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One Step Forward or Two Steps Back for the Music Industry: Analyzing the Statutory and Practical Issues in Title I of the Music Modernization Act

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One Step Forward or Two Steps Back for the Music Industry: Analyzing the Statutory and Practical Issues in Title I of the Music Modernization Act

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TABLE OF CONTENTS

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I. INTRODUCTION

The Music Modernization Act of 2018 ("MMA") codified the most significant reform to copyright law and music industry practices in over two decades.[1] Across three titles, the landmark statute: (1) established a new system of blanket licensing for digital service providers ("DSPs"), like Spotify and Apple Music; (2) authorized the creation of the Mechanical Licensing Collective ("MLC"), a centralized non-profit organization, to administer blanket mechanical licenses and distribute royalty payments to songwriters; (3) created a legal remedy for the collection of royalties on 'unprotected' sound recordings fixed before the 1972 Copyright Act; and (4) enacted a new scheme for record producers, engineers, and mixers to receive royalty payments.[2] While DSPs, major music publishers, and politicians hailed the MMA as a massive step forward for the music industry, the MMA also reinforced the industry's existing hierarchies.[3] Namely, as this Note argues, the Act left independent songwriters, producers, and publishers without equal representation on the MLC, created inequitable structures for the distribution of unmatched royalties, and limited the remedies available to plaintiffs pursuing litigation against major streaming services.

The three titles of the MMA cover a broad range of music copyright concerns. Title I, the "Musical Works Modernization Act," revised Section 115 of the Copyright Act to create a new blanket license for compulsory mechanical licensing of musical works.[4] Title I also established the new Mechanical Licensing Collective to administer the royalties resulting from that compulsory license.[5] Title II, the "Classics Protection and Access Act," incorporated pre-1972 sound recordings into the federal copyright system.[6]

1. Dani Deahl, *Senate Passes Music Modernization Act*, THE VERGE (Sept. 18, 2018, 4:08 PM), https://www.theverge.com/2018/9/18/17876660/senate-passes-music-modernization-act.

2. Tyler Ochoa, *An Analysis of Title I and Title III of the Music Modernization Act, Part 2 of 2 (Guest Blog Post)*, TECH. & MKTG. L. BLOG (Jan. 22, 2019, 9:01 AM), https://blog.ericgoldman.org/archives/2019/01/an-analysis-of-title-i-and-title-iii-of-the-music-modernization-act-part-2-of-2-guest-blog-post.htm.

3. *Id.*

4. *Id.*

5. *Id.*

6. Tyler Ochoa, *An Analysis of Title II of Public Law 115-264: The Classics Protection and Access Act (Guest Blog Post)*, TECH. & MKTG. L. BLOG (Oct. 24, 2018), https://blog.ericgoldman.org/archives/2018/10/an-analysis-of-title-ii-of-public-law-115-264-the-classics-protection-and-access-act-guest-blog-post.htm.

Lastly, Title III, the "Allocation for Music Producers Act," modified existing copyright law to allocate sound recording royalties to music producers, mixers, and sound engineers.[7]

Upon its passage in October 2018, the MMA received broad acclaim from many corners of both Washington, D.C. and the music industry.[8] The MMA represented a remarkable political and commercial success. The bill passed with unanimous consent in both the House and the Senate.[9] Music industry leaders praised the MMA as an "unprecedented consensus between music creator groups, music publishers, performing rights societies, records labels, and the groups representing digital services providers, the Digital Media Association and the Internet Association."[10] Politicians praised the bipartisanship in Congress and collaboration in the music industry that led to the MMA's passage.[11] Numerous lawyers in the industry argued the bill would "revolutionize the way songwriters get paid in America."[12] However, despite the praise given to the achievements and collaboration between the many parties involved, copyright law scholars also noted that those gains "[came] with the costs of further entrenching existing stakeholders and business models in statutory language" and "erecting barriers to entry for new entities in the form of an impenetrable tangle of statutory language that deters all but repeat players from engaging in the system."[13]

This Note focuses specifically on a number of prominent issues arising out of Title I of the MMA. Part II of this Note explains the relevant copyright laws implicated in the streaming of music and altered by the MMA. Part III explores the MMA's new blanket licensing system. Part IV probes the flaws related to the structure of the new Mechanical Licensing Collective. Part V analyzes the conflicts of interests inherent in the MLC's practices for allocating unmatched royalty monies. Part VI looks at the implications of the liability limitation provisions granted to DSPs in exchange for their participation in the MMA. Finally, Part VII offers several considerations for the future of the MMA and the MLC.

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7. Ochoa, *supra* note 2.

8. Amy X. Wang, *Music Modernization Act Passes, Despite Music Industry Infighting*, ROLLING STONE (Sept. 18, 2018), https://www.rollingstone.com/pro/news/music-modernization-act-passes-despite-music-industry-726091/.

9. David Israelite, *The Music Modernization Act Marks a New Era for the Music Industry*, NAT'L MUSIC PUBLISHERS' ASS'N (Oct. 23, 2018), https://www.nmpa.org/david-israelite-the-music-modernization-act-marks-a-new-era-for-the-music-industry/.

10. *Music Modernization Act: A Breakdown*, SXSW, https://www.sxsw.com/wp-content/uploads/2018/03/LaPolt-MMA-CLE-Materials.pdf (last visited Nov. 16, 2023).

11. *The Creation of the Music Modernization Act*, U.S. COPYRIGHT OFF., https://web.archive.org/web/20230515182519/https://www.copyright.gov/music-modernization/creation.html (last visited Apr. 15, 2023).

12. Ben Sisario, *New Way to Pay Songwriters and Musicians in the Streaming Age Advances*, N.Y. TIMES (June 28, 2018), https://www.nytimes.com/2018/06/28/business/media/music-copyright-digital-services.html.

13. Ochoa, *supra* note 2.

II. OVERVIEW OF PERTINENT COPYRIGHT LAW

A. COPYRIGHT IN THE CONSTITUTION

Copyright protection is authorized by the language of the Constitution.[14] Article I grants Congress the power "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[15] Copyrights promote "Progress" by providing authors with a "limited duration monopoly" over original works of authorship in order to incentivize the creation and distribution of such works of authorship.[16]

Copyrights in music define and protect two discrete categories of protected works, "musical works" and "sound recordings."[17] Any given music recording embodies both of these protected copyrights.[18] The "musical work" refers to the song's composition, encompassing both the music and lyrics of a song.[19] The sound recording, or "master," refers to the actual recorded sounds heard when streaming a song.[20] The crux of the issues addressed in the MMA—and this Note—deal with points related to copyrights in musical works.

B. SECTION 106 OF THE COPYRIGHT ACT

Section 106 of the Copyright Act grants several exclusive rights to owners of valid musical work and sound recording copyrights including: the right to reproduce the work in copies[21] or phonorecords,[22] the right to prepare derivative works based upon the copyrighted work (i.e. a remix), the right to distribute copies or phonorecords, the right to publicly perform the musical work, and, in the case of sound recordings, the right to "perform the copyrighted work publicly by means of a digital audio transmission."[23]

14. U.S. CONST. art. I, § 8, cl. 8.

15. *Id.*

16. "Progress" citation from U.S. Const. art. I. § 8, cl. 8; DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 211 (Simon & Schuster, 10th ed. 2019).

