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Copyright's Deficit: Technology, Modern Consumer Preferences, and the Music Marketplace

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Copyright's Deficit: Technology, Modern Consumer Preferences, and the Music Marketplace

Abstract

While it is clear, and arguably has been for the last five years, that paid subscription streaming is the future of the music industry, the law has failed to keep pace with “modern consumer preferences and technological developments in the music marketplace.” The Music Modernization Act of 2018 (MMA), which amends the U.S. copyright law, 17 U.S.C., is Congress’s effort to keep pace with the music industry by fixing our cumbersome and inefficient music licensing system. The MMA is a step in the right direction, but it falls short of Congress’s goal. Focusing on Title I of the MMA—the Music Licensing Modernization Act—I argue that, aside from creating a compulsory blanket mechanical license for musical works, Title I of the MMA has done very little to improve business transactions in the music marketplace. Moreover, instead of “present[ing] a series of balanced tradeoffs among interested parties to create a fairer, more efficient, and more rational system for all,” Title I of the MMA hyper-

focuses on the short-term interests of the music publishers and non-performing songwriters that lobbied during the MMA legislative process.

I, therefore, argue that Congress should revisit the music marketplace question and update our music licensing system with the following goals in mind: (1) protect the public’s interest in having affordable access to interactive streaming, (2) create administrative synergies in our music licensing system, and (3) increase revenues for industry players and cut costs in the music marketplace. Specifically, Congress should:

- Replace the willing-buyer/willing-seller standard with the §801(b)(1) (repealed 2018) policy-oriented standard for statutory rate-setting proceedings;
- Instruct the Copyright Royalty Board (CRB) to factor basic principles of federal antitrust law into royalty rate determinations;
- Expressly communicate to the CRB that maximizing the quality of musical works made available to the public is outside the scope of the CRB’s statutory authority;
- Reject the principle set forth by the Copyright Office that “[g]overnment licensing processes should aspire to treat equivalent uses of sound recordings and musical works alike”;
- Authorize the formation of a new Mechanical and Performance Licensing Collective (MPLC), f/k/a Mechanical Licensing Collective (MLC), and create a compulsory individual and blanket license for the public performance of nondramatic musical works;
- Migrate public performance rate-setting proceedings from the performing rights organization (PRO) rate courts in the Southern District of New York over to the MPLC;
- Require terrestrial radio to pay sound recording royalties to recording artists and record companies;
- Apportion the annual assessment (operating) costs for the funding of the MPLC f/k/a MLC among applicable licensors and licensees; and
- Create a compulsory licensing system for the recording and commercial release of interpolations.

In the following sections—Part I, II, and III—I set forth the details of my policy proposal, identify the drawbacks of our music licensing system, and demonstrate how my recommendations seek to address these inefficiencies.

Keywords

Copyright, Music Industry, Streaming Music, Napster, Spotify, Record Sales, Universal Music Group, Sony Music Entertainment, Warner Music Group, Recording Industry Association of America, Congress, Copyright Royalty Board, Music Licensing Modernization Act, Mechanical and Performance Licensing Collective, Satellite Digital Audio Radios Services

COPYRIGHT'S DEFICIT: TECHNOLOGY, MODERN CONSUMER PREFERENCES, AND THE MUSIC MARKETPLACE

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Introduction

In 1999, the U.S. recorded music industry was performing at an all-time high. Data collected and reported by the Recording Industry Association of America (RIAA) showed \$14.6 billion in total revenue for the year with CD sales accounting for \$12.8 billion—nearly 88%—of revenue for all selected formats.¹ But this success was short-lived. That same year, two teenagers, Shawn Fanning, and Sean Parker, launched the free online file sharing platform, Napster, and its impact was massive.² Not only did Napster revolutionize the ways in which people engaged with music, the peer-to-peer platform drove the price of a CD from \$14 down to zero.³

¹ U.S. Sales Database, RIAA, <https://www.riaa.com/u-s-sales-database/> (last visited May 7, 2020).

² Hundreds of download programs have come and gone since 1999 (Limewire, Kazaa, BitTorrent, to name a few). Napster deserves credit not just for being the first, but for revolutionizing a new frontier in music consumption.” Alex Suskin, *15 Years After Napster: How the Music Service Changed the Industry*, DAILY BEAST (July 12, 2017, 5:45 AM), <https://www.thedailybeast.com/15-years-after-napster-how-the-music-service-changed-the-industry>. In *Meet Me in the Bathroom: Rebirth and Rock and Roll in New York City, 2001-2011*, journalist, Lizzie Goodman, interviewed industry professionals about the post-Napster fall-out. (Note: all job titles are pulled from *Cast of Characters* ix-x). “We didn’t know it was going to end,” shared Dominique Keegan, DJ and co-founder of the record label, Plant Music, and the influential Lower East Side establishment, Plant Bar. LIZZIE GOODMAN, *MEET ME IN THE BATHROOM: REBIRTH AND ROCK AND ROLL IN NEW YORK CITY, 2001-2011* 81 (2017). “In the nineties, CD sales surpassed anything that had existed before in the record industry. It was insane.” *Id.* “Record companies discovered that people in their thirties and forties would buy their record collection again on CD,” explained former Geffen A&R executive and producer for Ryan Adams, James Barber. *Id.* “So people are going to record stores regularly because, ‘Oh, this week the Pink Floyd album that I like is coming out again.’ Everything costs \$18.98. So, in the nineties, there was a lot of money sloshing around the business. *But this was a one-time deal.*” *Id.* at 81-82 (emphasis added). David Gottlieb, former product manager, RCA, analogized the industry’s reaction to digital to “somebody not seeing their midlife crisis coming.” *Id.* at 82. He explained: “The music industry had always, to that point, come up with another format that was more successful—from seventy-eights, to forty-fives, to full LPs, to cassettes, to eight-tracks, to cassettes, to the CD. They saw it as a benefit. They saw it as something that they could make their own. Because they were content owners. No one saw what was coming on the horizon.... I remember I was on a flight back to L.A. and saw two high school kids with a portfolio of CDs. Only one in thirty was store bought; the rest were burns. So, I asked these kids, ‘All right, how do you do this? What do you do? Why don’t you buy CDs?’ And they told me, ‘There was only one good song on it, so it’s better if I just make a mix.’ I’m like ‘Okay, but you have this Dave Matthews CD.’ The kid says, ‘One person buys it and we all trade it.’ I was just sitting there thinking, ‘Oh my god. We’re dead.’” *Id.* at 82-83.

³ See David Goldman, *Music’s Lost Decade: Sales cut in half*, CNN MONEY (Feb. 3, 2010, 9:52 AM), https://money.cnn.com/2010/02/02/news/companies/napster_music_industry/.

Between 1999-2009, total record sales dropped by nearly 50% to \$7.8 billion.⁴

In the early 2000s, the launch of online stores offering digital downloads found “consumer acceptance,” but revenues were “nowhere near sufficient to close the gap caused by plummeting physical sales.”⁵ Acting decisively, record companies revised their business strategies, invested in new infrastructure, and formed strategic partnerships with innovators in the interactive streaming space.⁶

In July 2011, the interactive streaming service, Spotify, entered the U.S. market.⁷

The Swedish-based company, along with the “big three” record companies, Universal Music Group (UMG), Sony Music Entertainment (Sony Music) and Warner Music Group (WMG), and global digital rights agency for independent labels, Merlin, sought to stabilize the industry,

⁴ *Id.*

⁵ Written Direct Testimony of Michael Kushner, Executive Vice President, Business & Legal Affairs, Atlantic Recording Corporation (Oct. 2016) at ¶ 12, In the Matter of: Determination of Royalty Rates and Terms for Transmission of Sound Recordings by Satellite Radio and “Preexisting” Subscription Services (SDARS III), No. 16-CRB-0001 SR/PSSR (2018-2022), <https://www.crb.gov/rate/16-CRB-0001-SR-PSSR-SDARSIII/statements/soundexchange/testimony-jonathan-bender.pdf> [hereinafter Kushner Testimony SDARS III] (Mr. Kushner’s testimony is located in this compiled .pdf of SoundExchange’s written direct statement).

⁶ “An ‘interactive service’ enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient...” 17 U.S.C. §114(j)(7) (2018). In other words, interactive streaming is “on-demand” as opposed to noninteractive or “radio-style” streaming, like Sirius XM. See U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE, A REPORT OF THE REGISTER OF COPYRIGHTS 48 (May 2016) [hereinafter COPYRIGHT AND THE MUSIC MARKETPLACE].

⁷ Charlie Sorrel, *Spotify Launches in the U.S. at Last*, WIRED (July 14, 2011, 8:51 AM), <https://www.wired.com/2011/07/spotify-launches-in-the-u-s-at-last/> (“The free, ad-supported music streaming service has been available in many European countries for years, but thanks to the tangle of interests that is international licensing, it has only just arrived on U.S. shores.... So why would you choose to follow ten million European listener and choose Spotify? It’s about two things: the software experience, and the catalog. Spotify already has millions of titles, and it’s rare that you come across anything that is missing.... Anyone who has used Spotify will tell you that it is fast. You press play and the music starts instantly. Even on a 3G connection (using the iPhone app), the response is almost immediate. In fact, the desktop app puts iTunes to shame in terms of speed, which is rather embarrassing for Apple.... Another compelling feature is Spotify Social, which lets you share tracks, and subscribe to the playlist of other Spotify users. Anything they share with you shows up in your inbox, along with an optional note. And if you sign into Facebook, any other Spotify-using friends will show up in your “People” list...”). Aside from Spotify, U.S. market players include Apple, Amazon, and Google, Pandora, Tidal, and (legal) Napster f/k/a Rhapsody. See Mark Mulligan, *Music Subscriber Market Shares H1 2019*, MIDIA (Dec. 5, 2019), <https://www.midiaresearch.com/blog/music-subscriber-market-shares-h1-2019/> (analyzing the global streaming market).

displace piracy, and convince the American public to pay a monthly fee for unlimited, ad-free access to millions of songs.⁸

The streaming strategy worked. Backed by the RIAA's reporting, it is widely accepted that the recorded music industry is now "booming again."⁹ In 2019, streaming accounted for \$8.8 billion—nearly 80%—of the \$11.1 billion in total retail revenue for all selected formats.¹⁰

