COMMENTS

The Times They Are a Changin': The Music Modernization Act and the Future of Music Copyright Law

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I. INTRODUCTION 53
II. THE COPYRIGHT ACT AND MUSIC 55
III. WHO'S WHO AND WHAT'S WHAT OF THE MUSIC INDUSTRY 58
IV. THE MUSIC MODERNIZATION ACT 60
A. Reform of § 115 of the Copyright Act 61
B. Repeal of § 114(i) 63
C. Willing Buyer/Willing Seller Standard 64
D. The "Wheel" Approach 66
V. ANALYSIS OF THE MUSIC MODERNIZATION ACT 67
VI. CONCLUSION 68

I. INTRODUCTION

In October 2014, Taylor Swift dropped one of her biggest albums, *1989*.[1] This album "drop" garnered significant media attention as it was one of the first times an artist publicly denounced interactive digital music services that provide consumers with on-demand streaming, specifically Spotify.[2] Swift's rejection of on-demand streaming services was a pinnacle change in the music industry regarding artists' revenue and protection of music licenses.[3] Swift's protest is just one example of artists'

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1. Lisa Respers France, *Finally, Taylor Swift's '1989' Is Out*, CNN (Oct. 27, 2014), http://www.cnn.com/2014/10/27/showbiz/music/taylor-swift-1989-album-release/index.html.

2. Owen Williams, *Taylor Swift's 1989 World Tour Live to Skip iTunes, Stream Exclusively on Apple Music*, NEXT WEB (Dec. 13, 2015), http://thenextweb.com/insider/2015/12/13/taylor-swifts-1989-world-tour-live-album-to-skip-itunes-stream-exclusively-on-apple-music/; *see also* Kaitlyn Tiffany, *A History of Taylor Swift's Odd, Conflicting Stances on Streaming Services*, VERGE (June 9, 2017), http://www.theverge.com/2017/6/9/15767986/taylor-swift-apple-music-spotify-statements-timeline.

3. Tiffany, *supra* note 2.

and songwriters' attempts at controlling the different mediums in which their works are received in the music industry.[4]

Over the years, musicians and songwriters have called attention to revenue concerns within the industry.[5] While some musicians have taken to writing guest columns in popular news outlets,[6] others have used these issues to create musical hits.[7] Some songs about the discontent in the music industry have included "Radio Radio" by Elvis Costello, "Barracuda" by Heart, and "The Entertainer" by Billy Joel.[8] While some of the songs have become well-known, it has become increasingly apparent that songwriters are utilizing their talents to be heard in the only way they know how—through creative expression as authors. Fortunately for songwriters, Congress heard their cries and introduced the Music Modernization Act in 2014.[9]

Nearly four years later, on October 11, 2018, President Trump signed into law the Orrin G. Hatch-Bob Goodlatte Music Modernization Act (MMA) while surrounded by Sam Moore of Sam & Dave, Mike Love of the Beach Boys, Kid Rock, Doobie Brothers guitarist Jeff "Skunk" Baxter, and several other "Trump-friendly" artists.[10] The MMA is a new, bipartisan bill introduced to Congress on April 10, 2018.[11] This Comment first addresses the history of the music industry, including music licensing under the Copyright Act of 1976 (Copyright Act) as well as notable term distinctions and primary entities within the industry. Next, this Comment

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4. *Id.*

5. Steven Tyler & David Israelite, *Congress, Fix How Songwriters Are Paid & Pass the Music Modernization Act (Guest Column)*, BILLBOARD (Feb. 15, 2018), http://www.billboard.com/articles/business/8100002/steven-tyler-david-israelite-music-modernization-act-guest-column.

6. *Id.*

7. Matt Sulem, *The 20 Best Songs About the Music Industry*, MSN (July 27, 2017), http://www.msn.com/en-us/music/gallery/the-20-best-songs-about-the-music-industry/ss-AAoVUTv#image=21.

8. BILLY JOEL, *The Entertainer*, STREETLIFE SERENADE (Devonshire Sound 1974) ("I've got to meet expenses, I got to stay in line, Gotta get those fees to the agencies" and "I let 'em rub my neck and I write 'em a check and they go their merry way"); ELVIS COSTELLO, *Radio, Radio*, THIS YEAR'S MODEL (Radar Records 1978) ("I wanna bite the hand that feeds me . . . . I wanna bite that hand so badly . . . . I want to make them wish they'd never seen me . . . you had better do as you are told. You better listen to the radio"); HEART, *Little Queen*, LITTLE QUEEN (Portrait 1977) ("No right no wrong you're selling a song, a name . . . whisper game").

