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Songwriters v. Spotify: Is Spotify the Problem or a Symptom of the Problem?

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Abstract

Today, streaming is the prevailing mode of music consumption. Yet, streaming services are struggling to turn a profit, as songwriters also face significant financial challenges in the streaming era. All the while, record labels are collecting the majority of streaming revenue and seeing record profits.

The 2018 Music Modernization Act attempted to address songwriters' and streaming services' financial problems by altering the factors considered by the Copyright Royalty Board in determining the mechanical royalty rates owed by streaming platforms to songwriters. A proper application of this newly instated factor test necessitates considering both songwriters' and streaming services' business operations and finances. However, during the 2018–2022 mechanical rate determinations, the majority court largely disregarded the financial interests of streaming services in determining the new mechanical rate. As a result, in February 2019, the Copyright Royalty Board raised the rate of mechanical royalties paid by streaming services to songwriters by an unprecedented 44%.

This article demonstrates that Spotify's pending appeal of the new mechanical rate is predicated on legitimate and reasonable concerns regarding the Board's application of the law. Additionally, the article analyzes both songwriters' and Spotify's positions and, in addressing them, proposes two alternative solutions to the 44% mechanical rate increase.[1]

1. Since the authorship of this article, in August 2020, the DC Circuit partly vacated and remanded the Copyright Royalty Board's 2018-2022 Mechanical Rate Determination, finding that the Board "failed to give adequate notice or to sufficiently explain critical aspects of its decisionmaking." *See* Johnson v. Copyright Royalty Board, No. 19-1028, at 4 (D.C. Cir. 2020), https://www.cadc.uscourts.gov/internet/opinions.nsf/720464D843B0D6C7852585C10074B11B/$file/19-1028-1856124.pdf. The DC Circuit cited three primary reasons for vacating the Copyright Board's mechanical rate determination: (1) for "fail[ing] to provide adequate notice of the rate structure it adopted," (2) for "fail[ing] to explain its rejection of a past settlement agreement as a benchmark for rates going forward," and (3) for failing to "identif[y] the source of its asserted authority

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to substantively redefine a material term after publishing its Initial Determination." *Id.* While this article does not address points (1) and (3), it does discuss several of the concerns raised by the DC Circuit under point (2), particularly the fact that the Board's new, unprecedented formula for determining the 2018-2022 mechanical rates was predicated on the fallacious assumption that, in response to a 44% increase in songwriters' mechanical royalty rates, record labels would "naturally" decrease the cost of their sound recording royalties out of good will and to "'ensure[] the continued survival and growth of the music streaming industry.'" *Id.* at 15. This article further discusses and analyzes this concern, to which the Board must respond in its remand proceedings. The Board's remand proceedings are expected to run "at least into the second half of 2021." *See Announcement Concerning Interim Mechanical Royalty Rates Pending the Outcome of Copyright Royalty Board Remand Proceedings in Phonorecords III*, MLC (Jan. 13, 2021), https://www.themlc.com/press/announcement-concerning-interim-mechanical-royalty-rates-pending-outcome-copyright-royalty.

I. INTRODUCTION

Songwriters and Spotify are at war.[2] In February of 2019, the Copyright Royalty Board raised the rate of royalties paid by streaming services to songwriters ("Songwriters")[3] by an unprecedented 44%.[4] Within weeks, Spotify announced its intent to appeal the rate increase.[5] In response, Songwriters, including Justin Tranter (who wrote Justin Bieber's "Sorry" and Selena Gomez's "Bad Liar") and Ross Golan (who wrote Ariana Grande's "Dangerous Woman" and Flo Rida's "My House"), declared war.[6] In a letter addressed to Spotify and disseminated across social media, these and other Songwriters called out: "You have used us and tried to divide us but we stand together. . . . Our fight is for all songwriters. . . . WE all create the ONE thing you sell. . . . Do the right thing and drop your appeal of the Copyright Royalty Board rate determination."[7]

From the sound of the Songwriters' war cry, it seems like Spotify's appeal is yet another familiar tale of corporate greed—but is it?[8] This Comment addresses this question by analyzing Spotify's position in the appeal and

2. Chris Leo Palermino, *Is Spotify Suing Songwriters? The Latest Legal Battle, Explained*, VULTURE (Mar. 15, 2019), https://www.vulture.com/2019/03/spotify-songwriters-battle-explained.html.

