringement liability and burdensome statutory damages.[141]

At the outset of drafting the MMA, the growing multi-million-dollar pool of unpaid black box royalties presented one of the most pressing challenges to restoring order in the mechanical copyright system. Exorbitant transaction costs from individually licensing mass amounts of content—not to mention the ex-post transaction costs of litigating licensing failures—directly cut against the compulsory license's original purpose and placed both copyright holders and DSP licensees in untenable positions. Thus, a blanket compulsory license under the MWMA, covering all songs under a single lump-sum royalty fee, represented a major solution to one of the most glaring problems in the pre-MMA digital copyright licensing space. It was to be administered by the newly formed MLC entity, which became officially designated to carry out the MMA's statutory responsibilities by the

137. COPYRIGHT OFFICE MUSIC MARKETPLACE REPORT, *supra* note 18, at 126.

138. *Id.*

139. Mitch Glazier, David Israelite & Sarah Oh Lam, Two Think Minimum Podcast, *Music Licensing After the Music Modernization Act with Mitch Glazier and David Israelite*, TECH. POL'Y INST., at 06:58–07:05 (Nov. 5, 2018), https://techpolicyinstitute.org/publications/intellectual-property/music-licensing/music-licensing-after-the-music-modernization-act-with-mitch-glazier-and-david-israelite-two-think-minimum-podcast [https://perma.cc/Q35A-RKQB]; Dina LaPolt, CLE Panel at South by Southwest: The Music Modernization Act: Changing the Licensing Landscape for Streaming (Mar. 16, 2018).

140. Glazier et al., *supra* note 139, at 07:05–07:26. In the case of other collective licensing organizations, artists typically bear the cost of the collective by paying anywhere from ten to twenty percent of their earnings to cover the collective's operation. *Id.*

141. LaPolt, *supra* note 139.

Copyright Office in July 2019.[142]

In January 2021, the MLC launched its full operation and began administering blanket licenses.[143] Only qualified DSPs are eligible to receive this blanket license,[144] and at the time the MLC became operational, it reported that over forty eligible DSP services had started using its blanket license.[145] DSPs now no longer have to individually license songs by the tens of thousands and, as a tradeoff for this newfound legal security, the DSP licensees must pay out the full cost of mechanical licensing fees to the newly formed MLC entity. On a monthly basis, each DSP sends the MLC data that logs all recordings used on the streaming service that month, as well as the corresponding mechanical royalties owed, which the MLC maintains in its "MLC Portal."[146] It is then responsible for locating and paying out known rights holders in monthly payments,[147] the first one of which was completed in April 2021.[148] The MLC's model ensures that DSPs regularly process and pay royalties for all licensed works—even those with missing or incomplete songwriter information—rather than allowing them to hold onto royalty money under the pretext that rights holders information was nonexistent or too hard for DSPs to track down.

After the MLC distributes royalties to known rights holders, it places all unmatched and unclaimed royalties in an interest-earning account for three years, where they await a potential match with their copyright holders.[149] The MLC distinguishes between royalties that may be "unmatched," such as the black box royalties that have no known association with any musical work in the MLC database, and "unclaimed" royalties, which are matched to a song but cannot be paid out because shares of the song have not yet been claimed by their rights holders.[150] Both types of

142. *See generally* Designation of Music Licensing Collective and Digital Licensee Coordinator, 84 Fed. Reg. 32274 (Jul. 8, 2019) (codified at 37 C.F.R. § 210).

143. *The MLC: History & Milestones*, THE MLC, https://www.themlc.com/milestones [https://perma.cc/U7CA-U766].

144. Abdo & Abdo, *supra* note 14, at 2.

145. Murray Stassen, *Meet the Organization That's Distributed Over $250M in Mechanical Royalties to Rightsholders This Year*, MUSIC BUS. WORLDWIDE (Dec. 9, 2021), https://www.musicbusinessworldwide.com/meet-the-organization-thats-distributed-over-250m-in-mechanical-royalties-to-rightsholders-this-year [https://perma.cc/3VPK-JJ7W].

146. *Id.*

147. *Id.*

148. *The Mechanical Licensing Collective Completes First Royalty Distribution*, THE MLC (Apr. 19, 2021), https://blog.themlc.com/press/mechanical-licensing-collective-completes-first-royalty-distribution [https://perma.cc/YEX2-DEPU].

149. Orrin G. Hatch–Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264 § 102(d)(3)(G), (H), 132 Stat. 3676, 3694–95 (2018); Abdo & Abdo, *supra* note 14, at 3.

150. Kristin Robinson, *The MLC's Kris Ahrend on $1B in Payouts, 'Illuminating' Black Box Royalties & More*, BILLBOARD (Mar. 3, 2023), https://www.billboard.com/pro/mlc-chief-1b-payouts-black-box-streaming-royalties [https://archive.ph/poco0].

royalties make up the sum of money pooled into this account. If, after three years, the royalties remain unmatched or unclaimed, they are liquidated to known copyright holders—both publishers and songwriters.[151] Ultimately, while some unclaimed royalties may never make it into the hands of their rightful owners, the MLC's pooling measure strengthens incentives for artists in the copyright system by ensuring that the money is, at the very least, redistributed amongst the rights-holding community. Prior, DSPs financially benefited from songwriters' failure to locate their unmatched royalties, as the unpaid money sat in their pockets and created no incentive for DSPs to seek a solution to orphaned royalties.[152] This further discouraged music composition rights holders, especially songwriters, who felt DSP's unpaid use of their work signaled just how little both DSPs and the industry at large valued their contributions to music.

While the DSPs benefited from legal clarity as a result of MLC's creation, the legislation largely arose from a recognition that songwriters needed to be "properly protected" and that a new mechanical licensing system required creating "sufficient incentives . . . to find the people the money [from royalties] belong[ed] to."[153] With songwriters' concerns placed at the center of the legislation, an independent collective like the MLC primarily protects and advocates for the mechanical rights of composition copyright holders. The MLC thus aims to ensure that, eventually, as few royalties as possible will languish in the ownerless "black box" pool by creating an accessible mechanism for songwriters and publishers to claim ownership of a work.

