

**THE TIMES THEY ARE A-CHANGIN':
HOW MUSIC'S MECHANICAL LICENSING SYSTEM MAY HAVE
FINALLY MOVED INTO THE 21ST CENTURY**

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INTRODUCTION

*“After silence, that which comes nearest to expressing the inexpressible is music.”*¹

[1] Today’s average music consumer likely enjoys his or her music without giving much thought to the underlying licensing and compensation systems that make their listening experience possible. Indeed, average consumers are unlikely to fully comprehend the complexities of these systems. This is not solely because consumers are uninformed or apathetic. Rather, it is because the licensing and compensation systems in place are highly complex, fragmented, and outdated.² Since the early twentieth century, Congress has responded to technological advances within the music industry by enacting piecemeal reforms intended to solve emerging rights clearance problems resulting from such innovation.³ As a result, music licensing today operates within a system developed prior to, and unprepared for the Internet Age. At a time when music streaming is at an all-time high,⁴ existing licensing systems are failing industry players more than ever before—namely, songwriters and music publishers.⁵

¹ ALDOUS HUXLEY, *MUSIC AT NIGHT AND OTHER ESSAYS* 17 (Doubleday Doran & Company, Inc. ed., 1931).

² See Stasha Loeza, *Out of Tune: How Public Performance Rights are Failing to Hit the Right Notes*, 31 BERKELEY TECH. L.J. 725, 725 (2016), http://btlj.org/data/articles2016/vol31/31_ar/0725_0758_Loeza_WEB.pdf [<https://perma.cc/C7T6-TXJ6>] (describing the music licensing system structure as complex, fragmented, and “created primarily before the Internet Age”).

³ See *id.*

⁴ See *U.S. Music Mid-Year Report 2018*, NIELSEN CO. (July 6, 2018), <https://www.nielsen.com/us/en/insights/report/2018/us-music-mid-year-report-2018/> [<https://perma.cc/Y5N5-L4R7>].

⁵ See Loeza *supra* note 2.

[2] To be fair to Congress, because licensing and compensation processes differ based on what the copyrightable work is, who is attempting to license it, and how that work is used,⁶ sweeping reform is often difficult due to competing interests that exist within the music industry.⁷ Criticisms of existing licensing and compensation systems are not uncommon and differing proposals have prompted considerable debate in recent years.⁸ Regardless of the outcome, any debate should focus on achieving the underlying policy goal of music copyright: “encourag[ing] artists to create through the prospect of financial gain.”⁹

[3] Copyright law incentivizes the creation and distribution of works by granting the owners of those works a limited monopoly in order to make a profit.¹⁰ In the context of music copyright, that profit comes from the ability of owners to sell copies of their work or licenses that authorize the use of those works.¹¹ Those transactions then result in royalties paid to copyright owners.¹² Therefore, a music licensing system should provide

⁶ *See id.*

⁷ *See generally* U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE: A REPORT OF THE REGISTER OF COPYRIGHTS 18–24 (2015) [hereinafter MUSIC MARKETPLACE] (discussing the interests competing for compensation and representation within the music industry).

⁸ *See generally id.* at 68–132, 145–61 (discussing the criticism faced by the current regulatory scheme as well as the more recent proposals currently debated among scholars and legislators).

⁹ Scott L. Bach, *Music Recording, Publishing, and Compulsory Licenses: Toward a Consistent Copyright Law*, 14 HOFSTRA L. REV. 379, 383 (1986).

¹⁰ *See, e.g.,* JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 7 (4th ed. 2015).

¹¹ *See, e.g., id.* at 411.

¹² *See, e.g., id.*

those opportunities with more efficiency and ease than it currently does, especially in the context of mechanical licensing for digital music streaming. Accordingly, this Note focuses on reforms to the mechanical licensing system that provide licensees the ability to reproduce and distribute the musical compositions owned by songwriters and music publishers in the digital age.

[4] The discussion that follows explores the past, present, and future of the mechanical licensing of musical compositions. While the recent passage of the Music Modernization Act (“MMA”) appears to follow down the historical path of piecemeal reform,¹³ this Note argues that the MMA provides a significant boost to songwriters and music publishers. First, Part I explores the evolution of the American music industry and music copyright to illustrate how today’s mechanical licensing system has become outdated and concludes with a discussion of *Wixen Music Publishing, Inc. v. Spotify USA Inc.*¹⁴ to provide a working example of how an outdated system creates compliance issues for licensees and declining revenues for songwriters and publishers. Part II then discusses the Music Modernization Act, recent legislation that attempts to modernize this area. Finally, Part III analyzes whether the MMA, in its current form, successfully addresses the problems discussed herein, and exemplified in *Wixen*, and concludes that the MMA offers some of the most robust changes to music licensing in the past two decades.

¹³ See Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115–264, 132 Stat. 3676 (2018).

¹⁴ See Complaint for Copyright Infringement & Demand for Jury Trial, *Wixen Music Publishing, Inc. v. Spotify USA Inc.*, (C.D. Cal. filed Dec. 29, 2017) (No. 2:17-cv-09288); see also discussion *infra* para. [18].

I. BACKGROUND

A. Copyrights in Music

[5] To understand the complexities faced by songwriters and music publishers under current licensing systems, it is essential to understand that musical audio recordings contain two copyrightable works: (1) the musical composition (the musical work) and (2) the sound recording.¹⁵ The musical composition consists of the underlying music and lyrics.¹⁶ Songwriters, as authors, own the musical composition copyright¹⁷ and often assign administration and ownership interests to music publishers.¹⁸ With such authority granted by a songwriter, music publishers are then able to promote the songwriter's work and collect the royalties owed to both the songwriter and publisher under their pre-negotiated "split" of collected royalties.¹⁹ Sound recordings, on the other hand, are the recorded versions of a musical composition.²⁰ The sound recording copyright is

¹⁵ See 17 U.S.C. § 102(a)(2), (7) (2018).

¹⁶ See MUSIC MARKETPLACE, *supra* note 7, at 18.

¹⁷ See 17 U.S.C. § 201(a) (2018) ("Initial Ownership—Copyright in a work protected under this title vest initially in the author or authors of the work.").

¹⁸ See MUSIC MARKETPLACE, *supra* note 7, at 19 (explaining that usually songwriters assign about fifty percent of their copyright to publishers).

¹⁹ See *id.* at 19. Importantly, musical composition copyrights provide two exclusive rights to the copyright owner: the mechanical reproduction right and the right of public performance. Licenses for both (as well as for the rights attached to sound recordings) are required in order for a streaming service to make a song available on their platform. See Loeza, *supra* note 2, at 726–29 (explaining differences between musical works, sound recordings, and their accompanying rights). This Note focuses primarily on the musical composition copyright, the mechanical reproduction right, and the licensing system associated.

²⁰ See 17 U.S.C. § 101 (2011) (defining "sound recordings" as "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds

often owned by a record label rather than the recording artist²¹ and provides the exclusive right to exploit the sound recording, the licensing of which results in royalties paid to the label and/or recording artist.²²

[6] Complicating things further, both the musical composition copyright and the sound recording copyright have distinct sub-rights attached to each of them.²³ Because this Note does not explore the rights associated with sound recordings, only the sub-rights associated with musical compositions become relevant. Those rights include the mechanical right to reproduction and distribution and the right of public performance.²⁴ Of those two, it is the former that this Note will explore at some length. Accordingly, the following discussion provides an overview of mechanical licensing's evolution, or lack thereof, over the course of the twentieth century in order to illustrate how reform has become increasingly necessary in today's digital world.

accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied."); U.S. COPYRIGHT OFFICE, CIRCULAR NO. 56A, COPYRIGHT REGISTRATION OF MUSICAL COMPOSITIONS AND SOUND RECORDINGS 1 (2019) (comparing the definitions and copyright protections of musical compositions and sound recordings).

²¹ See Randy S. Frish & Matthew J. Fortnow, *Termination of Copyrights in Sound Recordings: Is There a Leak in the Record Company Vaults?*, 17 COLUM.-VLA J.L. & ARTS 211, 216 (1993) (explaining the way music industry contracts commonly identify sound recordings as "works made for hire" in contracts which gives the record label, not the recording artist, ownership of the recording's copyright from the time it is made).

²² See MUSIC MARKETPLACE, *supra* note 7, at 73–74 (discussing royalties from sound recording use on digital radio and streaming services).

²³ See *id.* at 18, 25, 43.

²⁴ See *id.* at 25; *Music Royalties Guide*, ROYALTY EXCHANGE (June 16, 2014), <https://www.royaltyexchange.com/blog/music-royalties#sthash.pjxBtEaN.dpbs> [<https://perma.cc/Z65B-C3H9>] (explaining the basic differences between public performance licenses and mechanical licenses).