17. 17 U.S.C. § 102(a).

18. PASSMAN, *supra* note 16.

19. 17 U.S.C. § 102(a)(2).

20. PASSMAN, *supra* note 16, at 79.

21. 17 U.S.C. § 101 defines "Copies" as "material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "copies" includes the material object, other than a phonorecord, in which the work is first fixed."

22. 17 U.S.C. § 101 defines "Phonorecords" as "material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed."

23. 17 U.S.C. § 106.

Every single stream of a song on platforms like Spotify implicates both the sound recording, the musical work, and several of the exclusive rights granted to these categories of copyrights.[24] Regarding musical works, streaming a single song implicates the exclusive rights of reproduction, distribution, and public performance.[25]

Broadly speaking, the reproduction right means that if a musician writes a song, no one else can publish it as sheet music or otherwise copy it without that musician's permission, including in the form of a sound recording.[26] The distribution right, closely tied to the reproduction right, gives the author control over the first distribution of copies or phonorecords of the musical work.[27] Finally, the right to publicly perform the work means that permission from the copyright owner is required any time someone "performs" a copyrighted musical work publicly. Performing publicly includes playing the musical work on the radio, streaming it on Spotify, and more.[28]

C. OWNING AND ASSIGNING THE EXCLUSIVE RIGHTS IN A COPYRIGHT

Ownership of the musical work and sound recording copyrights, along with their relevant exclusive rights or any subdivision of those rights, can be assigned, licensed, and defined by contract.[29] Initial ownership of either copyright vests in the creators of the musical work and the sound recording respectively.[30] However, record labels typically obtain ownership of the sound recording copyright via the label's record deal with the artist, while publishing companies acquire ownership of the musical work copyright via publishing deals.[31]

Publishing companies work on behalf of songwriters to issue licenses and collect money for any commercial use of the musical work.[32] In exchange, songwriters typically sign over the copyright in the musical work to the publishing company and agree to split all respective income with the publisher.[33] Importantly, a single song may have multiple songwriters who can all own a specific percentage of the musical work copyright in that song.[34] Songs written for massive pop artists, such as Beyoncé for example, frequently involve more than five songwriters, each of whom might work

24. PASSMAN, *supra* note 16, at 232.
25. *Id.*
26. *Id.* at 213.
27. *Id.*
28. *Id.* at 225.
29. *Id.* at 212.
30. 17 U.S.C. § 201(a).
31. PASSMAN, *supra* note 16, at 76, 220.
32. *Id.* at 220.
33. *Id.*
34. *Id.* at 292.

with a different publisher to manage that songwriter's share of the musical work copyright.[35]

In order to host a song for streaming, DSPs must obtain licenses from the owners of the relevant exclusive rights in the musical work and the owners of the relevant exclusive rights in the sound recording.[36] Hosting songs for streaming without all proper licenses constitutes copyright infringement.[37] For example, if Spotify did not have proper licenses for every record on the platform, they could be held responsible for infringing millions of copyrights every day.[38] Record labels typically issue the licenses for sound recording copyrights.[39] Licenses for the musical work historically exist in two forms: (1) blanket licenses to publicly perform the musical work, typically issued by performing rights organizations and (2) mechanical licenses to reproduce and distribute the musical work, usually issued by the publishing company.[40]

With blanket licenses, publishers grant certain rights in their entire catalogues to a collection society.[41] In the case of public performance blanket licenses, publishers grant the ability to license their catalogue's musical work public performance rights to a performing rights organization (e.g., ASCAP and BMI).[42] The performing rights organization amasses rights from numerous publishers, then sells a "blanket license" to users covering the public performance rights in all of the respective publishers' catalogues.[43] In other words, rather than having to seek out individual licenses from every rightsholder, users can pay for a single blanket license that covers all the rights controlled by that collection society.[44]

Mechanical licenses pertain to the right to reproduce and distribute a musical work.[45] Reproductions and distributions of a musical work historically included the literal, physical reproduction and distribution of sheet music and phonorecords of sound recordings that embody the underlying musical work.[46] Today, as explained below, streaming services technically reproduce and distribute temporary copies of the musical work

35. *See generally* PASSMAN, *supra* note 16, at 299-300.

36. Henry Gradstein, *How the Music Modernization Act Takes Royalties From DIY Songwriters and Gives Them to the Major Publishers (Guest Column)*, BILLBOARD (Mar. 2, 2018), https://www.billboard.com/pro/music-modernization-act-royalties-diy-songwriters-henry-gradstein/.

37. *Id.*

38. *Id.*

39. PASSMAN, *supra* note 16, at 470.

40. *Id.* at 220, 227.

41. *Id.* at 226-27.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 215.

46. *Id.*

every time someone streams that song.[47] Monies generated from these reproductions and distributions are known as mechanical royalties.[48]

D. SECTION 115 OF THE COPYRIGHT ACT

While copyright owners typically maintain exclusive control over the licensing of their works, seven statutory "compulsory licenses" dictate certain instances where the statute itself automatically grants a license to a third party.[49] Section 115 of the Copyright Act establishes the "compulsory mechanical license" for musical works.[50] This compulsory licensing regime accounts for the making and distributing of phonorecords of so-called "nondramatic musical works," defined as any musical work except for opera and the entirety of musical theater soundtracks.[51]

In practice, the Section 115 compulsory mechanical license stipulates that after a sound recording of a nondramatic musical work is recorded and released to the public, any other person may reproduce the musical work without permission of the copyright owner, provided they notify the copyright owner and pay a specified royalty rate.[52] Before 2018, this provision pertained only to traditional sales of physical records and digital downloads (e.g., purchasing MP3s on iTunes).[53] Streaming services, like Spotify and Apple Music, threw a wrench into an already highly complicated system.[54]

As previously mentioned, streaming music on DSPs implicates the rights of reproduction and distribution—as well as the right of public performance—because every single stream of a record creates incidental reproductions and distributions of the music file.[55] In short, this means that every stream of a song creates a temporary copy of that song on the DSPs computer servers, which is then distributed to the user's device, creating additional temporary copies.[56] Each of those digital copies technically reproduce and distribute the underlying musical work, thus generating mechanical royalties owed to the owners of those rights. Therefore, DSPs need mechanical licenses for every musical work on their platforms, in addition to negotiated licenses for the sound recording copyrights, to comply

47. Gradstein, *supra* note 36.
48. PASSMAN, *supra* note 16, at 215.
49. *Id.*
50. 17 U.S.C. § 115(a).
51. *Id.*
52. PASSMAN, *supra* note 16, at 216.
53. *Id.* at 215.
54. *Id.* at 239-41.
55. *Id.* at 232.
56. *Id.*

with copyright law.[57] Herein lies the problem that the MMA attempts to fix.[58]

E. THE NEED FOR A NEW BLANKET LICENSE

While performing rights organizations like ASCAP allow DSPs to obtain blanket licenses that together cover the public performance rights for nearly all recorded music, no such organization or blanket license existed for digital reproduction and distribution rights prior to the passage of the MMA.[59] The lack of such an organization meant that DSPs had to seek out every publisher to obtain individual licenses covering every songwriter of every musical work on the platform.[60]