⁸ Spotify is incorporated in Luxembourg, with headquarters in, *inter alia*, Sweden and New York. See *About Us*, SPOTIFY, <https://www.spotify.com/us/about-us/contact/> (last visited May 7, 2020). In 2008, the interactive streaming startup issued 352,176 of its total 1,956,531 outstanding shares to Sony BMG (6%), Universal Music Group (5%), Warner Music Group (4%), EMI Records (2%), and Merlin (1%) in exchange for €8,804.40. (At that time, Spotify's corporate capital was set at €48,913,275 divided into 1,956,531 shares having a par value of €0.25). Tim Ingham, *Here's Exactly How Many Shares the Major Labels and Merlin Bought in Spotify—and What Those Stakes Are Worth Now*, MUSIC BUSINESS WORLDWIDE (May 14, 2018), <https://www.musicbusinessworldwide.com/heres-exactly-how-many-shares-the-major-labels-and-merlin-bought-in-spotify-and-what-we-think-those-stakes-are-worth-now/>; see also <https://cdn.mbw.44bytes.net/files/2018/05/MBWSpotifyshares.png> (relevant part of Spotify's articles of incorporation). Shortly thereafter, the major record companies started to consolidate. In 2008, Sony Corporation acquired Bertelsmann's 50% stake in Sony BMG and created the new company, Sony Music Entertainment (Sony Music), a wholly owned subsidiary of Sony Corporation of America. See *Sony Completes Acquisition of Bertelsmann's 50% Stake in Sony BMG*, SONY MUSIC (Sept. 30, 2008), <https://www.sonymusic.com/sonymusic/sony-completes-acquisition-of-bertelsmanns-50-stake-in-sony-bmg/>. Next, in 2012, Universal Music Group (UMG) acquired EMI Records. See *Universal Music Completes Acquisition of EMI Music*, MUSIC BUSINESS WORLDWIDE (Sept. 28, 2012), <https://www.musicbusinessworldwide.com/universal-music-completes-acquisition-of-emi-music/>. Between 2008 and 2018, the holdings of the record companies and Merlin were "heavily diluted" by additional investors. See Tim Ingham, *supra*. Finally, on April 3, 2018, Spotify went public via direct listing on the NYSE, opening at \$165.90 per share with 178,112,840 ordinary shares available in its company. See Tim Ingham, *supra*; see also Josh Costine, *Here's why Spotify will go public via direct listing on April 3*, TECH CRUNCH (Mar. 15, 2018, 1:12 PM), <https://techcrunch.com/2018/03/15/spotify-direct-listing-date/> ("During CEO Daniel Ek's presentation, he explained that Spotify emerged as an alternative to piracy by convenience to make paying or ad-supported access easier than stealing. Now he sees the company as the sole leading music streaming service that's a dedicated music company, subtly throwing shade at Apple, Google, and Amazon. 'We're not focused on selling hardware. We're not focused on selling books. We're focused on selling music and connecting artists with fans,' said Ek"). At that time, Sony Music owned 5.7% of Spotify's ordinary shares, and Music Business Worldwide estimated that UMG owned 3.5%, Warner Music Group (WMG) owned 1.9%, and Merlin owned .5%. See Tim Ingham, *supra*. In 2018, Merlin sold off its entire stake in Spotify for an undisclosed amount, WMG sold off 100% of its shares for \$504 million, and Sony Music cashed in 50% of its shares for \$768 million. Eligible record labels and recording artists received payouts from Merlin, WMG, and Sony Music. See *Merlin Cashes In Its Entire Equity Stake In Spotify*, MUSIC BUSINESS WORLDWIDE (May 14, 2018), <https://www.musicbusinessworldwide.com/merlin-cashed-in-its-entire-stake-in-spotify-following-sony-and-warner-sell-offs/>; *Warner Sells Entire Stake in Spotify, Crediting Artists with \$126M of the Money*, MUSIC BUSINESS WORLDWIDE (Aug. 7, 2018), <https://www.musicbusinessworldwide.com/warner-sells-entire-stake-in-spotify-crediting-artists-with-126m-as-a-result/>; *Confirmed: Sony Cashed in 50% Of Its Spotify Shares For \$768M Earlier This Year*, MUSIC BUSINESS WORLDWIDE (Jul. 31, 2018), <https://www.musicbusinessworldwide.com/confirmed-sony-cashed-in-50-of-its-spotify-shares-for-768m-in-q1-this-year/>.

⁹ Frank Pallotta, *The music industry was left for dead a few years ago. Now it's booming again*, CNN BUSINESS (Feb. 28, 2020, 7:36 AM), <https://www.cnn.com/2020/02/28/media/music-industry-streaming/index.html>.

¹⁰ RIAA, *Charting a Path to Music's Sustainable Success*, MEDIUM (Feb. 25, 2020), <https://medium.com/@RIAA/charting-a-path-to-musics-sustainable-success-12a5625bbc7d>.

According to the RIAA, “[p]aid streaming services added an average of more than 1 million new subscriptions per month, as the total number of paid subscribers in the U.S. topped 60 million.”¹¹ Mitch Glazer, CEO and Chairman, RIAA stated with the release of the RIAA’s full-year 2019 revenue report for U.S. recorded music, “two things are abundantly clear: [p]aid subscription streaming is driving the return to growth; and [a]chieving long-term sustainable success still requires good public policies.”¹²

While it is clear, and arguably has been for the last five years, that paid subscription streaming is the future of the music industry, the law has failed to keep pace with “modern consumer preferences and technological developments in the music marketplace.”¹³ The Music Modernization Act of 2018 (MMA), which amends the U.S. copyright law, 17 U.S.C., is Congress’s effort to keep pace with the music industry by fixing our cumbersome and inefficient music licensing system.¹⁴ The MMA is a step in the right direction, but it falls short of Congress’s goal. Focusing on Title I of the MMA—the Music Licensing Modernization Act—I argue that, aside from creating a compulsory blanket mechanical license for musical works, Title I of the MMA has done very little to improve business transactions in the music marketplace. Moreover, instead of “present[ing] a series of balanced tradeoffs among interested parties to create a fairer, more efficient, and more rational system for all,” Title I of the MMA hyper-

¹¹ *Id.*

¹² *Id.*

¹³ *The Music Modernization Act*, COPYRIGHT.GOV, <https://www.copyright.gov/music-modernization/> (last visited May 7, 2020).

¹⁴ *Music Licensing Modernization Act*, COPYRIGHT.GOV, <https://www.copyright.gov/music-modernization/115/> (last visited May 7, 2020) (Title I of the MMA “replaces the existing song-by-song compulsory licensing structure for making and distributing musical works with a blanket licensing system for digital music providers to make and distribute digital phonorecord deliveries (e.g., permanent downloads, limited downloads, or interactive streams”).

focuses on the short-term interests of the music publishers and non-performing songwriters that lobbied during the MMA legislative process.¹⁵

I, therefore, argue that Congress should revisit the music marketplace question and update our music licensing system with the following goals in mind: (1) protect the public's interest in having affordable access to interactive streaming, (2) create administrative synergies in our music licensing system, and (3) increase revenues for industry players and cut costs in the music marketplace.¹⁶ Specifically, Congress should:

- Replace the willing-buyer/willing-seller standard with the §801(b)(1) (repealed 2018) policy-oriented standard for statutory rate-setting proceedings;
- Instruct the Copyright Royalty Board (CRB) to factor basic principles of federal antitrust law into royalty rate determinations;
- Expressly communicate to the CRB that maximizing the quality of musical works made available to the public is outside the scope of the CRB's statutory authority;
- Reject the principle set forth by the Copyright Office that “[g]overnment licensing processes should aspire to treat equivalent uses of sound recordings and musical works alike”;
- Authorize the formation of a new Mechanical and Performance Licensing Collective (MPLC), f/k/a Mechanical Licensing Collective (MLC), and create a

¹⁵ COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 6 at 1; *see also Overview of the Copyright Office*, COPYRIGHT.GOV, <https://www.copyright.gov/about/> (last visited May 7, 2020) (“The Register directs the Copyright Office as a separate federal department within the Library of Congress, under the general oversight of the Librarian, pursuant to specific statutory authorities set forth in the United States Copyright Act. By statute, the Register of Copyrights is the principal advisor to Congress on national and international copyright matters, testifying upon request and providing ongoing leadership and impartial expertise on copyright law and policy. Congress relies upon and directs the Copyright Office to provide critical law and policy services” including, *inter alia*, implementing the MMA and conducting “necessary rulemakings”).

¹⁶ In this paper, the industry players I primarily refer to are record companies and recording artists, music publishers and songwriters, and interactive streaming services.

compulsory individual and blanket license for the public performance of nondramatic musical works;

- Migrate public performance rate-setting proceedings from the performing rights organization (PRO) rate courts in the Southern District of New York over to the MPLC;
- Require terrestrial radio to pay sound recording royalties to recording artists and record companies;
- Apportion the annual assessment (operating) costs for the funding of the MPLC f/k/a MLC among applicable licensors and licensees; and
- Create a compulsory licensing system for the recording and commercial release of interpolations.¹⁷

In the following sections—Part I, II, and III—I set forth the details of my policy proposal, identify the drawbacks of our music licensing system, and demonstrate how my recommendations seek to address these inefficiencies.

Part I. Protect the public’s interest in having affordable access to interactive streaming.

The primary purpose of U.S. copyright law is to benefit the public, not the creators of artistic works and the enterprises that invest in their careers.¹⁸ “As reflected in the Constitution,

¹⁷ See COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 6 at 2 (In the report, the Office recommended principles that “should...guide any process of reform”). For the avoidance of doubt, the new MPLC would *not* collect licensing revenues for the public performance of sound recordings.

¹⁸ See ROBERT A. GORMAN, JANE C. GINSBURG, AND R. ANTHONY REESE, COPYRIGHT CASES AND MATERIALS 15, 9th ed. (2016) (quoting REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 3-6 (1961) (“The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings, for the Supreme Court has held that such rights as he has are purely statutory rights, but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings. The Constitution does not establish copyrights, but provides that Congress shall have the power to grant such rights if it thinks best. *Not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given. Not that any particular class of citizens, however worthy, may benefit, but because the policy is believed to be for the benefit of the great body of people, in that it will stimulate writing and invention to give some bonus to authors and inventors.*”) (emphasis added).

the ultimate purpose of copyright legislation is to foster the growth of learning and culture for the public welfare, and the grant of exclusive rights to authors for a limited time is a means to that end.”¹⁹ Applying these foundational principles to music copyright law, it is imperative that licensing legislation and regulations maximize the availability of commercial music to the public and promote the long-term sustainable success of the industry as a whole.²⁰

A. Replace the willing-buyer/willing-seller standard with the §801(b)(1) (repealed 2018) policy-oriented standard for statutory rate-setting proceedings.

Congress erred when it did away with the § 801(b)(1) policy-oriented standard for the scheduling of rates for the digital public performance of sound recordings and the making and distribution of digital phonorecords.²¹ The market-based, willing-buyer/willing-seller standard is inappropriate for statutory rate-setting proceedings, because it does not incorporate “accepted standards of ratemaking” specifically designed to further the primary and secondary purposes of U.S. copyright law.²² Under the willing-buyer/willing-seller standard, the Copyright Royalty Judges are instructed to execute the following:

¹⁹ *Id.*

²⁰ Factor A in § 801(b)(1) instructs the CRB to calculate rates that “maximize the availability of creative works to the public.” 17 U.S.C. § 801(b)(1)(a) (repealed 2018).

²¹ § 803(b)(6) provides:

The Copyright Royalty Judges may issue regulations to carry out their functions under this title. All regulations issued by the [CRB] are subject to the approval of the Librarian of Congress and are subject to judicial review pursuant to chapter 7 of title 5, except as set forth in subsection (d).

17 U.S.C. § 803(b)(6) (2018). Prior to the enactment of Title I of the MMA, the CRB applied the §801(b)(1) standard to determine reasonable rates for the digital performance of sound recordings in § 114(f)(1)(A). A discount was provided for “preexisting” noninteractive (i.e., radio-style) subscription services and satellite digital audio radios services (SDARS). Music Choice, Muzak, and Sirius XM fell within this category. *See* COPYRIGHT AND THE MUSIC MARKETPLACE STUDY, *supra* note 6 at 49. By contrast, § 114(f)(2)(B) instructed the Judges to apply the willing-buyer/willing-seller standard to determine reasonable rates for all other noninteractive streaming services.