B. Piano Rolls, Phonorecords, and the Beginnings of the Mechanical Reproduction Right

[7] Musical compositions have been protected by federal copyright law since 1831.²⁵ Of the rights associated with musical compositions, the exclusive right of reproduction became increasingly valuable to composers and publishers in the nineteenth and early twentieth centuries because it encompassed the making of sheet music.²⁶ Sheet music was virtually the only way to reproduce one's musical composition until the invention of the phonograph and provided publishers and composers their main source of revenue.²⁷ In fact, sheet music sales reached their peak in 1919 with popular compositions often selling two or three million copies.²⁸

[8] At the turn of the century however, the music industry saw one of its first disruptive innovations in the invention of piano rolls—perforated paper rolls used by self-playing player pianos.²⁹ Fears quickly emerged from composers and publishers who believed that the rising popularity of player pianos, and the compositions embodied in piano rolls, would begin to harm sheet music sales.³⁰ In fact, in 1908, the Supreme Court "startled

²⁵ See Act of Feb. 3, 1831, ch. 16, § 1, 4 Stat. 436, amended by Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075.

²⁶ See AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 673–75 (4th ed. 2010) [Hereinafter KOHN].

²⁷ See *id.* at 5.

²⁸ See *id.* at 6.

²⁹ See *id.* at 6–7; Clifton B. Parker, *Stanford's New Player Piano Collection Brings Sounds of History to Life*, STANFORD REPORT (Oct. 13, 2014), <https://news.stanford.edu/news/2014/october/player-piano-collection-101314.html> [<https://perma.cc/EFD6-X69>].

³⁰ See Kal Raustiala & Christopher Jon Sprigman, *How a Terrible Supreme Court Decision About Player Pianos Made the Cover Song What It Is Today*, SLATE (May 12,

the music industry by deciding that piano rolls . . . were not 'copies' of musical compositions and, therefore, not an infringement of the rights in the compositions. . . ."³¹ Such a decision thus foreclosed a potential revenue stream for composers and publishers despite the fact that musical compositions were being reproduced, albeit in a new "mechanical" form.³² Indeed, without protection, musical composition authors would have had to keep track of potentially millions of previously-sold sheet music copies. In response to this threat,³³ Congress passed the Copyright Act of 1909 which extended a "mechanical reproduction" right to owners of musical compositions.³⁴ This newly formed right created the "compulsory" mechanical licensing system which provided a composition's author a statutory royalty for the sale of any piano roll containing his work.³⁵ In effect, the law allowed any third party interested in reproducing and distributing a musical composition to do so without the explicit consent of

2014, 10:00 AM), <https://slate.com/technology/2014/05/white-smith-music-case-a-terrible-1908-supreme-court-decision-on-player-pianos.html> [<https://perma.cc/7FY7-Q8YP>].

³¹ KOHN, *supra* note 26, at 7.

³² *See id.* at 7.

³³ *See* White-Smith Music Pub. Co. v. Apollo Co., 209 U.S. 1, 18 (1908).

³⁴ *See* Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075 (1909) (amending and consolidating the Acts respecting copyrights) (repealed 1976); *see also* KOHN *supra* note 26, at 719 (deriving the term "mechanical" from the determination that the reproduction was heard with the aid of a machine).

³⁵ *See* 17 U.S.C. § 115 (2018); KOHN, *supra* note 26, at 719.

the copyright owner,³⁶ so long as certain statutory requirements were met.³⁷

[9] As with piano rolls, the invention of the phonograph also worried those in the sheet music business as sales of phonograph records increased during the first half of the twentieth century.³⁸ Unlike pianos rolls, however, phonograph records allowed anyone able to read sheet music to reproduce another's work onto a tangible medium for the first time in history.³⁹ The concern for copyright owners was essentially the same as with the emergence of piano rolls,⁴⁰ but this innovation would transform the music industry for decades to come because it allowed people to engage in the creation and consumption of music in ways never before seen.⁴¹ Fortunately, the newly established mechanical reproduction right, and its compulsory licensing system, extended to phonograph records and allowed composers, songwriters, and publishers to make up for lost

³⁶ See Alyssa Goldrich, *Streaming Moguls Are Biting the Hand that Feeds Them: Artists Beg for a Change in Intellectual Property Laws*, 15 J. INT'L BUS. & L. 287, 301 (2016).

³⁷ See generally 17 U.S.C. § 115 (outlining the statutory requirements of a compulsory license for making and distributing phonorecords).

³⁸ See KOHN, *supra* note 26, at 7, 18–19 (explaining that publishing companies provide record companies with mechanical licenses and collect royalties based on record sales and eventually extended this right to CDs and digital music files).

³⁹ See Dann Albright, *The Evolution of Music Consumption: How We Got Here*, MAKEUSEOF: TECHNOLOGY EXPLAINED (Apr. 30, 2015), <https://www.makeuseof.com/tag/the-evolution-of-music-consumption-how-we-got-here/> [<https://perma.cc/8MLH-XNNT>].

⁴⁰ See KOHN, *supra* note 26, at 7, 18–19.

⁴¹ See Goldrich, *supra* note 36, at 288.

revenue from declining sheet music sales through the receipt of mechanical royalties.⁴²

[10] The method for obtaining a compulsory mechanical license has changed little, if at all, since its creation under the Copyright Act of 1909.⁴³ Today, the statutory provisions outlining the mechanical licensing process can be found in chapter 17 of the United States Code.⁴⁴ Under section 115, a party seeking a mechanical license to make and distribute reproductions of a musical composition is required to serve a notice of intent (“NOI”) on the copyright owner within thirty days of the reproduction and prior to distribution.⁴⁵ In the event that the licensee is unable to locate or identify the copyright holder, he or she may file the NOI with the Copyright Office in order to fulfill the NOI obligation.⁴⁶ After service of the NOI, the licensee must provide statements of account and pay the statutorily proposed royalties to the copyright owner.⁴⁷ Those statutory royalty rates are established by the Copyright Royalty Board (“CRB”) every five years,⁴⁸ but parties may negotiate royalty rates

⁴² See RUSSELL SANJEK, *PENNIES FROM HEAVEN: THE AMERICAN POPULAR MUSIC BUSINESS IN THE TWENTIETH CENTURY* 42 (1996).

⁴³ See Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (repealed 1976).

⁴⁴ See 17 U.S.C. § 115 (2018).

⁴⁵ See *id.* at § 115(b)(1).

⁴⁶ See *id.*

⁴⁷ See *id.* at § 115(c)(5).

⁴⁸ See 17 U.S.C. § 804(b)(4) (2018); U.S. COPYRIGHT OFFICE, *MECHANICAL LICENSE ROYALTY RATES* (Sept. 2018), <http://copyright.gov/licensing/m200a.pdf> [<https://perma.cc/5FDP-PPU>] (noting that with respect to physical phonorecords and digital downloads, rates to make and distribute a musical composition were previously set at 9.1 cents per copy or 1.75 cents per minute for songs over five minutes, whichever is greater); Ed Christman, *NMPA Claims Victory: CRB Raises Payout Rate from Music Subscription Services*, *BILLBOARD* (Jan. 27, 2018), <https://www.billboard.com/articles/>

between themselves if they choose to do so.⁴⁹ Importantly, and regardless of how the parties arrive at a royalty amount, any failure to abide by the strict statutory requirements outlined above “forecloses the possibility of a compulsory license . . . [and] in the absence of a voluntary license, the failure to obtain a compulsory license renders the making and distribution of [a musical composition] actionable as [an] act [] of infringement. . . .”⁵⁰

[11] In sum, the emergence of a mechanical reproduction right provided copyright holders with federal protection for their musical compositions. The development of the compulsory licensing system established procedures for music composition licensees to obtain music while providing compensation to rightful copyright holders for their creative efforts. This dynamic was mutually beneficial because it reduced inefficiency on both sides and achieved the economic policy goals of copyright law⁵¹ at a time when the reproduction of music involved only

news/8096590/copyright-royalty-board-crb-nmpa-spotify-apple-music-streaming-services [https://perma.cc/8GJM-2KEH] (noting that with respect to digital streaming and limited downloads, streaming services must pay a mechanical royalty of 15.1 percent to composition owners); *see also* BRIAN T. YEH, CONG. RES. SERV., RL33631, COPYRIGHT LICENSING IN MUSIC DISTRIBUTION, REPRODUCTION, AND PUBLIC PERFORMANCE 10 (Sept. 22, 2015), <https://fas.org/sgp/crs/misc/RL33631.pdf> [https://perma.cc/ASQ6-5XD9].

⁴⁹ *See* YEH, *supra* note 48, at 4 (noting that in the event that a negotiation cannot be reached between the parties, the CRB will step in to resolve rate-setting issues).

⁵⁰ 17 U.S.C. § 115(b)(4)(A) (2018).

⁵¹ *See* *Stewart v. Abend*, 495 U.S. 207, 229 (1990) (noting that copyright law provides a set of exclusive property rights “intended to provide the necessary bargaining capital to garner a fair price” for and individual’s work); Abdo & Abdo, *In This Issue, What You Need to Know About the Music Modernization Act*, 35 ENT. & SPORTS LAW 5 (2019) (noting that despite the fundamental exclusive right to reproduce and distribute one’s work, the compulsory mechanical license provides a narrow exception and provides a royalty to songwriters and publishers without the explicit consent of either when a third party wishes to reproduce and/or distribute a musical composition); *see also* 17 U.S.C. § 115(b) (2018).

mechanical reproductions.⁵² However, advances in technology over the years brought the mechanical licensing system under scrutiny once again with the advent of digital music downloads and, eventually, digital streaming. Accordingly, the following will briefly discuss the unexpected changes to the music industry after 1976 that expanded the scope of the mechanical reproduction right through piecemeal legislation.