When streaming services launched, they "went into unchartered waters with their business model" and "quickly discovered that they were dealing with millions of songs, and billions of lines of data."[61] Furthermore, the digital delivery of the records to the DSPs typically did not come with the "metadata necessary to identify the copyright owner of the song embodied in the recording."[62] Even if the DSPs could identify the correct owners, they "weren't set up to handle tens of thousands of licenses from obscure publishers around the world."[63] To this day, these services take in "tens of thousands of new tracks *every day* and must license them properly."[64] Because DSPs license a massive volume of songs, this process proved both "ineffective and inefficient."[65]

As a result, the DSPs owed "tens of millions of dollars that they didn't know where to pay."[66] However, the DSPs did not wait to identify the correct owners before proceeding to offer those tracks for public streaming on their platforms.[67] Instead, they made the songs available to the public, without obtaining licenses from the respective copyright owners, resulting in countless instances of copyright infringement.[68] These circumstances set the stage for the collaboration that led to the drafting of the MMA.[69]

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57. *Id.* at 239.
58. *Id.*
59. *Id.* at 226, 240.
60. Bill Rosenblatt, *Here Are the Loopholes Closed by the Music Modernization Act*, FORBES (Oct. 11, 2018, 3:26 PM), https://www.forbes.com/sites/billrosenblatt/2018/10/11/music-modernization-act-now-law-leaves-one-copyright-loophole-unclosed/.
61. PASSMAN, *supra* note 16, at 239.
62. Gradstein, *supra* note 36.
63. PASSMAN, *supra* note 16, at 240.
64. Rosenblatt, *supra* note 60.
65. Kenneth J. Abdo & Jacob M. Abdo, *What You Need to Know About the Music Modernization Act*, 35 ABA ENT. AND SPORTS LAW. 1, (2019).
66. PASSMAN, *supra* note 16, at 240.
67. Gradstein, *supra* note 36.
68. *Id.*
69. PASSMAN, *supra* note 16, at 240.

The DSPs faced potential liability for a mountain of copyright infringement and unfair compensation claims due to their failure to properly acquire the requisite mechanical licenses.[70] Music publishers could have sued (and likely won) on these claims.[71] However, rather than pursuing costly, prolonged litigation, the music publishers decided to work with the DSPs to create a system that would both accurately pay out publishers and relieve the DSPs of their liability.[72] "I have no doubt that we could have sued them out of existence," David Israelite, president of the National Music Publishers Association, said of the infringing streaming services. "But we took a different approach," he continued; "we decided that we wanted to settle this and try to fix the problem, because we want them to be our business partners."[73] "In other words," writes lauded music attorney Donald Passman, "we had one of those rare times when both sides were aligned in their goals, and this kum-ba-ya moment gave birth to the MMA."[74]

III. THE CREATION OF A NEW BLANKET LICENSE AND THE MECHANICAL LICENSING COLLECTIVE

A. THE TRANSFORMATION OF MUSIC LICENSING UNDER THE MMA

Title I of the MMA significantly revised Section 115 of the Copyright Act by creating a compulsory blanket license and allowing DSPs to obtain that license for any "covered activities."[75] These activities include "making a digital phonorecord delivery of a musical work, including in the form a permanent download, limited download, or interactive stream."[76] In short, these covered activities describe the exact subject of a DSP's business – providing consumers with the "interactive" ability to choose the music they want to stream from a massive, online library of songs.[77]

The MMA's new blanket license grants users lawful access to millions of compositions.[78] The license authorization covers all musical works, even ones "whose copyright owners cannot be located."[79] Accordingly, DSPs no longer face the fraught, complicated task of identifying every song's correct

70. Sisario, *supra* note 12.
71. PASSMAN, *supra* note 16, at 240.
72. *Id.*
73. Sisario, *supra* note 12.
74. PASSMAN, *supra* note 16, at 240.
75. Ochoa, *supra* note 2.
76. 17 U.S.C. § 115(e)(7).
77. *See generally* About Spotify, SPOTIFY FOR THE RECORD, https://newsroom.spotify.com/company-info/ (last visited Apr. 15, 2023).
78. Jordan Bromley, *The Music Modernization Act: What Is It & Why Does It Matter? (Guest Column)*, BILLBOARD (Feb. 23, 2018), https://www.billboard.com/pro/music-modernization-act-what-is-it-why-does-it-matter-jordan-bromley/.
79. Lydia Pallas Loren, *Copyright Jumps the Shark: The Music Modernization Act*, 99 B.U. L. REV. 2519, 2530 (2019).

copyright holder, contacting the respective publishers, obtaining individual licenses, and accounting to all parties involved.[80] Instead, as long as DSPs comply with the MMA's requirements, they may obtain this new blanket license that covers all of those steps.[81] This means DSPs faced a dramatically reduced risk of litigation for infringing copyrights.[82]

B. THE ROLE OF THE MLC

The MMA also authorized the US Copyright Office to designate an independent, not-for-profit collections society known as the "Mechanical Licensing Collective."[83] The MLC functions as the "central hub from which streaming services will obtain permission to use the millions of songs found on their platforms, and through which songwriters will be paid."[84] The MMA specifies in great detail how exactly the entity will be formed and governed.[85] In an intriguing arrangement, the DSPs fund the MLC through either "voluntary contribution . . . determined by private negotiation and agreement" with copyright holders, or in the form of an "administrative assessment" to be determined by the Copyright Royalty Board.[86]

The MMA authorizes the MLC to perform thirteen enumerated functions including: offering and administering blanket licenses, collecting and distributing royalties, identifying and locating the copyright owners of musical works, processing unclaimed royalties, and more.[87] To effectively manage the intake of musical work copyright information and process royalty payments to respective parties, the MMA requires the MLC to create and maintain a database containing exhaustive information about all licensed musical works.[88] This database must be publicly accessible "in a searchable, online format, free of charge."[89] To calculate royalty payments, DSPs must submit monthly streaming reports to the MLC, covering all "usage data for musical works under the blanket license."[90] Once the MLC receives these reports and payments from the DSPs, the MLC must (1) match the streamed recording in the DSP reports to the respective copyrighted musical work based on information in the MLC database; (2) identify the different copyright owners and publishers; (3) identify what portion of the song each

80. Gradstein, *supra* note 36.
81. 17 U.S.C. § 115(d)(1)(B).
82. Loren, *supra* note 79.
83. 17 U.S.C. § 115(d)(3).
84. Israelite, *supra* note 9.
85. 17 U.S.C. § 115(d)(3).
86. 17 U.S.C. §§ 115(d)(7)(A)(i), (d)(7)(B)(i).
87. Ochoa, *supra* note 2.
88. 17 U.S.C. § 115(d)(3)(C)(i).
89. 17 U.S.C. § 115(d)(3)(E)(v).
90. 17 U.S.C. § 115(d)(4)(A)(i), (ii).

party controls; (4) calculate the exact royalties owed to each party; and (5) determine where to send payments.[91]

Given the prior labyrinthine licensing system, the MLC database arrived as a streamlined and potentially game-changing solution. Never before had the industry successfully created a single, central hub for the collection of musical work rights information that could also function as a payment portal for all songwriters around the world. On paper, the MLC provides a centralized, public, and transparent system for gathering copyright ownership information and paying out artists.[92] Structurally, the creation of an organization that publishers control and DSPs fund feels like a major coup for the publishing industry. As one writer put it, "the best database is one that you control and someone else pays for."[93]

The creation of the database received familiar laudatory refrains from industry leaders. David Israelite noted that "never before have we committed as a unified community to delivering an open, accessible database to ensure musical work owners are paid and information – and the royalties stemming from that information – is not lost."[94] Music lawyer Jordan Bromley posited that a comprehensive, accurate database will mean "no more politicization of information [at] the expense of progress.[95] In theory, this database deserves all of these plaudits. However, in practice, both the MLC and the database raise several concerns.

