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Music Modernization and the Labyrinth of Streaming

*Mary LaFrance**

ABSTRACT

The shift from record sales to music streaming has revolutionized the music industry. The federal copyright regime, which is rooted in a system of economic rewards based largely on sales, has been slow to adapt. This has impaired the ability of copyright law to channel appropriate royalties to songwriters, music publishers, and recording artists when the streaming of their works displaces record sales. The Orrin G. Hatch-Bob Goodlatte Music Modernization Act of 2018 addresses some of the most significant flaws in the current system. At the same time, it creates significant ambiguities and leaves some existing issues unresolved.

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I. INTRODUCTION

Even as streaming becomes the dominant mode of music exploitation, the federal copyright regime for music and sound recordings is still based largely on laws that were designed for piano rolls and vinyl records.¹ At the turn of the twenty-first century—as digital streaming began to supplant record sales—songwriters, music publishers, recording artists, and record labels urged Congress to modernize the system in order to restore the economic incentives for creators and copyright owners.² Although the creation of the exclusive streaming right (called a “digital audio transmission right”) for sound recordings in 1995 was a significant step forward,³ the unprecedented scale of copyright utilization in the music streaming industry revealed continued weaknesses in the copyright system’s ability to channel lawfully-earned revenues to the correct rights-holders. These problems compelled rights-holders to return to Congress in search of more reforms.⁴

This article examines the infrastructure behind the flow of revenue from the music streaming services to the rights-holders, the flaws that rights-holders have identified in that infrastructure, and the extent to which those flaws are addressed in Congress’s latest reform: the Orrin G. Hatch-Bob Goodlatte Music Modernization Act (“MMA”).⁵ Part II briefly reviews the music industry’s shift from a physical-sales-based business model to a streaming-based model, and the parallel developments in the history of copyright protection for recorded music. Part III identifies the emerging issues that led rights-holders to return to Congress in search of better protection for their existing rights and new protection for a large group of sound recordings that have heretofore been completely excluded from the federal copyright scheme. Part IV examines and critiques the key components of Congress’s response to rights-holders’ concerns in the MMA. Part V identifies the benefits that will flow from this new legislation while pointing out some remaining areas of concern.

1. See Arthur Chang, *Outdated and Ineffective: The Problems with Copyright Law*, CLAREMONT J. OF L. & PUB. POL’Y (Apr. 11, 2018), <https://5clpp.com/2018/04/11/outdated-and-ineffective-the-problems-with-copyright-law/>.

2. Kyle Jahner, *Trump Signs Music Copyright Bill into Law*, BLOOMBERG L. (Oct. 11, 2018, 11:16 AM), <https://news.bloomberglaw.com/ip-law/trump-signs-music-copyright-bill-into-law>; Jamey Tucker, *Coalition Asking Congress to Update Music Copyright Laws*, WPSD LOCAL 6 (Jan. 26, 2018), <https://www.wpsdlocal6.com/2018/01/26/coalition-asking-congress-to-update-music-copyright-laws/>.

3. See, e.g., Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336.

4. See Ari Herstand, *What is the Music Modernization Act and Why Should it Pass*, DIGITAL MUSIC NEWS (Aug. 1, 2018), <https://www.digitalmusicnews.com/2018/08/01/music-modernization-act/>; Jordan Bromley, *The Music Modernization Act: What Is It & Why Does It Matter?*, BILLBOARD (Feb. 23, 2018), <https://www.billboard.com/articles/business/8216857/music-modernization-act-what-is-it-why-does-it-matter-jordan-bromley>.

5. Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (codified at 17 U.S.C. § 1401 (2018)).

II. BACKGROUND

The music industry was a simpler business when it was based on live performances, record sales, and radio airplay. In their capacity as copyright owners, songwriters and music publishers received royalties (called “mechanical royalties”)⁶ when their songs were recorded, reproduced, and sold as physical records or, in more recent years, as digital downloads.⁷ When their songs were played in public venues, the copyright owners also received public performance royalties, mostly through their performing rights organizations (“PROs”).⁸ Record labels made their money primarily from record sales and shared those royalties with the recording artists according to the terms of their contracts.⁹ There were problems, of course, when parties negligently or intentionally failed to comply with their legal or contractual obligations, but compliance was not especially difficult for parties acting in good faith.

All of this changed when digital streaming entered the music scene. Instead of buying recordings, audiences began to consume recorded music as a service. This gave rise to both radio-style digital streaming services—with either random or semi-customized playlists—and on-demand streaming services that enabled consumers to hear their preferred music at the time and place of their choosing.¹⁰ When the popularity of unlicensed file-sharing caused a rapid decline in sales of recorded music starting in the late 1990s,¹¹ songwriters, publishers, recording artists, and record labels hoped to replace these lost revenues with licensing fees from digital streaming services.¹²

As technological changes have transformed the music industry, Congress has periodically updated copyright laws in an effort to maintain the economic reward system that sustains the industry. Key pieces of legislation enacted to support this effort included the Sound Recording Act (“SRA”) of 1971,¹³ the Digital Performance Right in Sound Recordings Act (“DPRA”) of 1995,¹⁴ and the Digital Millennium Copyright Act (“DMCA”) of 1998.¹⁵ The MMA, enacted in 2018, is the latest effort to modernize copyright protection for music and sound recordings.¹⁶ Each of these pieces of legislation will be analyzed in turn.

6. A mechanical license permits the licensee to record a particular musical composition, and reproduce that recording for sale to the public, either in tangible form or through downloads. The royalty paid to songwriters and music publishers under this license is called a mechanical royalty. Kevin Zimmerman, *Understanding Mechanical Royalties*, BROADCAST MUSIC, INC. (Mar. 28, 2005), https://www.bmi.com/news/entry/Understanding_Mechanical_Royalties.

7. *Id.*

8. Joy Butler, *Music Licensing: The Difference Between Public Performance and Synchronization Licenses*, COPYRIGHT CLEARANCE CTR. (May 16, 2017), <http://www.copyright.com/blog/music-licensing-public-performance-license-synchronization/>.

9. Donald R. Friedman & Frank P. Scibilia, *The Recorded Music Industry*, in SELECTED CHAPTERS FROM ENTERTAINMENT LAW 27 (Howard Siegel ed., 4th ed. 2013).

10. STEVE GORDON, *THE FUTURE OF THE MUSIC BUSINESS* 105 (4th ed. 2015).

11. *Id.* at xxv-xxx.

12. *Id.* at xxxi; Aloe Blacc, *Streaming Services Need to Pay Songwriters Fairly*, WIRED (Nov. 5, 2014, 6:30 AM), <https://www.wired.com/2014/11/aloe-blacc-pay-songwriters/>.

13. Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391.

14. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336.

15. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

16. Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (codified at 17 U.S.C. § 1401 (2018)).

A. Sound Recording Act (“SRA”) of 1971

Until the SRA was enacted in 1971, federal copyright law did not extend to sound recordings at all.¹⁷ Thus, unauthorized copying and distribution of a sound recording (“record piracy”) did not constitute federal copyright infringement. At most, a criminal penalty or a civil cause of action might apply under state law.¹⁸

Per the request of the recording industry, which cited a loss of sales due to widespread record piracy, Congress enacted the SRA to establish uniform nationwide copyright protection for sound recordings.¹⁹ The protection granted was minimal, aimed only at combatting record piracy.²⁰ The SRA gave the copyright owners of sound recordings only the exclusive rights to copy and distribute their recordings;²¹ significantly, it did not give them any exclusive right of public performance.²² However, many sound recordings were denied even this inferior level of federal copyright protection, since the SRA protected only those sound recordings that were created on or after February 15, 1972 (hereinafter “copyrighted sound recordings”).²³ Recordings made in the United States prior to this date (hereinafter “pre-1972 recordings”) received no federal protection, and thus were protected only by the laws of individual states, to the extent such protections were available at all.²⁴

B. Digital Performance Right in Sound Recordings Act (“DPRA”) of 1995

As digital streaming began to displace physical record sales, Congress created a limited public performance right for the digital streaming of copyrighted sound

17. The law on this question was surprisingly murky at the time, since the 1909 Act did not clearly address the question. Courts and commentators generally accepted, however, that records were not copyrightable because the musical works they embodied were not visibly discernable; the Copyright Office consistently refused to register them. Barbara A. Ringer, *Study No. 26: The Unauthorized Duplication of Sound Recordings*, in STUD. PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE SENATE COMMITTEE ON THE JUDICIARY, 86TH CONG., 2D SESS. 2-7 (Comm. Print 1957), www.copyright.gov/history/studies/study26.pdf.

18. See, e.g., CAL. PENAL CODE § 653h (2011) (California’s record piracy statute).

19. H.R. REP. NO. 92-487, at 2–3 (1971), as reprinted in 1971 U.S.C.C.A.N. 1566; S. REP. NO. 92-72, at 4 (1971).

20. H.R. REP. NO. 92-487, at 2–4; S. REP. NO. 92-72, at 3–4.

21. Act of Oct. 15, 1971, Pub. L. No. 92-140, § 1(a), 85 Stat. 391. Perhaps because of the focus on record piracy, the exclusive right to copy was defined more narrowly for sound recordings than for other categories of copyrightable works, encompassing only copying of the actual sounds fixed in the copyrighted recording, rather than substantially similar imitations of those sounds.

22. 17 U.S.C. § 114(a) (2018).

23. § 3, 85 Stat. at 392.

24. Even in states which afford some level of copyright protection to pre-1972 sound recordings, the scope of protection may be unsettled. See, e.g., CAL. CIV. CODE § 980(a)(2) (1982) (giving the author of a pre-1972 sound recording “exclusive ownership therein” until February 15, 2047). For example, the highest courts of three states have been asked to rule on whether state law provides an exclusive public performance right in pre-1972 recordings. The New York and Florida courts have answered in the negative. See *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 70 N.E.3d 936 (N.Y. 2016); *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 229 So.3d 305 (Fla. 2017). A decision by the California Supreme Court was still pending as of October 2018. See *Flo & Eddie, Inc. v. Pandora Media, Inc.*, 851 F.3d 950 (9th Cir. 2017) (certifying question to California Supreme Court). Beginning in 1995, however, pre-1972 sound recordings that were first published *outside* of the United States, in countries that are signatories to various international copyright agreements, received federal copyright protection under the Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994) (codified at 17 U.S.C. § 104A (2002)).

recordings.²⁵ The DPRA was the initial legislation creating this right, which was refined and expanded three years later by the DMCA. This discussion summarizes the current regime that defines the rights of record labels and recording artists under both pieces of legislation.

Under §§ 106(6) and 114 of Title 17, satellite radio (e.g., SiriusXM) and radio-style streaming services (i.e., noninteractive services such as Pandora Free) are required to pay a statutory royalty for the right to stream a copyrighted sound recording.²⁶ The royalty proceeds are allocated as follows: 50% to the record label, 45% to the featured vocalists and musicians who performed on the recording, and 5% to the nonfeatured performers (split equally between vocalists and musicians).²⁷ In contrast, digital streaming services that allow listeners to choose the recordings they hear (i.e., interactive services such as Pandora Premium and Spotify) are ineligible for the statutory license, as are those services that enable users to predict which songs are most likely to be played.²⁸ Therefore, in order to stream a copyrighted sound recording, these interactive streaming services must obtain a license from the record label.²⁹ Interactive services are held to this more demanding standard because they are more likely to displace sales of physical records and digital downloads.³⁰

The DPRA also facilitated the digital distribution and transmission of sound recordings by expanding the scope of the compulsory mechanical license for musical compositions. The Copyright Act has always required record labels to obtain licenses from the copyright owners of musical compositions for the right to make and distribute recordings of those compositions.³¹ The labels could negotiate a mechanical license with the rights-holder (usually a publisher) or its agent (usually the Harry Fox Agency),³² or, for previously recorded works, they could invoke the compulsory mechanical license under § 115.³³ Royalty rates for the compulsory mechanical license were, and still are, established through administrative proceedings before the Copyright Royalty Board (“CRB”).³⁴ In the DPRA, Congress extended the compulsory mechanical license to include “digital phonorecord deliveries.”³⁵ Although this term clearly encompassed permanent downloads, it was less clear whether it also encompassed interactive or non-interactive streaming.³⁶

25. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, § 2, 109 Stat. 336.