C. Old System, New Industry: Digital Music Distribution

[12] Undoubtedly, the compulsory mechanical licensing system was created to address the threats posed by the ability of emerging technology to supplant sheet music sales.⁵³ As reproduction and distribution methods evolved over the course of the twentieth century, the compulsory licensing system was incorporated into the Copyright Act of 1976 to account for reproductions of musical compositions onto vinyl phonorecords.⁵⁴ In the decades that followed, the emergence of digital reproduction capabilities brought about compact discs, internet radio, and digital downloads, ultimately requiring another change to licensing laws.⁵⁵ Accordingly, Congress passed the Digital Performance Right in Sound Recordings Act (“DPRSRA”) in 1995, which amended the compulsory licensing system to include the reproduction and distribution of digital phonorecord deliveries (“DPDs”) over the Internet because of the threat posed to the sale of compact disks (“CD”).⁵⁶ Such a change expanded the scope of the mechanical license in that it no longer applied only to physical

⁵² See YEH, *supra* note 48, at 10.

⁵³ See Abdo & Abdo, *supra* note 51, at 5.

⁵⁴ 17 U.S.C. § 115 (2012) (amended 2018).

⁵⁵ See YEH, *supra* note 48, at 9 (discussing digital vs. analog).

⁵⁶ See Digital Performance Right in Sound Recordings Act of 1995, Pub. L. 104-39, 109 Stat. 336, 344–45 (1995).

reproductions of musical compositions.⁵⁷ Over the next decade, however, technology continued to advance, and questions soon arose over what constituted a DPD.⁵⁸

[13] The introduction of music streaming services like Spotify and Pandora turned the music industry on its head.⁵⁹ Where iTunes had dramatically changed how people accessed music through digital downloads instead of through the purchase of physical CDs, cassettes, and vinyl,⁶⁰ streaming provided unlimited access to unlimited amounts of music for an incredibly low price without any tangible or intangible property changing hands.⁶¹ Consumers welcomed streaming because of the access they had to millions of songs at the tap of a finger.⁶² For many artists, streaming allowed a direct-to-consumer platform that eliminated the costs of manufacturing, packaging, and shipping physical forms of music to record stores and fans.⁶³

⁵⁷ *See id.*

⁵⁸ *See* YEH, *supra* note 48, at 10.

⁵⁹ *See* Max Willens, *The Music Industry Desperately Needs a Global Rights Database, but No One Knows Who Will Pay for It*, INT'L BUS. TIMES (Oct. 7, 2015), <http://www.ibtimes.com/music-industry-desperately-needs-global-rights-database-no-one-knows-who-will-pay-it-2129412> [<https://perma.cc/HRM8-8UPV>].

⁶⁰ *A Brief History of Recorded Music*, CDROM2GO (Sept. 20, 2018), <https://www.cdrom2go.com/blog/a-brief-history-of-recorded-music> [<https://perma.cc/F74S-QDNG>].

⁶¹ *See* John Patrick Pullen, *Everything You Need to Know About Spotify*, TIME (Jun. 3, 2015), <http://time.com/3906839/Spotify-tips/> [<https://perma.cc/9MZY-X6RJ>].

⁶² *See* Goldrich, *supra* note 36, at 291.

⁶³ *See id.*

[14] However, as streaming’s popularity rose, concerns grew within the music industry that digital streaming services were not adequately compensating artists for the music consumed on their platforms.⁶⁴ Indeed, while record labels and chart-topping recording artists were compensated through direct negotiations with streaming giants, songwriters and publishers began to see declining revenues due to the disjointed nature of licensing practices and ambiguity in copyright law.⁶⁵

[15] One of the first issues confronted by music streaming was whether a stream of a song was considered a reproduction, which would require a mechanical license for the composition, or only a public performance, which would require its own license.⁶⁶ With respect to mechanical licenses, the DPRSRA only extended such licenses to DPDs (e.g. digital downloads).⁶⁷ A DPD is “each individual delivery of a phonorecord by [a] digital transmission of a sound recording that results in a specifically identifiable reproduction.”⁶⁸ Accordingly, a downloaded digital file was considered a DPD, but real-time transmissions “where no reproduction of

⁶⁴ See Amy X. Wang, *How Musicians Make Money – Or Don’t at All – in 2018*, ROLLING STONE MAG. (Aug. 8, 2018), <https://www.rollingstone.com/music/music-features/how-musicians-make-money-or-dont-at-all-in-2018-706745/> [<https://perma.cc/HLW7-YLPL>] (“By recent research estimates, U.S. musicians only take home one-tenth of national industry revenues. One reason for such a meager percentage is that streaming services . . . aren’t lucrative for artists unless they’re chart-topping names like Drake or Cardi B. According to one Spotify company filing, average per-stream payouts from the company are between \$0.006 and \$0.0084; numbers from Apple Music, YouTube Music, Deezer and other streaming services are comparable.”).

⁶⁵ See Paul Resnikoff, *Streaming Services Have 99 Problems. And They Are . . .*, DIGITAL MUSIC NEWS (Sept. 18, 2014), <http://www.digitalmusicnews.com/2014/09/18/streaming-services-99-problems/> (last visited Mar. 6, 2020).

⁶⁶ See KOHN, *supra* note 26, at 754–56.

⁶⁷ See YEH, *supra* note 48, at 9–10.

⁶⁸ 17 U.S.C. § 115(e)(10) (2018).

a sound recording [was] made for the purpose of the transmission” (i.e., a stream) did not constitute a DPD.⁶⁹ Thus, digital streaming of songs did not fall within the scope of a ‘mechanical’ reproduction under the amended language of the DPRSRA.

[16] Despite the statutory distinction, publishers banded together before the CRB and argued that interactive transmissions, or streams, required a mechanical license, as well as a public performance license.⁷⁰ In making this argument, they cited a provision in the DPRSRA concerning mechanical royalties, which states that “the provisions of [] section [115] concerning [DPDs] shall not apply to any exempt transmissions or retransmissions under section 114(d)(1).”⁷¹ The argument was based on the fact that interactive services (e.g., Spotify) were not exempt under § 114(d)(1) and, thus, required mechanical royalties to be paid.⁷² Surprisingly, musicians, publishers, record labels, and streaming companies reached an agreement proposing to establish royalty rates and terms that would cover limited downloads, interactive streaming, and “all known incidental [DPDs].”⁷³ The agreement established that limited download and interactive streaming services would pay mechanical royalty rates based on a percentage of the streaming revenue, minus any amounts owed for public performance royalties.⁷⁴ As a result of that agreement, streaming services were now on the hook for either negotiating

⁶⁹ See YEH, *supra* note 48, at 10.

⁷⁰ See KOHN, *supra* note 26, at 755.

⁷¹ 17 U.S.C § 155(c)(3)(K) (2012) (amended 2018).

⁷² See KOHN, *supra* note 26, at 756.

⁷³ See Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, 73 Fed. Reg. 57,033 (Oct. 1, 2008) (to be codified at 37 C.F.R. 385).

⁷⁴ See YEH, *supra* note 48, at 10 (citing Andrew Noyes, *Royalty Agreement Might Smooth Talks in 111th Congress*, CONGRESSDAILYAM (Sept. 24, 2008)).

directly with musical composition copyright holders or pursuing a license through the compulsory mechanical licensing system discussed above.⁷⁵ In theory, streaming services now knew what was required of them in order to legally stream music.

[17] In practice, however, the administrative burdens imposed by the license, including service of NOIs and monthly reporting of royalties on a song-by-song basis, were better suited for third-party administrators.⁷⁶ The oldest and largest of such organizations is the Harry Fox Agency, Inc. (“HFA”), which represents over 48,000 publishers in mechanical licensing and collection activities.⁷⁷ As a copyright administrator, HFA incorporates the terms of section 115 and contracts with streaming service providers, like Spotify, who choose to outsource their licensing needs.⁷⁸ Despite the existence of third party administrators like HFA, streaming services like Spotify have faced a multitude of legal actions for unpaid mechanical royalties.⁷⁹ To illustrate this point, the following section will briefly

⁷⁵ See discussion, *supra* para. [12].

⁷⁶ See KOHN, *supra* note 26, at 770, 808–809.

⁷⁷ See *History of HFA*, HARRY FOX AGENCY <http://www.harryfox.com/#/history> [<https://perma.cc/NH68-C5P3>] (last visited Mar. 6, 2020).

⁷⁸ See KOHN, *supra* note 26, at 803–806; Sarah Jeong, *A \$1.6 Billion Spotify Lawsuit is Based on a Law Made for Player Pianos*, VERGE (Mar. 14, 2018, 12:28 PM), <https://www.theverge.com/2018/3/14/17117160/spotify-mechanical-license-copyright-wixen-explainer> [<https://perma.cc/W8NA-RCA9>].