9. Ed Christman, *President Trump Signs Music Modernization Act into Law with Kid Rock, Sam Moore as Witnesses*, BILLBOARD (Oct. 11, 2018), http://www.billboard.com/articles/business/8479476/president-trump-signs-music-modernization-act-law-bill-signing.

10. *Id.*

11. Robert Levine, *Music Modernization Act Introduced with Bipartisan Support*, BILLBOARD (Apr. 10, 2018), http://www.billboard.com/articles/business/8301735/music-modernization-act-introduced-congress-bipartisan-support; *see also H.R. 5447(115th): Music Modernization Act*, GOVTRACK (Sep. 20, 2018), http://www.govtrack.us/congress/bills/115/hr5447.

will provide an overview of the major changes the MMA brings to the Copyright Act and the music-licensing process in general. Finally, this Comment will address how and why the MMA will benefit the music industry as a whole and its impact on any future regulation of music.

II. THE COPYRIGHT ACT AND MUSIC

The Constitution 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."[12] Congress has exerted this power by recognizing changes and developments in technology and implementing new laws to correspond to those changes.[13] Therefore, Congress aptly recognized that a more recent and pressing concern has been the copyright protection of artists' works in the music industry.[14]

Under the Constitution, copyright protection applies only to "original works of authorship fixed in any tangible medium."[15] With the development of technology, Congress has found new works of authorship requiring copyright protection that was specifically applicable to protecting the works of musicians and other artists.[16] Protection of new music technology began with the Copyright Act of 1831 in which Congress added "musical works" under "works of authorship."[17] This amendment granted authors and owners the right to distribute and reproduce musical compositions, such as sheet music.[18] From 1831 to 1909 the United States saw an increase of inventions, including inventions that could reproduce those compositions mechanically.[19] The new ability to mechanically reproduce music ultimately diminished the overall copyright value of owners' musical compositions.[20]

It was not until after the Supreme Court's decision in *White-Smith Music Publishing Co. v. Apollo Co.* that Congress interpreted and

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12. U.S. CONST. art. I, § 8, cl. 8.

13. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976); 17 U.S.C. § 102 (2012) (amending 17 U.S.C. §§ 2, 10, 12 (1909)).

14. *See generally* Levine, *supra* note 11.

15. 17 U.S.C. § 102.

16. *See id.*

17. *Id.*; *see* Flo & Eddie, Inc. v. Sirius XM Radio, Inc., 28 N.Y.3d 583, 591 (N.Y. 2016).

18. U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MARKETPLACE 17 (2015), http://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf.

19. Goldstein v. California, 412 U.S. 546, 564 (1973).

20. *Id.* at 564-65 ("Individuals who had use of a piano roll and an appropriate instrument had little, if any need for a copy of the sheet of music.").

eventually expanded the boundaries of the Copyright Act of 1831.[21] In *White-Smith*, the Court found that "piano rolls, as well as records, were not 'copies' to the copyrighted composition . . . but were merely component parts of a machine which executed the composition."[22] In other words, this decision ultimately denied the authors of these works copyright protection even though "the piano rolls employed the creative work of the composer."[23]

Following the decision in *White-Smith*, Congress issued the Copyright Act of 1909, which brought about exclusive mechanical rights for copyright owners.[24] Congress' biggest concern in enacting the Copyright Act of 1909 was to prevent a monopoly in mechanical reproductions of musical works.[25] In effect, the Act made it so that compulsory licenses were required to mechanically reproduce musical compositions.[26] Thus, while the Act resolved the issue of producing copies of musical works, it failed to address the concerns associated with sound recordings.[27]

Only in 1971 did Congress introduce legislation aimed at preserving the rights of both songwriters and publishers of musical works under the Sound Recording Amendment of 1971, which included "sound recordings" as a protectable work of authorship under the Copyright Act of 1909.[28] The amended protection was seemingly limited as it only protected recordings "on or after February 15, 1972."[29] Additionally, the artists only had "the exclusive rights of reproduction, distribution, and preparation of derivative works."[30] However limited, the amendment demonstrated Congress's awareness of issues arising in the music industry, particularly the issue of piracy.[31]

The Sound Recording Amendment of 1971 was a band-aid solution on the Copyright Act of 1909's shortcomings—a temporary fix for an even bigger problem. First, it failed to address sound recordings created