Though DSPs still escaped the primary burden of locating and paying out rights holders, the MMA took part of this burden off the shoulders of rights holders as the MMA established the MLC to increase transparency in the mechanical licensing process and conduct outreach to artists. Title I of the MMA imbued the MLC with the responsibility of "engag[ing] in efforts to identify musical works . . . and locate the copyright owners of such musical works," creating an obligation on the part of the MLC to seek out rights holders rather than allow black box royalties to accrue without accountability.[154] A central part of executing this mandate included creating a "musical works database" within the MLC Portal, known as the MLC Public Work Search.[155] The public can access the records in the Public Work

151. Music Modernization Act § 102(d)(3)(C).

152. *See* Abdo & Abdo, *supra* note 14, at 2.

153. *Music Creation for the 21st Century Hearing*, *supra* note 111, at 00:31:47 (statement of Sen. Diane Feinstein).

154. Music Modernization Act § 102(3)(C)(i)(III) (codified at 17 U.S.C. § 115(d)(3)(E)).

155. *Id.* § 102(3)(C)(i)(IV) (codified at 17 U.S.C. § 115(d)(3)(E)).

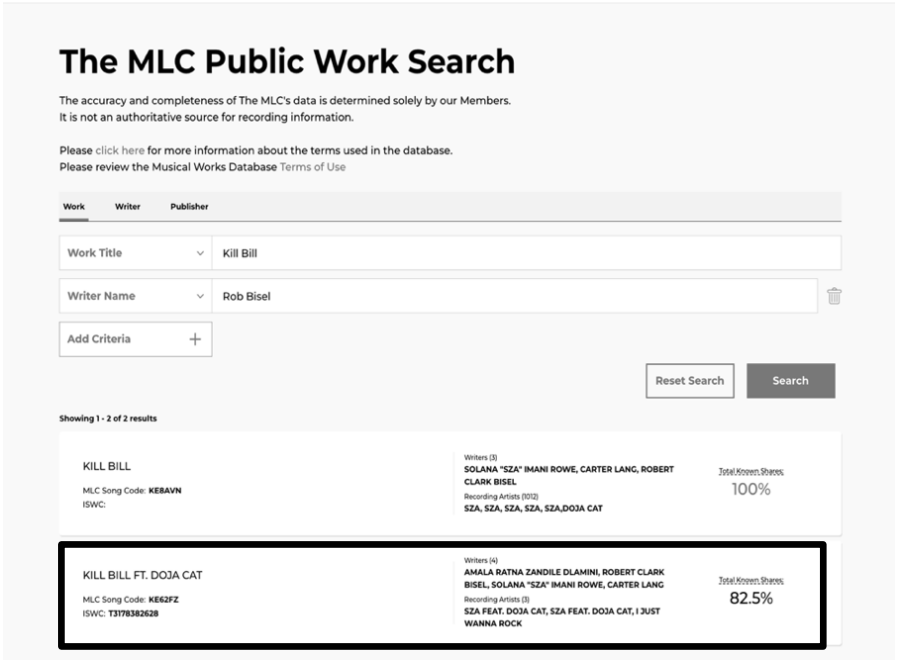
Search, while verified "members"—payable publishers or songwriters—can use related portals to register their works or find and claim an ownership share in an already registered work.[156] Each MLC database entry contains comprehensive information about the listed song, including the percentage of ownership share in the work, the identity and location of the composition copyright owners, if known, and ownership information regarding the sound recording that embodies the musical work.[157] For example, Figure 6 shows MLC entries for two versions of SZA's "Kill Bill."[158] The entry for the song's original release indicates that the MLC database has information for 100% of the "total known shares" of songwriter ownership, including songwriter names and publishers. In contrast, the version of "Kill Bill" featuring Doja Cat indicates that only 82.5% of the song's ownership is accounted for in the MLC Portal, so the song's publisher or collaborating songwriter may search the song and discover whether their share of the work remains unattributed.

156. *Musical Works Database Terms of Use*, THE MLC (Apr. 11, 2022), https://www.themlc.com/musicalworksdatabasetermsuse [https://perma.cc/U9HB-YRMH].

157. *Id.*

158. *See infra* Figure 6.

FIGURE 6. MLC's Comprehensive Database: The Public Work Search



Source: *The MLC Public Work Search*, *supra* note 21 (searched under "Work Title" for the song "Kill Bill," added writer name criteria, and searched for Rob Bisel).

The MLC's user-friendly database lowers the barrier to entry for copyright holders to assert ownership of their works, making it feasible for them to monitor their rights in licensing transactions. Additionally, by increasing assurances that songwriters will get paid correctly and reliably for what they are owed, the MLC's Portal and Public Work Search should resolve gaps in songwriter pay and bolster the incentive for creators.

The MLC also works with another entity established in Title I of the MMA called the Digital Licensee Coordinator ("DLC"), which represents DSPs in the new post-MMA licensing system and helps the MLC carry out its mandate.[159] The DLC is required to "assist the [MLC] in the efforts . . . to locate and identify copyright owners of unmatched musical works" through active outreach to the songwriting community.[160] Together, the MLC and

159. Designation of Music Licensing Collective and Digital Licensee Coordinator, 84 Fed. Reg. 32274 (Jul. 8, 2019) (codified at 37 C.F.R. § 210). *See generally FAQ*, DIGIT. LICENSEE COORDINATOR, https://digitallicenseecoordinator.org [https://perma.cc/R75Y-SW7N].

160. Music Modernization Act § 102(d)(5)(C)(iii) (codified at 17 U.S.C. § 115(d)(3)(B), (d)(5)).

DLC create resources and host webinars oriented toward independent songwriters to educate them on how to assert their rights in the post-MMA copyright regime.[161] The accessibility and transparency built into the MMA aim to further lower the transaction cost barrier for DSPs and rights holders alike to fulfill obligations that accompany the compulsory license.