⁷⁹ See Ed Christman, *Spotify Hit with \$150 Million Class Action Over Unpaid Royalties*, BILLBOARD (Dec. 29, 2015) [hereinafter Christman, *Unpaid Royalties*], <https://www.billboard.com/articles/business/6828092/spotify-class-action-royalties-david-lowery-cracker-150-million> [<https://perma.cc/Z9TZ-EDP7>]; Ed Christman, *Spotify Hit with Second Lawsuit Over Copyright Infringement*, BILLBOARD (Jan. 9, 2016) [hereinafter Christman, *Second Lawsuit*], <https://www.billboard.com/articles/business/6836439/spotify-hit-with-second-copyright-infringement-lawsuit-melissa-merrick-david-lowery> [<https://perma.cc/5523-E82N>].

discuss one such case and explore how the existing compulsory licensing system creates compliance issues for streaming services while harming copyright owners.

D. Wixen Music Publishing, Inc. v. Spotify USA Inc.

[18] With each technological advance in the music industry, Congress has attempted to resolve emerging problems for copyright holders by passing piecemeal legislation.⁸⁰ However, intermittent and infrequent fixes to music copyright laws have resulted in increasingly untenable licensing systems in an age where digital streaming has become more pervasive than ever.⁸¹ Accordingly, a number of lawsuits have been waged against streaming giants to recoup alleged unpaid royalties owed to songwriters and music publishers for the use of their unlicensed musical compositions.⁸² The following controversy is a good example of the disputes that have arisen between digital streaming services and copyright holders due to the inability of the current mechanical licensing system to properly issue millions of licenses.

1. The Parties

[19] Founded by Randall Wixen in 1978, Plaintiff Wixen Music Publishing, Inc. (“Wixen”) is a California-based publishing company responsible for licensing the music catalogs of more than 2,000 artists,

⁸⁰ See YEH, *supra* note 48, at 5–6 (discussing various pieces of legislation passed in response to changing technology affecting the music industry).

⁸¹ See Bill Rosenblatt, *In Music’s New Era, Streaming Rules, but Human Factors Endure*, FORBES (Apr. 8, 2018, 12:37 PM), <https://www.forbes.com/sites/billrosenblatt/2018/04/08/in-the-new-era-for-music-streaming-rules-but-human-factors-endure/#7fb03cd55472> [<https://perma.cc/9GC4-7BLU>].

⁸² See Christman, *Unpaid Royalties*, *supra* note 79; Christman, *Second Lawsuit*, *supra* note 79.

including rock legends like Tom Petty, Neil Young, and The Beach Boys.⁸³ As the copyright administrator for its artists, Wixen is the exclusive licensee of thousands of musical compositions and possesses the exclusive right to conduct all associated administration activities, including registering the compositions with performing rights organizations, filing copyright applications, negotiating and issuing licenses (including mechanical licenses), collecting royalties, and filing lawsuits for copyright infringement.⁸⁴ In sum, Wixen is in the business of negotiating licensing deals for the reproduction, distribution, and public performance of its artists' music and ensuring that royalties are received and properly distributed.

[20] Respondent Spotify USA Inc. ("Spotify") launched in the United States in 2011 and offers interactive music streaming services to its American customers via a free or paid option.⁸⁵ Spotify users access the service online or through a downloadable smartphone application.⁸⁶ Since its launch in the United States, Spotify has grown to over 200 million active users and 87 million subscribers, obtained over \$1 billion in private equity, and achieved a valuation in excess of \$8 billion prior to going public in late 2017.⁸⁷ As a digital streaming service, Spotify must obtain

⁸³ See Daniel Kreps, *Wixen's \$1.6 Billion Spotify Lawsuit: What You Need to Know*, ROLLING STONE (Jan. 3, 2018, 5:40 PM), <https://www.rollingstone.com/music/news/wixens-1-6-billion-spotify-lawsuit-what-you-need-to-know-202532/> [<https://perma.cc/WCG6-GQAC>].

⁸⁴ See Complaint & Demand for Jury Trial at 4–5, *Wixen Music Publishing, Inc. v. Spotify USA Inc.*, No. 2:17-cv-09288 (C.D. Cal. Dec. 29, 2017) [hereinafter *Wixen Complaint*].

⁸⁵ See *id.* at 5.

⁸⁶ See *id.*

⁸⁷ See *id.*; *Spotify Hits 200 Million Active Users*, BILLBOARD (Jan. 1, 2019), <https://www.billboard.com/articles/business/8493115/spotify-200-million-monthly-active-users> [<https://perma.cc/PAM8-ZFMV>]; Kreps, *supra* note 83.

two distinct licenses for the music it distributes: a sound recording license and a musical composition license.⁸⁸ It is the latter of these two licenses that gave rise to this action.

2. The Controversy

[21] On December 29, 2017, Wixen filed a lawsuit against Spotify for willfully infringing copyrights in the musical compositions of over 10,000 songs by failing to obtain the necessary mechanical licenses required for the reproduction and distribution of those songs.⁸⁹ Notably, Wixen sought an award of damages to the tune of \$1.6 billion pursuant to 17 U.S.C. § 504(c), \$150,000 per composition willfully infringed for each of the approximately 10,784 musical compositions in Wixen’s catalogue.⁹⁰ In its complaint, Wixen alleged that “Spotify [] repeatedly failed to obtain [the] necessary statutory, or ‘mechanical,’ licenses to reproduce and/or distribute musical compositions on its [streaming] service.”⁹¹ As a consequence of these activities, Wixen further alleged that songwriters and their publishers were unable “to fairly and rightfully share in Spotify’s success, as Spotify ha[d] in many cases used their music without a license and without compensation.”⁹²

⁸⁸ See Michelle Castillo, *Spotify IPO Filing Reveals How Insanely Complicated it is to License Music Rights*, CNBC (Feb. 28, 2018, 5:44 PM), <https://www.cnbc.com/2018/02/28/how-spotify-licenses-and-pays-for-music-rights.html> [<https://perma.cc/9TC5-V88Y>].

⁸⁹ See Wixen Complaint, *supra* note 84, at 1, 9.

⁹⁰ See 17 U.S.C. § 504(c)(2) (2018); Wixen Complaint, *supra* note 84, at 9–10.

⁹¹ Wixen Complaint, *supra* note 84, at 1.

⁹² *Id.*

[22] As discussed, obtaining the necessary mechanical license can be accomplished through direct negotiation with a copyright holder or through the compulsory licensing system.⁹³ Obtaining a compulsory license requires the licensee to send NOIs and monthly accountings to copyright owners.⁹⁴ When the name and address of the copyright owner is unknown, or difficult to identify or locate, the licensee is required to file the NOI with the Copyright Office.⁹⁵ Here, Spotify was required to send NOIs to Wixen for each of the songs it streamed or, if unable to identify the composition copyright holder, to file the NOI with the Copyright Office. The failure to do either was actionable as copyright infringement.

[23] Wixen alleged that before Spotify launched in the United States, it attempted to license sound recordings through direct negotiations with major record labels.⁹⁶ In fact, Spotify typically pays a record label approximately 52% of the revenue generated by each stream of a given song.⁹⁷ The label, in turn, then pays the artist, or itself, a royalty of 15-50% depending on the deal between the artist and the label.⁹⁸ With respect to mechanical licenses, however, Wixen alleged that Spotify made no such effort to collect the required mechanical licenses, either through direct negotiation or through a compulsory license.⁹⁹ Instead, Spotify outsourced

⁹³ See 17 U.S.C. § 115(a)(1)(A) (2018); Wixen Complaint, *supra* note 84, at 6.

⁹⁴ See 17 U.S.C. § 115(b)(1) (2018).

⁹⁵ See *id.*

⁹⁶ See Wixen Complaint, *supra* note 84, at 7.

⁹⁷ See Ben Sisario, *A New Spotify Initiative Makes the Big Record Labels Nervous*, N.Y. TIMES (Sept. 6, 2018), <https://www.nytimes.com/2018/09/06/business/media/spotify-music-industry-record-labels.html> [<https://perma.cc/FF4T-GES8>].

⁹⁸ See *id.*

⁹⁹ See Wixen Complaint, *supra* note 84, at 7.

that responsibility to a third party, the Harry Fox Agency (“HFA”), which provides mechanical licensing and royalty services to interested parties.¹⁰⁰ Unfortunately, while the HFA does serve the mechanical licensing needs of tens of thousands of clients, Wixen, not the songwriters it represents, was affiliated with HFA. As such, the songwriters themselves were never notified that their compositions were being actively reproduced and distributed by Spotify.¹⁰¹ Accordingly, Wixen took the position that Spotify knew HFA did not possess the infrastructure to obtain the required mechanical licenses and/or lacked the necessary information for the songs at issue, thus amounting to willful and ongoing copyright infringement.¹⁰²

[24] To bolster its argument, Wixen directed the court’s attention to a recently approved settlement in the class action lawsuit of *Ferrick et al. v. Spotify USA Inc. et al.*¹⁰³ There, the plaintiff, and other similarly-situated holders of mechanical rights in copyrighted musical compositions, brought suit against Spotify alleging that it had reproduced and distributed musical compositions without mechanical licenses in an “egregious, continuous, and ongoing campaign of deliberate copyright infringement.”¹⁰⁴ That class action resulted in a settlement of approximately \$43 million to the plaintiffs and was intended to compensate rights holders for Spotify’s

¹⁰⁰ *See id.*

¹⁰¹ *See id.*; Erin M. Jacobson, *Spotify May Have to Pay Songwriters \$345 million*, FORBES, (Jul. 19, 2017), <https://www.forbes.com/sites/legalentertainment/2017/07/19/spotify-may-have-to-pay-songwriters-345-million/#2011f90193d4> [<https://perma.cc/8QJY-DZSZ>].