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21. *See id.*
22. *Id.* at 565.
23. *Id.*
24. U.S. COPYRIGHT OFFICE, *supra* note 18, at 17.
25. Marybeth Peters, *Section 115 Compulsory License*, REG. COPYRIGHTS (Mar. 11, 2004), http://www.copyright.gov/docs/regstat031104.html.
26. *Id.*
27. U.S. COPYRIGHT OFFICE, *supra* note 18, at 17.
28. *Id.*; *see also* Flo & Eddie, Inc. v. Sirius XM Radio, Inc., 28 N.Y.3d 583, 591 (N.Y. 2016).
29. U.S. COPYRIGHT OFFICE, *supra* note 18, at 17.
30. *Id.*
31. *See Flo & Eddie*, 28 N.Y.3d at 592.

before February 15, 1972, which resulted in confusion within the music industry.[32] Second, it did not provide owners with an exclusive right of public performance.[33] As a result, radio broadcasters and record companies used the lack of public performance protection to their benefit.[34] They would work together, forming a "give and take" relationship in which the broadcasters acted as advertisers for the record companies and their artists.[35] For example, a broadcaster would play a sound recording on the radio, the public would hear that sound recording, like it, and then go out and buy it.[36]

The lack of an exclusive right of public performance for sound recordings in all transmissions was unrealistic with the development of the Internet and other music technology.[37] It was not until 1995, under the Digital Performance Right in Sound Recordings Act (DPRA), that owners were granted an exclusive right in public performance, but only for digital audio transmissions.[38] The DPRA was enacted to "expand[] the scope of the compulsory license to include the making and distribution of a digital phonorecord."[39] It would also coin the term the "'digital phonorecord delivery (DPD),' to describe the process whereby a consumer receives a phonorecord by means of digital transmission, the delivery of which require[d] the payment of a statutory royalty under Section 115."[40]

While the DPRA provided protection to public performances of sound recordings, it exluded audio transmissions such as noninteractive, non-subscription, and broadcast transmissions.[41] This created a complex process and a "statutory licensing regime for noninteractive digital subscription services."[42] Additionally, Congress implemented a system in which copyright owners "were required to grant license[s] to eligible subscription services" and agree on a royalty rate.[43] If there were any conflicts over deciding a royalty rate, "the DPRA outlined an arbitration mechanism for determining a reasonable rate . . . authoriz[ing] the Copyright Office to convene a copyright arbitration royalty panel to

32. *See* U.S. COPYRIGHT OFFICE, *supra* note 18, at 17.
33. *Id.*
34. *Id.*
35. *Id.*
36. Bonneville Int'l Corp. v. Peters, 347 F.3d 485, 487 (3d Cir. 2003).
37. *See generally id.* at 488.
38. U.S. COPYRIGHT OFFICE, *supra* note 18, at 17.
39. Peters, *supra* note 26.
40. *Id.*
41. 17 U.S.C. § 114(d)(1)(A) (2012); *Bonneville Int'l Corp.*, 347 F.3d at 488.
42. Flo & Eddie, Inc. v. Sirius XM Radio, Inc., 28 N.Y.3d 583, 593 (N.Y. 2016).
43. 17 U.S.C. § 114(d)(2). *See generally Bonneville Int'l Corp.*, 347 F.3d at 489.

arbitrate licensing rates."[44] It was also difficult for licensors to identify reproductions that were subject to compensation from those that were not.[45] Thus, even though the DPRA provided significant changes to address the burgeoning digital music industry, there was still a concern that it did not fully protect copyright owners.[46]

Following the enactment of the DPRA, Congress realized there were still issues that needed to be addressed so it introduced the Digital Millennium Copyright Act of 1998 (DMCA). The DMCA addresses a variety of copyright concerns brought about by online streaming.[47] The DMCA requires compulsory licenses for webcasting, "which means that, under certain conditions . . . the owner of the recording must allow its performance for a set fee."[48] Prior to licenses of this kind, copyright owners whose work was streamed online did not have the ability to prohibit others from using their protected work.[49]

III. WHO'S WHO AND WHAT'S WHAT OF THE MUSIC INDUSTRY

To fully understand the MMA, it is essential to first understand the differences between musical works and sound recordings, as well as the parties involved with shaping the music industry as a whole. While musical works and sound recordings may be considered by the public to be interchangeable, they are listed as two distinct works under the Copyright Act of 1976.[50] In other words, each work requires separate copyright protection.[51]

A musical work is created by a songwriter or composer and makes up the underlying composition of a sound recording.[52] The composition may be the structure of a musical piece, sheet music, or anything that can be included in a phonorecord.[53] In comparison, a sound recording is a "work[] that result[s] from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects,