C. CHALLENGES IN PRACTICAL IMPLEMENTATION, AND POSSIBLE SOLUTIONS

As an initial matter, the novelty of the database may also herald its pitfalls given that no "complete and accurate database of rights information" previously existed.[96] Rather, users are responsible for submitting their own information and effectively building out the platform.[97] The success of the database effectively depends on the participation of the global songwriting community. The database website even states, "the accuracy and completeness of The MLC's data is determined solely by our Members."[98]

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91. Gradstein, *supra* note 36.

92. Jordan Darville, *What Every Songwriter and Publisher Needs to Know About the Music Modernization Act*, THE FADER (July 9, 2019), https://www.thefader.com/2019/07/09/music-modernization-act-explainer-interview-david-israelite.

93. Robert Levine, *Congress Should Tweak—and Pass—the Music Modernization Act (Column)*, BILLBOARD (Apr. 20, 2018), https://www.billboard.com/pro/congress-music-modernization-act-fixes-changes-column/.

94. Israelite, *supra* note 9.

95. Bromley, *supra* note 78.

96. Levine, *supra* note 93.

97. *Id.*

98. *The MLC Public Work Search*, THE MLC, https://portal.themlc.com/search#work (last visited Apr. 15, 2023).

The extra burden on users is seemingly outweighed by the potential benefits of accurate, streamlined royalty payments. However, the creation of the database puts "further weight on the shoulders of publishers and songwriters, who will need to enroll their entire catalog with the agency after already registering the songs with the copyright office, the performing rights organizations" and several other industry entities.[99] For artists with managers and lawyers who can handle all of these submissions, this may pose no problem at all. In contrast, other underground and independent artists may not even be aware that such an entity exists.

As a practical matter—though admittedly one of personal opinion—the current website itself is slow, inconsistent, and not user-friendly. A single search for a prominent songwriter yielded six different profiles all seemingly for the same, one person.[100] The site launched on January 1, 2021, so any criticism should be tempered by the relatively short lifespan of the database.[101] However, such a project will require many years to live up to its accolades as a revolutionary resource.

One potential, proposed solution would require that all new music uploaded to streaming services include thorough metadata covering accurate records of copyright ownership.[102] Similarly, digital music distribution companies, like TuneCore or CD Baby, that often work with independent artists, could be tasked with supplying "all of the necessary personal information with their digital music file so every copyright owner is properly identified."[103]

Alternatively, the MLC could launch a marketing campaign to encourage songwriters to register their works. The companies involved in creating and financing the MLC collectively value in the billions.[104] Since those same companies have widely praised the launch and future potential of the database, they also stand to benefit from pooling even a moderate amount towards efforts to educate and encourage registration amongst songwriters around the world. If the success of the platform depends on its users, then any effort to attract users should rank as a top priority.

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99. Al Evers, *What's Wrong With the Music Modernization Act*, FOSS FORCE (Apr. 15, 2019), https://fossforce.com/2019/04/whats-wrong-with-the-music-modernization-act/.

100. MLC Public Work Search for Jason Evigan, THE MLC, https://portal.themlc.com/search#work, (search under "Work Title" field).

101. *The MLC: History & Milestones*, THE MLC, https://www.themlc.com/milestones (last visited Nov. 11, 2023).

102. Jillian J. Dahrooge, *The Real Slim Shady: How Spotify and Other Music Streaming Services are Taking Advantage of the Loopholes Within the Music Modernization Act*, 21 J. HIGH TECH. L. 199, 231 (2021).

103. *Id.* at 232.

104. Barbara Collins, *How Spotify Stayed No. 1 in Streaming Audio Even With Apple, YouTube, and Amazon Aiming for It*, CNBC (Nov. 10, 2022, 3:10 PM), https://www.cnbc.com/2022/11/10/how-spotify-stayed-no-1-in-streaming-music-vs-apple-youtube-amazon.html.

IV. ISSUES RELATED TO THE MLC BOARD

The makeup of the MLC Board of Directors ("MLC Board") raises several points of concern regarding equal representation, conflicts of interest, and lack of accountability. In July 2019, the Copyright Office designated a group comprised of the National Music Publishers Association, the Nashville Songwriters Association International, and the Songwriters of North America to build and operate the MLC.[105] These same parties helped spearhead the negotiation and drafting of the MMA.[106]

The MLC Board comprises fourteen members with ten seats held by major publishing companies and four seats held by individual, independent songwriters.[107] The voting distribution alone has the potential to "further entrench the control enjoyed by large music publishing companies."[108] As one critic noted, "in allowing for the music publishers to control a majority of the Board seats, the MMA creates the possibility that the music publishers' private objectives may conflict with the objective of the MLC."[109] The primary conflict centers on how the MLC Board's treatment of unmatched royalties—addressed in the following section—has the potential to financially benefit the Board members' respective companies.

Arguably, a group comprised of major publishers should spearhead the Collective. The MLC Board members share a common interest in the successful operation of a collective dedicated to improving the collection and distribution of royalty payments. Additionally, the group represents a unified front of major industry players coming together to improve longstanding industry issues. Conversely, the composition of the Board raises legitimate concerns about further entrenchment of power in the industry. The Board remains largely self-governed and unregulated.[110] The MMA requires that the MLC conduct an internal audit of its practices every five years.[111] However, the law lacks clarity on the rigor or metric for assessing the credibility of the audit.[112] Furthermore, the MLC will select its own auditor, with no "requirement that a thorough conflict check be done."[113] The MMA does not even specify that the auditor "be independent

105. Ed Christman, *U.S. Copyright Office Approves Mechanical Licensing Collective Sponsored by NMPA*, BILLBOARD (July 5, 2019), https://www.billboard.com/music/music-news/us-copyright-office-approves-mechanical-licensing-collective-sponsored-by-nmpa-8518805/.

106. *Id.*

107. Spencer Paveck, *All the Bells and Whistles, but the Same Old Song and Dance: A Detailed Critique of Title I of the Music Modernization Act*, 19 VA. SPORTS & ENT. L.J. 74, 83 (2019).

108. *Id.* at 93.

109. *Id.*

110. Daniel S. Hess, *The Waiting Is the Hardest Part: The Music Modernization Act's Attempt to Fix Music Licensing*, U. ILL. J.L. TECH. & POLICY, 187, 208 (2019).

111. 17 U.S.C. § 115(c)(3)(D)(ix)(II).

112. Hess, *supra* note 110, at 206.

113. *Id.*

or free of conflicts of interest."[114] As a result, the MLC may be "motivated to spend as little money as possible for an audit that's as toothless as possible."[115]

These provisions come as no surprise given that the MMA reached Congress effectively as "negotiated agreements between existing stakeholders."[116] Now, those same stakeholders occupy the key positions of power in shaping the implementation of that bill. As one music lawyer noted, "the songwriter groups who were allowed to participate in the drafting bear an ominous burden of responsibility."[117] The MLC has the power to dramatically improve the previously chaotic system of royalty payments. One hopes that the MLC's current structural issues do not hinder the potential for such systemic improvements.