Lastly, Title I of the MMA sought to make music composition copyright holders whole by capturing the millions of dollars of unpaid royalties held by the DSPs prior to the MMA's passage, bestowing upon the MLC the responsibility of uniting historical unmatched royalties with their proper rights holders.[162] In February 2021, twenty-one DSPs finally transferred over $424 million to the MLC in historical unmatched royalties and provided accompanying usage data to help determine how the money should correspond with eventual royalty payments.[163] Despite the DSPs' continued use of songwriters' content on their platforms over the preceding decade, this money represented the first mechanical royalty payment made for content with "unmatched" copyright owners. The MLC made its first payment of formerly unmatched royalties from the $424 million pool in June 2022.[164] As of June 2023, the MLC has distributed $24 million of the originally unpaid, unmatched royalties.[165] The MLC has not yet paid out all historical unmatched royalties; however, its success in doing so will play an essential role in restoring songwriters' trust in the music copyright system to protect their work and provide the financial incentives promised by copyright's underlying policy goals.

2. Unfolding Reality: The MLC in Action

As reasonably expected for the establishment of a new entity, the MLC was not operational until over two years after the MMA was passed, and only a few years have since passed for the MLC to prove its worth as a solution to the publishers' and songwriters' concerns.[166] That said, the MLC achieved a robust operation rather quickly, with over 30 million songs registered in its

161. *See* DIGIT. LICENSEE COORDINATOR, *supra* note 159. *See generally The Mechanical Licensing Collective, Digital Licensee Coordinator Announce Landmark Agreement*, THE MLC (Dec. 14, 2019), https://blog.themlc.com/press/mechanical-licensing-collective-digital-licensee-coordinator-announce-landmark-agreement [https://perma.cc/754A-AZSR].

162. "Historical unmatched royalties" is the MLC's preferred term for "black box royalties" but refers to the same concept. Stassen, *supra* note 145; Robinson, *supra* note 150.

163. THE MLC, *supra* note 143.

164. *Historical Royalties*, THE MLC, https://www.themlc.com/historical-unmatched-royalties [https://perma.cc/E282-9A5N].

165. *Id.*

166. THE MLC, *supra* note 143. The entity was created and became operational in 2020 during COVID-19 pandemic, which also may have altered the runway for the entity's operations. *Id.*

database as of March 2023[167] and having already distributed over $1.5 billion in mechanical royalties as of its recent metric announcement in October 2023.[168]

While these metrics contextualize the growth of the MLC, they reveal less about the entity's success in achieving its founding goals. In this regard, however, it also seems relatively successful in its early stages, though much remains to be seen.[169] As of March 2023, the MLC announced that it had achieved a consistent 89% match rate for all royalty payments passing through the collective,[170] and in October 2023, the collective achieved a just slightly higher match rate at 90%.[171] This match rate refers to the rate at which the MLC can properly attribute royalties to an existing song in its database, not the rate at which royalties are actually claimed, which still requires a proactive assertion of ownership by the copyright holder.[172] With approximately 25% of all royalties deemed missing or unmatched before 2018, matched royalties have increased by about 15% between the pre-MMA system and now due to the MLC's database and matching system.[173] The MLC's CEO, Kris Ahrend, suggests that the more data the MLC receives, the more it will be able to close out this gap; the MLC continues to grow its database with the participation of its publisher and songwriter members.[174] Most recently, the MLC has partnered with five music data matching vendors to improve its match rate, though the MLC's greatest challenge will remain in gathering data on its most difficult songs—"those created by DIY, unsigned songwriters, many of whom are still unaware of The MLC."[175]

Additionally, concerning the historical unmatched royalties accrued before 2018, $200 million of the original $242 million pool paid in February 2021 has been matched with copyright holders, meaning that the MLC has almost fully accounted for the historical void of rights holder information in

167. Robinson, *supra* note 150. For context, Spotify claims to host 100 million "tracks" on its platform as of 2024. *About Spotify*, SPOTIFY: FOR THE RECORD, https://newsroom.spotify.com/company-info [https://perma.cc/U6L7-2FSZ].

168. Mandy Dalugdug, *The MLC Has Paid Out over $1.5B to Date*, MUSIC BUS. WORLDWIDE (Oct. 31, 2023), https://www.musicbusinessworldwide.com/the-mlc-has-paid-out-over-1-5bn-to-songwriters-to-date [https://perma.cc/5XXS-MXD6].

169. *Infra* Section III.A.

170. Robinson, *supra* note 150.

171. Dalugdug, *supra* note 168.

172. Robinson, *supra* note 150.

173. *See* Christman, *supra* note 123 (citing that 25% of all royalties went unmatched prior to the creation of the MLC).

174. *See* Dalugdug, *supra* note 168.

175. Kristin Robinson, *The MLC Partners with 5 Data Matching Companies to Increase Royalties Match Rate*, BILLBOARD (Dec. 7, 2023), https://www.billboard.com/business/publishing/the-mlc-improve-royalties-match-rate-new-data-network-1235545949 [https://perma.cc/992Y-NTLC].

just under three years after its founding.[176] Though it has paid out only a small fraction of these royalties to date, this is due to circumstances outside the MLC's control.[177]

In sum, the MLC is, on paper, doing what the MMA intended—just perhaps more slowly than songwriters and publishers would like. Though more work remains, initial data suggests that the MLC has absorbed a significant amount of the existing transaction costs that complicated and cluttered the pre-MMA mechanical licensing system. DSPs can no longer get away with licensing content for free, hundreds of thousands of unverified NOIs have been eliminated, and composition rights holders can seek out their work and lay claim to what they are rightfully owed.[178] There are, of course, criticisms of the MLC as well. Songwriters have protested the MLC's refusal to publicize the sum of money it holds in unmatched royalties, claiming that the MLC has an incentive to refuse transparency, as the majority of its board is comprised of publishing company representatives who disproportionately benefit if the unmatched royalty pool remains orphaned.[179] These grievances indicate songwriters' ongoing scramble for remuneration at the bottom of the value chain.[180] Thus, even though addressing songwriter incentive was one of the MMA's core goals, it has become likely that MLC can only do so much to remedy this concern.

B. A NEW REGIME FOR ROYALTY RATE SETTING

1. The MMA's Solution: A Willing Buyer–Willing Seller Rate

As previously explored, one of the direst realities prior to the passage of the MMA was the rapidly disappearing songwriter profession. Statistics and widespread testimony illustrated just how much songwriters' livelihoods had been altered by the rise of DSPs; this reality was a repeated feature of discussion at the Senate's hearing on the MMA in 2018 and framed a sense

176. THE MLC, *supra* note 164.

177. Since DSPs appealed Phonorecords III, the CRB rate proceeding for 2018 to 2022, the MLC could not pay rights holders the proper rates owed for all historical unmatched royalties from 2018 onwards until the CRB ruled on the appeal. *See* Songwriters of North America, Black Music Action Coalition & Music Artists Coalition, *Songwriters Have Been Waiting Five Years for a Whopping $700-$800 Million in Royalties: Here's What You Can Do to Help*, VARIETY (Mar. 31, 2023, 7:57 AM), https://variety.com/2023/music/news/songwriters373-million-in-royalties-petition-1235569464 [https://perma.cc/W435-7DK4]; *see also infra* Section III.C.