²² *I.e.*, (1) promoting the public welfare; (2) providing creators and their financial backers a fair return on their creative contributions and investments. Prior to the enactment of the 1976 Copyright Act, Thurman Arnold, Esq., “a well-known advocate of strong antitrust enforcement,” testified on behalf of the RIAA that the Act should “include... ‘accepted standards of statutory ratemaking,’ including a rate ‘that insures the party against whom it is imposed a reasonable return on...investment’ and ‘that divides the rewards for the respective creative contributions of the [licensees] and the [licensors]...equitably between them.’” Determination of Royalty Rates and Terms for

[E]stablish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller. In determining such rates and terms...the Copyright Royalty Judges shall base their decision on economic, competitive, and programming information presented by the parties, including—

(i) whether the use of the compulsory licensee’s service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the musical work copyright owner’s other streams of revenue from its musical works; and

(ii) the relative roles of the copyright owner and compulsory licensee in the copyrighted work and the service made available to the public with respect to the relative contribution, technological contribution, capital investment, cost, and risk.”²³

This standard, particularly in the context of § 115 rate-setting proceedings, is “faulty at best, [because] ‘the “market” [it] seeks to construct or emulate does not exist and often has never existed....”²⁴ Furthermore, in both the § 114 and § 115 rate-setting contexts, factoring in the “promotional value” that a compulsory licensee’s service provides is misplaced.²⁵ The testimony of Michael Kushner, Executive Vice President, Business & Legal Affairs, Atlantic Records, in the *SDARS III* proceeding elucidates this point:

[O]ur desire to have our recordings on terrestrial radio should not be confused with a desire to have our recordings used for free. Free use on terrestrial radio is the result of a historical accident perpetuated in federal law, and does not suggest that we voluntarily discount uses that are in some

Transmission of Sound Recordings by Satellite Radio and “Preexisting” Subscription Services (SDARS III), 83 Fed. Reg. 65210, 65211 (Dec. 19, 2018) (37 C.F.R. pt. 382) (*citing Hearing on S. 597, Subcomm. on Patents, Trademarks and Copyrights on the Judiciary*, (Mar. 20-21, 1967) (Senate Hearing)).

²³ § 115(c)(F) (schedule of reasonable rates for digital phonorecords); § 114(f)(B) (licenses for certain nonexempt transmissions) (note: the text for section 114 is the same, but “musical works” is replaced with “sound recordings”).

²⁴ COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 6 at 106. In 1909, copyright protection was extended from the public performance of musical works to include an “exclusive right to make ‘mechanical’ reproductions of songs in ‘phonorecords....’” *Id.* at 17. However, due to antitrust concerns, “Congress limited the new phonorecord right by [creating] a compulsory license for this use.” *Id.* Fast-forward to 2014, throughout the Copyright Office’s study, music publishers and songwriters contended that mechanical rates set under the “section 801(b)(1) standard [were] depressed as a result of the government rate-setting process and [did] not reflect the fair market value of musical works. *Id.* at 105. “While advocating for the elimination of the compulsory license,” the publishers and songwriters also argued for licensing parity and “assert[ed] that at the very least mechanical rates should be set under the more market-oriented willing-buyer/willing-seller standard....” *Id.* The digital music services disagreed, however, and “contend[ed] that the statutory rates set under the section 801(b)(1) standard reflect fair market value, or higher.” *Id.* at 106.

²⁵ See e.g., § 115(c)(F)(i) (“whether the use of the compulsory licensee’s service may substitute for or may promote the sales of phonorecords...”).

way promotional.... And while we promote to [streaming services] in much the same way we promote to terrestrial radio and to Sirius XM, in an attempt to get crucial positioning on playlists and thus greater market share, those services do not presume to get discounts from us just because there are aspects of their service that serve a promotional function.²⁶

Unlike the willing-buyer/willing-seller standard, the § 801(b)(1) policy-oriented standard affords the CRB the opportunity to determine reasonable rates, because the “four factors ‘pull in opposing directions,’” and instruct the Judges to achieve the following objectives:

- (A) To maximize the availability of creative works to the public.
- (B) To afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions.
- (C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.
- (D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.²⁷

In sum, this standard takes a holistic approach to the rate-setting problem, because it promotes the primary (Factor A) and secondary (Factors B and C) purposes of U.S. copyright law and instructs the Judges to conduct a standard cost-benefit analysis (Factor D) prior to scheduling rates that could be detrimental to the industry’s overall health.²⁸

B. Instruct the CRB to factor basic principles of federal antitrust law into royalty rate calculations.

²⁶ Kushner Testimony SDARS III, *supra* note 5 at ¶ 24.

²⁷ 17 U.S.C. § 801(b)(1) (repealed 2018); *see also* Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), 84 Fed. Reg. 1918, 1955 (Feb. 5, 2019) (37 C.F.R. pt. 385).

²⁸ *See e.g.*, REGULATORY PLANNING AND REVIEW, E.O. 12866 (Sep. 30, 1993) (President Clinton instructs executive agencies to prepare economic impact analyses); *see also* Regulatory Flexibility Act, 5 U.S.C. §§ 601-612.

Congress should reject the principle adopted by the Copyright Office—to separately manage and address rate-setting and the enforcement of antitrust laws—and instruct the Copyright Royalty Judges to schedule rates that combat willful consolidation in the music marketplace.²⁹

In *Phonorecords III*, the CRB determined that the digital services’ undisputed “lack of profitability [was] a function of lack of scale” and that “[l]owering mechanical rates to provide [s]ervices profitability, in the face of the acknowledged problem of a lack of scale, would constitute an unwarranted subsidy to these services at the expense of [c]opyright [o]wners.”³⁰ This reasoning is misguided. Lowering the “all-in” (mechanical plus public performance) rate would not have constituted an unwarranted subsidy to interactive streaming services; rather, it would have promoted competition and innovation in the music marketplace and protected the public’s interest in having affordable access to high-quality interactive streaming.

²⁹ See COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 6 at 2; see also *Phonorecords III*, 84 Fed. Reg. at 1978-79 (“The products supplied in the [interactive streaming] market (upstream and downstream) ...are not simply *individual* copies of discrete musical works. Rather, the product is the *collection* of repertoires of musical works, collectivized (through ownership, administration and distribution) by the music publishers and, in final (downstream) delivery, through the major record companies (and a constellation of smaller publishers). These collective activities are highly concentrated among only a few such publishers.... Much of the economic value of a collection of millions of copyrights within one publishing umbrella lies in the economizing of transaction costs—allowing large entities to administer copyrights. However, along with the efficiencies of collective ownership comes the market power of the collective.... ‘In so much as copyright law establishes a...monopoly of each copyright holder in his or her own item of intellectual property, copyright collectives imply an even larger monopoly situation for entire specific types of intellectual property in general. Exactly how this monopoly power affects social welfare is a natural point of discussion.... There are social costs involved when a natural monopoly is run by only one firm, since that firm will not sell its output at the social optimal price, but rather at the pure profit maximizing price. It is for this reason that most natural monopolies are subject to heavy regulation.... The administration and marketing of intellectual property has many aspects of a natural monopoly.... The fact that unregulated copyright collectives do not achieve a social optimum establishes strong theoretical foundations for arguing that such collectives should be regulated’”) (Strickler, J., dissenting) (citation omitted).

³⁰ *Phonorecords III*, 84. Fed. Reg. at 1960; see also *id.* at 1944 n.107 (The CRB knew the digital service were “all losing money under these rates; and (2) their experts suggest[ed] much lower rates than the [s]ervices propose[d].” Moreover, the services “seem[ed] to be locked in a battle for market share, in which the single survivor...[could] acquire the market power sufficient to” turn a profit).

If the CRB had calculated rates for the 2018 to 2022 period through an antitrust lens, it is likely the Judges would have reduced the all-in rate for musical works which, at that time was the greater of 10.5% of service revenue and 21% to 22% of total content cost (TCC).³¹ By contrast, in an effort to accommodate the copyright owners of musical works, the Judges decided to increase the all-in rate by 44%.³²

The rates below neither protect consumers nor promote long-term sustainable success for the music industry.

³¹ DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 234-36, 10th ed. (2019) (discussing interactive streaming rates before and after the 2018 CRB ruling). Note: TCC means “the total amount that the service pays out for the right to make interactive streams and limited downloads of sound recordings for that period.” *Id.* at 235-36. In *Phonorecords III*, Google’s expert witness, David Pakman, testified that he was unaware “of a single standalone digital music service that has achieved profitability to date.” Written Direct Testimony of David Pakman (Oct. 31, 2016) at ¶ 23, In the Matter of: Determination of Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), No. 16-CRB-003-PR (2018- 2022), <https://app.crb.gov/case/viewDocument/13960> [hereinafter Pakman Phonorecords III Testimony] (Mr. Pakman’s testimony is located in this compiled .pdf of Google’s written statement). Mr. Pakman further explained:

Market evidence shows that royalty rates that have been set in the past are extraordinarily high relative to the amount of revenue that could be generated by digital music services. Ultimately, the cost of music licensing royalties often exceeded the revenue generated by both advertising and subscription business models, producing businesses that operate with negative gross margins and are unable to generate any profit.... The available public data bears this out. Spotify, the world’s largest interactive streaming on-demand music service, has more than 100 million active users and more than 40 million paying subscribers. In 2015, its revenue was \$2.1 billion. Of this, a great majority of its revenues were paid out as royalty costs to rights holders. Even with this extremely large paying user base, Spotify lost approximately \$200 million in 2015 and has never achieved profitability.

Id. at ¶¶ 23, 26. Mr. Pakman’s analysis holds true today. Spotify’s 2019 annual report shows an operating loss of €73 million for 2019, €43 million for 2018, €378 million for 2017, €349 million for 2016, and €235 million for 2015. See SPOTIFY TECHNOLOGY S.A. FORM F-20 5, SEC.GOV, https://www.sec.gov/Archives/edgar/data/1639920/000156459020004357/ck0001639920-20f_20191231.htm (last visited Nov 10, 2020) [hereinafter SPOTIFY ANNUAL REPORT].

³² *Phonorecords III*, 84. Fed. Reg. at 1945 n.107; see also *id.* at 1943 (“[I]n setting effectively competitive rates, the Judges are more concerned with providing [music publishers and songwriters] with a rate that appropriately compensates them...even if the [s]ervices may incur a somewhat higher level of accounting losses”); see also *id.* at 1969 (“While the reasonable rate determined by the Judges does not present the same risk of disruption as the rates sought by the [c]opyright [o]wners, it does represent a not insubstantial increase of approximately 44% over the current headline rate. In order to mitigate the risk of short-term market disruption, and to afford the services sufficient opportunity ‘to adequately adapt to the changed circumstance produced by the rate change,’ the Judges will phase in the new rate in equal annual increments over the rate period”).

2018-2022 ALL-IN RATES³³

	2018	2019	2020	2021	2022
Percent of Revenue.....	11.4	12.3	13.31	14.2	15.1
Percent of TCC.....	22.0	23.1	24.1	25.2	26.2

For healthy competition to prevail in the interactive streaming market, the all-in rate must function as a prophylactic for anticompetitive behavior.³⁴ If Congress does not instruct the CRB to incorporate antitrust principles into its calculations, the all-in rate will most likely remain at the current level or even be raised by the Judges in the next applicable rate-setting proceeding. If this occurs, “ecosystem” streaming services such as Apple, Amazon, and Google will be afforded an even greater opportunity to consolidate market power and push “pure-play” streaming services, such as Spotify and Pandora, out of business.³⁵

³³ *Id.* at 1918.