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44. *See generally Bonneville Int'l Corp.*, 347 F.3d at 489.
45. *See* Peters, *supra* note 26
46. Peters, *supra* note 26.
47. *See generally* DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 260 (9th ed. 2015).
48. *Id.*
49. *Id.*
50. 17 U.S.C. §§ 101, 102 (2012); U.S. COPYRIGHT OFFICE, *supra* note 18, at 18.
51. *See* 17 U.S.C. §§ 101, 102 (2012); U.S. COPYRIGHT OFFICE, *supra* note 18, at 18.
52. U.S. COPYRIGHT OFFICE, *supra* note 18, at 18.
53. *Id.*

such as disks, tapes, or other phonorecords, in which they are embodied."[54] Essentially, sound recordings are musical works fixed in a tangible medium.[55] For example, Selena Gomez's "Bad Liar" is made up of two works of authorship.[56] The composition of "Bad Liar" borrows some of the musical composition of the song "Psycho Killer" by the band Talking Heads, co-written by Justin Tranter and Julia Michaels.[57] The second work is the sound recording of "Bad Liar," which is owned by Gomez because she created the lyrics and overall recording of the song.[58] Understanding the close relationship between these two works of authorship allows for a clearer understanding of the MMA and the issues facing the music industry today.

There are three major "players" of the music business that contribute to the overall dynamic of the industry and that the MMA plans to change.[59] These essential players consist of music publishers, songwriters, and performing rights organizations (PROs).[60] All three groups have significantly impacted the music industry and how Congress has approached music copyright law, specifically the influence of music publishers and songwriters.[61]

Songwriters are considered to be the "creatives" and music publishers are viewed as the "business."[62] A songwriter will write a song and assign the copyright of that song to the publisher.[63] The publisher will then license that song to third parties so that the public can use it.[64] In addition to issuing licenses, the publisher may also handle any and all finances for an author.[65] The publisher may also act in a creative sense when it liaises between other authors.[66] For example, a publisher may bring songwriters together to work with other artists and collaborate on different projects.[67] Since publishers and songwriters have a mutual

54. 17 U.S.C. §§ 101, 102.
55. *Id.*; U.S. COPYRIGHT OFFICE, *supra* note 18, at 18.
56. *See generally* Luke Morgan Britton, *David Byrne Responds to Selena Gomez Sampling Talking Heads on 'Bad Liar*,*'* NME (May 18, 2017), http://www.nme.com/news/music/david-byrne-responds-selena-gomez-sampling-talking-heads-bad-liar-2073673.
57. *Id.*
58. *Id.*
59. *See generally* U.S. COPYRIGHT OFFICE, *supra* note 18, at 18-20.
60. *Id.*
61. *Id.*
62. PASSMAN, *supra* note 47, at 235.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at 237.
67. *Id.*

interest in expanding the license's availability and popularity of a song, they will typically split any income 50/50.[68] Sony/ATV Music Publishing, Warner/Chappell Music, and Universal Music Publishing Group (Universal) are some of today's largest publishers of music.[69]

Performance rights organizations (i.e., performing rights societies) are also a major component of the music industry.[70] PROs provide blanket licenses to the public so that consumers and broadcasters can transfer songs to the public through different outlets.[71] The American Society of Composers, Authors, and Publishers (ASCAP) and Broadcast Music Inc. (BMI) are two leading nonprofit PROs that license an owner's public performance right "on a non-exclusive basis on behalf of music publishers who own or administer the copyright in a musical composition."[72] These organizations then provide users (e.g., digital service providers) with a blanket license.[73] The blanket license grants the user with the right to "perform all the compositions controlled by all the publishers affiliated with that society" in exchange for a fee.[74]

IV. THE MUSIC MODERNIZATION ACT

The MMA is an updated music licensing bill that plans to fill in any copyright gaps that prevent efficient protection for music publishers and owners under the Copyright Act of 1976.[75] It is a combination of three other bills that have previously failed to become laws.[76] These bills were referred to as the Music Modernization Act, the Allocation for Music Producers Act (AMP), and the Compensating Legacy Artists for their Songs, Service, & Important Contributions to Society Act (CLASSICS).[77]

As a bipartisan bill, the MMA has been met with open arms by the House Judiciary Committee.[78] It restructures the current music licensing process and aims to increase royalty payments to copyright holders in the music industry.[79] The primary goal of the MMA is to reform §§ 115 and

68. *Id.*
69. *Id.* at 239.
70. *See generally id.* at 240.
71. *Id.* at 210.
72. Broad. Music, Inc. v. Pandora Media, Inc., 140 F.Supp.3d 267, 275 (S.D.N.Y. 2015).
73. PASSMAN, *supra* note 47, at 201.
74. *Id.*
75. Levine, *supra* note 11.
76. *Id.*
77. *Id.*
78. *Id.*
79. Ted Johnson, *Senators Seek to Streamline Music Licensing, Boost Payments to Songwriters*, VARIETY (Jan. 24, 2018), http://variety.com/2018/politics/news/music-licensing-