3. *See* Copyright Owners: Written Direct Statements Vol. I–IX, No. 16-CRB-0003-PR (2018–2022) [hereinafter Statements of Copyright Owners]. Throughout this Comment, the term "Songwriters" shall reference all songwriters and music publishers on whose behalf the parties, *inter alia*, National Music Publishers Association and Harry Fox Agency LLC, are participating in the Copyright Royalty Board's 2018–2022 Mechanical Rate Determinations. *See* Joint Petition to Participate of National Music Publishers Ass'n, Harry Fox Agency LLC, Nashville Songwriters Ass'n International, Church Music Publishers Ass'n, Songwriters of North America at 1, No. 16-CRB-0003-PR (2018–2022) (Copyright Royalty Board Feb. 3, 2016).

4. *See* Palermino, *supra* note 2.

5. *You Might Have Heard About the Streaming Industry's CRB Appeal—Here's What You Need to Know*, SPOTIFY FOR ARTISTS: NEWS (Mar. 11, 2019), https://artists.spotify.com/blog/you-might-have-heard-about-the-streaming-industry%27s-crb-appeal-here%27s-what [hereinafter SPOTIFY ARTISTS NEWS]; *see also* Jem Aswad, *Hit Songwriters Slam Spotify's Attempt to Lower Royalties: 'You Have Used Us'*, VARIETY (Apr. 9, 2019, 2:36 PM), https://variety.com/2019/biz/news/spotify-secret-genius-songwriters-lower-royalties-1203184870/; Elias Leight, *Threats, Bullying and Misinformation: Inside Spotify's Battle with Songwriters*, ROLLING STONE (Apr. 19, 2019, 12:15 PM), https://www.rollingstone.com/music/music-features/threats-bullying-misinformation-spotify-battle-songwriters-820969/.

6. *See supra* note 5 and accompanying text.

7. Aswad, *supra* note 5.

8. *See, e.g.*, *id.* (publishing the Songwriters' "war cry" letter and listing notable supporting Songwriters).

explaining how Spotify's position is predicated not on greed, but on legitimate business concerns.[9] Rather than persecuting Spotify, this Comment seeks to address the problem underlying both Songwriters' and Spotify's issues on appeal—present-day digital music copyright law.[10]

To begin, Part II of this Comment briefly recounts the history and evolution of music copyright and royalty payments.[11] Part III explains the current state of digital music copyright law and the Copyright Royalty Board's 2018 mechanical rate determination.[12] Part IV analyzes both Songwriters' and Spotify's arguments on appeal, explains why Spotify's argument is particularly compelling in light of current copyright law, and proposes an alternative to the Copyright Royalty Board's 2018–2022 Rate increase and an amendment to music copyright law that solves both Songwriters' and Spotify's problems.[13] Finally, Part V concludes.[14]

II. MUSIC COPYRIGHT LAW: FROM PLAYER PIANOS TO STREAMING

Since its enactment in 1790, Congress has regularly amended the Copyright Act in response to advances in technology.[15] However, today Congress has yet to properly address copyright law as it pertains to streaming technology.[16] To understand why Songwriters and Spotify are particularly disenfranchised in the streaming era, one must familiarize oneself with the evolution and context of present-day music copyright law.[17]

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9. *See infra* Part IV.A (analyzing Spotify's position and business concerns).

10. *See infra* Part III.

11. *See infra* Part II (recounting the history of music copyright law, from piano sheet music to digital music).

12. *See infra* Part III.

13. *See infra* Part IV.

14. *See infra* Part V.

15. Kaitlin Chandler, *The Times They Are a Changin': The Music Modernization Act and the Future of Music Copyright Law*, 21 TUL. J. TECH. & INTELL. PROP. 53, 55 (2019).