³⁴ Section 1 of the Sherman Act regulates collective behavior by outlawing “every contract, combination, or conspiracy in restraint of trade.” 15 U.S.C. § 1. Section 2 of the Sherman Act regulates structural impediments and outlaws “monopolization, attempted monopolization, or combination to monopolize.” 15 U.S.C. §2. Section 7 of the Clayton Act supplements the Sherman Antitrust Act by, *inter alia*, forbidding mergers that could create a monopoly or substantially lessen competition. 15 U.S.C. § 18; *see also* GORMAN *supra* note 8 at 15 (“The real danger of a monopoly might arise when many works of the same kind are pooled and controlled together”).

³⁵ *See* Phonorecords III, 84 Fed. Reg. at 1921 (“Some of the services that offer music streaming are pure-play music providers, such as Spotify and Pandora. Others, such as Amazon, Apple Music, and Google Play Music, are part of wider economic ‘ecosystems,’ in which a music service is one part of a multi-product, multi-service aggregations of activities, including some that are also related to the provision of a retail distribution channel for music); *see also* Pakman Phonorecords III Testimony, *supra* note 31 at ¶ 29 (“*The only outcome that seems to produce success for investors and entrepreneurs is when digital music services are sold to larger companies willing to provide additional capital to operate these services, despite the challenging economic model and dim prospects for reaching profitability for digital music services.* For example, large companies like Apple, Google, and Amazon may be willing to operate low gross-margin digital music services because their other companion businesses are profitable and can subsidize the music service. *It would be a sign of an unhealthy market if the only remaining digital music services are those owned by larger companies content to subsidize their music subsidiaries while generating profit elsewhere in the businesses. Yet, in my experience, this is precisely the state of the digital music market.* An independent, stand-alone digital music service can only operate while its investors are willing to fund the low-margin business. But as investors come to see that there are no prospects of reaching profitability and decline to provide additional funding, the digital music service either shuts down or exits to large companies willing to subsidize the digital music service and run at break-even or for a modest profit.... The likely outcome is that only a few digital music services will remain and most likely operated by large companies capable of funding extremely low-margin businesses. This result deprives rights-holders of the chance to earn more royalty payments from more companies and likely further results in a smaller total digital music market) (emphasis added); *see also* SPOTIFY

Although it is not within the Judges' power to show preferential treatment to pure-play services, the all-in rate should not remain at a level that so clearly facilitates anticompetitive behavior.³⁶

Lastly, it is imperative for the Judges and rate-setting proceeding participants to understand that consumers have a willingness to pay (WTP). If streaming prices rise to levels the 60 million U.S. paid subscribers are no longer willing or able to pay for, one by one, consumers will deactivate their paid subscription accounts, return to free ad-supported listening, or even defect to "stream-ripping" and other forms of digital piracy. Post-Napster and the industry's on-going battle against copyright infringers supports this assumption.³⁷

ANNUAL REPORT, *supra* note 31 at 19 ("We rely upon the Google Cloud Platform (GCP) to operate certain aspects of our business and to store almost all of our data...We cannot easily switch our GCP operations to another cloud provider, and any disruption of, or interference with, our use of GCP could have a material adverse effect on our business, operating results, and financial condition. While the consumer side of Google competes with us, we do not believe that Google will use the GCP operation in such a manner as to gain competitive advantage against our Service. In 2018, we entered into a new service agreement with Google for the use of GCP. We must make minimum payments during the first three years of service. As of December 31, 2019, the remaining minimum payments are approximately €138 million"). Based off the foregoing information, I would not be surprised if Google explores the option of acquiring Spotify in the near future.

³⁶ The Copyright Office works regularly with the Department of Justice (DOJ) on various investigation and enforcement matters. *See Overview of the Copyright Office*, COPYRIGHT.GOV, <https://www.copyright.gov/about/> (last visited May 7, 2020) ("[T]he Copyright Office works regularly with the Department of Justice, the Department of State, the Office of the U.S. Trade Representative, the Department of Commerce, including the Patent and Trademark Office and the Office of the Intellectual Property Enforcement Coordinator"). It would be a more efficient use of government resources if the CRB addressed identifiable issues and quashed anti-competitive behavior at the manageable rate-setting stage. *See Phonorecords III*, 84 Fed. Reg. at 1944-45 (majority opinion finding consolidation of market power in the interactive streaming sector to be a non-issue) ("If pure play interactive streaming services are unable to match the pricing power of businesses imbued with the self-financing power of a large commercial ecosystem, nothing in section 801(b)(1) permits, let alone requires, the Judges to protect those pure play interactive streaming services from the forces of *horizontal* competition. Moreover, any disruption arising from the disparate impact of a rate increase among interactive streaming services would not constitute a "disruption" under Factor D. Disruption resulting from competition would not upend the structure of the industry or general prevailing industry practices; rather it would influence particular business models).

³⁷ Hugh McIntyre, *What Exactly Is Stream-Ripping, The New Way People Are Stealing Music*, FORBES (Aug. 11, 2017, 10:40 AM), <https://www.forbes.com/sites/hughmcintyre/2017/08/11/what-exactly-is-stream-ripping-the-new-way-people-are-stealing-music/#d891f01956fe>.

C. Expressly communicate to the CRB that maximizing the quality of musical works made available to the public is outside the scope of the CRB’s statutory authority.

Our Article III jurisprudence places a strong emphasis on the basic principle that judges are not appraisers of art. Accordingly, if the § 801(b)(1) standard is reinstated, Congress should clarify that Factor A in §801(b)(1) seeks to maximize the *availability* of musical works—*i.e.*, the *quantity*—made available to the public, not the quality.

In the 1903 copyright case, *Bleistein v. Donaldson Lithographing Co.*, the Supreme Court was presented with the question of whether pictorial advertisements of a circus fell within the protection of federal copyright law.³⁸ Holding that authors of “pictorial illustrations” are entitled to copyright protection, the Court expressed this right was not only reserved for “illustrations or works connected with the fine arts.”³⁹ Delivering the Court’s opinion, Justice Holmes stated: “It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”⁴⁰ The Justice further explained:

At the one extreme some works of genius would be sure to miss appreciation.... At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and the state of any public is not to be treated with contempt.”⁴¹

Although the CRB is not an Article III court, and under the § 801(b)(1) standard, the Judges have legislative discretion in making independent policy determinations, it is not within the scope of

³⁸ *Bleistein v. Donaldson Lithographing Co.* 188 U.S. 248, 248 (1903).

³⁹ *Id.* at 250.

⁴⁰ *Id.* at 251.

⁴¹ *Id.* at 251-52.

the CRB's authority to establish rates that seek to preserve a certain subjective level of quality music releases.⁴² In the *Phonorecords III* decision, the majority stated the following:

The evidence in this proceeding supports a conclusion that the existing rates for mechanical royalties for streaming are a contributing factor in the decline in songwriter income, and that this decline has led to fewer songwriters. If this trend continues, the availability of *quality* songs will inevitably decrease.... *Although largely anecdotal and unsupported by sophisticated surveys, studies, or economic theories, the uncontroverted evidence from songwriters and publishers should not go unheeded.* That evidence points strongly to the need to increase royalty rates to ensure the continued viability of songwriting as a profession. The rate determined by the Judges represents a 44% increase over the current headline rate, and thus satisfies the Factor A objective in this respect as well.⁴³

On this reasoning alone, an appeal for judicial review by the streaming platforms is justified.⁴⁴

Before reaching its decision, the majority seemed to pay special attention to the testimonies of three non-performing songwriters, Steve Bogard, Lee Thomas Miller, and Liz Rose, all of whom live in Nashville and write primarily country and country pop crossover songs. The Judges summarized:

Steve Bogard, a successful veteran songwriter from Nashville, testified that “I have written many songs that have become hits and continue to do so. However, over the past few years, my income has not reflected my continued success because the interactive streaming services are paying a fraction of what I earn from physical sales and permanent downloads.” Lee Thomas Miller, another successful

⁴² *Phonorecords III*, 84 Fed. Reg. at 1955 (citing *SoundExchange, Inc. v. Librarian of Cong.*, 571 F.3d 1120, 1224 (D.C. Cir. 2009)); *see also* *SDARS III* p. 65211 (citing *Music Choice v. Copyright Royalty Bd.*, 774 F.3d 1000, 1010 (D.C. Cir. 2014) (Applying the four-factor policy-oriented standard, “the Judges have the discretion to choose a market rate, a market-based rate, or a rate unrelated to market evidence. Any such rate would be legally appropriate provided it was not ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or if the facts relied upon by the Judges have no basis in the record’”); *see id.* at 1957-58 (regarding preserving non-performing songwriters’ careers).

⁴³ *Phonorecords III*, 84 Fed. Reg. at 1957-58 (emphasis added).

⁴⁴ *See* *Johnson v. Copyright Royalty Bd.*, 969 F.3d 363 (D.C. Cir. 2020); *see also* Tim Ingham, *Spotify vs. Songwriters: Publishers Remain Confident That Streaming Platforms Will Be Forced To Increase Royalties In The US* (Aug. 12, 2020), <https://www.musicbusinessworldwide.com/spotify-vs-songwriters-publishers-remain-confident-that-streaming-platforms-will-be-forced-to-increase-royalties-in-the-us/> (“The US Court of Appeals decision... ticks off the Copyright Royalty Board’s three judges for failing ‘to give adequate notice or to sufficiently explain critical aspects of its decision making.’ Specifically, it says the CRB ‘failed to provide adequate notice of the rate structure it adopted, failed to explain its rejection of a past settlement agreement as a benchmark for rates going forward, and never identified the source of its asserted authority to substantively redefine a material term.’ The long and short of that criticism? The decision is being kicked back to the CRB, which is being told to review specific elements of the process by which it reached key conclusions”).

Nashville-based songwriter, when asked to describe the mechanical royalty income he earns from on-demand streaming, stated “it is so insignificant that we rarely even scroll down and look at the line items.... You look at these numbers of millions of spins and then you look at the tens of dollars that they pay. Mechanical royalties play a critical role in enabling professional songwriters to write songs as a full-time occupation. [Liz Rose testified that] “When I first arrived in Nashville, experienced and established songwriters would invite young, talented songwriters to write with them. This was a very illuminating experience for the young songwriters and helped them grow into better professionals. It also gave the established writer new ideas and influences. Today, a professional non-performing songwriter cannot simply try to write a great song alone or with co-writers who are also professional songwriters, then hope that an artist records it. Now, an established songwriter cannot mentor young songwriters if he or she wants to maintain a living. Veteran songwriters, such as myself, simply do not have time. Instead, I spend three to four days a week with young recording artists who already have record deals and need help writing their songs. These recording artists are sometimes very talented songwriters, but it often takes the craft and art of the professional writer to turn their thoughts into commercial songs.”⁴⁵

This portion of the CRB’s opinion, as well as the witness statements of the non-performing songwriters provided in footnote 45 of this article, is cause for concern. These testimonies offer an extremely narrow opinion on the state of the music industry. And the remarks about music consumption habits and streaming business models imply that these specific songwriters have

⁴⁵ Phonorecords III, 84 Fed. Reg. at 1957; *see also* Witness Statement of Lee Thomas Miller, October 28, 2016, at ¶ 12, Phonorecords III (“Even as our profession is being decimated, consumers are enjoying and obtaining music more than they ever have.... These are my words and my melodies. They should have never been offered to them for free. I should’ve been able to say no to the streaming services such as Spotify whose business model was to sell advertising then give the music away. But the compulsory license demands that I must say yes to their license request and, in return, I am given a micro-penny as decreed by my government.”); *See also* Witness Statement of Liz Rose, October 28, 2016, at ¶¶ 3, 35, Phonorecords III (“Our songs are no less valuable if they are streamed or sold on albums or as permanent downloads. Therefore, the interactive streaming services must start compensating fairly for the value of their work to save the songwriting industry from extinction.... Their ability to pay increased royalties is further evidenced by the generous compensation paid to their executives and for free gourmet food and snacks, fitness classes and gyms, massage rooms, nap pods, haircuts and onsite doctors offered to their employees. They even have playrooms set up around their offices. And, to top it off, their revenues are soaring.”); *See also* Witness Statement of Steve Bogard, October 28, 2016, at ¶¶ 4, 21, Phonorecords III (“There is no logical reason for the disparate mechanical rates. Music fans do not enjoy our music less when they stream it than when they listen to it on an album or CD, or a permanent download. Music fans who enjoy our songs by streaming them anytime, anywhere, as many times as they want... no less ‘own’ our songs than music fans who buy albums or downloads.... I believe that a critical factor in considering compulsory mechanical rates and terms for interactive streaming include the economic, emotional, and cultural significance of songs and songwriters who create them. Starting with the economics, songwriters are the backbone of the music industry and the many businesses and professions that rely on music.... Without songwriters, there are no record companies, recording artists, recording studios, session musicians, background singers, record producers, recording engineers, studio employees, recording technology manufacturers, concert tours, sound and light designers, or concert t-shirts and merchandise”).

failed to keep pace with modern consumer preferences and technological developments in the music marketplace.