178. *See supra* Section I.D.2.

179. Dylan Smith, *Songwriter Organizations Urge Congressional Action on the Mechanical Licensing Collective's 'Black Box' Royalties—'Very Blatant Conflict of Interest*,*'* DIGIT. MUSIC NEWS (July 24, 2023), https://www.digitalmusicnews.com/2023/07/24/mechanical-licensing-collective-black-box-congress-letter [https://perma.cc/ZT59-VH56].

180. *See* DiCola, *supra* note 28, at 306.

of urgency around passing the law.[181] While unmatched and unpaid royalties accounted for a fraction of songwriters' diminished incentive, the bottom line remained that there was simply no longer enough money being generated by mechanical royalties in the digital age. The massive reduction in overall mechanical royalties caused by streaming's replacement of physical albums or digital download sales and the long-depressed statutory royalty rates produced an untenable situation for songwriters. Though publishers, too, felt the strain on mechanical royalty revenue, the plight of songwriters demanded resolution by the MMA for copyright policy to achieve its stated goals.

Title I of the MMA, therefore, introduced a new standard for the CRB to use when determining mechanical royalty rates—not only for streaming but for all other mechanical royalties as well. The MMA shifted the CRB's rate-setting standard from the highly criticized "policy-oriented" rate to a "willing buyer–willing seller" rate meant to reflect market demand. The standard, which the music industry had demanded for years, requires that the CRB "establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller."[182] As cited in another CRB rate proceeding that utilized the willing buyer–willing seller rate standard, "the Judges look to . . . a hypothetical marketplace, free of the influence of compulsory, statutory licenses."[183]

To make rate determinations under this standard, CRB judges are also to "base their decision on economic, competitive, and programming information presented by the parties," which may include factors like the degree to which a compulsory licensee's service interferes with or enhances a musical work copyright holder's other revenue streams and the parties' "relative creative contribution, technological contribution, capital investment, cost, and risk."[184] Before the MMA, the CRB followed a "limited-evidence process," and any market data was excluded from consideration when setting mechanical rates.[185] Thus, while the original 801(b) factors demanded that the CRB consider "fair income under existing economic conditions" as suggested by the incentive theory of copyright policy, pre-MMA rates clearly could not fully adjust for economic realities

181. *See generally Music Creation for the 21st Century Hearing*, *supra* note 111.

182. Orrin G. Hatch–Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, § 102(c)(1)(F), 132 Stat. 3676, 3680 (2018); PASSMAN, *supra* note 20, at 234.

183. Determination of Royalty Rates and Terms for Ephemeral Recording and Webcasting Digital Performance of Sound Recordings (Web IV), 81 Fed. Reg. 26316, 26316 (May 2, 2016) (codified at 37 C.F.R. § 380).

184. 17 U.S.C. § 114(f)(1)(B); *see also* Web IV, 81 Fed. Reg. at 26316.

185. PASSMAN, *supra* note 20, at 234.

when the legal regime excluded market data from consideration.[186]

Despite the full legislative history showing the initial access-incentive justification for the mechanical compulsory license,[187] in the 2015 Copyright Office Music Marketplace Report, the Office asserted that a compulsory license "should exist only when clearly needed to address a market failure."[188] The report explicitly called on Congress to adopt a "uniform market-based ratesetting standard," stating that "[t]here is no policy justification for a standard that requires music creators to subsidize those who seek profit from their works."[189] In taking this position, the Copyright Office acknowledged that the supposed access-incentive reasoning behind the compulsory license overtly restrained creators' sense of incentive by forcing them to underwrite licensees' royalty costs at their own expense. The willing buyer–willing seller rate-setting standard had also already been implemented in most other CRB rate proceedings.[190] Some critics argue that shifting from a policy-oriented analysis to a willing buyer–willing seller analysis abandons copyright's underlying policy goals;[191] however, the failure of 801(b) factors to adequately support incentive, as shown by the Copyright Office's findings, suggests that a willing buyer–willing seller rate could better account for some typical copyright policy considerations than the original policy factors themselves.

Additionally, songwriters and publishers advocated for this change in hopes that it would lead to higher compensation, reinforcing this provision's goal of recalibrating the incentive-access tradeoff. Though the willing buyer–willing seller rate would not fully create free market mechanical rates, as would be possible without any compulsory license regime, theoretically, it at least mimics a free-market reality tempered by CRB review. David Israelite described these rate-setting alterations, stating that if "songwriters are to remain in a compulsory license prison," the MMA's rate-setting provisions "at least improve the conditions of their confinement."[192] As his tone connotes, publishers and songwriters generally would have much preferred the abolition of the compulsory license "prison" entirely, yet in the name of achieving consensus legislation, accepted the shift to the willing

186. Copyright Act of 1976, Pub. L. No. 94-553, § 801, 90 Stat. 2541, 2595 (1976) (formerly codified at 17 U.S.C. § 801(b)).

187. *See supra* Section I.C.1.

188. COPYRIGHT OFFICE MUSIC MARKETPLACE REPORT, *supra* note 18, at 163.

189. *Id.* at 3.

190. *Id.*

191. *See generally* Victor, *supra* note 38.

192. *Music Creation for the 21st Century*, *supra* note 111, at 00:59:10 (statement of David Israelite, President & CEO, NMPA).

buyer–willing seller rate.[193] One skeptical songwriter described the songwriting community's celebration of the willing buyer–willing seller rate as an "example of Stockholm Syndrome" in reaction to a "beautification" of the dreaded compulsory license.[194] Those who share this belief doubt that a willing buyer–willing seller rate regime will make any substantive difference in improving the massive incentive problem in the streaming era.