114 of the Copyright Act.[80] But the bill also addresses other reforms including the development of a single licensing entity, appointing a new Copyright Royalty Board (CRB) to determine rates under a "willing buyer/willing seller" standard, initiating a "wheel" approach in rate courts, and repealing § 114(i) which will allow rate court judges to consider the sound recording marketplace when setting rates.[81]

A. Reform of § 115 of the Copyright Act

Section 115 of the Copyright Act states that "to make and to distribute phonorecords of [nondramatic musical works], are subject to compulsory licensing."[82] This Section defines the scope of exclusive rights in nondramatic musical works and requires compulsory licenses when making and distributing phonorecords.[83] The MMA intends to streamline the regulation of compulsory licenses by amending the law in several different ways.[84] First, the bill calls for creating a blanket mechanical license for interactive digital downloads and streaming of musical works.[85] Second, the licenses will be overseen by a centralized mechanical licensing entity entitled the Mechanical Licensing Collective (MLC).[86] Third, the MMA will change the statutory rate standard from the § 801(b) standard to the "willing buyer/willing seller standard."[87] Finally, § 115 reform will create a position for a digital licensee coordinator.[88] The digital licensee coordinator will work in conjunction with the MLC and the copyright royalty judges.[89]

Section 115 of the Copyright Act requires that a person obtain a compulsory license "only if [his or her] primary purpose in making phonorecords is to distribute them to the public for private use."[90] In order to obtain a compulsory license, a Notice of Intent (NOI) must be sent to

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songwriters-new-bill-f1202675634/.

80. *Id.*

81. Doug Collins, *The Music Modernization Act Will Provide a Needed Update to Copyright Laws*, HILL (Jan. 10, 2018), http://thehill.com/blogs/congress-blog/technology/368385-the-music-modernization-act-will-provide-a-needed-update-to; Ted Lieu, *Overview of the Music Modernization Act*, TEDLIEU.HOUSE.GOV, http://lieu.house.gov/sites/lieu.house.gov/files/Overview%20of%20the%20Music%20Modernization%20Act.pdf. (last visited on Mar. 12, 2019).

82. 17 U.S.C. § 115 (2012).

83. *See id.*

84. *See* Lieu, *supra* note 81.

85. *Id.*

86. *Id.*

87. *Id.*; *see also* 17 U.S.C. § 801(b)(1).

88. Music Modernization Act, H.R. 4706, 115th Cong. (2017-2018).

89. *Id.*

90. 17 U.S.C. § 115(a)(1).

the copyright owner or filed with the Copyright Office.[91] However, larger companies have developed a "shortcut" to obtain these licenses.[92] Without considering specific information about the copyright ownership information, large companies will file "bulk" NOIs with the Copyright Office.[93] By submitting bulk NOIs copyright owners do not receive royalties from new streaming services and opens up the larger companies to litigation because they are unknowingly using music without the owner's permission.[94]

One of the more important provisions of the MMA's reform to § 115 is the creation of the Mechanical Licensing Collective (MLC).[95] The MLC will be run by copyright owners as a nonprofit entity, independent from the Copyright Office, the CRB, and the PROs.[96]

The purpose of the MLC is to provide the industry with an internal checks and balances system by creating clear roles for leading players in the industry.[97] The MLC will be governed by a board of directors, made up of music publishers and professional songwriters.[98] There will also be two nonvoting members: a representative of the digital licensee coordinator and a representative of a nationally recognized nonprofit trade association.[99] The board of directors will be responsible for establishing and appointing an unclaimed royalties oversight committee as well as a dispute resolution committee.[100] Most importantly, the MLC will establish and maintain a musical works database, which will identify, locate, and match owners of sound recordings and musical works.[101] The database will help to organize the current digital music system by distributing royalties to the proper owners.[102]

The MLC is Congress's first move towards resolving the system under the Copyright Act—inaccurate and disorganized bulk NOIs.[103]

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91. *Id.* § 115(b).
92. Collins, *supra* note 81.
93. *Id.*
94. *Id.*
95. *See* Music Modernization Act, H.R. 4706, 115th Cong. (2017-2018).
96. *Id.*
97. *See generally id.*
98. *Id.* ("[E]ight voting members shall be music publishers to which songwriters have assigned exclusive rights of reproduction and distribution . . . [and] two voting members shall be professional songwriters who have retained and exercise[d] exclusive rights of reproduction and distribution.").
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*