First and foremost, not all songwriters are non-performing or “pure” songwriters. Generally, songwriters fall within the three following categories: (1) non-performing or “pure” songwriters, who solely make their income through songwriting; (2) artist-songwriters, who also record and perform live and, therefore, make money off album sales/streams, touring, and merchandise sales; (3) and producer-songwriters who, “in addition to writing songs, perform the functions typically ascribed to music producers, such as selecting and arranging songs, coaching and guiding the recording artists, and supervising the recording, mixing and mastering process” for an album.⁴⁶

Second, the role of publishers and songwriters in the record-making process has changed. It is no longer “common for the music and lyrics of a song to be created in advance, separate from the artist, and then taken to the studio and recorded.”⁴⁷ Furthermore, although “publishers continue to engage in some promotion in the narrow genre of country music, [song-plugging] is atypical in the genres of rock,” hip-hop, electronic dance music, and pop.⁴⁸

Third, mechanical income generated through physical sales and digital downloads is not a useful benchmark for determining the amount of mechanical income a songwriter should receive via streaming platforms. This is because, under the access model (e.g., paid subscription streaming), record companies and recording artists and, in turn, publishers and songwriters are

⁴⁶ Witness Statement of Peter S. Brodsky (Oct. 28, 2016) at ¶ 10, Phonorecords III, In the Matter Of: Determination of Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), No. 16-CRB- 0003-PR (2018-2022), <https://www.crb.gov/rate/16-CRB-0003-PR/statements/copyright-owners/volume1.pdf> (Mr. Brodsky’s testimony is located in the compiled .pdf of the Written Direct Statement of Copyright Owners).

⁴⁷ Testimony of Michael Kushner, Senior Vice President, Business & Legal Affairs, The Atlantic Records Group, November 29, 2006 at 6, Before the Copyright Royalty Judges, Washington D.C., <https://www.crb.gov/proceedings/2006-3/riaa-kushner-amended.pdf>.

⁴⁸ *Id.*

no longer paid based off the number of album units sold. Instead, the focus has shifted from selling physical units to maximizing volume and market share on the greatest number of available platforms.⁴⁹ Due to this structural shift, even if the CRB had increased the headline rate by 100%, most non-performing songwriters would still struggle to pursue songwriting as a full-time job.⁵⁰

Fourth, whether or not the non-performing songwriter profession remains a viable career option has nothing to do with achieving the Factor A objective in §801(b)(1).⁵¹ Even if it had been in the *Phonorecords III* proceeding, the evidence submitted by the digital services showed that the publishing sector had been profitable throughout the previous rate period.⁵² Relatedly, prior to the *Phonorecords III* decision, it was widely known that, between 1999-2009, when record companies

⁴⁹ See 37 C.F.R. pt. 385.20 (how to calculate mechanical royalty rates; note, all capitalized terms are defined in the C.F.R.) (“(1) *Step 1: Calculate the all-in royalty for the Offering.* For each Accounting Period, the all-in royalty shall be the greater of the applicable percent of Service Revenue and the applicable percent of TCC set forth in the [foregoing] table. (2) *Step 2: Subtract applicable Performance Royalties....* (3) *Step 3: Determine the payable royalty pool.* The payable royalty pool is the amount payable for the reproduction and distribution of all musical works used by the Service by virtue of its Licensed Activity for a particular Offering during the Accounting Period. This amount is the greater of: (i) the result determined in step 2 in paragraph (b)(2) of this section; and (ii) the royalty floor (if any) resulting from the calculations described in § 385.22. (4) *Step 4: Calculate the per-work royalty allocation.* This is the amount payable for the reproduction and distribution of each musical work used by the Service by virtue of its Licensed Activity through a particular Offering during the Accounting Period. To determine this amount, the Service must allocate the result determined in step 3 in paragraph (b)(3) of this § to each musical work used through the Offering. The allocation shall be accomplished by dividing the payable royalty pool determined in step 3 for the Offering by the total number of Plays of all musical works through the Offering during the Account Period...to yield a per-Play allocation, and multiplying that result by the number of Plays of each musical work...through the Offering during the Accounting Period...”).

⁵⁰ “As a *VERY* rough rule of thumb,” record companies make around “\$3,500 to \$5,000 for each million streams.” See PASSMAN, *supra* note 31 at 93. “So, if a recording artist has “a 10% royalty, they receive \$350 to \$500 for each million streams.” *Id.* It follows that publishers and non-performing songwriters make even *less* in mechanical royalties per one million streams. Moreover, songwriters normally do not receive mechanical royalty payments from their music publishers until advance monies are recouped.

⁵¹ This rationale (i.e., increase rates to keep non-performing songwriters in business) is in direct conflict with the Judges’ explanation of Factor D in § 801(b)(1): “[A]ny disruption arising from the disparate impact of a rate increase among interactive streaming services would not constitute “disruption” under Factor D. Disruption resulting from competition would not upend the structure of the industry or generally prevailing industry practices; rather it would influence particular business models.” *Phonorecords III* 84, Fed. Reg. at 1944-45. Similarly, an argument could be made that reducing the all-in rate would not disrupt the songwriting industry; rather it would negatively impact the mechanical royalty incomes of songwriters who did not achieve the highest number of streams per month.

⁵² See *Phonorecords III*, 84, Fed. Reg. at 1957 (majority noting that Google’s expert witness, Dr. Leonard, stated in his opinion that the publishing sector had been profitable throughout the recent rate period).

were “cutting costs to the bone, slashing artist rosters, signing fewer artists, and reducing internal headcount,” music publishers had “actually enjoyed an *increase* in public-performance revenue.”⁵³

APPROXIMATE REVENUES (IN MILLIONS)⁵⁴

	ASCAP	BMI
2009	\$955	\$905
2008	\$933	\$901
2007	\$863	\$839
2006	\$785	\$780
2005	\$749	\$728
2004	\$699	\$673
2004	\$688	\$630

In his book, *The Future of the Music Business*, entertainment attorney, Steve Gordon explained:

As more and more opportunities arise for music licensing, thanks in large measure to new technologies such as music apps, video games, and ringtones, publishers have been able to benefit from the general increase in Internet performance and usage and have not suffered as much as the recording industry from file sharing and streaming. In fact, the music-publishing business is doing well compared to the record industry.⁵⁵

Mr. Gordon asked David Israelite, President and CEO, National Music Publishing Association (NMPA) to weigh in on the matter, and Mr. Israelite provided the following statement:

The music-publishing industry is fortunate that we have a bundle of rights that produce income in different ways. While mechanical revenue is down significantly, performance income has mostly held steady, and publishers have become more aggressive in seeking alternative revenues from sources such as synchronization, lyrics and tablature, and merchandising.⁵⁶

It is unclear why these well-known industry facts did not outweigh the evidence presented by the copyright owners in *Phonorecords III*. Nevertheless, based off the record of the proceeding

⁵³ Kushner SDARS III Testimony, *supra* note 5 at ¶ 11; *see also* STEVE GORDON, *THE FUTURE OF THE MUSIC BUSINESS* 13, 3d ed. (2011).

⁵⁴ *Id.* at 14.

⁵⁵ *Id.*

⁵⁶ *Id.*

alone, the CRB should have realized that raising the all-in rate for interactive streaming would do very little to improve the financial situation of copyright owners in the non-performing songwriter profession.

Fifth, the Judges should not have included the “pure” songwriter witnesses’ inability to find time to mentor young non-performing songwriters in the reasoning of the majority opinion. Even if the importance of mentorship had been a factor for rate-setting calculations, time-efficient alternatives to in-person mentoring sessions exist and are simple to execute (e.g., webinars, online tutorials, and one-on-one video conferences).

Relatedly, up-and-coming songwriters should not enter into deals with publishing companies until they reach a certain level of success and require funding to take their careers to the next level. Digital has democratized the music industry. Aspiring songwriters have plenty of resources at their fingertips, both in the local and online artist communities, as well as the tech startup and venture capital communities. In other words, signing with a publishing company to pursue their craft is no longer the only viable option young songwriters have.

Taken together, the majority opinion, testimonies, and widely accepted industry facts suggest the CRB abused its discretion in raising the all-in rate in *Phonorecords III*. It would therefore be in the best interest of the public and the industry as a whole if Congress expressly communicated to the Judges that setting rates in the hopes of preserving the non-performing songwriting profession and, in turn, commercial music quality is not within the CRB’s decisionmaking authority.

D. Reject the principle set forth by the Copyright Office that “[g]overnment licensing processes should aspire to treat equivalent uses of sound recordings and musical works alike.”⁵⁷

Unless Congress renounces this policy, it will become increasingly difficult for industry players to plan and execute transactions in the music marketplace.⁵⁸ In the *Copyright and the Music Marketplace* study, the Copyright Office placed strong emphasis on harmonizing the ways in which the licensing system “regulates (or does not regulate) analogous platforms and uses.”⁵⁹ In terms of licensing control for digital formats, the Copyright Office believed “sound recordings and the underlying musical works should stand on more equal footing.”⁶⁰ This suggested principle is misguided, because sound recording rights and musical works rights are not, and have never been, “perfect complements.”⁶¹ Moreover, the compulsory license creates certainty in the music marketplace and allows record companies to act independently. In order for the industry to continue to function properly, this framework must remain intact.

Record companies incur more costs and take on greater business risks than music publishers in the music marketplace. Thus, record companies shifting business strategies from a primarily physical distribution model to an interactive streaming model—to meet consumer

⁵⁷ COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 6 at 2.

⁵⁸ *Id.* (Congress’s removal of the § 801(b)(1) standard from rate-setting proceedings suggests that lawmakers agree with the Copyright Office’s licensing parity principle).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ See Phonorecords III, 84. Fed. Reg. at 1938 (Copyright owners’ expert, Dr. Eisenach, opined that “for music users that require both sound recording rights and musical works rights, the two sets of rights can be thought of in economic terms, as perfect complements in production: Without both inputs, output is zero.”); *but see id.* at 1938 (Google’s economic expert, Dr. Leonard, explained: “At the time a musical work is selected by a label for recording by an artist, *ex ante* recording, the label can choose among competing and substitutable musical works. Thus, it is only *ex post* recording that the particular musical work that had actually been selected is necessary to create a level of output (and value) greater than zero”).

preferences—does not suggest that publishing companies should now privately negotiate with digital services without a statutory rate functioning as a ceiling.