26. 17 U.S.C. § 106(6) (2002); 17 U.S.C. § 114(f).

27. 17 U.S.C. § 114(g)(2).

28. *Id.* § 114(d)(2)(A)(i).

29. H.R. REP. NO. 104-274, at 14 (1995).

30. *Id.*

31. 17 U.S.C. § 106(1), (3) (giving copyright owners the exclusive right to reproduce and distribute their works in phonorecords).

32. The Harry Fox Agency (“HFA”) represents its affiliated music publishers in issuing mechanical licenses and in collecting and disbursing mechanical royalties. See *What Does HFA Do?*, HARRY FOX AGENCY, https://www.harryfox.com/publishers/what_does_hfa_do.html (last visited Dec. 16, 2018).

33. 17 U.S.C. § 115 (2018).

34. *Id.* § 115(e)(3)(C)-(D).

35. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, § 4, 109 Stat. 336, 344.

36. See Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, Copyright Royalty Board, No. 2006-3 CRB DPRA, 74 Fed. Reg. 4510, (Jan. 26, 2009) (to be codified at 37 C.F.R. 385), <https://www.govinfo.gov/content/pkg/FR-2009-01-26/pdf/E9-1443.pdf> (declining to decide this question); 17 U.S.C. § 115(e)(10) (defining digital phonorecord delivery); Jenna Hentoff, *Compulsory*

C. Digital Millennium Copyright Act (“DMCA”) of 1998

In 1998, Congress enacted the DMCA to clarify and limit the copyright liability of internet service providers (“ISPs”) for hosting, storing, or providing access to infringing material.³⁷ With respect to ISPs that host content provided by users, as exemplified by YouTube, the § 512 “safe harbor” largely insulates eligible ISPs from liability for storing and transmitting the infringing content posted by its users.³⁸ Generally speaking, to qualify for the safe harbor, the ISP must implement a policy of terminating repeat infringers, and it must expeditiously remove any content that it knows is infringing.³⁹ Because of this safe harbor, YouTube has become the most popular music streaming service in the world—far larger than fully licensed services such as Spotify.⁴⁰

The DMCA also amended the § 114 statutory royalty scheme to include a wider array of digital streaming services and to clarify the definition of interactive services,⁴¹ leading to the current regime as described in Part B above.

III. EMERGING PROBLEMS

Even with these legislative changes in place, streaming services faced significant challenges. To obtain public performance licenses for the songs that they wished to stream, streaming services were in the same position as terrestrial radio stations—they simply needed to negotiate blanket licenses from each of the domestic performing rights organizations (“PROs”).⁴² However, the streaming services had an additional expense that terrestrial radio did not; under §§ 106 and 114, they had to pay public performance royalties to the record labels as well.⁴³

Interactive services faced one more hurdle. Whereas record labels needed to obtain only one mechanical license for each of a dozen songs on a typical record album, streaming services seeking to build a large enough catalog of recordings to

Licensing of Musical Works in the Digital Age: Why the Current Process is Ineffective & How Congress is Attempting to Fix It, 8 J. HIGH TECH. L. 113, 253 (2008).

37. H.R. REP. NO. 105-551, at 11 (1998).

38. 17 U.S.C. § 512 (2010).

39. *Id.* § 512 (c)(1), (i)(1). Knowledge can be imputed when the service provider is aware of facts or circumstances from which the infringing activity is apparent. *Id.* § 512 (c)(1)(A)(ii).

40. Bill Rosenblatt, *Google Tries, Tries Again with New YouTube Music Service*, FORBES (May 27, 2018, 5:02 PM), <https://www.forbes.com/sites/billrosenblatt/2018/05/27/google-tries-tries-again-with-new-youtube-music-service/#67643069ce2c>; *Connecting with Music: Music Consumer Insight Report*, INT’L FED’N OF THE PHONOGRAPHIC INDUSTRY 5 (Sept. 2017), <http://www.ifpi.org/downloads/Music-Consumer-Insight-Report-2017.pdf> (YouTube accounts for 46% of all time spent listening to on-demand music streams); Hugh McIntyre, *The Top 10 Streaming Music Services By Number of Users*, FORBES (May 25, 2018, 9:15 AM), <https://www.forbes.com/sites/hughmcintyre/2018/05/25/the-top-10-streaming-music-services-by-number-of-users/#6a64b5b35178> (1.5 billion users for YouTube and 170 million for Spotify); Hugh McIntyre, *Report: YouTube Is The Most Popular Site For On-Demand Music Streaming*, FORBES (Sept. 27, 2017, 8:45 AM), <https://www.forbes.com/sites/hughmcintyre/2017/09/27/the-numbers-prove-it-the-world-is-listening-to-the-music-it-loves-on-youtube/#49a931a16141> (1.3 billion people stream music on YouTube, compared to approximately 100 million Spotify subscribers); Anna Nicolaou, *How Streaming Saved the Music Industry*, FIN. TIMES (Jan. 16, 2017), <https://www.ft.com/content/cd99b95e-d8ba-11e6-944b-e7eb37a6aa8e>.

41. Digital Millennium Copyright Act, Pub. L. No. 105-304, § 405, 112 Stat. 2860, 2890–2902 (1998).

42. GORDON, *supra* note 10, at 114.

43. 17 U.S.C. § 106(6) (2002).

attract and retain subscribers suddenly needed thousands of mechanical licenses.⁴⁴ In light of the cost of obtaining the licenses, uncertainty over the legal necessity for those licenses (discussed in sub-part B below), and the challenges of locating all of the rights-holders in the absence of a reliable database, streaming services in their start-up days often neglected to obtain those licenses.⁴⁵

As these discrepancies became more evident, songwriters and music publishers began raising serious concerns about the adequacy of the existing legislative scheme.⁴⁶ In particular, they believed that the public performance and mechanical royalties they received from streaming services were simply too low.⁴⁷ While the record labels succeeded in obtaining relatively favorable royalties from streaming services,⁴⁸ the two largest PROs, ASCAP⁴⁹ and BMI,⁵⁰ were constrained by the

44. Joseph Dimont, Note, *Royal Inequity: Why Music Streaming Services Should Switch to a Per-Subscriber Model*, 69 HASTINGS L.J. 675, 680–81 (2018); Todd Larson, *Don't Believe the Hype: Spotify Is Right to Challenge Mechanical License Demands for Interactive Streaming*, 94 PAT., TRADEMARK & COPYRIGHT J. 1466 (2017); Michael J. Perlstein, *Music Publishing*, in SELECTED CHAPTERS FROM ENTERTAINMENT LAW 119 (Howard Siegel ed., 4th ed. 2013); Sarah Jeong, *A \$1.6 Billion Spotify Lawsuit is Based on a Law Made for Player Pianos*, VERGE (Mar. 14, 2018, 12:28 PM), www.theverge.com/2018/3/14/17117160/spotify-mechanical-license-copyright-wixen-explainer; Jody Dunitz, *The Easiest Way to Fix the Streaming Mechanical is to Get Rid of It*, DIGITAL MUSIC NEWS (Sept. 25, 2017), www.digitalmusicnews.com/2017/09/25/fix-streaming-mechanical/; David Oxenford, *Copyright Office Issues Notice of Proposed Rulemaking That Could Make Section 115 Royalty Applicable to Internet Radio*, BROADCAST L. BLOG (July 16, 2008), www.broadcastlawblog.com/2008/07/articles/copyright-office-issues-notice-of-proposed-rulemaking-that-could-make-section-115-royalty-applicable-to-internet-radio/; ALLEN BARGFREDE, MUSIC LAW IN THE DIGITAL AGE 94–95 (Jonathan Feist ed., Berkeley Press 2d ed. 2017).

45. Ryan Faughnder, *Meet the Music Entrepreneur Who's Taking on Spotify and Other Streaming Services*, SEATTLE TIMES, www.seattletimes.com/business/technology/meet-the-music-entrepreneur-whos-taking-on-spotify-and-other-streaming-services/ (last updated Jan. 25, 2016, 9:38 AM); John Paul Titlow, *Why Can't Spotify Stop Getting Sued? It's More Complex Than It Sounds*, FAST COMPANY (July 25, 2017), www.fastcompany.com/40441194/why-does-spotify-keep-getting-sued.

46. Ben Sisario, *New Way to Pay Songwriters and Musicians in the Streaming Age Advances*, N.Y. TIMES (June 28, 2018), www.nytimes.com/2018/06/28/business/media/music-copyright-digital-services.html; Blacc, *supra* note 12; Chris Leo Palermino, *Songwriting Organizations Take to the Senate for Better Pay from Streaming*, DIGITAL TRENDS (Mar. 27, 2015, 3:23 PM), www.digitaltrends.com/music/songwriters-streaming-services-court-battle/; Nate Rau, *Music Modernization Act: Eleventh-Hour Proposal Could Torpedo Landmark Bill, Backers Warn*, TENNESSEAN, www.tennessean.com/story/money/2018/07/23/nashville-group-says-sesac-proposal-endangers-music-modernization-act/819721002/ (last updated July 23, 2018, 3:35 PM); Ed Christman & Colin Stutz, *Music Modernization Act Introduced in U.S. Senate After Passing House of Representatives*, BILLBOARD (May 10, 2018), www.billboard.com/articles/business/8455506/music-modernization-act-introduced-us-senate.

47. Nat. Music Publishers' Ass'n, Comments Regarding PRO Licensing of Jointly Owned Works, 1 (Sept. 22, 2015), www.justice.gov/atr/public/ascapbmi2015/ascapbmi22.pdf; Adam Gorgoni, *Come Together: Why Songwriters Should Support the Music Modernization Act*, BILLBOARD (Apr. 2, 2018), <https://www.billboard.com/articles/business/8280631/music-modernization-act-songwriters-should-support-congress-sona>; Jack Denton, *'We're on Life Support': Is Streaming Music the Final Note for Professional Songwriters?*, PACIFIC STANDARD (Apr. 23, 2018), <https://psmag.com/economics/is-streaming-music-the-final-note-for-professional-songwriters>; Ben Beaumont-Thomas, *Spotify to Pay out \$112M in Royalties to Songwriters After Settlement*, GUARDIAN (May 24, 2018, 5:53 PM), www.theguardian.com/music/2018/may/24/spotify-to-pay-out-112m-in-royalties-to-songwriters.

48. They achieved these rates through direct negotiation with interactive services, and through CRB rate-setting proceedings for the non-interactive services. See Andrew Flanagan, *Record Labels Welcome Rise from Streaming, But Songwriters Aren't Smiling Yet*, BILLBOARD (Sept. 23, 2016), www.billboard.com/articles/business/7518839/record-labels-streaming-songwriters-publishers-less-revenue-not-smiling.

49. American Society of Composers, Authors and Publishers.

50. Broadcast Music, Inc.

terms of their antitrust consent decrees,⁵¹ to the detriment of the songwriters and publishers they represent.⁵² These problems are discussed in detail below.

A. Public Performance Royalties

Most songwriters and music publishers receive their nondramatic public performance royalties through their PROs, which collect these royalties from broadcasters, streaming services, and operators of public venues through “blanket” licensing of each PRO’s entire music catalog.⁵³ The PROs negotiate the rates and terms of these blanket licenses with the licensees. In conducting these negotiations, the two largest PROs, ASCAP and BMI,⁵⁴ operate under significant constraints imposed by antitrust consent decrees dating from the 1940s.⁵⁵ Most notably, if a potential licensee objects to the rates or terms of the proposed blanket license, then the dispute must be resolved by federal judges in the Southern District of New York (known as the “rate court”).⁵⁶ Even while a dispute is pending, ASCAP and BMI must allow the licensee to use the entire catalog of music, even though the royalties will not be paid until the conclusion of the rate court proceeding.⁵⁷ Most American songwriters and publishers cannot avoid the constraints of the consent decrees by joining different PROs; the two other PROs in the United States—SESAC and Global Music Rights—are not subject to consent decrees, but accept members on an invitation-only basis.⁵⁸

Songwriters and music publishers were particularly distressed to discover that digital streaming services generally pay higher royalties to record labels for the use of sound recordings than to songwriters and publishers for the use of the musical

51. Ira S. Sacks & Ross J. Charap, *DOJ Rejects Modifications of ASCAP, BMI Consent Decrees*, LEXOLOGY (Aug. 9, 2016), www.lexology.com/library/detail.aspx?g=71689334-51fa-483a-a7c4-38670b74a30d.