2. Unfolding Reality: Phonorecords IV Under a Willing Buyer–Willing Seller Rate

Since the MMA's passage in 2018, only one CRB proceeding has been decided under the new rate-setting regime, and this proceeding provided only minimal foreshadowing as to whether the rate standard can bring composition copyright holders closer to fair compensation of decades past. Phonorecords IV, which set the royalty rates for musical compositions between 2023 and 2027, began in 2021.[195] At its outset, the key industry parties involved in the proceedings—the National Music Publishers' Association, the Nashville Songwriters Association International, and the Digital Media Association (which represents the DSPs)—seemed poised for an extensive legal battle, as all submitted drastically disparate rate proposals to the CRB.[196]

Phonorecords IV represented a major moment for many songwriters who eagerly anticipated the first rate proceeding to implement MMA's new standard.[197] However, in a surprising turn, industry players ultimately settled in August 2022 before the CRB's final adjudication, agreeing on a royalty headline rate of 15.35% of the DSP's total annual revenue.[198] When the CRB

193. Glazier et al., *supra* note 139.

194. Chris Castle, *How Songwriters Get Screwed by Cheese and Pies*, MUSIC TECH. POL'Y (Jan. 22, 2021), https://musictechpolicy.com/2021/01/22/how-songwriters-get-screwed-by-cheese-and-pies [https://perma.cc/P7YE-UTPA].

195. Tim Ingham, *Songwriters Are Already Fighting for Better Pay. But in 2021, They Face an Even Bigger Battle*, ROLLING STONE (Jun. 15, 2020), https://www.rollingstone.com/pro/features/songwriters-spotify-amazon-crb-royalties-war-1015116 [https://archive.ph/LK278].

196. Tim Ingham, *Can You Feel the Love Tonight? Spotify and Fellow Music Streamers Strike Agreement with Publishers for 15.35% Go-Forward Royalty Rate in the U.S.*, MUSIC BUS. WORLDWIDE (Aug. 31, 2022) [hereinafter Ingham, *Can You Feel the Love Tonight*], https://www.musicbusinessworldwide.com/can-you-feel-the-love-tonight-spotify-and-fellow-music-streamers-strike-agreement-with-publishers-for-15-35 [https://perma.cc/RQ4H-KWS5]; *see* Ingham, *supra* note 195. On behalf of publishers and songwriters, the NMPA sought to increase the DSPs' royalty headline rate from the prior period's 15.1% of annual DSP revenue to 20%. Ingham, *Can You Feel the Love Tonight?*, *supra*. In comparison, DSPs proposed a headline rate of 10.5%, the lowest royalty rate in recent history. *Id.*; 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/9EW3-S2XN].

197. *See* Ingham, *Can You Feel the Love Tonight?*, *supra* note 196.

198. Determination of Royalty Rates and Terms for Making and Distributing Phonorecords

approved the settlement and published its rate determinations in December 2022, it was rebuked by a number of songwriter groups, as they had held out hope that the new rate-setting standard would enable another needed rate increase.[199] Several opposition comments submitted to the CRB asserted songwriters' concerns that the settlement "would thwart application of the willing buyer, willing seller rate setting standard," which would have been applied for the first time in the absence of a settlement.[200]

In its final publication of the Phonorecords IV rate determination, the CRB did note that although the willing buyer–willing seller standard "was not expressly applied as it would be in a full proceeding, the operable rate standard exist[ed] as a relevant factor" when considering the validity of the settlement.[201] The settlement, thus, was not devoid of the new standard, though the extent of its impact on the CRB's decision-making remains unclear. The CRB stated it found no "reasonable basis" to reject the settlement and its suggested reasons may allude to the influence of the new rate standard.[202] The CRB asserted that it found no persuasive economic argument for rejecting the settlement, particularly indicating that the rate structure was not "gratuitous."[203] Instead, the settlement included thoughtful changes to prior rates and was designed through a careful negotiation in which "complex terms in [the] commercial agreement" represented a "market [that is] itself . . . complex."[204] While this does not fully provide an analysis of how rates may have differed if they had been developed by the CRB under a pure willing buyer–willing seller standard, it suggests that the factors used to consider a free and competitive market do not necessarily lend themselves to as noticeably high of a rate change as many in the industry may have anticipated.

Additionally, the negotiation itself is viewed to represent prices set between a willing buyer and a willing seller, and, as a practical matter, this may forebode a stifled rate standard for future Phonorecord rate proceedings. Strong evidence suggests that regardless of settlement, the willing buyer–willing seller rate holds little weight when mechanical royalty rates have no hypothetical market of willing buyers and willing sellers—the mechanical

(Phonorecords IV), 87 Fed. Reg. 80448, 80458 (Dec. 30, 2022) (to be codified at 37 C.F.R. § 385).

199. *Id.* at 80451. For the purposes of a settlement, the Copyright Royalty Judges can only reject or approve settlements in whole. *Id.* at 80452. *See* Kristin Robinson, *Songwriter Streaming Royalty Rate Settlement Released to Public in Full*, BILLBOARD (Oct. 7, 2022), https://www.billboard.com/pro/songwriter-streaming-royalty-rate-settlement-released [https://archive.ph/RQzgh].

200. Phonorecords IV, 87 Fed. Reg. at 80451.

201. *Id.* at 80453.

202. *Id.* at 80452.

203. *Id.*

204. *Id.* at 80452–53.

royalty has never once been considered in the context of true market demand.[205] In 1995, Congress enacted the Digital Performance Right in Sound Recordings Act, in which a willing buyer–willing seller standard similarly replaced 801(b) policy factors in CRB rate proceedings for noninteractive public performance royalties.[206] In that situation, the Copyright Arbitration Royalty Panel, the predecessor to the CRB, was left with "the unenviable task of ascertaining what a willing webcaster and a willing record label would consider to be a fair deal for Internet radio royalties in the face of an almost total absence of real world evidence."[207] In the same vein, the willing buyer–willing seller mechanical license rate "seeks to construct or emulate [a 'market' that] does not exist and often has never existed."[208] Under this analysis, it seems possible that the NMPA, in pursuing this settlement over litigating for a desirable rate, may have filled the vacuum of market knowledge with a rate that will lay a foundation for future decisions and is less than desirable for publishers and songwriters in the long run. Notably, in past rate proceedings for a willing buyer–willing seller standard, the CRB found that "[t]here is no *a priori* reason to conclude that the rates set in [an] earlier proceeding failed to reflect or approximate market forces."[209]