¹⁰² *See* Wixen Complaint, *supra* note 84, at 7–8.

¹⁰³ *See id.* at 7.

¹⁰⁴ Complaint at 2, *Melissa Ferrick et al. v. Spotify USA Inc., et al.*, (S.D.N.Y. Dec. 28, 2015) (no. 1:16-cv-8412).

infringing activities.¹⁰⁵ However, Wixen characterized that settlement as grossly insufficient to compensate *all* songwriters and publishers for Spotify's infringing activities.¹⁰⁶

[25] Furthermore, Wixen pointed to a recent report indicating that Spotify had failed to pay songwriter royalties to publishing companies approximately 21% of the time.¹⁰⁷ By Wixen's calculations, because Spotify maintained approximately 30 million songs in its catalogue at that time, approximately 6.3 million compositions being streamed on its platform were unlicensed, including those belonging to Wixen.¹⁰⁸ As a result of Spotify's infringing activities, Wixen claimed it was entitled to the maximum statutory relief available under the Copyright Act of 1976, a total statutory award of at least \$1.6 billion.¹⁰⁹ Nonetheless, the parties agreed to an undisclosed settlement as part of a "broader business partnership between the parties . . . and [to] establish a mutually-advantageous relationship for the future."¹¹⁰

¹⁰⁵ See Wixen Complaint, *supra* note 84, at 7.

¹⁰⁶ See *id.* at 7–8.

¹⁰⁷ See *id.* at 8; see also 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://perma.cc/DTJ9-N4Z5>].

¹⁰⁸ See Wixen Complaint, *supra* note 84, at 8.

¹⁰⁹ See *id.* at 8–9; see also 17 U.S.C. § 504(c) (2012).

¹¹⁰ Jem Aswad, *Spotify Settles \$1.6 Billion Lawsuit From Wixen Publishing*, VARIETY (Dec. 20, 2018, 9:16 AM), <https://variety.com/2018/biz/news/spotify-settles-1-6-billion-lawsuit-from-wixen-publishing-1203093990/> [<https://perma.cc/7MUM-ZU46>]; see also Notice of Dismissal at 1, *Wixen Music Publishing, Inc. v. Spotify USA Inc.*, No. 2:17-cv-09288 (C.D. Cal. Dec. 20, 2018).

3. Wixen as an Example of the Shortcomings of the Current Licensing System

[26] The dispute between Wixen and Spotify, while ultimately settled, likely left many within the music industry wondering what measures might be put in place to avoid similar problems down the road. After all, a settlement between private parties would not prevent Spotify from engaging in negligent, or even willful behavior, toward other musical compositions in the future. In reality, songwriters and music publishers who fall victim to the infringing activities alleged in *Wixen* are only able to seek remuneration through the courts and not take advantage of the present statutory licensing structure.

[27] Indeed, in the immediate aftermath of *Wixen*, the mechanical licensing system still required direct negotiation with music publishers or obtainment of compulsory licenses on the front end, in many cases through a third party like HFA.¹¹¹ For compulsory licenses, licensees such as Spotify, or HFA, were still required to send NOIs to copyright owners, even if they were unable to identify or locate the rights holder of the musical composition.¹¹² That being the case, the outcome in *Wixen* fell well short of providing actual change to a seemingly outdated system in need of transformation, especially at a time when the music industry was better poised than ever to work under a centralized, automated system for licenses and royalties.¹¹³

[28] Wixen sued Spotify over its failure to obtain mechanical licenses.¹¹⁴ As discussed, the mechanical licensing regime was created in

¹¹¹ See Jeong, *supra* note 78.

¹¹² See *id.*

¹¹³ See *id.*

¹¹⁴ See Wixen Complaint, *supra* note 84, at 1–2.

reaction to the threat posed by the invention of piano rolls¹¹⁵ at a time when sheet music was a composer's and publishers' main source of revenue.¹¹⁶ Accordingly, the *Wixen* case was based on a legal regime intended to compensate early 20th century songwriters and publishers who could not feasibly keep track of where their sheet music was being physically reproduced on piano rolls.¹¹⁷ Furthermore, that regime, seldom updated over the years, required Spotify, or HFA, to send actual paperwork to every owner of every musical composition streamed on its service. The sheer volume of paperwork required is too high a burden for a streaming service with over 30 million songs in its catalogue.

[29] On the one hand, streaming services today know with precision how many people are listening to what song and when.¹¹⁸ It seems likely then, that a service as popular and powerful as Spotify could develop an efficient system to cure some of the issues faced in the *Wixen* case, such as the identity and location of composition owners for NOIs and royalty payments. However, the burden of implementing such a system might outweigh the costs expended in occasional litigation when mechanical licensing mishaps occur. On the other hand, the complexity of music deals and the disjointed ownership of rights in music among multiple parties make the tracking of composition owners difficult for whomever that responsibility falls to.¹¹⁹

¹¹⁵ See Kohn, *supra* note 26, at 7.

¹¹⁶ See *id.* at 5.

¹¹⁷ See Jeong, *supra* note 78; see also Kohn, *supra* note 26, at 7.

¹¹⁸ See Jeong, *supra* note 78.

¹¹⁹ See, e.g., Daniels Kreps, *Satriani's "Viva La Vida" Copyright Suit Against Coldplay Dismissed*, ROLLING STONE (Sept. 16, 2009, 1:19 PM), <https://www.rollingstone.com/music/music-news/satrianis-viva-la-vida-copyright-suit-against-coldplay-dismissed-68391/> [<https://perma.cc/2GQB-MPTK>].

[30] To complicate matters further, clearinghouses like HFA exist for the purpose of facilitating mechanical licensing and royalty administration but do not possess the necessary resources, knowhow, or infrastructure to obtain all mechanical licensing information for every song streamed on a platform.¹²⁰ While it is not clear from the complaint whether Spotify or HFA dropped the ball in the *Wixen* case, the challenges faced by mechanical licensees appear to be industry-wide and due to the fact that copyright holders are free to associate with whomever they choose for administrative purposes.¹²¹

[31] Arguments can be made that powerful streaming services are simply taking advantage of an outdated system that requires service of paper NOIs and monthly royalty payments. After all, the current system allows mechanical licensees to file NOIs with the U.S. Copyright Office when a copyright holder cannot be identified or located, providing them immunity from infringement until and if the copyright holder is found.¹²² Given the complex nature and division of ownership rights in a single song,¹²³ it is likely that licensees do not have the most up to date information available to them. This may have created a permission structure for streaming services to evade their statutory obligations while technically complying with federal law.

¹²⁰ See Ari Herstand, *Apple Music Admits Harry Fox Agency Is Incompetent*, DIGITAL MUSIC NEWS (Mar. 10, 2016), <https://www.digitalmusicnews.com/2016/03/10/apple-music-admits-harry-fox-agency-is-incompetent/> [<https://perma.cc/32SE-8BSV>] (discussing the challenges facing collection houses such as the Harry Fox Agency).

¹²¹ See Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 579 (2004).

¹²² See 17 U.S.C. § 115(b)(1) (2018).

¹²³ See Lee Ann Obringer, *How Music Royalties Work*, HOW STUFF WORKS (May 24, 2003), <https://entertainment.howstuffworks.com/music-royalties2.htm> [<https://perma.cc/8LRS-TNDH>].

[32] In addition, third party administrators, like HFA, provide licensing services to tens of thousands of songwriters and publishers¹²⁴ while streaming services maintain catalogues of songs in the tens of millions—not all of which are administered by one, or even a small group, of licensing organizations.¹²⁵ Such a dynamic illustrates the need for sweeping reforms to an outdated mechanical licensing system, especially at a time where advances in technology have transformed the music industry into an on-demand business for its consumers, at a cost to those seeking compensation for their original and artistic creations. Luckily, the recent-passage of the Music Modernization Act¹²⁶ may provide solutions to several of the problems discussed above. As such, Parts II & III below discuss those solutions and whether they go far enough.

[33] In sum, the existing system for licensing of mechanical compositions has evolved little over the last century, and, when it has, only in piecemeal fashion. In the modern age of digital streaming, calls for changes to the licensing system abound as music copyright laws have led to lower revenues for songwriters and publishers while allowing streaming giants to face few consequences. Until now, the result has been a highly complex system full of bureaucratic requirements, burdensome to parties on both sides of the licensing conversation. The time has come for the mechanical licensing system to catch up with the technologically advanced music industry it is intended to serve.

¹²⁴ See YEH, *supra* note 48, at 6.

¹²⁵ See MUSIC MARKETPLACE, *supra* note 7, at 21.

¹²⁶ See Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (2018) (to be codified at 17 U.S.C. §115).

II. THE MUSIC MODERNIZATION ACT OF 2018

[34] On October 11, 2018, The Orrin G. Hatch-Bob Goodlatte Music Modernization Act (“MMA”) was signed into law.¹²⁷ The MMA contains three titles: (I) “Music Licensing Modernization,” (II) “Classics Protection and Access,” and (III) “Allocation for Music Producers.”¹²⁸ Each title addresses a unique area of copyright law and the Act as a whole received unanimous approval in Congress and praise from stakeholders in each corner of the music industry.¹²⁹ The following discussion focuses on the contents of Title I related to mechanical licensing and explores whether the changes offered advance the interests of songwriters and music publishers by addressing some of the issues discussed herein.