52. Brontë Lawson Turk, Note, “It’s Been a Hard Day’s Night” for Songwriters: Why the ASCAP and BMI Consent Decrees Must Undergo Reform, 26 *FORDHAM INTELL. PROP. MEDIA & ENT. L. J.* 493, 495–96 (2016); David Oxenford, *The Summer of Copyright Part 4 – The Department of Justice Reviews the ASCAP and BMI Consent Decrees – What Should Broadcasters and Music Services Know?*, BROADCAST L. BLOG (Aug. 6, 2014), www.broadcastlawblog.com/2014/08/articles/the-summer-of-copyright-part-4-the-department-of-justice-reviews-the-ascap-and-bmi-consent-decree-what-should-broadcasters-and-music-services-know/.

53. *Buffalo Broad. Co. v. Am. Soc’y of Composers, Authors & Publishers*, 744 F.2d 917, 922 (2d Cir. 1984).

54. Perlstein, *supra* note 44, § 2.7; DONALD S. PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 201 (7th ed. 2009).

55. *United States v. Am. Soc’y of Composers, Authors and Publishers*, No. 41-1395, 2001 WL 1589999, at *3–4 (S.D.N.Y. June 11, 2001); *United States v. Broad. Music, Inc.*, No. 64 Civ. 3787, 1994 WL 901652, at *1 (S.D.N.Y. Nov. 18, 1994). See U.S. Dep’t of Justice, *Antitrust Consent Decree Review – ASCAP and BMI 2014*, U.S. DEP’T OF JUSTICE: ANTITRUST DIV., <https://www.justice.gov/atr/ascap-bmi-decree-review> (last updated Dec. 16, 2015).

56. *Buffalo Broad. Co.*, 744 F.2d at 923; GORDON, *supra* note 10, at 124.

57. GORDON, *supra* note 10, at 15; BARGFREDE, *supra* note 44, at 43; U.S. COPYRIGHT OFFICE, *COPYRIGHT AND THE MUSIC MARKETPLACE* 94 (2015) [hereinafter *COPYRIGHT AND THE MUSIC MARKETPLACE*].

58. SESAC, www.sesac.com (last visited Sept. 1, 2018); Paul Resnikoff, *A Comprehensive Comparison of Performance Rights Organizations (PROs) in the US*, DIGITAL MUSIC NEWS (Feb. 20, 2018), www.digitalmusicnews.com/2018/02/20/performance-rights-pro-ascap-bmi-sesac-soundexchange/.

works themselves.⁵⁹ However, they were precluded from using this disparity to argue for higher royalties in rate court proceedings because § 114(i) prohibited sound recording royalties from being considered in any governmental, judicial, or administrative proceeding to determine the appropriate rate of public performance royalties for musical works.⁶⁰ When publishers attempted to withdraw digital performance rights from their PROs to engage in direct licensing with streaming services, the Second Circuit ruled that this was not permitted by the consent decrees, and the Department of Justice refused to modify this aspect of the decrees.⁶¹ This left publishers and songwriters frustrated with their inability to command performance royalties comparable to those received by the record labels.

B. Mechanical Royalties

In the past, it has not been entirely clear whether streaming services are required to pay mechanical royalties to the copyright owners of musical compositions, because no court has ruled definitively on whether streaming transmissions, as opposed to permanent or tethered downloads, implicate the reproduction right.⁶² While some interactive streaming services have paid for compulsory mechanical licenses pursuant to § 115, Spotify faced and settled massive lawsuits for its failure to pay.⁶³

Although Spotify questioned whether mechanical licenses were required for streaming,⁶⁴ its chief excuse for failing to pay the licensing fee was the difficulty of identifying and locating the copyright owners.⁶⁵ When Spotify exercises its § 115 digital phonorecord delivery rights by adding a recording to its streaming repertoire, it does not necessarily know the identity of the rights-holders. For example, if a copyright owner is not affiliated with the Harry Fox Agency, it may be difficult for a streaming service to identify and locate the owner.⁶⁶ Although metadata that identifies copyright owners, as well as the other rights-holders and creative participants,

59. Flanagan, *supra* note 48; Annie Lin, *Music Publishing's Metadata Problem*, HYPEBOT.COM (July 30, 2015), www.hypebot.com/hypebot/2015/07/music-publishings-metadata-problemdraft.html.

60. 17 U.S.C. § 114(i) (2018). Congress originally enacted this provision based on the songwriters' and publishers' concern that, in rate court proceedings, streaming services would cite their new obligation to pay royalties to record companies as an argument for reducing the royalties payable for the musical works.

61. *Pandora Media, Inc. v. Am. Soc. of Composers, Authors and Publishers*, 785 F.3d 73, 77 (2d Cir. 2015); DEP'T OF JUSTICE, STATEMENT OF THE DEP'T OF JUSTICE ON THE CLOSING OF THE ANTITRUST DIVISION'S REVIEW OF ASCAP AND BMI CONSENT DECREES 2-3 (2016); *see also* Steven J. Gagliano, Comment, *Consent Decrees in the Streaming Era: Digital Withdrawal, Fractional Licensing, and § 114(i)*, 10 J. BUS. ENTREPRENEURSHIP & L. 317, 321-22 (2017).

62. Larson, *supra* note 44, at 1.

63. Robert Levine, *Spotify Settles Class Action Lawsuits Filed by David Lowery and Melissa Ferrick with \$43.4 Million Fund*, BILLBOARD (May 26, 2017), <https://www.billboard.com/articles/business/7809561/spotify-settles-class-action-lawsuits-filed-by-david-lowery-and-melissa>.

64. Ed Christman, *Spotify, Bluewater, & Mechanical Licensing: What's Really Driving the Streaming Giant's Latest Legal Fight*, BILLBOARD (Sept. 5, 2017), <https://www.billboard.com/articles/business/7950194/spotify-bluewater-mechanical-licensing-latest-legal-fight>.

65. Ari Herstand, *Why Exactly is Spotify Being Sued and What Does This Mean?*, DIGITAL MUSIC NEWS (Dec. 30, 2015), www.digitalmusicnews.com/2015/12/30/why-exactly-is-spotify-being-sued-and-what-does-this-mean/.

66. RETHINK MUSIC INITIATIVE, FAIR MUSIC: TRANSPARENCY AND PAYMENT FLOWS IN THE MUSIC INDUSTRY 18 (2015), <http://www.rethink-music.com/research/fair-music-transparency-and-payment-flows-in-the-music-industry>.

can easily be embedded in digital music files, data is frequently missing or inaccurate.⁶⁷ The record labels have no legal obligation—and arguably little incentive—to address the problem.⁶⁸ Even when accurate data is included, the formats are not always standardized, making it difficult to track what is being streamed and who should be compensated.⁶⁹

Even if the metadata embedded in a recording is initially accurate, the copyright ownership of a musical composition embedded in a particular recording may change over time as songwriters terminate their publishers' contracts and reassign the rights to new publishers; the same is true when publishers assign their catalogs to new owners or successors in interest.⁷⁰ To complicate matters, multiple publishers may each own fractional shares of a song.⁷¹ Thus, the information about rights-holders contained in the embedded metadata may be difficult to collect initially and then may cease to be accurate over time.

The most promising solution to the metadata problem is the creation of a single database to collect and maintain all metadata for every sound recording and musical composition in a way that is accessible to all rights-holders and actual or potential licensees. The challenges this solution presents are (1) determining how to require the parties who possess the relevant information to contribute it to the database and (2) determining who will be responsible for funding, maintaining, and performing the necessary updates to the database to ensure continued accuracy of its contents.

In the United States and Europe, there have been several unsuccessful attempts to create such databases.⁷² Typically, these failures stemmed from the participants' inability to agree on how to control the database or what technological standards

67. Corey Denis, *The Global Dissonance & Disruption Of Music Metadata*, TAG STRATEGIC (Aug. 31, 2011), www.tagstrategic.com/the-global-dissonance-disruption-of-music-metadata; Kiran George, *Royalties in the Digital Music Industry: The Metadata Predicament*, SPICY IP (May 12, 2016), spicyip.com/2016/05/royalties-in-the-digital-music-industry-the-metadata-predicament.html; Eddie Moses, *The Metadata Race: A Contest That Record Labels Can Win*, HYPEBOT.COM (May 31, 2017), www.hypebot.com/hypebot/2017/05/the-metadata-race-one-record-labels-can-win.html. See, e.g., Michael Lavorgna, *Neil Young's Americana & the Case of the Missing Metadata*, AUDIO STREAM (June 12, 2012), <http://www.audiostream.com/content/neil-youngs-americana-case-missing-metadata>.

68. Spotify is now experimenting with "crowd-sourcing" metadata from its users. Janko Roettgers, *Spotify Enlists Its Users to Add Music Metadata*, VARIETY (Mar. 12, 2018), <http://variety.com/2018/digital/news/spotify-line-in-music-metadata-1202723757>.

69. Solveig Whittle, *The Future of Music is Standardized Metadata*, SHADES OF SOLVEIG (Nov. 1, 2013), <http://www.shadesofsolveig.com/2013/11/01/future-music-metadata/>; see also *Music Metadata Style Guide*, MUSIC BUS. ASS'N 2 (2016), <http://musicbiz.org/wp-content/uploads/2016/04/MusicMetadataStyleGuide-MusicBiz-FINAL2.0.pdf> (proposing metadata standards).

70. Annie Lin, *Music Publishing's Metadata Problem*, HYPEBOT.COM (Jul. 30, 2015), <http://www.hypebot.com/hypebot/2015/07/music-publishings-metadata-problemdraft.html>.

71. *United States v. Broadcast Music, Inc.*, No. 16-3830-CV, 2017 WL 6463063, at *3 (2d Cir. Dec. 19, 2017) (discussing that licensees must pay mechanical royalties to each publisher in accordance with that publisher's share of the song. Although the Department of Justice attempted to impose a new practice of 100% licensing at the time it reviewed the consent decrees, the Second Circuit rejected that interpretation of the decrees, and held that fractional licensing was permissible).

72. See Klementina Milosic, *The Failure of the Global Repertoire Database*, HYPEBOT.COM (Aug. 31, 2015), <http://www.hypebot.com/hypebot/2015/08/the-failure-of-the-global-repertoire-database-efort-draft.html>. Several PROs in the U.S. and Europe formed the International Music Joint Venture in 2000, but never succeeded in producing the database. In 2009, the European Commission established the Global Repertoire Database Working Group, but the effort collapsed in 2014. The World Intellectual Property Organization (WIPO) undertook to create the International Music Registry in 2011, but this effort failed as well.

should be employed; these disagreements led key stakeholders to stop participating and to withdraw funding.⁷³ Several new efforts were announced in 2017.⁷⁴

In addition to the failure of interactive streaming services to deliver mechanical royalties to the correct rights-holders, songwriters and publishers complained that the formula used by the CRB resulted in compulsory mechanical royalties that were too low.⁷⁵ In the past, the CRB used a complicated formula based largely on the revenues of the interactive service.⁷⁶ While this approach may have been appropriate when streaming services were start-ups that generated relatively small revenues, songwriters and publishers argued that rights-owners should no longer be expected to subsidize these operations.⁷⁷ At the same time, record labels have negotiated relatively favorable deals with interactive services, receiving significant advances and, in some cases, equity interests in addition to the royalties received from those services.⁷⁸ Even the statutory royalties that non-interactive services pay to record labels have borne a closer resemblance to fair market value than the compulsory mechanical royalties paid by the same services.⁷⁹ This created a significant disparity between the amounts paid to record labels and the amounts paid to the copyright owners of the musical works.⁸⁰

However, songwriters and publishers reacted positively to a 2018 ruling from the CRB, which significantly changed the formula for calculating the compulsory mechanical royalty that must be paid by interactive streaming services, including Apple, Amazon, Google, Spotify, and Pandora.⁸¹ Instead of basing the royalty on the revenues of the streaming service from 2018 to 2022, the royalty will be based on *the greater of* (1) a percentage of the service's revenues or (2) a percentage of

73. *Id.*

74. ASCAP and BMI announced that they would combine their music databases. Daniel Sanchez, *ASCAP and BMI Just Made the Biggest Commitment Yet to a Shared Licensing Database*, DIGITAL MUSIC NEWS (Jul. 26, 2017), <https://www.digitalmusicnews.com/2017/07/26/ascap-bmi-music-database/>. ASCAP and two foreign PROs—SACEM in France and PRS For Music in the United Kingdom—announced a joint project using blockchain technology to link International Sound Recording Codes (ISRCs) with International Standard Work Codes (ISWCs) in order to match musical compositions with the recordings that embody them. See Richard Smirke, *ASCAP, SACEM and PRS For Music Team Up on Initiative to Improve Royalty Collection*, BILLBOARD (Apr. 7, 2017), <https://www.billboard.com/articles/business/7752442/ascap-sacem-prs-for-music-initiative-improve-royalty-collection>.