The Phonorecords IV settlement may suggest that, at least in the short term, the MMA's new rate-setting standard will result in no real improvement in incentives for songwriters, as demanded to rectify the current imbalanced copyright policy. The early days of the Phonorecords IV proceeding may also provide insight into challenges posed by converting to this new rate-setting norm. Immediately after the parties to Phonorecords IV submitted their rate proposals, the CRB used the new willing buyer–willing seller standard to deny the NMPA's request for further documentation regarding an initial lowball DSP proposal.[210] The CRB rejected their request for information from the DSPs explaining the "historical quantum" of DSP revenue to be deducted from the mechanical royalty pool under the DSPs' rate proposal and information on the "impact" of those proposed deduction

205. *See* Linn, *supra* note 41, at 335–45 (explaining why the willing buyer–willing seller rate will be challenging to apply to mechanical royalties).

206. COPYRIGHT OFFICE MUSIC MARKETPLACE REPORT, *supra* note 18, at 82; Linn, *supra* note 41, at 332.

207. Linn, *supra* note 41, at 339 (quoting Peter DiCola & Matthew Sag, *An Information-Gathering Approach to Copyright Policy*, 34 CARDOZO L. REV. 173, 226 (2012)); *see* COPYRIGHT OFFICE MUSIC MARKETPLACE REPORT, *supra* note 18, at 82.

208. COPYRIGHT OFFICE MUSIC MARKETPLACE REPORT, *supra* note 18, at 106.

209. Determination of Royalty Rates and Terms for Ephemeral Recording and Webcasting Digital Performance of Sound Recordings (Web IV), 81 Fed. Reg. 26316, 26382 (May 2, 2016) (codified at 37 C.F.R. § 380); Linn, *supra* note 41, at 329.

210. Phonorecords IV, Public Order on Copyright Owners' Motion to Compel, No. 21-CRB-0001-PR, 1, 5 (Copyright Royalty Bd. April 26, 2022).

terms on mechanical royalties.[211] The CRB held that such justifications for further documents may have been relevant under two of the former 801(b) standards of fairness and "disruption-avoidance," but that such considerations of "impact," "historical quantum" of revenue, and deduction terms no longer appeared to be appropriate when purely assessing market factors relating to the parties' investment in their products and positions in relation to economic demand.[212] This further suggests that though the standard may in some ways seem liberatory by providing a comparison to an open market, it may also limit composition copyright holders from making arguments about traditional copyright policy considerations, including fairness.

Despite early signs that the willing buyer–willing seller standard may not yield the rate increases publishers and songwriters sought, any overall rate increases may also raise a concern on the horizon for DSPs. Phonorecords III, which set rates for 2017 to 2022, was the last CRB proceeding conducted under the pre-MMA standard judged by 801(b) factors, and it introduced the most significant rate increase in the CRB's history when it increased the headline rate from 10.5% of DSP's revenue to 15.1%.[213] The DSPs appealed this major win for publishers and songwriters, and not long after the CRB affirmed Phonorecord III on appeal, Spotify and YouTube music raised their prices just a few days apart from each other, indicating that when incentives to copyright holders improve, the access variable, in turn, is affected as well.[214] Apple Music and Amazon Music also raised their prices the year before in 2022.[215] While this price increase occurred in the aftermath of the Phonorecords III, a proceeding that was not the product of MMA legal changes, it raises questions about the cost of the willing buyer–willing seller rate should it achieve its intended outcome of increasing copyright holder compensation. Increased royalty rates are of particular concern for Spotify, which has operated at a loss every year since its founding despite being the United States' most popular music streaming platform.[216] As indicated by the price hikes, the burden of licensing costs is ultimately passed on to the consumer and impinges on public access to

211. *Id.* at 1. "Historical quantum" refers to the amount of revenue historically paid by DSPs, which composed the royalty pool prior to the DSPs' proposal.

212. *Id.* at 1, 5.

213. PASSMAN, *supra* note 20, at 235–36.

214. Erik Hayden, *Spotify Officially Hikes Prices of Premium Plans*, HOLLYWOOD REP. (July 24, 2023, 4:42 AM), https://www.hollywoodreporter.com/business/business-news/spotify-price-raise-12355 31034 [https://perma.cc/A44U-3W96].

215. *Id.*

216. *Online Music Services Used Most Frequently in the United States as of January 2024*, *supra* note 36; *Spotify Net Income/Loss 2009 to 2023*, STATISTA (May 29, 2024), https://www.statista.com/ statistics/244990/spotifys-revenue-and-net-income [https://perma.cc/UJ3Q-VKJG].

copyrighted works. Nonetheless, while this concern remains in the background, the balance between access and incentive likely still demands an increase in consumer prices to effectuate the increased incentive necessary to salvage the songwriting profession.

TABLE 2. Pre- and Post-MMA Policy Concerns

Policy Goal	*Pre-MMA Score*	*Post-MMA Score*
Incentives	Incentive for songwriters is *LOW*; attributable to a minimal statutory royalty rate, governmental restrictions on *both* types of songwriters' royalties, and industry structure providing equal payout between publishers and songwriters.	*MARGINALLY IMPROVED*. It will require several more years to see how much the MMA altered incentives for creators. However, songwriter testimony strongly suggests that creators at the bottom of the copyright chain of value have not seen the MMA substantively move the needle on the incentive variable. This remains an urgent problem in the copyright policy triad, indicating that the equilibrium of policy goals remains unbalanced.
Access	Access is *HIGH* in the short term, with concern that this variable may shift if DSPs continue operating at a deficit.	*HIGH*, but the same problem remains as prior to the MMA. Costs will likely be pushed onto the consumer if royalty rates continue to rise in response to the unsolved incentive variable.
Transaction Costs	Transaction costs are *HIGH*. While the compulsory license reduces transaction costs of licensing negotiation, matching royalties to songwriters imposes high transaction costs for DSPs and songwriters alike.	*VASTLY IMPROVED*. The MLC has effectively begun to reduce transaction costs by mimicking the collective licensing and blanket license model of other areas of copyright law. It will take several more years to see the full efficiency of the MLC, but it has driven strong results thus far.