[35] Title I of the MMA requires interactive streaming services to obtain mechanical licenses for musical compositions embodied in the recordings they stream.¹³⁰ As codified, this eliminates any ambiguity as to whether a mechanical license is required for streaming music.¹³¹ In

¹²⁷ *See id.* (“This title, and the amendments made by this title, shall take effect on the date of enactment of this Act.”).

¹²⁸ *See id.*

¹²⁹ *See* 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/#7a6334f7272c> [<https://perma.cc/2579-22NX>].

¹³⁰ *See* Orrin G. Hatch-Bob Goodlatte Music Modernization Act, § 102, 132 Stat. at 3677–84 (to be codified at 17 U.S.C. § 115); *see also* 17 U.S.C. § 115(e)(10), (13) (2018) (defining “digital phonorecord delivery” to include interactive streaming as well as downloads, but not non-interactive (radio-style) streaming).

¹³¹ *See* Orrin G. Hatch-Bob Goodlatte Music Modernization Act, § 102, 132 Stat. at 3684, 3718–19; Yeh, *supra* note 48, at 10 (noting that prior to the MMA’s passage, compulsory mechanical licenses were required based on the 2008 settlement reached between parties before the CRB, pursuant to its authority under Section 801(b)(7) of the Copyright Act).

addition, the MMA confirms that streaming services may utilize the section 115 compulsory license. In fact, Title I establishes a new blanket license for qualified digital streaming services, referred to in the MMA as “digital music providers” (“DMPs”).¹³² Accordingly, a DMP that engages in the digital distribution of music and adheres to other statutory reporting requirements may avail itself of the new blanket license.¹³³

[36] The statutory rate for a blanket license is set by the Copyright Royalty Board (“CRB”) through rate-setting proceedings and requires the CRB to use a “willing buyer/willing seller” (i.e., fair market value) standard to determine the section 115 compulsory mechanical royalty rate.¹³⁴ Previously, section 115 required the CRB to set a “reasonable” rate,¹³⁵ where reasonableness was determined by the rate’s ability to achieve the following:

- (1) Maximizing public availability of creative works, (2) giving the copyright owner a fair return and the licensee a fair income, (3) reflecting the copyright owner and licensee’s relative roles in making the product available to the public, and (4) minimizing disruption of the industries involved and generally prevailing industry practices.¹³⁶

¹³² See Orrin G. Hatch-Bob Goodlatte Music Modernization Act, § 102(d)(1), (e)(8), 132 Stat. at 3684, 3718 (defining “digital music provider” and “blanket mechanical license”).

¹³³ See *id.* § 102(d).

¹³⁴ See *id.* § 102(a)(1)(F) (“The Copyright Royalty Judges shall establish rates and terms that must clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller. In determining such rates and terms for digital phonorecord deliveries, the Copyright Royalty Judges shall base their decision on economic, competitive, and programming information presented. . .”).

¹³⁵ See 17 U.S.C. § 115(c)(3)(C) (2018).

¹³⁶ See *id.* § 801(b)(1)(A)–(D).

This change is significant and likely to provide increased royalties to songwriters and publishers for their mechanical licenses because it settles pre-existing rate-setting discrepancies that often resulted in lower returns to songwriters and publishers than to record labels and recording artists (and even to songwriters and publishers for public performance licenses).¹³⁷

[37] While setting royalty rates for compulsory mechanical licenses through a fair market value standard appears to benefit songwriters and publishers in how much of a return they receive for their licenses, the most significant change offered by the MMA is arguably related to the administration of licenses and royalties moving forward. Title I calls for the establishment of the Mechanical Licensing Collective (“MLC”) to administer the newly created blanket license for mechanicals.¹³⁸ Specifically, the MLC will function as an independent non-profit organization made up of copyright owners¹³⁹ and will (1) issue blanket mechanical licenses to DMPs, (2) collect mechanical royalties for those licenses, and (3) distribute royalties to rightful copyright owners.¹⁴⁰

[38] In addition, the MLC is tasked with creating and maintaining a centralized database that identifies (1) the musical compositions embodied in individual sound recordings, (2) the copyright owners of those musical compositions, (3) the respective ownership shares of each of those

¹³⁷ See MUSIC MARKETPLACE, *supra* note 7, at 81–83, 135–37; Mary LaFrance, *Music Modernization and the Labyrinth of Streaming*, 2 BUS., ENTREPRENEURSHIP & TAX L. REV. 310, 324 (2018).

¹³⁸ See Orrin G. Hatch-Bob Goodlatte Music Modernization Act, § 102(d), 132 Stat. at 3684.

¹³⁹ See *id.* at § 102(d)(3)(A)(i).

¹⁴⁰ See *id.* at § 102(d)(3)(C).

copyright owners, and (4) contact information for each owner.¹⁴¹ In practice, this will require licensees to serve NOIs to the MLC rather than to individual copyright owners or the Copyright Office when copyright owners cannot be identified.¹⁴² The result is likely to eliminate the need for third-party copyright administrators like the HFA and unburden the Copyright Office in their efforts to locate copyright owners on behalf of DMPs.¹⁴³ Accordingly, the MMA offers sweeping changes to the structure and administration of compulsory mechanical licenses.

[39] Whether these new statutory provisions will actually benefit songwriters and publishers is yet to be seen, and the parties who will officially make up the MLC have yet to be designated.¹⁴⁴ However, professionals around the music industry have lauded the MMA's passage and agree that the law is an unprecedented step toward updating outdated licensing systems and ensuring that songwriters and publishers are paid fairly and on time.¹⁴⁵ To that end, the MMA provides sweeping changes

¹⁴¹ See *id.* at § 102(d)(3)(E).

¹⁴² See *id.* at § 102(d)(2)(A).

¹⁴³ See Doug Collins, *The Music Modernization Act Will Provide a Needed Update to Copyright Laws*, THE HILL (Jan. 1, 2018), <https://thehill.com/blogs/congress-blog/technology/368385-the-music-modernization-act-will-provide-a-needed-update-to> [<https://perma.cc/AS5D-XKHA>] (explaining that when a DMP was unable to locate or identify a mechanical copyright holder, § 115 allowed them to file NOIs with the Copyright office; however, DMPs seek to license millions of songs and have filed more than 45 million NOIs since 2016).

¹⁴⁴ See Bart Herbison, *Songwriter Groups Agree on New Music Modernization Act Licensing Entity*, TENNESSEAN (Mar. 21 2019), <https://www.tennessean.com/story/opinion/2019/03/21/music-modernization-act-songwriter-groups-come-consensus-mechanical-licensing-collective/3240339002/> [<https://perma.cc/KY5K-2S2C>].

¹⁴⁵ See Amy X. Wang, *Trump Signs Landmark Music Bill into Law*, ROLLING STONE (Oct. 11, 2018), <https://www.rollingstone.com/music/music-news/trump-signs-music-modernization-act-736185/> [<https://perma.cc/L4SL-Y2MQ>].

that may reduce litigation in the area of mechanical licensing. Indeed, the MMA actually forecloses the possibility of bringing an infringement action, like that in *Wixen*, against a DMP so long as it obtains and complies with the terms of a valid blanket license.¹⁴⁶

[40] What, then, can songwriters and music publishers expect from the MMA moving forward? The following will analyze how the statutory changes discussed above will impact the licensing process for all parties from the perspective of the *Wixen* case discussed *supra* in Part I(D). Next, Part III will conclude with a brief overview of potential challenges that may arise in the wake of the MMA's passage.

III. Does The MMA Go Far Enough?

A. It's All About the License: MMA's Ability to Address Problems Like *Wixen*

[41] The underlying issue in *Wixen* was Spotify's failure to obtain the necessary mechanical licenses required to reproduce songs on its streaming platform.¹⁴⁷ While a response was never filed by Spotify in that case, Spotify could have argued that it had in fact complied with the statutory requirements of section 115 by filing NOIs with the Copyright Office,¹⁴⁸ or that such responsibility fell to its third-party administrator, HFA. Nevertheless, the licensing system at play resulted in *Wixen*'s songwriters not getting paid.¹⁴⁹ This meant that, pre-MMA, a licensee that wanted to pay for mechanical rights for streaming purposes may have

¹⁴⁶ See Orrin G. Hatch-Bob Goodlatte Music Modernization Act, § 102(d), 132 Stat. at 3684.

¹⁴⁷ See *Wixen* Complaint, *supra* note 84, at 8–9.

¹⁴⁸ See 17 U.S.C. § 115(b)(1) (2018).

¹⁴⁹ See Kreps, *supra* note 83.

found it incredibly difficult, if not impossible, to make payments for each of the 30 million songs streamed on its platform. Songwriters, in turn, likely failed to make any money on those 30 million songs. That is because rights in musical compositions are complex and often split up among parties within the music industry.¹⁵⁰ As an added challenge, those rights often change hands when songwriters change publishing companies or pass along their interests to others.¹⁵¹ This dynamic creates difficulties in keeping track of current copyright holders' contact information and makes the process of serving NOIs ineffective and inefficient.¹⁵² Spotify, with millions of songs streamed per day,¹⁵³ likely had no reasonable way of complying with the requirements of section 115.