75. *NMPA To Begin Copyright Royalty Board Proceedings for Streaming Mechanical Royalty Rates*, ASCAP (Mar. 8, 2017), <http://www.ascap.com/news-events/articles/2017/03/nmpa-crb-message-to-mbrs> [hereinafter ASCAP]; Casey Rae, *Where's My Mechanicals? The Ultimate Explainer*, FUTURE OF MUSIC COAL. (Nov. 11, 2015), <https://futureofmusic.org/blog/2015/11/11/wheres-my-mechanicals-ultimate-explainer>.

76. Perlstein, *supra* note 44, §2.6; BARGFREDE, *supra* note 44, at 94.

77. Paula Parisi, *Copyright Royalty Board Boosts Songwriters' Streaming Pay Nearly 50%*, VARIETY (Jan. 27, 2018, 11:23 AM), <https://variety.com/2018/biz/news/copyright-royalty-board-boosts-songwriters-streaming-pay-nearly-50-1202679118/>; ASCAP, *supra* note 75.

78. Bloomberg News, *Record Labels Reap More Than \$1 Billion Selling Spotify Stakes*, AD AGE (May 7, 2018), <http://adage.com/article/digital/record-labels-reap-1b-selling-spotify-stakes/313408/>; Chris DeVill, *Leaked Spotify Contract Reveals Sony's Streaming Rates, Advances*, STEREOGUM (May 19, 2015, 2:29 PM), <http://www.stereogum.com/1802820/leaked-spotify-contract-reveals-sonys-streaming-rates-advances/news/>.

79. COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 57, at 81.

80. *Id.* at 136.

81. Rates and Terms for Use of Nondramatic Musical Works in the Making and Distributing of Physical and Digital Phonorecords, Attachment A, § 385.21, No. 16-CRB-0003-PR (2018–2022), <https://crb.gov/rate/16-CRB-0003-PR/attachment-a-part-385-regs.pdf> [hereinafter Phonorecords]; *Petitions to Participate*, COPYRIGHT ROYALTY BD. <https://crb.gov/proceedings/16-crb-0003/> (last visited Sept. 13, 2018).

its “total cost of content,” which refers to the amounts paid to record labels for the right to stream the recordings.⁸² Since the “total cost of content” measure will usually generate the larger payment, the new formula is expected to increase mechanical royalties significantly.⁸³ The CRB also imposed a significant late fee on services that fail to pay the copyright owners on time.⁸⁴ While songwriters and publishers had hoped for a fixed per-stream rate,⁸⁵ the new formula has been well received.⁸⁶ As discussed in Part IV.A. below, new legislation now promises greater parity between the mechanical royalties paid to songwriters and publishers and those paid to record labels for the right to stream their works.

IV. THE ORRIN G. HATCH-BOB GOODLATTE MUSIC MODERNIZATION ACT

The MMA⁸⁷ makes significant changes to the federal laws governing sound recordings. The most significant of these changes are found in Titles I and II of the Act.⁸⁸ Title I, the Musical Works Modernization Act (“MWMA”),⁸⁹ addresses mechanical and public performance royalties for digital streaming of musical compositions.⁹⁰ Title II, the CLASSICS Protection and Access Act (the “CLASSICS Act”),⁹¹ creates the near-equivalent of full federal copyright protection for pre-1972 sound recordings.⁹²

82. In Re Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), Docket No. 16-CRB-0003-PR (2018-22), Attachment A §§ 385.2, 385.21; Parisi, *supra* note 77.

83. See, e.g., Glenn Peoples, *Songwriters Win Victory on Streaming Royalty Increase, But How?*, POLLSTAR (Jan. 31, 2018, 7:26 AM), <https://www.pollstar.com/article/songwriters-win-victory-on-streaming-royalty-increase-but-how-134415>.

84. Phonorecords, *supra* note 81, § 385.21(b); Parisi, *supra* note 77.

85. Phonorecords, *supra* note 81, § 385.3.

86. Parisi, *supra* note 77.

87. Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 [hereinafter MMA]. Because Congress hastily rewrote large portions of the MMA shortly before its passage, there was no Conference Committee Report. One week after the law’s enactment, however, Representative Goodlatte released a short explanation of the legislation. H.R. COMM. ON THE JUDICIARY, 115TH CONG., H.R. 1551, THE MUSIC MODERNIZATION ACT (2018) [hereinafter H.R. 1551, THE MUSIC MODERNIZATION ACT] https://copyright.gov/legislation/mma_conference_report.pdf.

88. Title III, the Allocation for Music Producers (AMP) Act, authorizes SoundExchange, the nonprofit organization that collects and distributes statutory royalties under § 114, to accept instructions from a recording artist payee to allocate a portion of the artist’s royalties to a producer, mixer, or sound engineer that worked on the recording, because one or more of those parties may have made significant creative contributions to the recording. *Id.* § 302.

89. *Id.* § 101.

90. See *infra* Part IV.A.

91. MMA § 201. The acronym CLASSICS stands for the cumbersome phrase “Compensating Legacy Artists for their Songs, Services, and Important Contributions to Society.” Marsha Silva, *U.S. Senate Initiates the CLASSICS Act to Finally Get Oldies Artists Paid*, DIGITAL MUSIC NEWS (Feb. 8, 2018), <https://www.digitalmusicnews.com/2018/02/08/classics-act-copyright-oldies/>.

92. See *infra* Part IV.B.

A. Title I: The Musical Works Modernization Act

The MWMA requires interactive streaming services to obtain mechanical licenses for musical works embodied in the recordings they stream;⁹³ thus, it eliminates any uncertainty as to whether such licenses are required. Further, it confirms that these services may utilize the § 115 compulsory license, but it subjects them to rules and procedures that differ from those applicable to record labels. Under prior law, a compulsory license for interactive streaming of a musical work was available only with respect to nondramatic musical compositions that had previously been recorded and distributed to the public on phonorecords.⁹⁴ However, the MWMA broadens § 115 by allowing an interactive streaming service to obtain a compulsory license for a nondramatic musical composition that has not previously been distributed on phonorecords.⁹⁵ As under prior law, the compulsory license still applies only if the sound recording was made with the consent of the musical work's copyright owner.⁹⁶ In addition, the copyright owner of the sound recording must have the authority to distribute it digitally, and must have authorized the streaming service to do so.⁹⁷

To facilitate compulsory licensing of streaming services, the MWMA authorizes the copyright owners of musical works to form a nonprofit mechanical licensing collective that will (1) issue blanket mechanical licenses to digital music services, (2) collect those mechanical royalties, and (3) distribute the royalties to the copyright owners.⁹⁸ In the past, a digital music service seeking a § 115 license could file its notice of intent with the Copyright Office, and if the service could not identify the copyright owner of the musical work, it frequently failed to pay the statutory royalty.⁹⁹ To remedy this, the MWMA requires interactive streaming services to serve notice on the mechanical licensing collective—not on the Copyright Office.¹⁰⁰ Therefore, even if the streaming service cannot identify the copyright owner(s) or determine their respective royalty shares, it must still pay the mechanical royalty to the licensing collective.¹⁰¹ Then, the collective itself will undertake the task of identifying the copyright owners and, in the case of a jointly owned work, determining each owner's share.¹⁰² Copyright owners will also have the right to audit the collective's records.¹⁰³

For the new mechanical licensing collective to allocate these royalties to the correct copyright owners, it will need an accurate database that identifies the copyright owners of the musical works embodied in each recording, just as

93. MMA § 102 (2018) (codified at 17 U.S.C. § 115(b)(4)(B) (2018)). The mechanical license requirement applies to “digital phonorecord deliveries,” which the MWMA defines to include interactive streaming as well as downloads, but not non-interactive (radio-style) streaming. 17 U.S.C. § 115(e)(10), (13). It also does not apply to exempt transmissions under § 114(d)(1), such as “canned” music services. *Id.* § 115(e)(13).

94. 17 U.S.C. § 115(a)(1).

95. MMA § 102(a)(1)(B) (codified at 17 U.S.C. § 115(a)(1)(A)(ii)).

96. 17 U.S.C. § 115 (a)(1)(A)(ii)(I).

97. *Id.* § 115 (a)(1)(A)(ii)(I), (II).

98. MMA § 102(a)(4) (codified at 17 U.S.C. § 115(d)(2)-(3)).

99. *See supra* notes 65–71 and accompanying text.

100. MMA § 102(a)(2) (codified at 17 U.S.C. § 115(b)(2)). Until the mechanical licensing collective is operational, notice must be served on the copyright owner.

101. MMA § 102 (a)(4) (codified at 17 U.S.C. § 115 (d)(4)).

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

103. *Id.* (codified at 17 U.S.C. § 115(d)(3)(L)).

SoundExchange needs an accurate database of the featured performers on those sound recordings.¹⁰⁴ To accomplish this, the MWMA charges the new mechanical licensing collective with creating and maintaining a database that identifies (1) the musical works embodied in individual sound recordings, (2) the copyright owners of those musical works, (3) the respective ownership shares of each of those copyright owners, and (4) contact information for each of the owners.¹⁰⁵ With respect to both the musical works and the sound recordings that embody them, the database must include, to the extent possible, the international standard codes that uniquely identify those works.¹⁰⁶ In addition, the database will be available to the public at no charge in a searchable online format.¹⁰⁷

Like SoundExchange, but unlike the PROs, the mechanical licensing collective will not set the royalty rates for the licenses it administers.¹⁰⁸ Instead, the CRB will continue to set the rates and terms for the streaming services' compulsory mechanical licenses,¹⁰⁹ although the new collective will provide documentation for the Board to consider in these proceedings.¹¹⁰

Under the prior version of § 115, a record label that obtained a compulsory license for a particular musical work could transmit, or authorize another party to transmit, the resulting recording by either downloading or interactive streaming.¹¹¹ This was referred to as a “pass-through” license.¹¹² Songwriters and publishers complained that the pass-through license required them to collect their digital mechanical royalties from the record companies rather than directly from the streaming services, making it more difficult for them to determine if they were receiving appropriate royalties based on the usage of their work.¹¹³ The MWMA revises § 115 to clarify that pass-through compulsory licenses are not available for interactive streaming, although they can still be used for permanent downloads.¹¹⁴

In a significant change that is likely to increase the mechanical royalties payable to songwriters and music publishers, the MWMA requires the CRB to use a “willing buyer/willing seller” (i.e., fair market value) standard to determine the § 115 compulsory mechanical royalty rate.¹¹⁵ Prior law required the CRB to set a “reasonable” rate,¹¹⁶ where reasonableness was determined by the rate's ability to achieve four objectives: “(1) maximizing public availability of creative works, (2)

104. SOUNDEXCHANGE, <https://isrc.soundexchange.com/#!/search> (last visited Sept. 13, 2018). SoundExchange's searchable database of sound recordings is publicly available.

105. MMA § 102(a)(4) (codified at 17 U.S.C. § 115(d)(3)(E)).

106. *Id.* These codes would include the International Standard Musical Work Code (ISWC), which identifies a specific musical composition, and the International Standard Recording Code (ISRC), which identifies a specific sound recording.