Prior to the MMA, digital music service providers filed bulk NOIs because they were unable to identify the owner of a particular song or musical work.[104] Congress did not have a formal process that helped music providers locate the owners of an unmatched copyrighted work, thereby making the licensing process difficult and timely. Licensors were able to use millions of dollars worth of unmatched copyrights without paying the owner because they could not identify the work's owner.[105] Therefore, by enacting the MLC, Congress intended to alleviate any inefficient communication and displaced funding between licensors and authors that was causing discontent within the industry.[106]

B. Repeal of § 114(i)

The MMA repeals § 114(i) of the Copyright Act.[107] Section 114 defines the scope of exclusive rights in sound recordings and defines the limitations on those rights.[108] Specifically, the statute provided noninteractive digital music services with compulsory licenses to broadcast sound recordings.[109] In order to acquire the license, a digital music service had to first demonstrate that it was "noninteractive" and then file its service with the Copyright Office.[110] Once a service acquired a license, the service was limited in its use of the sound recording.[111] For example, the service could not notify the public in advance about when a song or artist would be played or publish a program schedule.[112]

After a broadcaster had a license, it was then required to pay licensing fees to SoundExchange.[113] SoundExchange is another licensing, nonprofit entity that accepts payment of royalties.[114] It is similar to ASCAP and BMI, but unlike ASCAP and BMI, SoundExchange only collects licensing fees for performances of sound recordings rather than all songs.[115] Additionally, SoundExchange is unique in that it distinguishes between the producer and the artist by paying the artist first and will not pay the

104. *Id.*
105. *Id.*
106. *See generally id.*
107. *See id.*
108. 17 U.S.C. § 114 (2012); *see* U.S. COPYRIGHT OFFICE, *supra* note 18, at 46.
109. U.S. COPYRIGHT OFFICE, *supra* note 18, at 46.
110. *See generally* 17 U.S.C. § 114; PASSMAN, *supra* note 47, at 347.
111. *See generally* 17 U.S.C. § 114; PASSMAN, *supra* note 47, at 347.
112. 17 U.S.C. § 114; U.S. COPYRIGHT OFFICE, *supra* note 18, at 46.
113. PASSMAN, *supra* note 47, at 347.
114. *Id.*
115. *Id.*

producer until the artist notifies SoundExchange to also pay the producer.[116]

In order to fully understand the licensing process under § 114, it is helpful to distinguish between an interactive and a noninteractive digital service.[117] An interactive digital service is one in which there is "on-demand streaming."[118] Some of the more well-known services are Spotify, Apple Music, and Amazon Music.[119] The crux of an interactive digital service is the ability to play music any time you want from a large database of songs.[120] Courts have determined that this is not unlawful because the consumer is only permitted to listen to the songs, not copy them.[121] However, these services require both a mechanical license and a public performance license.[122]

In comparison, noninteractive services include programs like Sirius XM or Rdio, in which the user has no control over which songs to play.[123] The relative similarity between both interactive and noninteractive services has caused confusion among courts.[124] For example, in *Arista Records LLC v. Launch Media, Inc.*, the Court of Appeals for the Second Circuit addressed the issue of whether webcasting services that act like a radio station and can be customized by users' ratings of the content were considered an interactive or a noninteractive service.[125] The court found that the webcasting service was a noninteractive service because "the service did not displace music sales."[126] This distinction determined the royalty rates an artist would receive if their work was played because § 114 only provided licenses to noninteractive digital services.[127]

C. Willing Buyer/Willing Seller Standard

The changes to §§ 114 and 115 also affected how the CRB royalty rates will be measured.[128] "[T]he CRB is the administrative body responsible for establishing statutory rates and terms under the section 115

116. *Id.* at 136.
117. *See generally* 17 U.S.C. § 114; *see* PASSMAN, *supra* note 47, at 147.
118. PASSMAN, *supra* note 47, at 147.
119. *See id.*
120. *Id.*
121. *See id.*
122. *See id.* at 274.
123. *See* U.S. COPYRIGHT OFFICE, *supra* note 18.
124. *See* Arista Records, LLC v. Launch Media, Inc., 578 F.3d 148, 150 (2d Cir. 2009).
125. *Id.*
126. U.S. COPYRIGHT OFFICE, *supra* note 18, at 49.
127. *See* 17 U.S.C. § 114.
128. Collins, *supra* note 81.

license, a process that by statute takes place every five years."[129] It was established in 2004 and was made up of three judges appointed by the Librarian of Congress.[130] The CRB previously measured royalty rates under a section 801(b) standard, but with the influence of music streaming services, Congress moved to change the measurement to a willing buyer/willing seller standard.[131] Under a willing buyer/willing seller standard, the CRB will be responsible for setting royalty rates to reflect the market value of a song.[132]