V. THE MMA'S PROBLEMATIC TREATMENT OF UNMATCHED MONIES

The treatment of "unmatched monies" and royalties from "orphan works" is both the MLC's biggest imperative and the source of its most concerning flaw.[118] Every month, the DSPs must submit royalty payments alongside reports detailing the millions of tracks streamed on their services.[119] The MLC then takes these reports, matches the recordings to the underlying musical works, identifies the copyright owners and publishers, ascertains the percentages of that song that each owner and publisher controls, calculates the respective royalties, determines where to send the money, and then pays out that money to each party.[120] However, for several reasons, including simply missing information in the database, numerous copyright owners either cannot be identified or located.[121] If the MLC cannot identify or locate the owners of these "orphan works," the MMA requires the MLC to hold the royalties in interest-bearing accounts for at least three years after receipt or accrual of the royalties.[122]

114. Bill Rosenblatt, *Music Modernization Act Loses Opportunity to Clean Up Music Industry Data*, COPYRIGHT AND TECH. (Oct. 1, 2018), https://copyrightandtechnology.com/2018/10/01/music-modernization-act-loses-opportunity-to-clean-up-music-industry-data/.

115. *Id.*

116. Ochoa, *supra* note 2.

117. Christian Castle, *A Skeptical Look at the Music Modernization Act*, CHRISTIAN CASTLE (July 1, 2018), http://www.christiancastle.com/articles/2018/7/1/a-skeptical-look-at-the-music-modernization-act.

118. 17 U.S.C. § 115(d)(3)(E)(iii) (The term "unmatched works" reflects the language of the statute. The terms "unmatched works" and "orphan works" are used synonymously when in reference to the MLC).

119. Gradstein, *supra* note 36.

120. *Id.*

121. *Id.*

122. 17 U.S.C. § 115(d)(3)(g)(i).

This black box account of unmatched monies adds up to a "treasure trove of what can amount to hundreds of millions of dollars of licensing incoming that is not matched with compositions, and is therefore unable to be claimed and paid through."[123] Although exact numbers remain elusive, estimates place the total unmatched royalties in 2021 alone at nearly $562 million.[124] Under the MMA, the MLC must "maintain a publicly accessible online facility . . . that lists unmatched musical works (and shares of works)" and "engage in diligent, good-faith efforts to publicize the ability and procedures to claim unclaimed accrued royalties for unmatched musical works."[125] However, if the royalties remain unclaimed after the three years, the MLC may redistribute the unclaimed royalties and accrued interests to the other music publishers based on their market share.[126]

This arrangement sets up an inherent and substantial conflict of interest for the MLC. By law, the MLC must make a good-faith effort to locate the lawful recipients of the unmatched monies. However, if after three years the MLC cannot locate the proper payees, the MLC can redistribute the monies "among the same publishers that control [the MLC]."[127] In other words, the companies running the MLC can simply redistribute the money amongst themselves.[128] The MLC Board currently comprises representatives from nearly all of the major music industry publishers.[129] The publishers currently holding the largest market share—namely Sony, Universal, Warner, and BMG—are among the richest companies in the industry.[130]

Proponents of the MMA argued that this arrangement is an improvement over the previous system, where DSPs retained the unmatched money indefinitely.[131] These parties maintain that under the MMA "the money goes to the licensing entity, where we have the power to make sure it is distributed fairly."[132] While one might hope that a federally regulated entity would uphold such an ambitious, egalitarian mission, this arrangement presents a facially inherent conflict of interest. If the publishers who run the MLC do not find the owners of the work, they get to keep the money.[133] This kind of system does not provide "much of an incentive, other than

123. Bromley, *supra* note 78.

124. Dylan Smith, *Mechanical Licensing Collective (MLC) 'Unmatched Royalties' Approached $562 Million in 2021, Documents Reveal*, DIGIT. MUSIC NEWS (Feb. 3, 2023), https://www.digitalmusicnews.com/2023/02/03/mechanical-licensing-collective-black-box-royalties/.

125. 17 U.S.C. § 115(d)(3)(J)(iii).

126. *See* 17 U.S.C. § 115(d)(3)(J)(i)(II); *see also* Gradstein, *supra* note 36.

127. Levine, *supra* note 93.

128. *Id.*

129. Variety Staff, *Music Modernization Act's Mechanical Licensing Collective Takes Shape*, VARIETY (Feb. 5, 2019, 12:15 PM), https://variety.com/2019/biz/news/music-modernization-acts-mechanical-licensing-collective-takes-shape-1203127834/.

130. Gradstein, *supra* note 36.

131. *Music Modernization Act: A Breakdown*, *supra* note 10.

132. *Id.*

133. Levine, *supra* note 93.

transparency" to diligently seek out the lawful owners of the unmatched royalties."[134] As one copyright scholar more bluntly put it, "distributing unclaimed royalties from orphan musical works to other musical work copyright owners seems like little more than a naked money grab."[135]

Critics of this system note that the other publishers simply do not own the songs generating the unmatched royalties, yet they may now collect the royalties from those same songs.[136] As music lawyer Henry Gradstein puts it, "they have no more right to the unclaimed mechanical royalties than the stranger on the street."[137] The songwriters with unregistered or improperly registered copyrights typically comprise unsigned or foreign artists unfamiliar with the machinations of the American music industry and copyright procedures.[138] This reality, combined with the current treatment of unmatched monies, sets up an "insidious" and inequitable regime.[139] As Gradstein explains:

> "Distribution to publishers by market share rewards publishers in inverse proportion to any conceivable entitlement they may have to unclaimed royalties due to sophisticated systems and manpower deployed to make sure they get royalties due them. The larger a publisher's market share, the less likely it is they own unmatched songs. The MMA likely penalizes the group most likely to own unmatched songs, self-published songwriters, and codifies a disproportionate impact on minorities who are responsible for the most dominant genre of self-published music being ingested by the digital music providers today."[140]

Industry sources estimate that 25 to 30% of all the musical work copyrights will never get registered.[141] Unregistered works cannot receive money from the MLC.[142] An anonymous music industry source opined that "the struggling rapper from the inner city will never see that money – ever."[143]

Furthermore, the MMA requires the first distribution of unmatched royalties within the first year of operation (i.e., 2021).[144] In other words,

134. *Id.*
135. Ochoa, *supra* note 2.
136. Gradstein, *supra* note 36.
137. *Id.*
138. Paul Resnikoff, *Is the Music Modernization Act Enabling 'Legal Theft' Against Smaller Artists?*, DIGIT. MUSIC NEWS (May 7, 2018), https://www.digitalmusicnews.com/2018/05/07/music-modernization-act-mma-legal-theft/.
139. Gradstein, *supra* note 36.
140. *Id.*
141. Resnikoff, *supra* note 138.
142. Gradstein, *supra* note 36.
143. Resnikoff, *supra* note 138.
144. Gradstein, *supra* note 36.