107. *Id.*

108. *See, e.g., id.*

109. *Id.*

110. *Id.*

111. 17 U.S.C. § 115(e)(3)(a) (2018) (pre-MMA); S. REP. NO. 104-128, at 7 (1995); *Section 115 of the Copyright Act: In Need of an Update?: Hearing before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 108th Cong. 7–8 (2004) (statement of Marybeth Peters, Register of Copyrights), <https://www.copyright.gov/docs/regstat031104.pdf>; COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 57, at 131–32; *see also id.* at 166 (recommending allowing music publishers to opt out of the compulsory license with respect to interactive streaming and downloads).

112. COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 57, at 131–32.

113. *Id.*

114. MMA § 102(a)(4) (codified at 17 U.S.C. §§ 115(b)(3), (e)(12)).

115. *Id.* § 102(a) (codified at 17 U.S.C. § 115(e)(1)(F)).

116. 17 U.S.C. § 115(e)(3)(C) (pre-MMA); 17 U.S.C. § 801(b)(1) (2018) (pre-MMA).

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,¹¹⁷ and (4) minimizing disruption of the industries involved and generally prevailing industry practices.¹¹⁸

In contrast, the § 114 royalty received by record labels and recording artists for non-interactive streaming services is determined under a “willing buyer/willing seller” standard¹¹⁹ that more closely resembles a fair market value rate.¹²⁰ For interactive streaming, no statutory royalty applies to sound recordings, enabling record labels to negotiate for market rates.¹²¹ Recording artists, in turn, can negotiate with their record labels for a share of the interactive streaming royalty.¹²² Songwriters and publishers complained that this rate-setting discrepancy resulted in songwriters and publishers receiving lower returns than record labels and recording artists.¹²³ The MWMA's switch to the willing buyer/willing seller standard for mechanical royalties should help to assuage these concerns.

In addition to shifting the § 115 royalty for streaming to something closer to a market rate, the MWMA also addresses the discrimination in § 114 sound recording performance royalties between older and newer non-interactive streaming services. Under the previous § 114 statutory royalty scheme, older digital music services such as SiriusXM, Muzak, and Music Choice¹²⁴ paid record companies and recording artists a lower royalty rate than newer comparable services such as Pandora.¹²⁵ Two decades later, that preferential treatment—and its impact on rights-holders and the newer competing music services—was no longer warranted.¹²⁶ Accordingly, the MWMA applies the same willing buyer/willing seller standard to all non-interactive licensees.¹²⁷

The MWMA also changes the rules that govern the rate court's oversight of the blanket license fees charged by ASCAP and BMI for public performances of musical works by streaming services.¹²⁸ In the past, § 114(i) prohibited the rate court from considering the royalties paid by streaming services to the rights-holders of sound recordings.¹²⁹ Although § 114(i) was intended to prevent the sound recording performance royalties from having a depressing effect on the performance royalties

117. 17 U.S.C. § 801(b)(1)(C) (pre-MMA) (giving consideration to creative and technological contributions, capital investment, cost, risk, and “contribution to the opening of new markets for creative expression and media for their communication.”).

118. *Id.* § 801(b)(1)(A)-(D) (2018) (pre-MMA).

119. 17 U.S.C. § 114(f)(2)(B) (2018). Prior to the MMA, the older digital services – SiriusXM, Muzak, and Music Choice – were exceptions to this rule, and were governed by the same rate-setting standard as § 115. 17 U.S.C. § 114(f)(1)(a) (pre-MMA); COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 57, at 81.

120. COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 57, at 81.

121. 17 U.S.C. § 114(d)(2)(A)(i).

122. 17 U.S.C. § 114(g)(1).

123. COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 57, at 82–83, 135–37.

124. John Villasenor, *Digital Music Broadcast Royalties: The Case for a Level Playing Field*, ISSUES IN TECH. INNOVATION 4 (Aug. 2012), https://www.brookings.edu/wp-content/uploads/2016/06/CTI_19_Villasenor.pdf. This category includes services that were already in existence when the DMCA was enacted.

125. 17 U.S.C. § 114(f)(1); *see also* PASSMAN, *supra* note 54, at 119.

126. H.R. REP. NO. 115-651, at 14 (2018) (commenting on a similar provision in §103(a) of H.R. 5447, a predecessor of the MMA); Villasenor, *supra* note 124, at 12–13.

127. MMA § 103(a)(1) (2018).

128. *Id.* § 103(b)-(c).

129. 17 U.S.C. § 114(i).

paid for musical works (because streaming services might argue that the cumulative effect of both royalties was excessive),¹³⁰ in practice the sound recording royalties have been considerably higher.¹³¹ As a result, the copyright owners of musical works came to believe they would benefit if the rate court were allowed to consider the royalties paid for sound recordings.¹³² The MWMA responds to these concerns by replacing § 114(i) with a new provision that permits the rate court to consider sound recording performance royalties when setting or adjusting public performance royalties for the streaming of musical works.¹³³

B. Title II: The CLASSICS Protection and Access Act

The second major component of the MMA is the CLASSICS Act, which addresses the lack of federal protection for pre-1972 sound recordings.¹³⁴ According to the House Report, the purpose of the CLASSICS Act is to assist “older artists who have highlighted the negative impact upon their ability to survive economically as they increasingly enter their retirement years.”¹³⁵ As discussed below, the new law offers significant benefits to record labels and recording artists who own rights in these recordings. However, it also creates ambiguities and potential conflicts with other provisions in federal law.

i. Scope of Rights in Pre-1972 Recordings

Under the original House and Senate bills, the CLASSICS Act would have given pre-1972 sound recordings only a digital audio transmission right,¹³⁶ falling far short of the recommendation of the Copyright Office to grant them full federal copyright protection.¹³⁷ At the last minute, however, without further hearings or floor debates, the final bill was revised to create the near-equivalent of full federal copyright protection. Rather than simply amending the existing copyright statutes to include pre-1972 recordings, the CLASSICS Act adds a new Chapter 14 to Title 17—consisting of a single section, § 1401—that details the scope and duration of protection for these works.¹³⁸

In general, § 1401 gives the owner of the rights in a pre-1972 sound recording the same exclusive rights and infringement remedies as the owner of a copyrighted

130. COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 57, at 42, 104–05.

131. Ari Herstand, *Songwriters are One Step Closer to Higher Royalties*, DIGITAL MUSIC NEWS (May 15, 2014), <https://www.digitalmusicnews.com/2014/05/15/songwriters-one-step-closer-higher-royalties/>.

132. COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 57, at 104–05; H.R. REP. NO. 115-651, at 14 (discussing parallel provision in one of the MMA’s predecessor bills, H.R. 5447).

133. MMA § 103(b)-(c) (2018).

134. *Id.* §§ 201-02.

135. H.R. REP. NO. 115-651, at 15 (2018) (reporting on one of the MMA’s predecessor bills, H.R. 5447, 115th Cong. (2018)).

136. MMA § 202(a) (2018).

137. U.S. COPYRIGHT OFFICE, FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDINGS 175 (2011), <https://www.copyright.gov/docs/sound/pre-72-report.pdf> [hereinafter COPYRIGHT PROTECTION].

138. MMA § 202(a)(2) (codified at 17 U.S.C. § 1401 (2018)).

sound recording.¹³⁹ These rights include the exclusive rights under §§ 106 and 602 as well as the right to pursue actions for violations of §§ 1201 and 1202.¹⁴⁰ In general, these rights are subject to the same exceptions and limitations that apply to copyrighted sound recordings.¹⁴¹ In particular, the § 114(d) provisions on exempt transmissions¹⁴² and the statutory license for non-interactive digital audio transmissions¹⁴³ both apply, as does the § 112(e) statutory license¹⁴⁴ that permits ephemeral copying of a sound recording for the purpose of these transmissions.¹⁴⁵ In addition, the § 512 safe harbor for internet intermediaries that host user-provided content also applies to pre-1972 recordings, thus ending the split of authority on whether the safe harbor protects intermediaries from state law claims for infringement of pre-1972 recordings.¹⁴⁶

However, the exclusive rights in pre-1972 recordings are subject to one additional limitation that does not apply to copyrighted sound recordings, and which appears to have the purpose of encouraging educational and other noncommercial uses of older recordings that are no longer commercially available. In effect, this is an “orphan works” provision.¹⁴⁷ If a pre-1972 recording is not being commercially exploited by, or under the authority of, the rights owner, then another party can make noncommercial use of that recording under certain conditions.¹⁴⁸ First, the user must have been unable, after a good faith, reasonable search, to find the sound

139. 17 U.S.C. §§ 1401(a)(1) (granting the rights owner the full array of remedies under 17 U.S.C. §§ 502–05, 1203 against anyone who engages in a “covered activity” with respect to the sound recording, as “covered activity” is defined in 1401(l)(1)).

140. *Id.*

141. *Id.* These include fair use (§ 107), the library and archival exception (§ 108), the first sale rule (§ 109), the variety of specific exceptions listed in section 110, nonprofit teaching exceptions (§§ 110(1)–(2)), the statute of limitations (§ 507), and the DMCA safe harbors (§ 512). The § 115 compulsory license for reproduction and distribution of musical works in phonorecords did not require amendment. Under current law, it can be invoked for uses that involve duplicating a pre-1972 sound recording only if these uses are authorized by “any person who fixed the sound recording pursuant to an express . . . or . . . valid compulsory license for use of such work in a sound recording.” 17 U.S.C. § 115(a)(1)(B)(ii) (2018). In the case of copyrighted sound recordings, § 115 requires the consent of the copyright owner of the sound recording. 17 U.S.C. § 115(a)(1)(B)(ii).

142. 17 U.S.C. § 114(d)(1) (2018).

143. *Id.* § 114(d)(2).

144. 17 U.S.C. § 112(e) (2004).

145. 17 U.S.C. § 1401(b) (2018) (stating that if the user complies with the requirements of §§ 112 and 114, the transmissions and ephemeral copies will be considered to be authorized by the owner of the pre-1972 recording). With respect to digital audio transmissions that took place *before* enactment, and which may therefore give rise to liability under state law, compliance with these statutory licensing requirements can also have a preemptive effect, as defendants can terminate or avoid infringement actions under state law by paying the statutory royalties for all digital audio transmissions of the plaintiffs’ pre-1972 recordings during the three years preceding enactment. 17 U.S.C. § 1401(e).

146. *Compare* Capitol Records, LLC v. Vimeo, LLC, 826 F.3d 78, 99 (2d Cir. 2016) (holding that safe harbor applies to recordings protected by New York law), *cert. denied*, 137 S. Ct. 1374 (2017), *with* UMG Recordings, Inc. v. Escape Media Grp., Inc., 964 N.Y.S.2d 106, 112 (N.Y. App. Div. 2013) (the Grooves shark case) (reaching opposite conclusion), *and* COPYRIGHT PROTECTION, *supra* note 137, at 130 (also concluding that safe harbor does not apply).

147. The term “orphan work” generally refers to copyrighted works with respect to which it is difficult to identify and contact the copyright owner(s), thus making it difficult to obtain permission to exploit the works. Typically, these tend to be older works. *See, e.g.*, Dinusha Menis, *Orphan Works*, COPYRIGHTUSER.ORG, <https://www.copyrightuser.org/understand/exceptions/orphan-works/> (last visited Dec. 16, 2018).

148. 17 U.S.C. § 1401(c).

recording either in the files of the Copyright Office or “on services offering a comprehensive set of sound recordings for sale or streaming.”¹⁴⁹ Second, the user must file a notice of the intended use with the Copyright Office.¹⁵⁰ At this point, the rights owner has 90 days in which to notify the Copyright Office that it is “opting out” of the proposed noncommercial use.¹⁵¹ If the rights owner does not opt out, then the noncommercial use may proceed.¹⁵²

Thus, apart from the noncommercial use exception, the new law gives the rights owners of pre-1972 sound recordings most of the same rights and remedies that apply to copyrighted sound recordings. Yet, in spite of this, the new law expressly *denies* that pre-1972 sound recordings are protected by copyright. In a bizarre twist, the CLASSICS Act states that “no sound recording fixed before February 15, 1972, shall be subject to copyright under this title.”¹⁵³ For this reason, § 1401 consistently refers to the owner of exclusive rights in a pre-1972 sound recording as the “rights owner” rather than the copyright owner.