Under the 801(b) standard the CRB measured royalty rates for subscription services existing prior to the DMCA.[133] This standard required the CRB to consider the following four factors when measuring rates for a § 114 license:[134]

> (A) to maximize the availability of creative works to the public; (B) to afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions; (C) to reflect the relative roles of the copyright owners and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication; (D) to minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.[135]

The DMCA enacted this standard for subscription services because the standard was thought to "minimize disruption of their existing operations and to account for substantial capital investments and operating costs."[136] However, this standard resulted in lower rates being paid to copyright owners, thereby benefitting the subscription services.[137]

In comparison, the willing buyer/willing seller standard provides a higher royalty rate for owners and is seemingly less complex than the

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129. U.S. COPYRIGHT OFFICE, *supra* note 18, at 29.

130. Intercollegiate Broad. Sys. v. Copyright Royalty Bd., 684 F.3d 1332, 1335 (D.C. Cir. 2012).

131. *See generally* BRIAN T. YEH, CONG. RESEARCH SERV., RL33631, COPYRIGHT LICENSING IN MUSIC DISTRIBUTION, REPRODUCTION, AND PUBLIC PERFORMANCE 27 (Sept. 22, 2015), http://fas.org/sgp/crs/misc/RL33631.pdf.

132. Collins, *supra* note 81.

133. *See generally* YEH, *supra* note 131, at 27.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

801(b) standard.[138] Rather than applying the four statutory elements, the CRB sets a rate depending on the market value of the use of a song; thus, the CRB determines a performance rate standard based on the amount of times a song is streamed through an interactive and noninteractive service.[139]

By instituting a willing buyer/seller standard, Congress has already started a positive change.[140] While satellite and cable radio providers' rates are still determined under the 801(b) standard, the CRB has already applied the willing buyer/willing seller standard for Internet radio broadcasters.[141] Unfortunately, both standards differ greatly when applied to different areas of the music industry, so it is unlikely that satellite and cable providers will benefit from the new rate-setting standard.[142] However, Congress's responsibility is to protect the rights of authors and this new standard will greatly benefit copyright owners.[143] Additionally, it is beneficial to the industry as a whole to provide a uniform approach to rate-setting by the CRB.[144]

D. The "Wheel" Approach

The MMA will also alter the adjudication process for performance rate-setting litigation.[145] Prior to the MMA, any and all performance rate-setting conflicts brought by PROs and between licensees were adjudicated in the District Court for the Southern District of New York.[146] Each PRO was assigned, by consent decree, a judge to resolve any issues between the PRO and the digital service provider or licensee that it negotiated performance royalties with.[147] For example, Judge Denise Cote was assigned to all ASCAP rate-setting cases and Judge Louis Stanton was assigned to all BMI cases.[148] The concern with assigning only one judge

138. *Id.*
139. Collins, *supra* note 81.
140. *See* YEH, *supra* note 131, at 27.
141. *Id.*
142. *See generally* Lieu, *supra* note 81.
143. *Id.*
144. *See* U.S. CONST. art. I, § 8, cl. 8; *see* Ed Christman, *Senate Moves Forward on Music Modernization Act*, BILLBOARD (Jan. 24, 2018), http://www.billboard.com/articles/business/8096006/senate-bill-music-modernization-act-licensing-reactions.
145. *See* Lieu, *supra* note 81.
146. *Id.*
147. *Music Modernization Act: A Breakdown*, WE ARE SONA.COM, http://static1.squarespace.com/static/558dbdb6e4b0c990426100ab/t/5a56b8e0419202b16994db17/1515632864537/Music+Modernization+Act-+A+Breakdown.pdf (last visited on Mar. 12, 2019); Lieu, *supra* note 81; *see also* U.S. COPYRIGHT OFFICE, *supra* note 18, at 40.
148. Christman, *supra* note 144.

is that the judge is hearing similar negotiation disputes, so it was likely that the judge was unable to have an unbiased view of each new case or look at each issue with "new eyes."[149]

In order to address that concern of bias and repetitive resolution, the MMA institutes a "wheel" approach.[150] This new system promotes uniformity in a dynamic industry. The wheel symbolizes the rotation of judges assigned to each rate-setting case, so now there are several federal judges assigned, at random, to different PROs.[151] These judges are responsible for resolving performance rate-setting issues and deciding new royalty rates.[152]

MMA's enactment of the wheel approach may provide several benefits to the future of the music industry.[153] For example, by randomly appointing federal judges to rate-setting cases, a digital service provider or licensee will be less likely to manipulate the system by going to one judge over another because of that judge's history of issuing favorable rates.[154] These pros and cons can also be seen as the difference between a seesaw and wheels of a cart. Wheels have always been viewed as a way of moving toward something, whereas a seesaw merely fluctuates. In comparison, Congress's decision to apply the wheel approach for dispute resolution is likely to propel us towards the future with a "learning as you go mentality," rather than failing to actively create change by going back and forth like a seesaw.