[42] Under the MMA, these challenges will be reduced thanks to the creation of blanket licenses and the MLC. First, the MLC will eliminate the need for third-party mechanical license administrators like HFA.¹⁵⁴ Because the MLC will develop and maintain a centralized, searchable database containing mechanical rights ownership and contact information,¹⁵⁵ streaming service licensees will have a one-stop shop to

¹⁵⁰ See Jeong, *supra* note 78 (discussing how the rights in one song are split among several parties).

¹⁵¹ See, e.g., Laura Snapes, *Taylor Swift Leaves Lifelong Label to Sign with Universal Music Group*, THE GUARDIAN (Nov. 19, 2018, 11:47 AM), <https://www.theguardian.com/music/2018/nov/19/taylor-swift-leaves-lifelong-label-to-sign-with-universal-music-group> [<https://perma.cc/J5E6-TK43>].

¹⁵² See Christman, *Unpaid Royalties*, *supra* note 79.

¹⁵³ See *Top 200*, SPOTIFY CHARTS, <https://spotifycharts.com/regional/global/daily/latest> [<https://perma.cc/7B4M-RPTG>] (last visited Mar. 6, 2020).

¹⁵⁴ See Abdo & Abdo, *supra* note 51, at 6.

¹⁵⁵ See Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115–264 § 102(a)(4), 132 Stat. 3676, 3687 (2018).

discover any information they may need to qualify for a blanket license. Also, because DMPs like Spotify retain the informational data about which songs are played at any given time,¹⁵⁶ they will know exactly which songs will require a license. Accordingly, DMPs will no longer be able to claim that they cannot identify a particular copyright holder, file a NOI with the Copyright Office, and escape payment to songwriters and publishers by simply adhering to the statutory obligations.

[43] Additionally, the MMA simplifies the licensing process by requiring DMPs to file with, and make payments directly to the MLC even if the rights holder is unknown.¹⁵⁷ This provides benefits to all parties involved that were not available at the time of the *Wixen* case. First, the MMA's requirements create a system where DMPs must pay for a license up front, increasing the chances that a songwriter will receive payment.¹⁵⁸ Pre-MMA, when a licensee sought a compulsory license for an unidentified copyright holder's work, service of a NOI to the Copyright Office was enough.¹⁵⁹ However, the owner of the copyright was only entitled to a royalty once he or she was identified by the Copyright Office.¹⁶⁰ Often times, this meant a copyright holder had the burden of claiming their royalty¹⁶¹ because the sheer volume of NOIs filed with the

¹⁵⁶ See *FAQ*, SPOTIFY FOR ARTISTS, <https://artists.spotify.com/faq/stats#how-often-are-my-stats-updated-in-spotify-for-artists> (last visited Mar. 6, 2020).

¹⁵⁷ See Orrin G. Hatch-Bob Goodlatte Music Modernization Act, § 102(a)(4), 132 Stat. at 3687.

¹⁵⁸ See Micah Singleton, *Congress May Actually Fix Music Royalties*, THE VERGE (Jan. 26, 2018, 10:36 AM), <https://www.theverge.com/2018/1/26/16931966/congress-music-modernization-act-licensing-royalties> [<https://perma.cc/V2H5-UA64>].

¹⁵⁹ See 17 U.S.C. § 115(b)(1) (2018).

¹⁶⁰ See *id.* at § 115(c)(1).

¹⁶¹ See Abdo & Abdo, *supra* note 51, at 6.

Copyright Office made locating all rights holders virtually impossible.¹⁶² Under this new system, both the songwriter/publishers and DMPs benefit because copyright holders are no longer required to check in with the Copyright Office to see if their compositions have been licensed, and DMPs know how much they will owe to the MLC based on their own proprietary data.

[44] Another major benefit that this structure provides is that the MLC is responsible for remitting all royalties to respective copyright holders.¹⁶³ This means that DMPs and third-party administrators are no longer required to directly pay out royalties to the licensors. Pre-MMA, songwriters and smaller publishers not affiliated with large clearinghouses like HFA were less likely to be identified or receive payment due to complex statutory components of the compulsory mechanical license.¹⁶⁴ Because HFA represented the interests of 70% of the mechanical royalty market, licensing and payment responsibilities for the other 30% fell to DMPs, like Spotify, whenever a musical composition was streamed, a burdensome endeavor given the statutory requirements and divided interests among copyright holders.¹⁶⁵

¹⁶² See Collins, *supra* note 143.

¹⁶³ See Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115–264 § 102(a)(4), 132 Stat. 3676, 3694 (2018).

¹⁶⁴ See *Mechanical Royalties Guide 2019*, ROYALTY EXCHANGE (Jan. 17, 2019), <https://www.royaltyexchange.com/blog/mechanical-royalties#sthash.Nzu8L0fA.dpbs> [<https://perma.cc/K6N2-TXQQ>] (stating that Harry Fox represents the mechanical royalty interests of Sony/ATV, Universal, and Warner/Chappell, which is approximately 70% of the market).

¹⁶⁵ See *id.*

[45] Moving forward, DMPs will pay the MLC up front based on established royalty rates and usage data provided by DMPs.¹⁶⁶ In the event that a copyright holder cannot be identified, the MLC is required to place royalties owed into an interest bearing account until that copyright owner can be identified by the MLC.¹⁶⁷ A prescribed holding period of three years is also established under the MMA, and requires that unpaid royalties be distributed either when a copyright holder is subsequently identified or, when unidentified, on an equitable basis to any known copyright holders.¹⁶⁸ In essence, this unburdens all parties and allows the MLC to serve as an official middleman between DMPs and copyright holders to ensure that royalties are collected and remitted in an efficient and effective manner.

[46] Finally, the MMA provides an auditing mechanism to enhance accountability.¹⁶⁹ It provides that the MLC may audit DMPs in order to confirm that the information provided by them is accurate.¹⁷⁰ In addition, the MMA gives copyright holders the right to audit the MLC.¹⁷¹ Such a mechanism will ensure accountability and increase the likelihood that accountings and payments at each stage of the licensing process are accurate.¹⁷²

¹⁶⁶ See Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115–264 § 102(a)(4), 132 Stat. 3676, 3694–95 (2018).

¹⁶⁷ See *id.* at § 102(a)(4), 132 Stat. at 3694 (stating another benefit that MLC, rather than DMPs, third-party administrators, or the Copyright Office, is solely responsible for identifying unknown copyright holders).

¹⁶⁸ See *id.* at § 102(a)(4), 132 Stat. at 3695.

¹⁶⁹ See *id.* at § 102(a)(4), 132 Stat. at 3687–88, 3691–92.

¹⁷⁰ See *id.* at § 102(a)(4), 132 Stat. at 3691.

¹⁷¹ See *id.* at § 102(a)(4), 132 Stat. at 3698.

¹⁷² See Abdo & Abdo, *supra* note 51, at 6.

[47] In sum, the MMA appears to have solved many of the issues faced by DMPs and songwriters/publishers prior to its passage, as exemplified in *Wixen*. First, the establishment of a central licensing agency reduces many of the administrative burdens faced by DMPs and third-party licensing administrators. Moving forward, the MLC bears most of the responsibility for the collection and remittance of royalty payments. Second, the creation of a centralized database housing all composition information will make it easier for licensees looking to obtain a mechanical license. In addition, the MLC will have the added responsibility of maintaining this database to ensure all information is up to date. Finally, the auditing mechanism will allow the MLC to check DMPs and songwriters/publishers to check the MLC. This provides a new level of transparency not available in the pre-MMA era. Together, these changes have the potential to streamline the technical aspects of the licensing process, eliminate costs, increase revenues, and advance the policy goals of music copyright.

B. Not So Fast: Emerging Challenges

[48] The MMA is expected to provide greater revenues to songwriters and publishers by establishing the MLC, creating a centralized and automated database, and providing checks on licensees and the MLC.¹⁷³ However, while the text of the MMA appears to provide the changes needed to move the mechanical licensing system into the twenty-first century, implementation of the law will be no small task. As such, the following will briefly identify some of the major issues to be overcome in the wake of MMA's passage.

[49] First, the MMA requires the establishment of the MLC in order to administer mechanical licenses.¹⁷⁴ The MLC will be an independent non-

¹⁷³ *See id.*

¹⁷⁴ *See id.*

profit organization made up of copyright owners¹⁷⁵ and the first difficulty will be the formation of the collective itself. Details of the MLC requirements and a corresponding request for proposals was published by the U.S. Copyright Office in the December 21, 2018 Federal Register.¹⁷⁶ The solicitation identifies a number of requirements that must be met in order to be designated as the MLC¹⁷⁷ and required initial proposals to be received by March 21, 2019.¹⁷⁸ The register of Copyrights is directed to designate the MLC no later than July 8, 2019, or 270 days from the enactment of the statute.¹⁷⁹ The inherent difficulty lies in the fact that the MLC must be a collection of industry professionals and copyright holders who are endorsed by other industry professionals and copyright holders, which is no small task for an industry full of ego and competing interests.