III. CONSIDERATIONS FOR THE FUTURE

A. APPROACHING THE FIRST MLC FIVE-YEAR REVIEW

Section 102(a)(3)(B)(ii) of Title I of the MMA calls for periodic review of the MLC's designation by the Copyright Office every five years to review the entity's functioning and determine whether the MLC shall continue its designation as the MMA's chosen organization to orchestrate and manage mechanical licensing.[217] January 2024 marked the beginning of this first review period, though it remains uncertain what the scope of this review will include.[218] The MMA suggests that the Copyright Office will solicit information to assess only the high-level question of continued designation rather than initiating a review with further recommendations or imperatives for the MLC's improvement.[219] Some songwriters hoped the review would include more, having raised concerns on various alleged issues regarding songwriter representation within MLC's Board and other critiques beyond the scope of this Note.

Currently, no known reason exists to suspect that MLC's designation will change. The MLC attained substantial achievements thus far in a short time, establishing its infrastructure, creating a robust and growing database, building out resources, and paying out upwards of $1.5 billion in royalties.[220] Its success was publicly affirmed by an array of industry players in a June 2023 House Judiciary Committee hearing on the MMA's five-year milestone.[221] Even with successes, there has been insufficient time to prove the MLC's full success or to render it ineffective so as to cause a deeper assessment of the MLC's designation.

B. RECONSIDERING THE COMPULSORY MECHANICAL LICENSE: THEORETICAL SHIFTS VERSUS INDUSTRY REALITIES

A handful of songwriters have used the pending five-year review as a moment to demand another, more fundamental review of the music licensing system—a review of the mechanical compulsory license.[222] The Copyright

217. Orrin G. Hatch–Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, § 102(a)(3)(B)(ii), 132 Stat. 3676, 3686–87 (2018).

218. Mandy Dalugdug, *US Copyright Office Launches Review of the MLC and DLC's Designations*, MUSIC BUS. WORLDWIDE (Jan. 31, 2024), https://www.musicbusinessworldwide.com/us-copyright-office-launches-review-of-the-mlc-and-dlcs-designations [https://perma.cc/FW7E-TSXR].

219. Music Modernization Act § 102(a)(3)(B)(ii).

220. *See supra* Section II.A. *See generally Five Years Later: The Music Modernization Act: Hearing Before the Subcomm. on Courts, Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 118th Cong. (2023) [hereinafter *Five Years Later: The Music Modernization Act*].

221. *Five Years Later: The Music Modernization Act*, *supra* note 220.

222. Dylan Smith, *Copyright Office Declines to Revisit the Section 115 Compulsory License—'It Would Be Premature at This Time to Engage in a New Study,'* DIGIT. MUSIC NEWS (Aug. 29, 2023), https

Board outright rejected this suggestion, stating that because only two and a half years have passed since the MMA's licensing changes were implemented, it would be "premature at this time to engage in a new study of the Section 115 license."[223]

While this demand was more of a pipe dream—and not within the MMA's review requirements—the early success of the MLC certainly calls into question the basic necessity of a compulsory license. The mechanical compulsory license was once a fix-all solution to calibrating incentive, access, and transaction costs, but now, the MMA's new collective licensing organization and blanket licensing system appear to pull their weight in correcting transaction costs. Even before the MMA implemented this model, it has been effective in multiple other areas of music copyright law as a solution to mass licensing numerous small, discrete pieces of content. Meanwhile, the compulsory aspect of the mechanical license continues to prevent a recalibration of the access-incentive equilibrium vis-à-vis an unprecedentedly high level of access and demand for music and an unprecedently low level of songwriter incentive to create it.

Theoretically, abolishing the mechanical compulsory license likely makes sense. In addition to being an anomaly in the American system, today, the U.S. remains the only country outside Australia to maintain compulsory licensing for mechanical rights.[224] Its use has also clearly been controversial throughout its history; in 2004, at the earliest outset of streaming in the music industry, then-Register of Copyrights Marybeth Peters called on the House Judiciary Committee to eliminate the compulsory license, recognizing that it violated basic principles of copyright policy and was a deviation from music licensing norms in the rest of the world.[225] Traditional economic assumptions would strongly suggest that, given the music copyright system's intense reliance on mechanical licenses, high demand from licensees would compel licensing parties to reach a deal reflective of free market demand without obligating composition rights holders to license their work under a

://www.digitalmusicnews.com/2023/08/29/copyright-office-section-115-compulsory-license-review [https://perma.cc/VUC2-WC3W].

223. *Id.*

224. *Section 115 Compulsory License: The Register of Copyrights Before the Subcomm. on Courts, the Internet and Intell. Prop. of the H. Comm. on the Judiciary*, 108th Cong. (2004) [hereinafter *Section 115 Compulsory License*] (statement of Marybeth Peters, Register of Copyrights), https://www.copyright.gov/docs/regstat031104.html [https://perma.cc/Q3Z3-PEHR].

225. *Id.*; Chris Castle, *Five Things Congress Could Do for Music Creators That Wouldn't Cost the Taxpayer a Dime Part 2: Update the Compulsory License for Songwriters*, HUFFPOST (Aug. 5, 2013, 3:23 PM), https://www.huffpost.com/entry/five-things-congress-coul_b_3700995 [https://perma.cc/RSD9-B3GD]. Interestingly, Marybeth Peters also noted, twenty years before the MMA's implementation, that collective administration of rights like those used in public performance rights would likely provide a successful alternative. *Id.*

compulsory regime. In other areas of copyright law, the free-market forces are continually presumed to engender a successful equilibrium between incentive and access, and both here and in other licensing regimes, the blanket licensing scheme has compensated for other concerns by accounting for transaction costs.