16. Mary LaFrance, *Music Modernization and the Labyrinth of Streaming*, 2 BUS., ENTREPRENEURSHIP & TAX L. REV. 310, 311 (2018). Rather than address the nuances of streaming technology, Congress has repurposed "laws that were designed for piano rolls and vinyl records." *Id.*

17. *See id.*; *see also infra* Part III (explaining music copyright law in the streaming era).

A. Early Music Copyright: 1787–1831

In 1787, the Constitution imparted to Congress the power "to promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[18] Shortly thereafter, Congress exercised this power by enacting the Copyright Act of 1790, which protected solely "the authors of any maps, charts, book or books."[19] Notably, the Act left songwriters to fend for themselves.[20]

Nearly fifty years passed before Congress, in 1831, extended copyright protection to "musical compositions."[21] For the first time, authors and owners of "musical compositions" were granted the exclusive right to the "printing, reprinting, publishing and vending" of their works.[22] However, because the Act failed to define the term "musical composition," it left songwriters uncertain of the scope of their protection.[23] This ambiguity persisted for three-quarters of a century.[24]

B. The Copyright Act of 1909: Mechanical Licensing and Performance Licensing

In 1909, Congress finally amended the Copyright Act to define the term "musical composition" and clarify for songwriters the full scope of their copyright protection.[25] The Act stated that a "musical composition" was to be any "arrangement," "setting of," "notation," or "form of recording" music.[26] The Act further stipulated that copyright protection extended to *all* "musical

18. U.S. CONST. art. I, § 8, cl. 8.

19. Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124, 124 (1790) (current version at 17 U.S.C. § 1 (1978)).

20. *See id.*

21. Copyright Act of 1831, ch. 16, § 1, 2 Stat. 436 (1831).

22. *See id.*; *see also* Chandler, *supra* note 15, at 55–56.

23. *See* Copyright Act of 1909, ch. 320, § 1, 35 Stat. 1075 (1909) (repealed 1976). Today, the term "musical composition" encompasses any combination of "music (melody, rhythm, and/or harmony expressed in a system of musical notation) and accompanying words." U.S. COPYRIGHT OFFICE, CIRCULAR 56A, COPYRIGHT REGISTRATIONS: MUSICAL COMPOSITIONS AND SOUND RECORDINGS (2019) [hereinafter COPYRIGHT REGISTRATIONS].

24. *See generally infra* Part II.B.1 (describing Congress's first attempt to clarify the scope of the term "musical works").

25. Chandler, *supra* note 15, at 56; *see also* Copyright Act of 1909 § 1(b), (e).

26. Copyright Act of 1909 § 1(e).

works,"[27] which the Act defined as both musical compositions *and* the "mechanical reproduction" of such compositions.[28] The Act narrowly defined "mechanical reproductions" as the manufactured parts, such as piano rolls,[29] that are used in "music-producing machines."[30]

1. Compulsory Mechanical Licensing

Thereby, the Copyright Right Act of 1909 created the "mechanical license."[31] As a result, those seeking to mechanically reproduce a copyrighted song must first acquire the license to do so from its copyright owner.[32] In the wake of the 1909 Act, mechanical licenses became particularly vital to player piano companies,[33] which required a mechanical license for every piano roll manufactured and sold.[34] Consequently, Congress feared that player piano companies would purchase the exclusive mechanical rights to every popular song, thereby precluding others from reproducing popular music.[35] Thus, in

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27. *See generally id.* at § 1. The Copyright Act of 1909 coined the term "musical works" to reference the collective body of musical compositions eligible for copyright protection. *Id.*

28. *Id.*

29. *See Piano Roll*, OXFORD LEARNER'S DICTIONARIES, https://www.oxfordlearnersdictionaries.com/definition/english/piano-roll (last visited Jan. 14, 2021). A piano roll is "a roll of paper full of very small holes that controls the movement of the keys in a player piano." *Id.* A player piano is "a piano that plays itself by means of a piano roll." *See Player Piano*, OXFORD LEARNER'S DICTIONARIES, https://www.oxfordlearnersdictionaries.com/definition/english/player-piano (last visited Jan. 14, 2021).