The marketplace needs continuity. Under the ownership model, the record companies control distribution channels and dictate the price (i.e., PPD) of a physical product, such as CDs.⁶² The publishing companies, to an extent, negotiate mechanical rates with the record companies and have nothing to do with the physical supply chain. By contrast, under the access model, publishing companies and record companies now enter into separate deals with the digital services for the licensing of their respective copyrights. Without a statutory rate for mechanicals, record companies (and digital services) would be beholden to the music publishers, because publishers would then have the power to delay the commercial releases of all forthcoming records.

Furthermore, rate-setting proceedings between interactive streaming services and copyright owners of musical works should not be conducted in a vacuum. The roles record companies play in making the final music product—*i.e.* the digital sound recording—available to the public should also be considered in rate-setting proceedings between digital services and copyright owners of musical works.⁶³ The following insights from Mr. Passman (on music

⁶² COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 6 at 22 (“Though levels of responsibility vary...a record label’s usual role is to finance the production of sound recordings, promote the recordings (and sometimes the recording artists themselves), and arrange to distribute the recordings via physical and digital distribution channels”); *see also* Pakman Phonorecords III Testimony, *supra* note 31 at ¶ 20 n.2 (“Charles Ciongoli, the Chief Financial Officer of Universal Music Group, who at that time oversaw both the label and publishing functions at Universal, testified in the first Webcasting proceeding before the CARP that there were ‘significant differences between the record business and the music publishing business’ and that ‘record labels engage in a very risky business,’ whereas ‘the publishing business has less risk and less cost.’ Public Testimony of Charles Ciongoli Before the Copyright Arbitration Royalty Panel (Apr. 2001) at 1-2. In *Webcasting II*, Mr. Ciongoli testified again that ‘there are fundamental differences between the sound recording and music publishing businesses.’ He even went so far as to say that publishers ‘ride the coattails of the record company’ and that it was ‘therefore unsurprising that the risks and rewards – and the levels of compensation – for sound recordings and musical works differ greatly in markets where music is disseminated.’ Rebuttal Testimony of Charles Ciongoli (Sept. 2006) at 2-3”) (emphasis added).

⁶³ *See* Factor C in §801(b)(1) (repealed 2018) (“[t]o reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative contribution, technological

publishing) and Mr. Kushner (on record companies) should support this argument and illustrate why record companies receive (and should continue to receive) a greater percentage of streaming revenue than music publishers.

In *All You Need to Know About the Music Business*, Mr. Passman describes how the role of music publishers has changed dramatically since the publishing industry's inception:

Following the turn of the twentieth century, and well into the 1940s, publishers were the most powerful people in the music industry. (Ever heard of Tin Pan Alley? That's where the publishers' offices were located). In the early days, most singers didn't write songs, so they (and their record companies) were at the mercy of the publishers who controlled the major songwriters. Remember, no one can use a song for the first time without the publisher's permission...so the publishers decided which artist was blessed with the right to record a major new work. Because of the publishers' power and connections to the labels and artists, it was difficult, if not impossible, for songwriters to exploit their works without a major publisher behind them. Publishers today are still major players, but their role has changed radically. At one end are "creative" publishers, in the sense that they put their writers together with other writers, help them fine-tune their skills, pitch their songs to artists, etc. If the writer is also an artist, they use their clout to help find them a record deal. At the other end are publishers who are basically banking operations—they compute how much they expect to earn from a given deal, then pay a portion of it to get the rights....While all of this is important in the beginning and middle stages of [a writer's] career, many of the major writers make very skinny deals with the publishers. In other words, they use a publisher to handle the backroom chores of issuing licenses and collecting money, while the writer keeps ownership of their copyrights and the bulk of the money....This is because, once a writer is well-known, he or she can get to artists as easily as a publisher can, and maybe easier (artists often call important writers directly, looking for material, or the writer may be a major producer, and the artists they produce are always looking for songs). Also, more and more artists are writing their own songs, so there's no need for a publisher to get songs to them. All they really need is someone to make sure they get paid everything they're owed.⁶⁴

contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication"); see also § 115(c)(1)(F)(ii) (2018) (considering "the relative roles of the copyright owner and the copyright licensee in the copyrighted work and the service made available to the public with respect to the relative creative contribution, technological contribution, capital investment, cost, and risk").

⁶⁴ See PASSMAN, *supra* note 31 at 222-23.

In his testimony for the *SDARS III* proceeding, Mr. Kushner highlighted the various functions record companies must perform (e.g., signing and developing talent, producing and distributing music, and marketing and promoting new releases) so that commercial music can be made available to the public:

There is a popular misconception the shift from physical to digital distribution entails dramatic costs savings for a record company. In fact, most of our costs are not associated with distribution at all, and are driven by the process of creating and promoting recordings and the need to account to our artists and other royalty recipients. In addition to those costs, Atlantic has added an entire new department solely addressing digital marketing, while we continue to maintain our radio promotion staff, video production and promotion staff, and sales staff. Digital distribution requires complex negotiations with digital services providers, infrastructure to manage and deliver various versions of recordings to each service, development and delivery of extensive data about each recording, and employees to carry out these processes, while we also still maintain the staff and infrastructure necessary for physical distribution.... With the breakdown of the album and the traditional album release cycle, we are also increasing the pace of releases, with many artists frequently releasing singles, “mixtapes,” EPs, and other small bundles.... Today, an album release is accompanied by single versions of every track in different formats, multiple videos, and various extra tracks as live or acoustic versions. And while we used to create videos solely in connection with singles that we promoted to terrestrial radio and MTV, the advent of Youtube has required that we make videos of many more tracks to both promote and monetize our releases.... A record company like Atlantic makes substantial investments to provide the threshold level of support that our artists need to have a fair chance to realize their potential, and to maximize our chances of having a profitable release. While Atlantic knows that in most cases we will not recover all the money spent on creating and marketing an album, let alone make a profit, if a record is to have a chance at succeeding, we must approach it as if it will succeed. Over time and across the industry, the investments made to create the catalog of recordings available to digital music services is staggering. According to a 2015 RIAA study, during the decade 2003-2012 (which was not a prosperous time in the industry), the major labels spent a total of \$13.4 billion to find new artists and help them reach an audience, and \$20 billion on artist and songwriting royalties.⁶⁵

⁶⁵ Kushner Testimony *SDARS III*, *supra* note 5 at ¶¶13,23,77; *See also* Written Direct Testimony of Jeremy Sirota, Senior Vice President and Head of Business and Legal Affairs, Alternative Distribution alliance and Warner-Elektra-Atlantic Corporation, October 1, 2016 *SDARS III* (Mr. Sirota explains how WEA’s digital distribution operation serves the WMG labels and their recording artists (e.g., Atlantic Records and Elektra Records), as well as independent labels and the artist on their respective rosters).

Taken together, these industry facts and professional insights demonstrate that record companies and recording artists play a significantly greater role than publishing companies and non-performing songwriters in delivering the final music product to the public. To minimize the impact of government oversight on the structure of the music industry and on long-standing and effective industry practices, the government should not fundamentally change the ways in which it regulates (or does not regulate) the licensing of musical works and sound recordings.⁶⁶ At bottom, “fair” does not mean equal.⁶⁷ Therefore, licensing parity, particularly in the interactive streaming context, is simply not an option.

Part II. Create administrative synergies in our music licensing system.

A. Authorize the formation of a new MPLC f/k/a MLC and create a compulsory individual and blanket license for the public performance of nondramatic musical works.

Congress’s failure to integrate core PRO functions into the new MLC system constitutes a major legislative oversight that must be addressed in any forthcoming music licensing reform measures.⁶⁸ A compulsory blanket public performance license would create much-needed synergies in the existing licensing framework. The new MPLC would replace (and build upon)

⁶⁶ See Factor D in §801(b)(1) (repealed 2018) (“[t]o minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices”).

⁶⁷ See Factor B in §801(b)(1) (repealed 2018) (“[t]o afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions”).

⁶⁸ See *Music Licensing Modernization Act*, COPYRIGHT.GOV, <https://www.copyright.gov/music-modernization/115/> (last visited May 7, 2020) (The following adjustments to our public performance licensing system lack materiality: “The section 114(i) provision that prohibits PRO rate courts from considering licensing fees paid for digital performances of sound recordings in its rate-setting proceedings for the public performance of musical works is partially repealed. This repeal does not apply to radio broadcasters. Additionally, the legislation changes how judges in the Southern District of New York are assigned to the rate court proceedings set forth in the consent decrees for ASCAP and BMI, by assigning each new rate dispute on a rotating basis instead of all disputes being handled by the same judge”).

the MLC and perform the following functions for both mechanical and public performance rights:

(I). Offer and administer blanket licenses including receipt of notice license and reports of usage from digital music providers.

(II). Collect and distribute royalties from digital music providers for covered activities.

(III). Engage in efforts to identify musical works (and shares of such works) embodied in particular sound recordings, and to identify and locate the copyright owners of such musical works (and shares of such works).

(IV). Maintain the musical works database and other information relevant to the administration of licensing activities.

(VI). Administer collections of the administrative assessment from digital music provers and significant nonblanket licenses, including receipt of notices of nonblanket activity.

(VII). Invest in relevant resources, and arrange for services of outside vendors and others, to support the activities of the mechanical licensing collective....⁶⁹

Under the new MPLC licensing system, existing PROs would no longer administer blanket licenses, but would be free to enter into agreements with writers and publishers to administer individual public performance licenses and collect royalties for non-blanket uses. (This role would be similar to the administrative function Harry Fox Agency provides for mechanical licensing in the non-blanket context).

Categories for the compulsory public performance license— both individual and blanket—would include the following: television networks, radio stations, audio streaming (interactive and non-interactive), video streaming (e.g., YouTube and Vevo), online television and movie subscription services (e.g., Netflix, Amazon, and Hulu), background music

⁶⁹ § 115(d)(3)(A) and (C).

(e.g., in airports and shopping malls), and live events.⁷⁰ Grand rights (also known as dramatic performance rights) would remain voluntary.⁷¹ Synchronization or “sync” licenses, e.g., for motion pictures, television shows, video games, and commercials, would also remain voluntary, but a carve-out should be made for music videos, recorded livestreams, and user generated content (UGC).

In addition to being integral to the online community experience, UGC is an important component of artist marketing and promotion strategies. The same can be said of music videos and recorded live streams. These two mediums of artistic expression, which are shared primarily on social media and video-sharing platforms, are essential for building online presence, generating “buzz,” and engaging with fans, industry, and the general public.

If the merging of PRO—MLC functions were to take place, copyright owners of musical works would enjoy an increase in public performance royalties, because administrative intermediaries, *i.e.*, the PROs, would no longer deduct an unnecessary amount of operating costs from collected royalty revenues.⁷² Under the new system, the MPLC would be authorized to collect all-in royalty revenues from interactive streaming services, send the writers’ shares of the public performance revenues to the songwriters, and send the publishers’ shares of the public performance revenues, as well as mechanical revenues, directly to the publishers.

Furthermore, copyright owners’ works would be monetized more efficiently under the new system. In the *Copyright and the Music Marketplace* study, the Copyright Office reported that

⁷⁰ See PASSMAN *supra* note 31 at 225-231 (discussing public performance monies).