It is not clear why Congress chose to grant these recordings almost all of the protections of copyright law while still formalistically refusing to call this copyright protection. Prior to its repeal by the CLASSICS Act, § 301(c) stated that “no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2067.”¹⁵⁴ If Congress viewed this as a commitment the reversal of which might lead to a legal challenge, simply using a different word to describe a nearly equivalent federal right is unlikely to defeat such a challenge.

Section 1401 thus treats pre-1972 sound recordings much like copyrighted sound recordings but technically withholds copyright protection. As discussed below, there are, indeed, some differences between the rights granted by § 1401 and those granted to other copyrighted works. These add complexity and ambiguity to the statute without advancing any particular policy goals.

ii. Preemption

Although the wording of the new preemption provision is ambiguous, it seems clear that Congress intended the new federal protections for pre-1972 sound recordings to preempt most, but not all, of the state laws providing copyright-like protection to these recordings. Prior to amendment by the CLASSICS Act, § 301(c) of the 1976 Act stated that federal copyright laws would not preempt state laws protecting pre-1972 sound recordings until February 15, 2067.¹⁵⁵ However, the CLASSICS Act repeals that provision and provides instead that, on a prospective basis, the general preemption provisions of § 301(a) apply to “activities” involving pre-1972 recordings.¹⁵⁶ Although the intent is apparently to preempt most state laws providing the equivalent of copyright protection to pre-1972 recordings, the manner in which

149. *Id.* § 1401(c)(1)(A). Although pre-1972 recordings are not eligible for copyright registration under 17 U.S.C. § 408, the new law allows rights owners to file certain information with the Copyright Office. See *infra* notes 192–99 and accompanying text. 17 U.S.C. § 1401(f)(5).

150. 17 U.S.C. § 1401(c)(1)(B).

151. *Id.* § 1401(c)(1)(C).

152. *Id.*

153. 17 U.S.C. § 301(c) (2018).

154. 17 U.S.C. § 301(c) (pre-MMA).

155. *Id.*

156. 17 U.S.C. § 301(c).

this is expressed is confusing. Under § 301(a), Title 17 provides exclusive protection with respect to “all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . . in works . . . [that] come within the subject matter of copyright as specified by [§§] 102 and 103.”¹⁵⁷ Because the CLASSICS Act clearly states that pre-1972 recordings are *not* within the subject matter of copyright,¹⁵⁸ § 301(a) by its own terms does not apply to those works.¹⁵⁹ To interpret the statute literally would frustrate Congress’s apparent intent. Unless Congress makes a technical correction, courts will have to choose between giving effect to the statutory language or giving effect to Congress’s probable intent.

Assuming that courts interpret the new preemption provision in a way that effectuates Congress’s intent, federal law still will not entirely preempt state laws that protect pre-1972 sound recordings. This is because the new preemption provision of the CLASSICS Act expressly does not “affirm or negate” the preemption of state law claims arising from the “nonsubscription broadcast transmission of sound recordings . . . for activities that” are not covered by the exclusive rights of § 1401 during the period that § 1401 protects those recordings; instead, § 301(c) specifies that the analysis of federal preemption with respect to such broadcasts remains the same as it was before the CLASSICS Act.¹⁶⁰ Adding to the confusion, § 1401(e)(3) expressly states: “Nothing in this section may be construed to recognize or negate the existence of public performance rights in sound recordings under the laws of any State.”¹⁶¹ This convoluted treatment of the preemption question gives rise to several ambiguities.

First, because it does not either “affirm or negate” the preemption of state law claims for broadcast transmissions of sound recordings, the CLASSICS Act gives courts no guidance on whether such state law claims can proceed. Instead, it expressly leaves prior law unchanged.¹⁶² Second, it is not clear whether this agnosticism on broadcast transmissions is limited to pre-1972 sound recordings, thus leaving open the possibility that states could recognize exclusive broadcast rights in *copyrighted* recordings as well as in pre-1972 recordings. Third, due to the conflicting language of §§ 301(c) and 1401(e)(3), it is unclear whether the CLASSICS Act preempts state laws addressing public performances of sound recordings that involve *neither* terrestrial broadcasts nor digital audio transmissions, but instead take place in venues open to the public. These would include, for example, public performances in concert halls, stadiums, restaurants, bars, clubs, gyms, and retail stores.

157. *Id.* § 301(a).

158. *Id.* § 301(c).

159. The drafters were careless in carrying over problematic language from § 301(c) of the 1976 Act, which stated that § 301(a) would apply to state law protections for pre-1972 recordings with respect to undertakings commenced on or after February 15, 2007, even though federal copyright would not apply. Since no preemption issue would arise until 2067, there was never a need to litigate or clarify this language.

160. 17 U.S.C. § 301(c).

161. 17 U.S.C. § 1401(e)(3).

162. 17 U.S.C. § 301(c) (“Any potential preemption of rights and remedies related to such activities undertaken during that period [of § 1401 protection] shall apply in all respects as it did the day before” enactment of the CLASSICS Act.). The post-enactment explanation of the MMA that was released by Representative Goodlatte indicates that any non-preempted state protections for “over-the-air” broadcasts “will expire at the same time federal protection expires” under the CLASSICS Act. H.R. 1551, THE MUSIC MODERNIZATION ACT, *supra* note 87, at 15.

To the extent that states retain the authority to regulate at least some public performances of pre-1972 sound recordings after the CLASSICS Act, the new law does not eliminate the potential for a patchwork of conflicting state laws regulating terrestrial broadcasts and non-broadcast public performances of those recordings. This leaves the door open for continuing litigation by rights owners seeking royalties under state law when their recordings are performed on the radio, on television, or in venues open to the public.

iii. Term of Protection

Earlier versions of the CLASSICS Act protected all sound recordings created between 1922 and February 15, 1972 until February 15, 2067.¹⁶³ Even though these earlier bills provided only a digital audio transmission right, this term of protection proved controversial. During the House and Senate hearings on the CLASSICS Act, several advocacy groups objected to across-the-board protection lasting until 2067 because, for older pre-1972 recordings, the new digital right would outlast the term of federal copyright they would have received had they been eligible for such protection in the first place.¹⁶⁴ For example, if a sound recording released in 1940 had been eligible for federal copyright protection at the time, then its copyright would expire no later than 2035.¹⁶⁵ In contrast, the proposed digital audio transmission right would last until 2067.¹⁶⁶

Even as the final bill greatly broadened the *scope* of protection for these recordings beyond the original proposals, it significantly reduced the duration of that protection. Section 1401 now provides laddered terms of protection, depending on the age of the recording. All pre-1972 recordings receive at least 95 years of federal protection, measured from their year of first publication;¹⁶⁷ this is similar (although not identical) to the current copyright term for other published works from that period.¹⁶⁸ For some older works, however, this 95-year term will already have expired

163. See, e.g., S. 2823, 115th Cong. § 202(a) (2018) (referencing § 1401(a)).

164. Letter from Jonathan Band, Counsel, Library Copyright All., to Darrell Issa, Chairman, & Jerry Nadler, Ranking Member, Subcomm. on Cts., Intell. Prop., and the Internet (Aug. 9, 2017) (on file with the Library Copyright Alliance) (arguing that protection should end 95 years after publication); Letter from Meredith Rose, Policy Counsel, Public Knowledge, to Chuck Grassley, Chairman, U.S. Senate Committee on the Judiciary, et al. (Mar. 7, 2018), <https://www.publicknowledge.org/documents/public-knowledge-letter-on-music-modernization-act>; Press Release, Public Knowledge, Public Knowledge Urges Senate to Consider Music Modernization Act and CLASSICS Act Separately (Apr. 26, 2018), <https://www.publicknowledge.org/press-release/public-knowledge-urges-senate-to-consider-music-modernization-act-and-class> (arguing that § 1401 “creates a ‘faux copyright’ that locks these recordings behind federal protection until 2067, nearly a century and a half after many of them were made”).

165. Some of the advocacy statements measured the 95-year copyright term from the date of creation, while others used the date of publication. Band, *supra* note 164 (arguing that protection should end 95 years after publication). For most sound pre-1972 recordings, the difference is probably insignificant. However, under the 1909 Act, the starting date for copyright protection of most works was the date of publication. Copyright Act of 1909, Pub. L. No. 60-349, § 9, 35 Stat. 1075, 1077, *repealed by* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541.

166. S. 2823 § 202(a) (referring to § 1401(a)). The end date of February 15, 2067 was not chosen at random. Prior to amendment by the MMA, § 301(c) of the 1976 Act specified that state laws protecting sound recordings would not be preempted until that date, which is exactly 95 years from February 15, 1972, the date on which sound recordings became eligible for federal copyright. See *generally* COPYRIGHT PROTECTION, *supra* note 137.

167. 17 U.S.C. § 1401(a)(2) (2018).

168. 17 U.S.C. § 304(a) (2002) (providing for initial and renewal terms totaling 95 years).

by the effective date of the CLASSICS Act (October 11, 2018), or it may expire shortly thereafter. Therefore, in addition to the 95-year term, § 1401 grants each recording an additional term of years, depending in large part on the recording's year of publication:

- Recordings first published before 1923 receive an additional term ending 3 years after enactment (that is, 2021);
- Recordings first published between 1923 and 1946 receive 5 years in addition to 95, for a total term of 100 years;
- Recordings first published between 1947 and 1956 receive 15 years in addition to 95, for a total term of 110 years; and
- Recordings fixed before February 15, 1972 (but not described above) are protected until February 15, 2067.¹⁶⁹

Because this durational provision grants protection to sound recordings published before 1923, it protects recordings that would have already entered the public domain if they had been eligible for federal copyright protection when they were first published. By contrast, other types of works published before 1923—including musical compositions as well as works of art and literature—have already entered the public domain.¹⁷⁰ While the sound recordings falling into this category are probably few in number, with more historical than commercial value, the extension of protection is nonetheless noteworthy.

iv. Ownership

Because the CLASSICS Act expressly does not grant copyright protection to pre-1972 recordings, it refers to the owners of the exclusive rights under § 1401 as “rights owners” rather than copyright owners.¹⁷¹ But who are these rights owners? Surprisingly, § 1401 does not directly answer this question. Instead, it defers largely to state law.¹⁷² In doing so, it creates significant and unnecessary uncertainty.

Section 1401 defines the “rights owner” of a pre-1972 recording as “the person that has the exclusive right to reproduce a sound recording under the laws of any State, as of the day before enactment,” or any person to whom “a right to enforce a violation of this section may be transferred” after the enactment date.¹⁷³ The reference to “the laws of *any* State”¹⁷⁴ creates the possibility of conflicting ownership

169. *Id.*

170. Under § 23 of the 1909 Act, a work published in 1922 received, at most, 56 years of protection. Under § 304(a)(2) of the 1976 Act (prior to its amendment in 1998), that work received an additional 19 years of protection. This total of 75 years of protection expired in 1997, meaning that the work's copyright did not receive the benefit of the additional 20 years added by § 102 of the Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827 (giving a total term of 95 years of protection to works still in their renewal terms on the Act's effective date).

171. 17 U.S.C. § 1401(a).

172. *Id.* § 1401.

173. *Id.* § 1401(1)(2).

174. *Id.* (emphasis added).

claims based on the laws of different states. With respect to any given sound recording, there is no guarantee that state laws will be uniform in their assessment of who owns the reproduction right. State laws may vary with respect to the initial ownership of those rights at the time the recording was made, and also with respect to whether those rights have since been validly assigned or exclusively licensed. Given the unsettled nature of state copyright laws, in some cases the issue of ownership may have to be resolved through costly litigation.