Gradstein argues, the "MLC will not have had an adequate opportunity to match the sound recordings to the songs they embody, identify their copyright owners, encourage them to register or do much else in that time."[145] As a result, "the largest publishers are poised for an immediate windfall and the people that wrote the songs and earned the money will have their pockets picked without even knowing it."[146] In 2021, after the first round of royalty payments, the Artist Rights Alliance issued a statement arguing that "the major publishers that already settled with digital services and receive payment from them should not be allowed to claim a further share of the monies transferred to the MLC."[147]

Resolution of this conflict seems unlikely to come from within the MLC. The MLC operates an Unclaimed Royalties Oversight Committee that, in theory, offers a guardrail to make "recommendations to the Board on policies and procedures related to the distribution of unclaimed accrued royalties."[148] However, the bylaws of the MLC also dictate that music publishers must fill any vacancies on the Unclaimed Royalties Oversight Committee.[149] An oversight committee appointed by the members of the Board likely would not prioritize the resolution of a conflict already built into the MMA's procedures for distributing unmatched royalties. Such an arrangement only furthers the publishers' control over a process where they stand to profit significantly.

Gradstein proposes a compelling and simple solution: "unclaimed mechanical royalties should be maintained on deposit by the MLC indefinitely, for as long as it takes to be distributed to their rightful copyright owners."[150] Gradstein's solution seems immediately feasible and aligned with the purpose of the MLC. However, the MLC's Chief Executive Officer, Kris Ahrend, argued that "the whole point of that market share payout mechanism was to ensure that the MLC did not sit on pools of unpaid money indefinitely."[151] Ahrend justified this stance by noting: "the intent behind [the market share distribution] provision was to ultimately get that money back to rights holders and to make sure we don't sit idle with it for years or decades. Given this was the intent of Congress, we will honor that intent."[152] However, Ahrend's position seems inherently contradictory. If the provision

145. *Id.*

146. *Id.*

147. Evan Minsker, *Streaming Services Pay $424 Million in Unmatched Royalties to Mechanical Licensing Collective*, PITCHFORK (Feb. 16, 2021), https://pitchfork.com/news/streaming-services-pay-dollar424-million-in-unmatched-royalties-to-mechanical-licensing-collective/.

148. *Get Involved*, THE MLC, https://www.themlc.com/get-involved (last visited Apr. 15, 2023).

149. *Id.*

150. Gradstein, *supra* note 36.

151. 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/.

152. *Id.*

seeks to ensure that money reaches the rightful owners, why put limits on the search period for the lawful recipients? Moreover, why confine the statutory period to a mere three years?

It is possible that the publishing giants simply wanted to cap the period and allow the unmatched monies to flow to their companies. One legal scholar referred to the unmatched royalty provisions as a "major coup . . . won by the music publishing industry during MMA negotiations."[153] These arrangements appear as a victory for the publishing companies; but their victory almost certainly spells a loss for other less informed and underrepresented artists across the music industry. In its mission statement, the MLC proclaims that it "will strive to ensure songwriters, composers, lyricists, and music publishers receive their mechanical royalties … accurately and on time."[154] But, the current statutory and practical treatment of unmatched royalties casts a tarnished shadow across that mission.

VI. THE MMA'S LIMITATION OF LEGAL LIABILITY FOR DSPS

The MMA codified a contentious provision that limits a DSPs legal liability for prior unlicensed exploitations of musical works in any cases commencing on or after January 1, 2018.[155] So long as DSPs obtain the new blanket license from the MLC and comply with four statutory requirements, they receive a safe harbor from liability for any statutory damages resulting from copyright infringement of musical works.[156] When DSPs initially launched, they did not wait to identify the respective copyright owners of the musical works or obtain the requisite licenses before making those songs available to the public for streaming.[157] By hosting unlicensed musical works, the DSPs committed countless instances of copyright infringement,[158] leading to a barrage of litigation, including several multimillion-dollar class action suits filed by a range of artists and publishers.[159] The new MMA provision limits the potential liability of DSPs in lawsuits brought by songwriters and publishers alleging a DSP's infringement of music copyrights prior to January 1, 2018.[160]

153. Paveck, *supra* note 107, at 92.

154. *About the MLC*, THE MLC, https://www.themlc.com/our-story (last visited Apr. 15, 2023).

155. 17 U.S.C. § 115(d)(10)(A).

156. 17 U.S.C. § 115(d)(10)(B).

157. PASSMAN, *supra* note 16, at 239.

158. Gradstein, *supra* note 36.

159. Dahrooge, *supra* note 102, at 225.

160. Andrew Flanagan, *New Music Law Expedites a $1.6 Billion Lawsuit Against Spotify*, NPR MUSIC (Jan. 3, 2018, 5:35 PM), https://www.npr.org/sections/therecord/2018/01/03/575368674/sweeping-new-music-law-expedites-a-1-6-billion-lawsuit-against-spotify.

Under the MMA, if DSPs comply with the statutory requirements, successful plaintiffs can now only collect royalty payments, but no statutory damages or attorney's fees.[161] Before the MMA, copyright infringement claims filed before December 31, 2017 allowed successful plaintiffs, who registered their copyright prior to the infringement, to recover owed royalty payments, statutory damages, attorneys' fees, and profits from the willful infringement.[162] Statutory damages ranged from $750 to $150,000 per infringed work.[163] For over 100 years, statutory damages and attorneys' fees made up the "big stick" remedies that owners of registered copyrights could wield and pursue in litigation.[164] The possibility of recovering attorney's fees meant that plaintiffs, especially those with less resources, could more likely afford to pursue infringement actions.[165] Now, without the potential to recover statutory damages or attorney's fees, the sheer cost of pursuing federal litigation likely renders infringement lawsuits uneconomical for many injured plaintiffs.[166] This means that many artists and publishing companies who did not file actions, prior to January 1, 2018 may have practically lost the ability to sue for potential "billions in unpaid royalties."[167] With the compliant DSPs able to limit their liability and potential plaintiffs likely hindered from pursuing their claims, "millions of dollars of previously unlicensed or unallocated streams and sales would go unaccounted."[168]

This limitation on liability functioned as the quid pro quo to incentivize streaming services' involvement in the MMA.[169] According to a coalition that supported the MMA's passage, this provision served as "the main motivation that the DSPs have for endorsing the legislation and agreeing to pay all costs in connection with the new licensing entity."[170] So long as the DSPs agreed to "foot the bill" to fund the MLC, the DSPs essentially received protection for their prior acts of copyright infringement.[171] From a business perspective, the provision represents a savvy deal that successfully incentivized the streaming behemoths to not only come to the table in the first place, but to fully assume the role of funding the MMA's flagship licensing collective. The numerous parties involved deserve respect for successfully identifying and leveraging serious points of contention on all sides to create a unanimously approved legislative compromise. As NMPA president David Israelite opined, "an industry that was used to fighting

161. Dahrooge, *supra* note 102, at 236.
162. *Id.* at 226.
163. 17 U.S.C. § 504(c).
164. Castle, *supra* note 117.
165. *Id.*
166. Dahrooge, *supra* note 102, at 236.
167. Resnikoff, *supra* note 138.
168. Evers, *supra* note 99.
169. Flanagan, *supra* note 160.
170. *Music Modernization Act: A Breakdown*, *supra* note 10.
171. *Id.*

internal battles has now become a unified force to be reckoned with."[172] From the perspective of judicial efficiency, the provision also cleared "the courts of voluminous royalty-based litigation."[173]