⁷¹ What are “Grand Rights”?, SONGTRUST, <https://help.songtrust.com/knowledge/what-are-grand-rights> (last visited May 10, 2020) (“Grand rights...are for performances in a dramatic setting such as ballet, Broadway shows, or opera. While the line between dramatic and non-dramatic is not always clear, a dramatic performance usually means that the work is being used to tell a story or is being used as part of a story or plot”).

⁷² See e.g., *Follow the Dollar*, ASCAP, <https://www.ascap.com/~media/files/pdf/licensing/brochures/ascap-licensing-follow-the-dollar-update.pdf> (last visited May 10, 2020) (ASCAP’s operating expenses are 12% of revenue).

ASCAP and BMI use inaccurate “sample survey” techniques for determining royalty payments for public performance categories like terrestrial radio, television, and live concerts.⁷³ Even when a more accurate “census reporting” technique can be used by the PROs to gather and process digital data, it is not always applied.⁷⁴ The MLC recently granted private contracts to mechanical rights agency, Harry Fox Agency and blockchain company, ConsenSys, to assist with the Collective’s duties and functions under § 115.⁷⁵ There is no reason why these entities cannot also assist with the processing and administration of public performance licensing payments, at least for digital formats.

Lastly, if the newly created MPLC determines it needs more manpower and resources to handle blanket public performance license administration tasks, they would have the authority to grant contracts to private entities such as ASCAP, BMI, SESAC, or GMR to assist.⁷⁶

⁷³ COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 6 at 130.

⁷⁴ *Id.* (“An alternative, and more comprehensive, form of measurement is census reporting, whereby licensees account for each use of a mechanical work (e.g., each individual stream) to the collecting entity. Census reporting is more common for digital services, where it is easier to track individual performances. ASCAP relies upon census data only when it is ‘economically feasible’ to process. For many uses—including terrestrial radio uses and some digital uses—ASCAP uses a sample survey. BMI similarly relies on extrapolated data to pay royalties in many instances”).

⁷⁵ Paul Resnikoff, *Mechanical Licensing Collective Hands a Juicy Contract to HFA—Critics Call the Deal Crooked*, Music Business Worldwide (Nov. 27, 2019), <https://www.digitalmusicnews.com/2019/11/27/hfa-mechanical-licensing-collective-contract/> (“Technology company ConsenSys and mechanical licensing administrator Harry Fox Agency (HFA) received unanimous approval from the MLC Board to become the primary vendors responsible for managing the matching of digital uses to musical works, distributing mechanical royalties, and onboarding songwriters, composers, lyricists, and music publishers and their catalogs to the database...”).

⁷⁶ Designating one collective to administer blanket public performance licenses will also reduce anticompetitive behavior in the music marketplace. Around the time of the *Copyright and the Music Marketplace* study, SESAC, a for-profit PRO operating outside the ASCAP and BMI consent decrees, “had been the target of antitrust suits by local television stations and the RMLC” (Radio Music Licensing Committee.” COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 6 at 40. The television and radio stations “accused SESAC of engaging in anticompetitive conduct by taking steps to make its blanket license the only viable option for these users, such as by unreasonably and steeply raising the cost of the per-program license and imposing penalties on publishers that engage in direct licensing.” *Id.*

B. Migrate public performance rate-setting proceedings from the PRO rate courts in the Southern District of New York over to the CRB.

This will save all interested parties a lot of time, money, and manpower. The following excerpt pulled from the *Copyright and the Music Marketplace* study describes the challenges copyright owners face when attempting to collect public performance royalties under the existing licensing system:

Rate court proceedings have become extremely time and labor-intensive, costing the parties millions in litigation expenses. According to BMI, ‘a typical rate court case can take many years to be resolved, which includes the inevitable, potentially multi-year, appeal of the trial court’s decision.’ ASCAP noted that although the consent decree ‘mandates that proceedings must be trial-ready within one year of the filing of the initial petition, that deadline is rarely met....’ Other concerns revolve around the fact that the rate for a particular license may not be established until long after the licensee begins using musical works. The ASCAP and BMI consent decrees allow music users to perform the PRO’s repertoire upon the mere filing of an application for a license, without payment of a license fee. As a general matter, songwriters, publishers, and PROs found it unfair that “the current rate court system...does not provide for an inexpensive, effective way to set interim fees to compensate creators while the long rate-setting process plays out.”⁷⁷

If rate-setting proceedings were to migrate over to the CRB, these problems would be mitigated.

First, the CRB would reduce litigation costs and the length of rate-setting determinations for relevant parties by calculating the public performance and mechanical rates for the digital distribution and reproduction of phonorecords in the same rate-setting proceeding. Services would then send one lump sum of licensing revenue to publishers each month (via the MPLC), less the 50% writer’s share for the public performance of musical works (which would be distributed by the MPLC directly to the songwriters). Second, the rate-setting appeal process set forth in § 803(d)(1) would apply to public performance proceedings. This copyright provision

⁷⁷ *Id.* at 94.

requires services to continue paying licensing royalties to the copyright owners while rate-setting proceeding determinations undergo judicial review.⁷⁸

Part III. Increase revenues for industry players and cut costs in the music marketplace.

Congress should adopt policies that effectively regulate competition and balance the competing interests of record companies and recording artists, publishers and songwriters, and service providers in the music marketplace. Accordingly, any new music copyright legislation should promote the long-term sustainable success of the industry, eliminate market asymmetries, and reduce barriers to entry in the music marketplace.

A. Require terrestrial radio to pay sound recording royalties to recording artists and record companies.

In the *Copyright and the Music Marketplace* study, the Copyright Office reiterated its position that terrestrial radio should pay its fair share in sound recording royalties to record companies and recording artists.⁷⁹ “A long-standing justification for the lack of a sound recording

⁷⁸ See § 803(d)(2)(A) (2018) (“When this title provides that royalty rates and terms that were previously in effect are to expire on a specified date, any adjustment or determination by the Copyright Royalty Judges of successor rates and terms for an ensuing statutory license period shall be effective as of the day following the date of expiration of the rates and terms that were previously in effect, even if the determination of the Copyright Royalty Judges is rendered on a later date. A licensee shall be obligated to continue making payments under the rates and terms previously in effect until such time as rates and terms for the successor period are established.”); see also § 803(d)(2)(B) (2018) (“In cases where rates and terms have not, prior to the inception of an activity, been established for that particular activity under the relevant license, such rates and terms shall be retroactive to the inception of activity under the relevant license covered by such rates and terms.... Except as otherwise provided in this title, the rates and terms, to the extent applicable, shall remain in effect until such successor rates and terms become effective”).

⁷⁹ The Copyright Office has consistently advocated for this change and reiterated its position in the report:

As the Copyright Office has stated repeatedly for many years, the United States should adopt a terrestrial performance right for sound recordings. Apart from being inequitable to rightsholders – including by curtailing the reciprocal flow of royalties in the United States—the exemption of terrestrial radio from royalty obligations harms competing satellite and internet radio providers who must pay for the use of sound recordings. Assuming Congress adopts a terrestrial performance right, it would seem only logical that terrestrial uses should be included under the section 112 and 114 licenses that govern internet and satellite radio.

performance right has been the promotional effect that traditional airplay is said to have on the sale of sound recordings.”⁸⁰ The Copyright Office explained: “In the traditional view of the market, broadcasters and labels...enjoy a mutually beneficial relationship whereby terrestrial radio stations exploit sound recordings to attract the listener pools that generate advertising dollars, and, in turn, sound recording owners receive exposure that promotes the record and other sales.”⁸¹ This traditional viewpoint must be rejected. Under the access model, where maximizing number of plays on every platform is essential, any justification for this statutory exemption is no longer relevant. Moreover, requiring terrestrial radio to pay licensing fees to the copyright holders of sound recordings will balance the financial burdens that have been placed on digital music services due to this outdated statutory exemption.

B. Apportion the annual assessment (operating) costs for the funding of the MPLC f/k/a MLC among applicable licensors and licensees.⁸²

Although the digital services and copyright owners agreed to transfer mechanical licensing administration costs to the licensees, it would be in the best interest of the industry as a whole if Congress amended the statute and apportioned this funding responsibility among applicable licensors and licensees.⁸³ Aside from the settlement agreement, there is no reason

⁸⁰ *Id* at 44.

⁸¹ *Id*.

⁸² For ease of writing (and because the MPLC has yet to be created), I primarily refer to the collective as the MLC in this subsection.

⁸³ See The Mechanical Licensing Collective’s Opening Submission in Support of the Proposed Initial Administrative Assessment at 4, In re: Determination and Allocation of Initial Administrative Assessment to Fund Mechanical Licensing Collective, No. 19-CRB-009-AA, <https://app.crb.gov/case/viewDocument/7863> (“[O]ne of the drivers for the passage of the MMA was the recognition that the mechanical licensing practices of the [digital music providers] were fundamentally broken. The [digital music providers] had attempted to secure compulsory licenses through the issuance of Notices of Intent (“NOIs”), but frequently failed to properly locate copyright owners of songs exploited on their streaming platforms, resulting in the failure to pay those owners for the use of their music, and numerous lawsuits. *In light of these costly conflicts, the [digital music providers] recognized the benefit of the blanket license and supported the MMA with the full understanding that they would be responsible to fund the MLC’s total costs in return. They also obtained, in return for funding the MLC, the benefit of insulating themselves from liability for past failures to properly account for mechanical royalties through the MMA’s provisions limiting such infringement liability in certain circumstances.* Section 115(d)(1), (d)(10)”) (emphasis added).

why the digital music providers should solely bear the costs for the continuing operation of the MLC.⁸⁴

First, the interactive streaming services have yet to turn a profit and are already overburdened with unreasonably high licensing rates.

Second, all licensing agencies and performing rights organizations in the U.S. either charge a commission or deduct operating costs off the top of collected royalty revenues before distributing payments to licensors.⁸⁵

Third, the MLC is created by the copyright owners of musical works for the copyright owners of musical works. If copyright owners are required to contribute funds to the MLC, they will be more incentivized to monitor the organizations operations and assess whether the Board is conducting its duties efficiently.⁸⁶

Fourth, it is unduly harsh for the digital services to be continuously punished for their past failures to locate and pay the copyright owners of musical works that were not accurately listed in available databases. In the *Copyright and the Music Marketplace* study, the Copyright Office identified the following issues with existing database systems:

⁸⁴ On January 8, 2020, the Copyright Royalty Judges issued a final ruling that digital music providers must pay: (1) \$33,500,000 in start-up costs; (2) \$28,500,000 for the 2021 Annual Assessment, and (3) “For the calendar year 2022 and all subsequent years, the amount of the Annual Assessment will be automatically adjusted by increasing the amount of the Annual Assessment of the preceding calendar year by the lesser of: (i) 3 percent; and (ii) the percentage change in the [Employment Cost Index]”). Determination and Allocation of Initial Administrative Assessment to Fund Mechanical Licensing Collective (Initial AA), 85 Fed. Reg. 831, 831-833 (Jan. 8, 2020) (37 C.F.R. pt. 390).

⁸⁵ See generally PASSMAN, *supra* note 6 at 29.