At the time a particular sound recording was created, the reproduction rights could have vested (1) solely in the record label, (2) jointly in some combination of the performers, producer, sound engineer, and/or other creative participants, or (3) jointly in the record label and some of the creative participants.¹⁷⁵ To make this determination today, a court would have to determine what authorship and/or ownership rules were in place under state law at the time the recording was fixed.¹⁷⁶ In many states, this will present a novel question of law. Additionally, the outcome of this analysis could vary under the laws of different states, which creates a conflict of laws problem. For purposes of § 1401, should the initial ownership of the right be determined only under the law of the state where the recording was made? While this answer makes sense in terms of policy, it conflicts with § 1401's statement that ownership can be based on "the laws of *any* State."¹⁷⁷

A second concern relates to assignments and licenses. Regardless of which state's law determines the initial vesting of the reproduction right with respect to a particular recording, it is possible that the right has subsequently been assigned or licensed. To identify the current owner of the reproduction right, it may be necessary to resolve disputes over whether that right has been assigned or exclusively licensed. Once again, variation in state laws may lead to divergent answers on the question of whether a purported assignment or exclusive license was valid at the time it was executed, and whether an exclusive licensee of the reproduction right is the "owner" of that right under state law.¹⁷⁸ Due to the relatively undeveloped nature of state copyright laws, this is likely to be a novel question in many states.

While § 1401 appears to defer entirely to state law on the validity of assignments and licenses that take effect *prior* to the enactment date, it does address the validity of transfers that occur *after* enactment. Even here, though, it leaves many unanswered questions. Section 1401 recognizes as a rights owner "any person to which a right to enforce a violation of this section may be transferred, in whole or in part, after the date of enactment" pursuant to §§ 201(d), 201(e), and 204 of the Copyright Act.¹⁷⁹ Although the listed provisions apply specifically to transfers of

175. Cf. Mary LaFrance, *Authorship and Termination Rights in Sound Recordings*, 75 S. CAL. L. REV. 375 (2002) (addressing comparable issues under federal law).

176. See *Stern v. Lavender*, No. 16 Civ. 9886 (PAE), 2018 WL 3520497, at *10 (S.D.N.Y. Jul. 20, 2018). See, e.g., 17 U.S.C. § 1401 (measuring ownership throughout the statute as the date of fixation). Although the date of fixation is the most likely date on which authorship and initial ownership would be determined (as is the rule under federal law), even this is not a foregone conclusion under state law.

177. 17 U.S.C. § 1401(l)(2) (emphasis added). By assigning ownership of the § 1401 rights to the owner of the *reproduction right*, the CLASSICS Act also seems to overlook the possibility that, even before the enactment date, some of the rights encompassed by § 1401 might have been transferred separately from the reproduction rights. If *all* of the § 1401 rights belong to the owner of the reproduction rights on the enactment date, this would frustrate the reasonable expectations of a party to whom the distribution, adaptation, or digital audio transmission rights had been assigned or exclusively licensed.

178. See James H. Neu, *Rights of Copyright Owner*, 17 NOTRE DAME L. REV. 373, 384–91 (1942).

179. 17 U.S.C. §§ 1401(h)(1)(A), (l)(2)(B) (referencing 17 U.S.C. § 201(d)-(e) (1978); 17 U.S.C. § 204 (1976)).

“copyright” or the exclusive rights thereunder, it appears that Congress intends for them to govern transfers of § 1401 rights as well. Section 204 requires copyright transfers to be in writing; accordingly, transfers of § 1401 rights must be in writing as well. Section 1401 is silent, however, on the question of what, if any, additional rules apply to transfers of exclusive rights. For example, does an exclusive licensee qualify as a rights owner? Is specific language required for an assignment or exclusive license to be valid? If there are multiple authors or multiple owners of the sound recording, how many of them must join in an assignment or exclusive license? And, how many of them must consent to allow a third party to exercise their § 1401 rights? All of this uncertainty could have been avoided if Congress had subjected pre-1972 recordings to the federal provisions on ownership of copyrights.

v. Termination Rights

One of the most significant consequences of Congress’s decision to treat the § 1401 rights as something other than copyright is that assignments and licenses of the rights are not subject to a termination right. For works protected by federal copyright, authors (or, in some cases, their heirs) can ordinarily terminate a license or assignment after a specified term of years.¹⁸⁰ However, because the termination provisions apply only to *copyrights*, they do not apply to the § 1401 rights. Because § 1401 itself is silent on termination rights, the logical conclusion is that no such rights exist.

Because the exclusive rights in some of these recordings will endure for decades into the future, if the rights have already been assigned by the original authors to their record labels, the absence of a termination right gives the entire benefit of this windfall to the labels. Yet, Congress’s stated intent was to benefit the recording artists themselves.¹⁸¹ In contrast, when Congress has previously extended the term of copyright protection, it has always ensured that the benefit of that extension would accrue to the authors (or their families) rather than to assignees or licensees. For example, when the 1976 Act added 19 years to the renewal term of works published under the 1909 Act, Congress gave authors the right to terminate their grants in time to reclaim the 19-year extension.¹⁸² It did the same thing in the Sonny Bono Copyright Term Extension Act (“CTEA”), which added an additional 20 years to subsisting copyright terms.¹⁸³ Even the unitary copyright term under the 1976 Act includes an author’s termination right that can be exercised 35 to 40 years after the copyright is assigned or licensed.¹⁸⁴ These termination rights apply to all copyrighted works except for works made for hire.¹⁸⁵

Depending on state laws, the author(s), and thus the original rights-holder(s), of a pre-1972 sound recording could be one or more of the following, in various combinations: the original record label, the recording artist(s) who performed on

180. 17 U.S.C. §§ 203, 304(c)-(d) (2002) (providing termination provisions).

181. H.R. REP. NO. 115-651 at 15–16 (2018) (discussing a similar provision in H.R. 5447, a predecessor bill, and indicating Congress’s intent to enrich the original recording artist rather than any subsequent rights owner).

182. 17 U.S.C. § 304(c) (2002).

183. *Id.* § 304(d).

184. *Id.* § 203(a)(3).

185. 17 U.S.C. §§ 203(a), 304(c)-(d).

the recording, the producer, or other free-lance contributors.¹⁸⁶ At the time the original rights-owner licensed or assigned the reproduction right under state law, neither party to the transaction could have anticipated that a sale of the right to copy and sell the recording under state law would also convey the near-equivalent of federal copyright ownership, or that it would entail a digital streaming right. Accordingly, a termination right seems necessary to ensure that the benefit of the new right flows to the creator(s) of the work, consistent with Congress's stated intent.¹⁸⁷ By failing to provide a termination right, § 1401 conclusively treats all pre-1972 sound recordings as the state-law equivalent of works made for hire under federal law, an assumption that may be true for some recordings but not others.¹⁸⁸

In the absence of a federal termination right, some states might consider adopting their own termination rights. This would be effective under the statute, because § 1401 defers to state law in order to determine ownership. However, introducing a termination right after the term of protection and ownership rights have been established could raise constitutional concerns as a violation of due process.

vi. Subject Matter Jurisdiction

While federal courts have exclusive jurisdiction over copyright claims, this may not be the case for claims under § 1401. Federal courts have exclusive jurisdiction over claims “arising under any Act of Congress relating to patents . . . or copyrights,”¹⁸⁹ as well as Title 17 actions pertaining to semiconductor chips and boat hull designs.¹⁹⁰ Because § 1401 does not involve patents, semiconductor chips, or boat hull designs, and because Congress took pains to make clear that § 1401 does not provide copyright protection,¹⁹¹ claims arising under § 1401 fall into none of the categories over which federal courts have exclusive jurisdiction. Therefore, it would appear that state courts have concurrent jurisdiction. If Congress did not intend this result, then this will require a technical correction. Otherwise, rights owners will have the option of filing their claims in state court.

vii. Registration

Because pre-1972 sound recordings are not copyrighted, they are apparently not eligible for federal registration. The registration statute, § 408 of the Copyright Act, allows registration only “during the subsistence” of a copyright,¹⁹² which suggests that a work cannot be registered if it does not have a copyright term. On the other hand, the same provision permits “the owner of copyright or of *any exclusive*

186. See Part IV.B.iv.

187. See Meredith Filak Rose, *A Payday Built on Bad Policy*, PUB. KNOWLEDGE: MUSIC LICENSING (Apr. 9, 2018), <https://www.publicknowledge.org/news-blog/blogs/a-payday-built-on-bad-policy>.

188. Cf. *Fifty-Six Hope Road Music Ltd. v. UMG Recordings, Inc.*, No. 08 CIV. 6143(DLC), 2010 WL 3564258 (S.D.N.Y. Sept. 10, 2010) (applying highly fact-specific inquiry to determine whether Bob Marley's sound recordings were works made for hire for purposes of renewal rights under the 1909 Act).

189. 28 U.S.C. § 1338(a) (2011).

190. *Id.* Semiconductor chips and boat hull designs are the subjects of Chapters 9 and 13, respectively, in Title 17.

191. 17 U.S.C. § 301(c) (2018).

192. 17 U.S.C. § 408(a) (2005).

right” to register the work.¹⁹³ Notwithstanding this ambiguity, the correct answer appears to be that registration is not permitted. Works protected under chapter 9 (semiconductor chips) are expressly eligible for registration,¹⁹⁴ and registration is mandatory for boat hull designs under chapter 13.¹⁹⁵ Therefore, Congress’s failure to provide for registration in § 1401 suggests that pre-1972 recordings are not eligible.¹⁹⁶

However, the CLASSICS Act provides an alternative filing system, under which the rights owner may file “a schedule that specifies the title, artist, and rights owners of the sound recording” with the Copyright Office.¹⁹⁷ A person who seeks to invoke the statutory privilege for noncommercial uses of pre-1972 recordings must conduct a good faith, reasonable search of these schedules.¹⁹⁸ Since this filing is a prerequisite to collecting statutory damages and attorney’s fees with respect to unauthorized uses of pre-1972 recordings,¹⁹⁹ it is a partial substitute for copyright registration. In contrast, § 1401 makes clear that registration is not a prerequisite to bringing suit or to receiving an award of statutory damages or attorney’s fees.²⁰⁰

viii. Conflicts with § 104A

Section 1401 also creates multiple conflicts with § 104A,²⁰¹ under which many pre-1972 sound recordings first published outside the United States (“restored works”) already enjoy federal copyright protection. Under § 104A, federal copyright protection became available as early as 1996 for most pre-1972 sound recordings that (1) have at least one author or rights-holder that was a foreign national at the time of creation, (2) were first published in a foreign country and not published in the United States until more than 30 days later, and (3) had not yet entered the public domain in their countries of origin.²⁰² Those copyrights will expire no later

193. *Id.* When § 408 was drafted as part of the Copyright Act of 1976, the reference to “any exclusive right” could only have referred to the exclusive rights in *copyrighted* works, because Title 17 recognized no other exclusive rights at that time.

194. 17 U.S.C. § 908(a) (1984).

195. 17 U.S.C. § 1310(a) (1998).

196. This conclusion is supported by § 1401(h), which allows rights owners to bring suit without registering their recordings. *Id.* § 1401(h)(1)(B) (2018). It is also consistent with language in Representative Goodlatte’s post-enactment explanation:

[F]ormalities such as the copyright notice, deposit and registration provisions of chapter 4 do not apply to this new *sui generis* right but rather are replaced with different processes and provisions more applicable to pre-1972 recordings. Pre-1972 recordings have existed and been commercially exploited for many decades without compliance with such formalities, and it would not be feasible to apply those formalities now.

H.R. 1551, THE MUSIC MODERNIZATION ACT, *supra* note 87, at 15.

197. 17 U.S.C. § 1401(f)(5)(A)(i)(I) (2018).

198. *Id.* § 1401(e)(1)(A)(i). See *supra* notes 147–52 and accompanying text for a discussion on the noncommercial use privilege.

199. *Id.* § 1401(f)(5)(A)(i).

200. *Id.* §§ 1401(f)(5)(C), (h)(1)(B).

201. 17 U.S.C. § 104A (2002).

202. Section 104A extends federal copyright protection to pre-1972 recordings that were first published in countries that are partners with the U.S. in various copyright and trade agreements. 17 U.S.C. § 104A(h)(3), (h)(6)(C)(2). This encompasses the vast majority of foreign-made pre-1972 sound recordings. For countries that adhered to the Berne Convention or were members of the World Trade Organization as of January 1, 1996, their pre-1972 recordings became eligible for U.S. copyright protection on that date. 17 U.S.C. § 104A(h)(2).

than 95 years from publication, and many of them earlier.²⁰³ Therefore, they receive essentially the same protection as works first published in the United States.