[50] Despite the challenge however, two groups have emerged as potential applicants to form the MLC.¹⁸⁰ The first group, “dubbed the industry consensus group,” consisting of the National Music Publishers

¹⁷⁵ See *id.*; LaFrance, *supra* note 137, at 322.

¹⁷⁶ See Request for Information on Designation of Mechanical Licensing Collective and Digital Licensee Coordinator, 83 Fed. Reg. 65,747 (Dec. 21, 2018).

¹⁷⁷ See *id.* at 65,748 (“[t]he entity should be: [a] single nonprofit entity that is created by copyright owners to carry out its statutory responsibilities; [e]ndorsed by and enjoying substantial support from musical work copyright owners . . . ; [a]ble to demonstrate . . . that . . . it will have the administrative and technological capabilities to perform the required functions; and [g]overned by a board of directors that is composed of a mix of voting and non-voting members. . .”).

¹⁷⁸ See *id.* at 65,747.

¹⁷⁹ See *id.* at 65,748.

¹⁸⁰ See Ed Christman, *Lobbying for Spots on the Music Modernization Act’s Licensing Collective Heats Up*, BILLBOARD (Jan. 3, 2019) [hereinafter Christman, *Lobbying*], <https://www.billboard.com/articles/business/8491190/lobbying-spots-music-modernization-act-licensing-collective-heats-up> [<https://perma.cc/W4WU-4LQJ>].

Association (“NMPA”), the Nashville Songwriters Association International (“NSAI”), and the Songwriters of North America (“SoNA”),¹⁸¹ submitted its application to form the MLC on March 21, 2019.¹⁸² The other group, the American Music Licensing Collective (“AMLC”), has also submitted an application to form the MLC.¹⁸³

[51] Both groups have supporters and critics. “To some, there is a fear that the industry consensus group will be dominated by the three major music companies . . . [while] the [] AMLC board itself may be controversial to some digital services, as it includes [some] executives involved in suing Spotify over copyright infringement. . . .”¹⁸⁴ Furthermore, some critics complain that the industry consensus group has “the ability, the clout and the desire to cut direct deals with digital services so that they won’t even have to rely on the MLC” while still being able to benefit from the unmatched payouts, “since [those payouts] are determined by publishers’ market share. . . .”¹⁸⁵

[52] With respect to the concerns over unmatched payouts, critics believe that because the makeup of the MLC would consist of major publishing companies who represent a majority of songwriters and publishers, those companies will directly benefit from the payouts of

¹⁸¹ *Id.*

¹⁸² See *MLC Coalition Unveils Broad Support for Copyright Office Submission*, AMERICAN SONGWRITER (Feb. 4, 2019), <https://americansongwriter.com/2019/02/mlc-coalition-unveils-broad-support-for-copyright-office-submission/> [<https://perma.cc/CTE7-RQJ9>].

¹⁸³ See Christman, *Lobbying*, *supra* note 180.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

unmatched songs.¹⁸⁶ The argument is essentially that unpaid royalties belonging to someone who may not be represented by one of those major organizations will inevitably end up in the pockets of those organizations. Such a concern however, is easily dispelled due to the fact that “publishers and their songwriters are less likely to have their songs in the unmatched category” due to the creation of a centralized, informational database.¹⁸⁷ Furthermore, unclaimed royalties or out of date database information likely indicate that money is not a driving factor in songwriters’ creative endeavors.

[53] With respect to MLC members being able to cut deals directly with streaming service providers, a conflict may certainly arise due to the fact that the industry’s major players making up the MLC would be benefiting from both higher, directly negotiated rates and any unmatched royalties being split up based on market share.¹⁸⁸ Indeed, copyright holders may still directly negotiate mechanical royalty rates instead of using the compulsory licensing system.¹⁸⁹ Because powerful publishing companies will make up the MLC, higher rates than those set by the CRB might be attainable while still allowing benefits to flow into the coffers of those companies who have a larger market share of copyright ownership.¹⁹⁰ Again, however, this concern seems to be based more on the payout formula for unmatched royalties than it is on the MLC members acting in

¹⁸⁶ *See id.* (“Even some independent publishers who support the industry consensus group fear that the three majors will benefit from the black box payments disbursed by market share. . . .”)

¹⁸⁷ *Id.*

¹⁸⁸ *See id.* (“[The majors] will still be able to benefit by sharing in any black box payouts, since they are determined by publisher’s market share with each digital service that has unmatched paid royalties, argue the detractors of that payout formula.”).

¹⁸⁹ *See* 17 U.S.C. § 115(c)(1)(D) (2018).

¹⁹⁰ *See* Christman, *Lobbying*, *supra* note 180.

bad faith. Besides, an argument can be made that direct negotiations by larger companies will produce “willing buyer/willing seller” evidence that may be used in CRB rate-setting hearings.¹⁹¹ In turn, smaller publishers may actually benefit because direct negotiation evidence will indicate the true market value of a streamed musical composition. Furthermore, the auditing mechanisms in place under the MMA increase transparency and accountability and will be available to songwriters and publishers who suspect bad faith on the part of the MLC.¹⁹²

[54] Another major challenge for the MLC will be the creation of a centralized, automated database for licensees to use when identifying their licensing needs. Indeed, the MMA mandates the creation of such a database in order to identify copyright holders and to pay out royalties.¹⁹³ This will necessarily require the MLC to hire a tech company to “build a database capable of not only storing all the music publishing metadata, but also be able to match them to more than 45 million recordings.”¹⁹⁴ In addition, such a system will need to be capable of issuing detailed reports.¹⁹⁵ Other considerations for the database include keeping track of shifting ownership rights in composition copyrights, tax identification numbers, and payment preferences for each rights holder.¹⁹⁶ Such needs will be both immediate and ongoing and likely represent the largest challenge faced by the MLC moving forward.¹⁹⁷

¹⁹¹ See 17 U.S.C. § 115(c)(1)(F) (2018).

¹⁹² See *id.* at § 115(d)(3)(G).

¹⁹³ See Christman, *Lobbying*, *supra* note 180.

¹⁹⁴ *Id.*

¹⁹⁵ See *id.*

¹⁹⁶ See *id.*

¹⁹⁷ See *id.* (“The technology solution needs to deal with a large and complex problem that is growing We have never seen the volume of music and media like the one that is

[55] Finally, the MLC will be responsible for collecting and distributing royalty payments to the rightful copyright holders.¹⁹⁸ As discussed at length above, much of the concern over unmatched payouts appears focused on who is actually benefitting from those payouts.¹⁹⁹ Less discussion has been focused on those who simply do not end up getting paid. On one hand, the payout method established under the MMA for unmatched copyright holders appears to cut against the policy goal of the new law: incentivizing artists to create based on the prospect of financial gain.²⁰⁰ In effect, the MMA may be perpetuating the evil it seeks to remedy by not allowing *all* songwriters to reap the rewards of this sweeping legislation.

[56] On the other hand, the rationale for such a system may be based on the idea that the money should go somewhere after remaining unclaimed for a pre-determined amount of time and that only a small percentage of royalties will actually go unmatched after the robust database is up and running. However, if a songwriter does not come forward to collect his or her royalties, this would suggest that remuneration is not a driving factor behind his or her music creation and, thus, no harm is done when unmatched royalties are paid out. Regardless, the overall purpose of the MMA is to reduce the amount of unpaid royalties and increase the

coming. Now services tout that they have 45 million recordings, but 10 years from now that could be 350 million or 400 million recordings, with all the entanglements of trying to get all the writers paid. We will be talking trillions of lines of information.").

¹⁹⁸ See Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, § 102(a)(4), 132 Stat. 3676, 3694–95 (2018).

¹⁹⁹ See *id.* See, e.g., Annette I. Kahler, *Implementation of the Music Modernization Act: Copyright Office Issues Solicitation for Mechanical Licensing Collective*, HRFM TODAY (Feb. 21, 2019), <https://www.hrfmtoday.com/2019/02/ip-frontiers-implementation-of-the-music-modernization-act-copyright-office-issues-solicitation-for-mechanical-licensing-co.html> [https://perma.cc/97SP-S6CZ].

²⁰⁰ See Bach, *supra* note 9, at 383.

revenues of songwriters and publishers alike, a goal more likely to be accomplished now than at any point in recent history.²⁰¹

CONCLUSION

[57] The history of mechanical licensing is complex and nuanced. The Music Modernization Act, though following in the tradition of piecemeal reform in the face of technological change, offers some of the most robust reforms to a system originally intended to compensate music composers for lost revenue from declining sheet music sales. While logistical and political music industry challenges remain, it appears that the Music Modernization Act is well-suited to reshape the mechanical licensing system for an age where digital music streaming has become the preferred form of music distribution and consumption. Indeed, songwriters and publishers can now operate in an industry that has their best interests in mind while streaming services are provided with a simplified and streamlined system that reduces administrative burdens while increasing compliance. The intent of the law is clear: getting songwriters and publishers what they are owed in return for their contributions to culture and society. Whether that goal is achieved remains to be seen but the future appears brighter today than it once did.

²⁰¹ See Dani Deahl, *The Music Modernization Act Has Been Signed into Law*, THE VERGE (Oct. 11, 2018, 12:08 PM), <https://www.theverge.com/2018/10/11/17963804/music-modernization-act-mma-copyright-law-bill-labels-congress> [<https://perma.cc/M4LK-QPYM>].