V. ANALYSIS OF THE MUSIC MODERNIZATION ACT

The MMA addresses significant issues facing the music industry. It is presumably the most promising change to the Copyright Act in over half a century.[155] However, like all things, there is no such thing as perfection. While the MMA intends to provide important changes for several actors within the music industry, it fails to address certain concerns among others.[156]

One concern is the MMA's limitation on liability for prior unlicensed uses.[157] The provision states that "a copyright owner that commences an

149. *See id.*
150. Lieu, *supra* note 81.
151. *See id.*
152. *See id.*
153. *Music Modernization Act: A Breakdown*, *supra* note 147.
154. *Id.*
155. *See generally* Music Modernization Act, H.R. 4706, 115th Cong. (2017-2018).
156. *Id.*
157. *Id.*

action . . . on or after January 1, 2018, against a digital music provider for the infringement of the exclusive rights" will not be held liable for any unlicensed uses.[158] Some individuals in the industry have found this to be constitutionally unfair because it relieves any threat of litigation to bigger interactive digital music services like Spotify and Apple.[159]

Another concern is the potential for a lack of diversity among the board of directors for the MLC.[160] The MLC board is responsible for implementing the provisions of the MMA and ensuring fairness within the industry; however, there may be more music publishers on the board than songwriters.[161] The lack of balance between the two groups is notable because music publishers are responsible for voting on which songwriters are on the board.[162] This raises the question of whether music publishers will end up overpowering the voice and input of the songwriters.

While these are important concerns, the MMA reads like a strong, transformative piece of legislation that intends to revamp issues within the music industry. Not only does the Act provide a new organizational structure by providing major industry players with a new way to resolve issues and copyright owners with more congressional protection, it also reflects a new unity within the music business. The MMA is the product of songwriters, music publishers, broadcasters, house leaders, and senators.[163] This bill is the result of careful consideration by Congress and is a direct response to the issues that have been plaguing the industry over the past several decades.[164] Despite the relevancy of a few of the concerns regarding the bill, it is important to recognize the impact that the legislation will have on copyright law and the music industry today.

VI. CONCLUSION

On October 11, 2018, President Trump signed the MMA into law.[165] This Act has proven to be one of united minds amidst the current political

158. *Id.*

159. *Id.*

160. Daniel Sanchez, *3 Major Problems with the Music Modernization Act*, DIGITAL MUSIC NEWS (Feb. 27, 2018), http://www.digitalmusicnews.com/2018/02/27/music-modernization-act-major-problems/.

161. *See* Music Modernization Act, H.R. 4706, 115th Cong. (2017-2018); *see also* Sanchez, *supra* note 160.

162. *See* Music Modernization Act, H.R. 4706, 115th Cong.; *see also* Sanchez, *supra* note 160.

163. *See* Music Modernization Act, H.R. 4706, 115th Cong..

164. *See generally id.*

165. Dave Simpson, *Streaming Music Royalties Overhaul Heads to Trump's Desk*, LAW360 (Sept. 26, 2018), http://www.law360.com/media/articles/1086400/streaming-music-royalties-

turmoil.[166] Both parties have found a way to come together to effectively enact a law that will successfully uphold Congress's constitutional responsibilities to authors.[167] The Act has also brought together technology companies and content owners.[168] The sponsorship of the Act and the joint support from all types of groups have made the MMA a unique piece of legislation and a strong move toward the protection of individuals' artistic and creative rights.[169]

The music industry today has presented significant challenges to Congress. Not only has the invention of digital music impacted the industry, but also the public presence of songwriters and artists has greatly challenged the way Congress would traditionally handle certain aspects of the law. Different music groups, songwriters, and active members of the music industry have voiced their concerns and opinions in the media regarding the implementation of the MMA.[170] While it is essential to consider each and every one of their concerns, it is also important to implement a change now. The MMA is the result of several years of drafting and attempts at compromising.[171] For the first time in a long time, Congress has worked with the industry to find a solution, and the MMA will hopefully be the solution that will provide the most change.[172]

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166. *See* U.S. CONST. art. I, § 8, cl. 8. *See generally* Simpson, *supra* note 165.
167. *Id.*
168. Simpson, *supra* note 165.
169. *Id.*
170. Christman, *supra* note 9.
171. *See generally* Levine, *supra* note 11.
172. *See generally* Simpson, *supra* note 165.