However, as previously noted, the provision also had the effect of unilaterally closing off longstanding remedies for copyright owners.[174] The law "abrogated" the rights of intellectual property holders by effectively cutting off their ability to "pursue infringement claims that might not have been known to them before the 2017 cut-off date."[175] Moreover, this provision disproportionately impacted smaller companies and independent artists.[176] One law firm succinctly articulated that "by denying potential copyright claimants' access to statutory damages and attorneys' fees, the bill gives streaming services a free-pass to infringe upon the works of smaller artists and publishing companies that cannot otherwise afford to fund litigation to vindicate their rights."[177] Another music journalist noted that this "sneaky provision" essentially provides companies like Spotify with a "get-out-of-jail-free card."[178]

Efforts by one major publishing company highlighted the impacts of the then-looming provision.[179] On December 29, 2017—two days before the start of the MMA's indemnification provision went into effect—music publishing company Wixen sued Spotify for failure to obtain requisite licenses, subsequent copyright infringement, and failure to pay out songwriters' royalties.[180] The publishing company, which represents artists including Tom Petty and Rage Against the Machine, sought $150,000 in statutory damages per infringed song, totaling nearly $1.6 billion.[181] The two companies ultimately settled out of court.[182] Nonetheless, the suit demonstrates how this provision—buried within page eighty-two of the MMA—could have an outsized impact on those unaware of its consequences.[183] Unlike Wixen, those parties unaware of the provision or

172. Israelite, *supra* note 9.

173. Dahrooge, *supra* note 102, at 226.

174. 17 U.S.C. § 115(d)(10)(A).

175. Evers, *supra* note 99.

176. Cassie Daum, *Timed Out and Tuned Out: The Forfeiture of Unclaimed Royalties and the Loss of Meaningful Access to Litigation Under the Music Modernization Act*, SMITH GAMBRELL RUSSELL (Jan. 18, 2018), https://www.sgrlaw.com/client-alerts/timed-out-and-tuned-out-the-forfeiture-of-unclaimed-royalties-and-the-loss-of-meaningful-access-to-litigation-under-the-music-modernization-act/.

177. *Id.*

178. Paul Resnikoff, *Surprise! The 'Music Modernization Act' Prohibits Litigation Against Streaming Services*, DIGIT. MUSIC NEWS (Jan. 9, 2018), https://www.digitalmusicnews.com/2018/01/09/music-modernization-act-spotify/.

179. Dani Deahl, *Spotify and Wixen Settle the Music Publishing Company's $1.6 Billion Lawsuit*, THE VERGE (Dec. 20, 2018, 10:15 AM), https://www.theverge.com/2018/12/20/18150197/spotify-wixen-lawsuit-settlement-dismissal-music-publishing.

180. *Id.*

181. *Id.*

182. *Id.*

183. Resnikoff, *supra* note 178.

unable to file in time lost a crucial remedial channel. Company head Randall Wixen explained: "if you don't file a lawsuit against a music streaming company by January 1, 2018, you lose your rights to [recover certain remedies]. If the act was passed, and we hadn't filed a suit by January 1, we would have forfeited [those rights]." [184] Wixen further noted that once the provision went into effect, "it would retroactively give a free pass for a streaming service that has infringed on music rights in the past."[185]

Another lawsuit, filed after the enactment of the MMA, utilized a fairly radical approach in challenging these liability provisions.[186] In August 2019, Eight Mile Style, the publication company for famed rapper Eminem, sued Spotify for copyright infringement based on a claim that the MMA is "unconstitutional on its face."[187] Eight Mile Style argued that the MMA's limitation on the DSP's liability amounted to an "unconstitutional denial of substantive and procedural due process, and an unconstitutional taking of Eight Mile's vested property rights."[188] With regards to the due process arguments, the complaint posits that by depriving artists of their ability to recover lost profits, statutory damages, and attorney's fees, the MMA renders potential infringement lawsuits financially unfeasible.[189] In their complaint, Eight Mile Style explained:

> "Given the fraction of a penny rate for streaming paid to songwriters, the elimination of the combination of profits attributable to infringement, statutory damages, and attorneys' fees would essentially eliminate any copyright infringement case as it would make the filing of any such action cost prohibitive, and ensure that any plaintiff would spend more pursuing the action than their recovery would be."[190]

Accordingly, Eight Mile Style argued that the elimination of these damages "leaves a plaintiff with no real remedy against Spotify for copyright infringement" and effectively "makes the copyright right valueless."[191]

Additionally, Eight Mile Style claimed that both the MMA's provisions and Spotify's practices amounted to "an unconstitutional taking of vested

184. *Id.*

185. *Id.*

186. Celes Keene, *Is the MMA Unconstitutional? Eminem's Publisher Sues Spotify*, KLEMCHUK (Sept. 4, 2019), https://www.klemchuk.com/ideate/mma-unconstitutional-eigth-mile-style-eminem-sues-spotify-copyright-control-provision.

187. *Id.*

188. First Am. Compl. at 15, Eight Mile Style, LLC v. Spotify USA Inc., No. 19-CV-00736 (No. 97).

189. Dunlap Bennett & Ludwig PLLC, *Who's Really Shady? The Eminem vs. Spotify Copyright Battle Continues in Nashville*, JD SUPRA (Apr. 12, 2022), https://www.jdsupra.com/legalnews/who-s-really-shady-the-eminem-vs-2184762/.

190. Complaint, *supra* note 188, at 15.

191. *Id.* at 15-16.

property rights."[192] The complaint posits that this framework "cleared the last hurdle for Spotify to go public, thereby reaping tens of billions of dollars for its equity owners, including the major companies [who helped draft the MMA]."[193] Accordingly, Eight Mile Style argued that the provision effected an illegal taking, as it "was not for public use but instead for the private gain of private companies."[194] In their prayer for relief, Eight Mile Style called for a declaration that Spotify willfully and directly infringed Eight Mile's compositions, a disqualification of Spotify from receiving the MMA's limitation from damages, and a declaration that the MMA's "retroactive elimination of damage . . . is unconstitutional."[195]

The case continues to wind its way through the federal courts. In 2022, a federal district court in Tennessee denied both Spotify's motion to prevent the deposition of its CEO, Daniel Ek, and Spotify's subsequent Motion for a Review of a Nondispositive Order.[196] The court's propensity to permit such high-end depositions indicates a recognition of the legitimacy of the allegations and a need for compliance from those in positions of power. However, beyond these preliminary motion hearings, no ruling has definitively weighed in on the merits of the takings or due process claims.

An outcome in favor of Eight Mile Style could send shockwaves across the music industry. Disqualifying the limitations for Spotify or finding the statutory language unconstitutional would effectively gut the provision that arguably allowed the MMA to proceed. While this case specifically targets Spotify, a decision against Spotify could establish precedents for challenges against other major DSPs like Apple Music. If DSPs lose their indemnity, their incentive to fund the MLC could dissipate and ripple into catastrophe for the structures established by the MMA. The sheer scale and impact of such a ruling feel like a practical bar to the potential success of Eight Mile Style's claims.