Still, while copyright's theoretical underpinnings may support such a change, it is widely accepted throughout the music industry that its abolition will never happen. The Copyright Office asserted that review of the compulsory licenses would be "premature" at this juncture and did not rule out the possibility somewhere down the line, should the implications of the MMA be more fully played out and the MLC prove a comprehensive alternative.[226] However, throughout decades past, music industry players have voiced overpowering concerns that eliminating the compulsory license would cause "unnecessary disruptions" in the dynamics of the music industry.[227] Even more critically, a vast majority of the music industry's convoluted legal patchwork is owed to the outsized influence of vigorous and effective lobbying in Congress at the expense of copyright holders. Far too many players in the copyright landscape depend upon the compulsory mechanical license's below-market rates, and lobbying forces at record labels, DSPs, radio stations, and beyond will likely ensure that this reality never comes to fruition.[228]

C. SONGWRITERS' CONTINUED PLIGHT POST-MMA

Despite the MLC's relative successes thus far, the MMA's fundamental flaw may be that it fixed the glaring problem of untenably burdensome transaction costs without addressing the looming, more existential incentive problem, which lies at the very core of copyright policy. In many ways, the distressing pre-MMA stories and statistics about songwriters explored in this Note have carried into the present day. As Grammy-nominated songwriter Erika Nuri Taylor told the Washington Post in 2023, "I got my real estate license [three years ago] because I thought I'm not going to be able to sustain being a creative person, a songwriter, for the next 10 to 15 years if nothing changes in the music industry."[229] Taylor, who has written for the likes of Enrique Iglesias, Janelle Monáe, and Meghan Trainor and has been a professional songwriter since 1992, says that her royalty income has been cut in half over the past five years, even after the hopeful enactment of the

226. Smith, *supra* note 222.
227. *Section 115 Compulsory License*, *supra* note 224.
228. Tim Cohan, Peermusic Chief Couns., The A to Z of Music Streaming, Panel at USC Gould School of Law Institute on Entertainment Law and Business (Oct. 14, 2023).
229. Andrews, *supra* note 100.

MMA.[230] Today, she reluctantly considers herself a full-time real estate agent, holding out hope that she can still write songs on the side despite it once being her entire career. Her testimony is just one of many that have persisted after the MMA's enactment.

Many songwriters will continue to create for the love of it, seeing their art form as a "spiritual calling" for which they have made great sacrifices.[231] Perhaps this indicates that despite great financial pressures, the songwriter profession may evolve to become less reliant on copyright's promise of financial remuneration and will continue to be driven by an intrinsic desire to create. Alternative theories of copyright address this objection, arguing that perhaps copyright ownership and its accompanying "incentives" to create actually play a very minimal role in motivating creative work.[232] However, even amidst these alternative considerations and the possibility that songwriters may still create outside the bounds of adequate copyright incentives, songwriters persistently indicate the impact that low royalty rates across both mechanical and public performance royalties have on songwriting as a profession beyond its persistence as an art form.[233] Another songwriter cites that modern-day music no longer reflects the caliber of decades past because much talent is lost when many just "can't afford to do it anymore."[234] In practice, modern copyright regimes serve as the foundation for entire creative industries; here, the music copyright system's success dictates the success of the music industry as a whole, making it rather alarming when copyright laws fail to sustain their promise of a "fair return" for the class of creators upon which the music industry is built, resulting in the dying of one of the industry's most integral professions.[235]

Notably, there are also some critical confounding variables at play in the songwriter's plight beyond anything the drafters of the MMA could have predicted. Given that the CRB did not finalize the DSPs' appeal of the Phonorecords III rates for 2018 to 2022 until August 2023, the MLC could not pay out royalties for that term without established rates; this ultimately delayed the full payment of an additional $700 to 800 million in streaming royalties over the past five years.[236] From the rights holders' perspective, even while their royalties may have been increasing on paper since 2018, in reality, they have seen no such improvement in their financial circumstances,

230. *Id.*
231. *Id.*
232. *E.g.*, Julie E. Cohen, *Copyright as Property in the Post-Industrial Economy: A Research Agenda*, 2011 WIS. L. REV. 141, 143–45 (2011).
233. *See supra* Section I.D.1.
234. Andrews, *supra* note 100.
235. *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 546 (1985).
236. Songwriters of North America et al., *supra* note 177.

as their payments have been frozen at 2017 rates well into 2023. Many in the industry felt the arduous appeal process was disastrous for the publishing and songwriter economy, and Phonorecords IV ended in a settlement in large part because music publishers were adamant about avoiding the impossibly burdensome costs of litigation and further wreckage it could cause for songwriters and publishers.

Until composition rights holders receive full payment from Phonorecords III and routine payments on Phonorecords IV, it is hard to judge the potential adequacy of Phonorecord IV rates that arise from the MMA's new rate standard or, more generally, how effective the financial incentives are for songwriters within the current copyright licensing system. Further, as suggested by the Copyright Office, it may take several more years for the MMA's efficacy to come into full view, as both the MLC works toward achieving its envisioned efficiency and the willing buyer–willing seller gets tested in the Phonorecords V CRB proceeding.

CONCLUSION

In June 2023, the U.S. House of Representatives marked the MMA's impending five-year anniversary with a House Judiciary hearing in Nashville, reopening a conversation with representatives from across the music industry about the law's realized impact since its implementation in 2018.[237] As discussion resumes on Capitol Hill, there is a renewed opportunity to reflect on the underlying objectives of a music copyright system and whether Title I has brought the current legal regime closer to those aims. Sustained conversation on these issues is more pressing than ever, as many in the music industry fear disruptive impact of artificial intelligence on a system already in slow rehabilitation from the shift to the digital age.

In taking stock of the industry's current position, Title I of the MMA represents a major success in many ways. Its actualization was made possible by an unprecedented will within the music industry, with often opposing parties rallying behind the conviction that the music copyright system urgently needed to change. Title I of the MMA has pulled the industry from the brink of crisis, effectively eliminating untenable transaction costs that left an antiquated licensing system nearly non-functional.

In other ways, however, Title I also represents a band-aid solution to a crisis that boiled over in a fragmented legal scheme—a consequence of years of balkanized laws and decision-making heavily influenced by lobbying

237. *See generally Five Years Later: The Music Modernization Act*, *supra* note 220.

forces rather than fully reasoned policy. The industry's united front may have emerged not from a desire to affirm value of the copyright system or artists' creative works, but merely from the recognition that there was no other way out beyond a legal solution. As a result, Title I of the MMA has achieved relatively marginal results for one of its central aspirations and one of the industry's most looming concerns—the hollowing out of the songwriting profession. The plight of the songwriter thus remains one of the music industry's most fundamental yet unanswered problems in the digital age.