⁸⁶ See § 115(d)(3)(A)(i) (“The mechanical licensing collective shall be a single entity that—(i) is a nonprofit entity, not owned by any other entity, that is *created by copyright owners* to carry out their responsibilities under this subsection) (emphasis added); see also § 115(d)(3)(D)(“GOVERNANCE.—(i) BOARD OF DIRECTORS.—The mechanical licensing collective shall have a board of directors consisting of 14 voting members and 3 nonvoting members, as follows: (I) Ten voting members shall be representatives of music publishers...(II) Four voting members shall be professional songwriters...(III) One nonvoting member shall be a representative of the nonprofit trade association of music publishers that represents the greatest percentage of the licensor market for uses of musical works in covered activities...(IV) One nonvoting member shall be a representative of the digital license coordinator...(V) One nonvoting member shall be a representative of a nationally recognized nonprofit trade association whose primary mission is advocacy on behalf of songwriters in the United States”).

To begin with, there is a lack of comprehensive and reliable ownership data, particularly for musical works. As RIAA noted, “it is difficult to identify and keep track of musical work ownership due to changes when musical works and catalogs change hands....” In addition, digital files often do not include standard identifiers for the copyrighted works the files embody, i.e., the ISRC for the sound recording and the ISWC for the underlying musical work. Even when the file includes the ISRC, as is now commonplace for new releases, the ISWC for underlying musical works is often not yet assigned at the time of the release.

And even after an ISWC has been obtained by the musical work owner, there is no comprehensive, publicly accessible database that can be used to match the ISRC to the ISWC. Google noted that requiring licensors to supply data helps to “identify exactly what it is they are licensing...both from a deal implementation standpoint as well as a deal valuation standpoint,” adding that “those sort of data requirements...work their way back up the chain, to the creators.”⁸⁷

Fifth, the MLC relies on the copyright owners to submit accurate information so royalty payments can be made accurately and in a timely fashion. If Congress amends the statute to require the publishers and songwriters to pay their fair share in MLC operating costs, the copyright owners will have more of an incentive to keep this information up-to-date.

C. Create a compulsory licensing system for the recording and commercial release of interpolations of original musical works.

Cover songs are an important part of our nation’s shared musical heritage.⁸⁸ Without the § 115 compulsory license, we would not have American classics like Tina Turner’s rendition of “Proud Mary” (written by John Fogerty), Jimi Hendrix’s interpretation of “All Along the Watchtower” (written by Bob Dylan), or Aretha Franklin’s performance of “Respect” (written by Otis Redding).⁸⁹ Of course, if the compulsory license did not exist, recording artists

⁸⁷ COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 6 at 123-24.

⁸⁸ See GORMAN, *supra* note 8 at 27 (citing WILLIAM M. LANDES AND RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 37-57, 66-69 (2003) (“Creating a new work typically involves borrowing or building on material from a prior body of works, as well as adding original expression to it.... A new work of music may borrow tempo changes and chord progressions from earlier works....The less extensive copyright protection is, the more...a creator can borrow from previous works without a license yet without thereby infringing copyright, and the lower, therefore, the costs of creating a new work....”).

⁸⁹ TINA TURNER, PROUD MARY (Parlophone Records 1993) (streamed on Spotify), https://open.spotify.com/track/6gJdDnF2TzfA1WPMXuCa3x?si=f2S5aGASR76PvL_J7Z2aGg;

would always have the option of asking copyright owners for permission to use their works prior to each record's commercial release. These voluntary licenses are hard to come by, however, and they are never guaranteed.

1. Brief overview of the current process for clearing interpolations under the existing voluntary licensing framework.

At present, the clearance process for interpolations is overcomplicated and time-consuming, particularly for those who lack industry contacts.⁹⁰ For example, if an up-and-coming artist wants to obtain a voluntary license for a song, she cannot simply hop onto a publicly accessible database, reach out to the copyright owners listed for the works, and expect to get a prompt reply of “yes” or “no” before the desired release date of her record. And even if an artist is well-connected, it is never guaranteed the necessary parties will listen to her record or respond to clearance requests in a timely fashion. Consequences of delay approvals, or outright rejections, could include a delay in the artist's forthcoming album release, unnecessary spending and disruptions in the marketing timeline, and missed collateral entertainment opportunities (e.g., sponsorships, tour support, and festival bookings).

In addition to the foregoing issues, the price of a voluntary license can be steep. The clearance process for Ariana Grande's song, “7 Rings,” which interpolates the melody of the

JIMI HENDRIX, ALL ALONG THE WATCHTOWER (Experience Hendrix L.L.C. under exclusive license to Sony Music Entertainment 2009) (streamed on Spotify), <https://open.spotify.com/track/2aoo2jIRnM3A0NyLQqMN2f?si=CbgONgFUR6m2aQSBkFkk-Q>; ARETHA FRANKLIN, RESPECT (Atlantic Recording Corp. 1967) (streamed on Spotify), <https://open.spotify.com/track/7s25THrKz86DM225dOYwnr?si=ieV4aP3ES-O5rtbVZfKd7g>.

⁹⁰ *What Is the Difference Between a Sample and Interpolation?* SONGTRUST, <https://help.songtrust.com/knowledge/what-is-the-difference-between-a-sample-and-interpolation> (last visited May 10, 2020) (“When you sample something, you are required to get permission from both the owner of the Master Recording (normally a record label) for a Master Use License and also the owner of the underlying composition (normally a publisher) for a copyright license. This is because you are featuring both the recording and the underlying composition in the new musical work. However, if you are just doing an interpolation of a song, you only need to get permission from the owner of the underlying composition since you are not featuring the original recording in your new song, and just featuring the underlying composition”).

Rodgers and Hammerstein classic, “My Favorite Things,” shows how costly one of these transactions can be. In March of 2019, *The New York Times* reported:

In an especially speedy turnaround, the deal for “7 Rings” was decided a few weeks before the song’s release in January, when representatives for Ms. Grande and her label, Republic, brought the completed song to Concord, the music company that has owned the Rodgers and Hammerstein catalog since 2017. Concord requested 90 percent of Ms. Grande’s song, and her representatives accepted without further negotiation.... The song is credited to a total of 10 writers. But two of them — Richard Rodgers and Oscar Hammerstein II — control 90 percent of the songwriting royalties, a remarkable split that reflects the value of evergreen song catalogs, and of the negotiating leverage their owners have when pop stars come seeking permission. The deal means that Concord stands to make millions of dollars from the song, while Ms. Grande and her seven co-writers will each get just a fraction of what Concord makes.⁹¹

The “7 Rings” clearance process supports the following key points. First, creating a compulsory license for interpolations will democratize the song clearance process and allow artists with less industry contacts to reference and build off components of older songs. Second, interpolations could function as a major source of both mechanical and public performance revenue for songwriters. Third, interpolations would not undermine original works (even if they were released within the same overarching genre) because recording artists usually take snippets of the original songs and create original works that build off the borrowed portions of the original ones. Fourth, and relatedly, even if the tracks are closely similar, this should be a non-issue, because a compulsory license already exists for cover songs. Fifth, with the right press coverage and marketing strategies, interest in the original works can even be revived *because* of interpolation releases.

⁹¹ Ben Sisario, “‘7 Rings’ Is a Hit for Ariana Grande, and a Knockout for Rodgers and Hammerstein,” N.Y. TIMES (Mar. 19 2019), <https://www.nytimes.com/2019/03/19/business/media/ariana-grande-7-rings-rodgers-hammerstein.html>.

To be clear, although I am advocating for a compulsory license for interpolations, I agree with those who believe that not every rhythm, beat, and groove should be copyrightable. In an interview with *Rolling Stone*, Professor Buccafusco, Director, Intellectual Property & Information Law Program at Benjamin N. Cardozo School of Law explained that, due to uncertainties created by recent copyright infringement suits, the music industry has a crisis on its hands:

The world of musical composition is not that broad, and it's certainly not that broad when it comes to things like bass lines. Most musicians are working in a finite innovation space. There are not a lot of sounds generally pleasing to people's ears and not that many ways to say, 'Love is a wonderful thing.' Should they be financially on the hook for that?" As creators make more and more new music — case in point, Spotify said earlier this year that nearly 40,000 tracks are uploaded to its streaming platform each day — that marks less of a question than a crisis.⁹²

This observation made by Professor Buccafusco supports the argument that the approach to exercising control over musical works should relax.⁹³

2. New suggested framework for clearing interpolations.

We have the technological capabilities and the administrative framework to create a new compulsory licensing system for interpolations. The following hypothetical illustrates how a new system could work. Artist B is an unsigned artist living in Atlanta. She has a few thousand followers on social media and a strong following in the regional tour circuit. Artist B is a great

⁹² Amy X. Wang, *Why All Your Favorite Songs Are Suddenly Being Sued*, ROLLINGSTONE (Aug. 2, 2019, 12:46 PM), <https://www.rollingstone.com/music/music-features/katy-perry-led-zeppelin-ed-sheeran-music-lawsuits-865952/>.

⁹³ *Id.* (“‘They’re trying to own basic building blocks of music, the alphabet of music that should be available to everyone,’” [Katy] Perry’s lawyer Christine Lepera argued in the trial’s closing arguments.... Throughout most of the last century, copyright lawyers and music creators held a default view that copyright claims were valid for lyrics and melody, but not for more abstract details such as rhythm, beats and feel. The ‘Blurred Lines’ case forever changed the status quo when its court ordered the hit song’s writers to cough up \$5 million to Marvin Gaye’s heirs for creating too similar of a ‘vibe’ to Gaye’s 1977 hit “Got to Give It Up.” At the time, Thicke, Pharrell and collaborator T.I. (who worked on ‘Blurred Lines’ but was not deemed liable in the case) joined up to issue a statement that ‘while we respect the judicial process, we are extremely disappointed in the ruling made today, which sets a horrible precedent for music and creativity going forward’”).

singer and producer, but she needs to improve her songwriting skills. Artist B hears the lyrics of a song released in 1975 by Artist A. Inspired by the lyrics, she lifts the chorus from the original song and sings it on the recording of her new work. Once the master is ready, Artist B uploads the recording to an interpolation dashboard on the MPLC public database. An algorithm—based off the CRB’s determination of reasonable rates for interpolations of original works (which would require a new proceeding under 17 U.S.C) —offers Artist B proposed copyright ownership and royalty split terms for her anticipated release.

INPUT FACTORS FOR INTERPOLATION TOOL (SIMPLIFIED)

Original Sound Recording Release Date	Commercial Success	Category of Use	Percentage of Use Interpolated
1975	RIAA Certified Gold	Chorus	100% (full chorus)

DETERMINATION FROM AI ALGORITHM (SIMPLIFIED)

Artist B’s New Song (i.e., just the composition)	Artist B	Artist A
Copyright Ownership and All-In Royalty Rate Split (publishers’ shares baked in)	75%	25%

Artist B can either (1) agree to the proposed terms and commercially release her track or (2) reject the terms and try to obtain a voluntary license on more favorable ones. If Artist B accepts the terms of the MPLC algorithm determination, the MPLC will charge Artist B a small service fee. After Artist B commercially releases her track, the MPLC will subsequently collect public performance and mechanical licensing fees and distribute royalty payments to the applicable parties. Artist B will be responsible for paying Artist A any mechanical royalty payments that fall outside the scope of the MPLC, such as royalties for physical phonorecords, like vinyl.

Conclusion

Music has been, and always will be, an integral part of the American way of life. Our licensing system should promote this ideal by reflecting modern consumer preferences and technological developments in the music marketplace. Accordingly, any new copyright legislation should: (1) protect the public's interest in having affordable access to interactive streaming, (2) create administrative synergies in our music licensing system, and (3) increase revenues for industry players and cut costs in the music marketplace. If these three principles guide licensing reform initiatives, I am hopeful the law will facilitate transactions in the music marketplace and promote long-term sustainable success for the music industry as a whole.