Spotify will surely invest all of its resources towards defeating this case. It could be years before a final verdict, and the parties may well decide to settle out of court. Nonetheless, Eight Mile Style's bold legal strategy highlights the core of the limitation provision's inequities and the scale of the purported threat posed by the MMA's changes. Importantly, the case also illustrates how the provision similarly affects major pop artists, independent artists, and smaller publishing companies alike. As one legal scholar noted, "[h]ow this lawsuit shakes out will impact not just Eight Mile

192. *Id.* at 46.
193. *Id.* at 15.
194. *Id.*
195. *Id.* at 49.
196. Eight Mile Style, LLC v. Spotify USA Inc., No. 3:19-CV-0736, 2022 WL 2794280, at *5 (M.D. Tenn. July 15, 2022).

[Style] LLC on behalf of Eminem, but thousands of other smaller composition copyright owners."[197]

VII. CONSIDERATIONS FOR THE FUTURE OF THE MMA AND THE MLC

The relative nascency of the MMA mitigates any critique of how it will ultimately impact both copyright holders and the music industry at large. However, substantive flaws in the structure of the MLC, the Act's treatment of unmatched royalties, and the nature of the remedy limitations continue to pose points of real and immediate concern. Unfortunately, major changes to the MMA's contentious provisions are unlikely to occur anytime soon, given the MMA's unanimous passage in both chambers of Congress[198] and the music industry's celebration of the bill as a universal success.[199] Those parties likely do not see the issues addressed in this Note as major points of concern. Moreover, they almost certainly have no interest in potentially tarnishing the MMA's successes by revising its central provisions less than five years after passage.

Eight Mile Style's lawsuit has the potential to seriously challenge the indemnification provisions in the MMA. In the interim, the remedial channels for copyright infringement by DSPs remain limited. Therefore, the MMA's range of issues will continue to play out with unpublished, independent artists bearing the brunt of the impact. Those independent, underrepresented artists most affected by the contentious provisions do not have anywhere near the resources or lobbying strength of the major industry players now in control of the MLC.

However, these realities should not close off avenues for relief. Regarding the remedy limitation provision, injured rights holders may be able to pursue a reliance-based class action claim. The statute of limitations for copyright infringement claims runs for three years from the date of each instance of infringement.[200] The MMA effectively abrogated that statute of limitations by cutting off infringement claims against DSPs committed before December 31, 2017.[201] Rights holders could argue that they reasonably relied on the statute of limitations timeframe when planning to pursue a claim against a DSP. However, such a case would depend on the creation of a certifiable class of plaintiffs who share the same injury resulting

197. Joe Murphy, *Guess Who's Going to Jail Tonight: Ye and Eminem Highlight Legal Issues with Spotify and the Music Modernization Act*, SUFFOLK U. L. REV. (Apr. 18, 2022), https://sites.suffolk.edu/lawreview/2022/04/18/guess-whos-going-to-jail-tonight-ye-and-eminem-highlight-legal-issues-with-spotify-and-the-music-modernization-act/.

198. Israelite, *supra* note 9.

199. Wang, *supra* note 8.

200. 17 U.S.C. § 507(b).

201. Flanagan, *supra* note 160.

from similar circumstances. Additionally, plaintiffs would need a legal team willing to take on a challenge to a law that currently limits the recovery and reward of attorney's fees. However, such plaintiffs could form an argument that their reliance on the statute of limitations, coupled with the sudden bar on infringement claims, caused them significant harm by depriving them of their judicial rights and remedies. An outcome in favor of Eight Mile Style could provide substantial momentum for such a class of plaintiffs.

Several other solutions exist to combat the issues implicated by the structure of the MLC and the MMA's treatment of unmatched royalties. The MLC remains in its early days of reality testing the efficacy and impacts of the various changes enacted by the MMA. The MLC needs and deserves time to focus on truly getting the rights database and payment systems off the ground. However, now would arguably be the best time to recognize and remedy the early flaws in the lopsided representation and internal conflicts of interest on the MLC Board. For one, the MLC Board could expand its membership to include a greater number of independent songwriters and publishers. Presently, these independent parties hold only four of the fourteen Board seats.[202] Additionally, an independent committee could step in to provide impartial oversight. Currently, the Board effectively oversees its own operations and internal audits.[203] That arrangement does not provide for any true form of supervision or accountability.

Regarding the MLC's existing three-year window for holding unmatched royalties, the MLC Board could simply decide to extend the period allotted for identifying rightsholders either indefinitely or, at the very least, for a timeline greater than three years. Extending the search timeframe aligns squarely with the MMA's fundamental goal of improving industry structures for paying out songwriter royalties. Additionally, the MMA should require the MLC to exercise "best efforts" in seeking to match unclaimed royalties. The current statutory language merely requires "good faith, commercially reasonable" efforts on the part of the MLC.[204] Best efforts provisions typically impose a higher performance standard on the party tasked with a certain duty.[205] Coupling this requirement with independent Board oversight could help create more stringent standards for the MLC. However, because the MMA stipulates the language governing the timelines and good faith provisions, any amendments will require congressional action. Given the current potential for windfall payouts based on the present language, the Board likely has little incentive to petition for

202. Paveck, *supra* note 107.

203. Hess, *supra* note 110.

204. 17 U.S.C. § 115(d)(4)(B).

205. *See generally* Eric Fishman & Aubrey Charette, *Drafting a Better "Best Efforts" Clause*, PILLSBURY L. (July 23, 2013), https://www.pillsburylaw.com/images/content/4/3/v2/4368/DraftingaBetterBestEffortsClause-CorporateCounsel072313.pdf.

changes to the MMA's existing structure. Arguably, an MLC Board with equal representation from independent songwriters and publishers might have stronger backing to insist on these immediate changes. Ultimately, the Board's corporate financial interests should not stand in the way of their underlying, vital mission.

Furthermore, the parties operating the MLC should not receive payouts from the unmatched royalty monies. The current statutory arrangement establishes an inherent conflict of interest that runs contrary to the central aims of the MMA. Unless the MLC Board chooses to indefinitely retain unmatched monies, the Board should reallocate those black box funds towards hiring more staff to actively search for the legal rights holders. Additionally, the MLC Board could allocate those funds towards social media marketing efforts aimed at publicizing the MLC. Numerous songwriters may not know that the MLC even exists. Accordingly, those artists would have no awareness that a government body currently holds monies rightfully owed to them. The MLC could launch a nationwide, awareness initiative aimed at informing the public about the MLC's existence and operations. Given their deep connections within the music industry, the MLC could identify and enlist influencers and celebrity musicians to help reach younger, rising artists. Imagine for instance what a single Instagram post from Beyoncé could do for a generation of young songwriters.

VIII. CONCLUSION

The MMA arrived as a highly lauded turning point for the music industry. The MMA's three titles enacted substantial reforms to an industry fraught with systemic inequities. Yet, for all the fanfare that accompanied its innovations, the MMA effectively codified many of those same industry imbalances. At the time of passage, the MMA's chief sponsor, Senator Orrin G. Hatch, remarked that the bill's "tremendous approach towards the music industry" means that "songwriters are being treated fair for the first time."[206] It now behooves those in power to act expeditiously to remedy the MMA's statutory and practical flaws, out of an interest in that same pursuit of fairness.

206. *The Creation of the Music Modernization Act*, *supra* note 11.

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