On its face, § 1401 applies to all pre-1972 sound recordings, without regard to authorship, place of first publication, or current copyright status. This sets up an obvious conflict. Either Congress will have to make a technical correction to exclude restored works from § 1401, or courts will have to determine whether restored works are subject to the new provisions. If § 1401 applies to restored works, then many of them will enjoy longer copyright terms than they are afforded under § 104A. For example, if a sound recording by a foreign national was first published in Europe in 1950, under § 104A that recording has a federal copyright term of 95 years, expiring in 2045. If § 1401 applies, however, that recording will be protected for 110 years²⁰⁴—until 2060. In addition, some foreign recordings may have entered the public domain in their countries of origin before becoming eligible for copyright under § 104A, in which case they did not receive any federal copyright protection.²⁰⁵ It is unclear whether § 1401 would protect a foreign recording that never qualified for federal copyright protection and is no longer copyrighted in its country of origin. Nothing in the legislative history of § 1401 suggests that Congress intended to grant a copyright extension for such recordings, yet that is the inescapable result of applying this provision to all pre-1972 sound recordings, regardless of their current copyright status.

A second conflict between § 1401 and § 104A relates to ownership rights. Under § 1401, ownership rights in pre-1972 sound recordings are determined “under the laws of any State.”²⁰⁶ In contrast, § 104A provides that “[a] restored work vests initially in the author or initial right holder of the work as determined by the law of the source country of the work.”²⁰⁷ Thus, if a pre-1972 sound recording was first released outside of the United States, there are two conflicting rules for determining the initial owner of § 1401 rights: (1) the owner is the person who owns the reproduction right under the law of “any State,” regardless of the place of creation, or (2) the owner is the author or initial rights-holder under the law of the country where the recording was first released. While there may be few instances in which the inconsistent rules lead to conflicting ownership claims, the relative precision of § 104A highlights the careless drafting in § 1401.

Pre-1972 recordings that are copyrighted under § 104A are also subject to the termination provisions of the 1976 Act. Since those provisions do not seem to apply

203. Pre-1972 foreign recordings that had already entered the public domain in their country of origin due to expiration of copyright received no federal protection. 17 U.S.C. § 104A(h)(6). Other pre-1972 foreign recordings received federal protection for the remainder of the copyright term they would have been granted if they had been eligible. 17 U.S.C. § 104A(a)(1)(B). For those published between 1909 and 1977, the copyright term was 75 years from publication. 17 U.S.C. § 304(a)(1) (2002) (before amendment by § 102(d) of the Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827). If they were still under copyright in 1998, their total term became 95 years from publication. 17 U.S.C. § 304(a)(1).

204. 17 U.S.C. § 1401(a)(2).

205. 17 U.S.C. § 104A(h)(6)(B) (denying restoration of federal copyright to a work that entered the public domain in its country of origin before the restoration date). A foreign recording made in 1930 most likely entered the public domain in its country of origin by 1980, and thus would have received no federal copyright protection under § 104A. It is unclear whether § 1401 would grant a digital audio transmission right to a foreign recording that never qualified for federal copyright restoration and is no longer copyrighted in its country of origin.

206. 17 U.S.C. § 1401(g). See *supra* notes 173–74 and accompanying text.

207. 17 U.S.C. § 104A(b).

to works protected under § 1401, an attempt to terminate an assignment or license in a recording copyrighted under § 104A would not be valid if § 1401 applies.

ix. Benefits to Recording Artists

According to the House Report, the purpose of the CLASSICS Act is to assist “older artists who have highlighted the negative impact upon their ability to survive economically as they increasingly enter their retirement years.”²⁰⁸ To fulfill this purpose, the benefits of § 1401 should flow to the recording artists. However, as discussed below, this will be true only in part.

One of the most valuable rights protected by § 1401 is the digital audio transmission right. Section 1401 makes pre-1972 recordings subject to the rules of § 114—the same rules that govern digital streaming of copyrighted sound recordings.²⁰⁹ Under these rules, if the streaming of a pre-1972 recording complies with the requirements of § 114, then the royalty payments will also be dictated by § 114.²¹⁰ This means that recording artists, like record labels, will receive no royalties at all from “exempt transmissions.”²¹¹ In the case of non-exempt transmissions that are non-interactive, the featured recording artists will receive only 45% of the statutory royalty, because 50% goes to the record label.²¹² This is the only streaming revenue that the law guarantees for artists. In contrast, for interactive transmissions, the artist’s share of the streaming royalty will depend on (1) the deal negotiated between the label and the streaming service and (2) the terms of the artist’s recording contract.²¹³ Both of these factors may be problematic.

Even in the case of copyrighted sound recordings, record labels have sometimes taken equity interests in interactive streaming services in place of larger royalties, thus reducing any royalty pool to which their artists are contractually entitled.²¹⁴ For pre-1972 recordings, however, the terms of the artist’s recording contract may present an additional problem. Recall that, prior to the MMA, pre-1972 recordings were protected only by state laws.²¹⁵ In most states, protection was based on judicial interpretation of the common law doctrines of unfair competition, misappropriation, and the right of publicity, and encompassed, at most, copying and distribution.²¹⁶ Although some states have clarified their protection for sound recordings more recently,²¹⁷ recording artists entering into contracts during the pre-1972 period would not have foreseen those developments. Even today, there are no

208. H.R. REP. NO. 115-651, at 15 (2018) (reporting on one of the MMA’s predecessor bills, H.R. 5447, 97th Cong. (1983)).

209. 17 U.S.C. § 114(g) (2018).

210. *Id.*

211. *Id.* § 114(d)(1).

212. *Id.* § 114(g) (2). The remaining 5% is split between the nonfeatured vocalists and musicians.

213. *Id.*

214. See Helienne Lindvall, *Behind the Music: The Real Reason Why the Major Labels Love Spotify*, GUARDIAN (Aug. 17, 2009), <https://www.theguardian.com/music/musicblog/2009/aug/17/major-labels-spotify>.

215. See *supra* note 24 and accompanying text.

216. COPYRIGHT PROTECTION, *supra* note 137, at 20–49; PROGRAM ON INFO. JUST. AND INTELL. PROP., WASH. COLL. OF LAW, AM. UNIV., PROTECTION FOR PRE-1972 SOUND RECORDINGS UNDER STATE LAW AND ITS IMPACT ON USE BY NON-PROFIT INSTITUTIONS: A 10-STATE ANALYSIS 1 (2009); Marketa Trimble, *U.S. State Copyright Laws: Challenge and Potential*, 21 STAN. TECH. L. REV. 66, 113–16 (2017).

217. See, e.g., *Capitol Records, Inc. v. Naxos of Am., Inc.*, 830 N.E.2d 250 (N.Y. 2005); see also Trimble, *supra* note 216, at 115–16.

state laws that recognize digital audio transmission rights in sound recordings, either prospectively or retroactively.²¹⁸ Thus, at the time these artists signed their contracts, neither the artist nor the label was likely to have contemplated streaming or analogous rights. Therefore, the literal terms of the artists' recording contracts probably do not entitle them to any share of sound recording performance royalties from interactive streaming.²¹⁹

It is highly unlikely that the artist's contract for a pre-1972 recording included language calling for a public performance royalty or anything else that might be construed as a digital streaming royalty.²²⁰ Copies of pre-1972 recording contracts are difficult to find. However, a look at contracts from the 1980s—still predating the enactment of § 106(6)—suggests that these older contracts did not address public performance rights because they had no reason to do so. For example, the royalty clause in a 1983 recording contract between CBS (Sony's predecessor) and the band Toto contains detailed provisions on royalties from record sales, but no other royalty provisions.²²¹ In contrast, a 1989 contract between the Allman Brothers and CBS includes a clause stating that, "if legislation requiring the payment of copyright royalties for the public performance of Phonograph Records is enacted," and if CBS receives such royalties, it will pay the artist whatever share is required under CBS's collective bargaining agreement with the American Federation of Musicians.²²² Based on examination of these post-1972 contracts, it will likely be difficult to find language in a pre-1972 contract supporting a recording artist's claim to a share of streaming royalties, much less quantifying that share.

As is true with copyrighted recordings, § 1401 will not require the payment of royalties for public performances of pre-1972 recordings on terrestrial radio or in public venues such as bars, clubs, and restaurants.²²³ While § 1401 arguably leaves room for state laws to fill this gap, there is currently no indication that they will do so.²²⁴ Fortunately for rights-owners, the last-minute expansion of § 1401 to encompass rights equivalent to all of the exclusive rights held by sound recording copyright owners should bring in additional royalties from physical sales, downloads, and master use licenses. Some of these activities would have been foreseeable at the time recording artists entered their contracts with record labels, and, therefore, may be the subject of royalty clauses in those contracts.

218. See *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 821 F.3d 265, 272 (2d Cir. 2016); *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 827 F.3d 1016, 1024 (11th Cir. 2016); *Flo & Eddie, Inc. v. Pandora Media, Inc.*, 851 F.3d 950, 951 (9th Cir. 2017); see also COPYRIGHT PROTECTION, *supra* note 137, at 45.

219. If they are also songwriters, of course, they may receive mechanical and public performance royalties for the streaming of recordings that embody their compositions. See *supra* notes 6–8 and accompanying text.

220. They certainly would not refer to digital transmission rights, a technical term that would have had no meaning at that time, and which refers to a technology that did not exist at that time.

221. *Toto 1983 Recording Contract with CBS (Sony)*, § 9 at 12–16, <http://www.scribd.com/document/293930144/toto-1983-recording-contract-w-cbs-sony> (last visited Sept. 6, 2018).

222. *Allman Brothers Record Contract with CBS (1989)*, § 10.4 at 22, <http://www.scribd.com/document/293930010/Allman-Bros-Record-Contract-w-CBS-1989> (last visited Sept. 6, 2018).

223. See *supra* Part IV.B.ii.

224. See *supra* Part IV.B.ii.

V. CONCLUSION

The MMA introduces several important reforms to federal copyright protection of sound recordings. In particular, the MWMA's creation of an improved process for administering mechanical licenses and setting mechanical licensing rates should increase the likelihood that songwriters and music publishers will receive the compensation to which they are legally entitled. The mandate to create a publicly accessible music database will lead to the creation of an essential resource which, in conjunction with ongoing efforts in other countries, can expand to include a worldwide repertoire linking recordings to their underlying musical works and to all the creative participants who may be entitled to share in the proceeds of those works.

The CLASSICS Act is a significant improvement over the 1976 Act and the 1971 SRA, under which the protection of pre-1972 American sound recordings was left entirely to a patchwork of poorly developed state laws.²²⁵ However, while the CLASSICS Act resolves some important issues, it introduces unnecessary ambiguity by relying on state law to determine the identity of the rights-owner. In addition, if the true purpose of the CLASSICS Act is "to enable older artists and their families to benefit financially from their creativity,"²²⁶ the Act shows a lack of imagination. By subjecting pre-1972 recordings to the same § 114 royalty scheme as copyrighted recordings, and by not giving the recording artists any termination rights, the Act ensures that the lion's share of the financial rewards from the newly recognized right will go to the record labels rather than the artists.

Additional drafting problems create ambiguity over the extent to which state copyright laws are preempted, the exclusive jurisdiction of federal courts, and the copyright status of pre-1972 sound recordings that have already received copyright protection under §104A. If these problems are not addressed through technical corrections, they could lead to wasteful litigation.

Finally, the MMA does not address the serious problem of hosting sites such as YouTube—the largest music streaming service in the world. However, this problem goes well beyond what Congress could have hoped to accomplish in the MMA. As Congress continues its work on modernizing copyright law, the music industry will almost certainly continue to pressure lawmakers to reconsider the scope of the safe harbors that enable sites like YouTube to generate significant advertising revenues from music and sound recordings, while paying little or nothing to the copyright owners and recording artists. While the MMA enables songwriters, publishers, and recording artists to realize greater returns from licensed uses of their works, it leaves the challenge of unlicensed uses for another day.

225. *See supra* Part II.A.

226. H.R. REP. NO. 115-651, at 15 (2018).