30. Copyright Act of 1909 § 25(e). Thus, the Act expressly extended copyright protection to the mechanical reproduction of songs onto piano rolls (and any other form of mechanical reproduction, e.g., the process of creating phonorecords). *Statement of Marybeth Peters: The Register of Copyrights Before the Subcomm. on Cts., the Internet and Intell. Prop. of the H. Comm. on the Judiciary*, 108th Cong. (2004) [hereinafter *Statement of Marybeth Peters 2004*].

31. *Statement of Marybeth Peters 2004*, *supra* note 30; *see also Mechanical License*, WIKIPEDIA, https://en.wikipedia.org/wiki/Mechanical_license (last visited Jan. 14, 2021) (defining a "mechanical license" as a license granted by "the holder of a [musical work] copyright" that grants a licensee the right to "reproduce[] or sample a portion of the original composition").

32. *See Statement of Marybeth Peters 2004*, *supra* note 30.

33. *See supra* note 29 and accompanying text.

34. *See, e.g.*, White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1 (1907) *superseded by statute*, Copyright Act of 1909. Prior to the enactment of the Copyright Act of 1909, in *White-Smith*, musical works' copyright owners sought to enforce their mechanical rights against Apollo Co., a popular piano roll and player piano manufacturer. *See id.* at 8–9. However, because Congress had yet to define mechanical rights, the Court ruled in favor of Apollo Co. *Id.* at 18.

35. *See* Sarah Jeong, *A $1.6 Billion Dollar Spotify Lawsuit is Based on a Law Made for Player Pianos*, VERGE (May 14, 2018, 12:28 PM), https://www.theverge.com/2018/3/14/17117160/spotify-mechanical-license-copyright-wixen-explainer; DANA A. SCHERER, CONG. RSCH. SERV., R43984,

a preventive effort, Congress "tempered the newly granted mechanical right" by appending to it a compulsory licensing provision, rather than granting it an exclusive right.[36] Meaning, if a copyright owner granted one player piano company the right to mechanically reproduce her song onto piano rolls, the copyright owner would then be *compelled* to grant that mechanical right to anyone else seeking to mechanically reproduce her song, so long as the licensee paid two cents per "each such part manufactured."[37] Today, mechanical rights continue to bear this compulsory component.

2. Performance Licensing and Consent Decrees

In addition to mechanical rights, the Copyright Act of 1909 granted copyright owners the exclusive right to any "public performance" of their musical works.[38] A "public performance" is "any music played outside a normal circle of friends and family."[39] As opposed to mechanical licenses, which are required solely when a song is mechanically (i.e., physically) reproduced, performance licenses must be sought nearly every time a copyrighted song is played publicly.[40]

Keeping track of public performances and personally enforcing "performance rights" posed logistical challenges for songwriters.[41] Consequently, "copyright owners banded together to create Performance Rights Organizations (PROs), which offer blanket licenses[42] and collect

MONEY FOR SOMETHING: MUSIC LICENSING IN THE 21ST CENTURY 9 (2018).

36. Jeffrey A. Wakolbinger, *Compositions Are Being Sold for a Song: Proposed Legislation and New Licensing Opportunities Demonstrate the Unfairness of Compulsory Licensing to Owners of Musical Compositions*, 2008 U. ILL. L. REV. 803, 805 (2008); *see also* Chandler, *supra* note 15, at 56; *Statement of Marybeth Peters 2004*, *supra* note 30.

37. Copyright Act of 1909 ch. 320, § 1(a), (e), 35 Stat. 1075 (1909); *see also Statement of Marybeth Peters 2004*, *supra* note 30. *See generally Compulsory License*, WIKIPEDIA, https://en.wikipedia.org/wiki/Compulsory_license (last visited Jan. 14, 2021).

38. Copyright Act of 1909 § 1(e).

39. Sam Kronenberg, *Royalty Rates and Exclusive Releases Threaten Music Streaming*, 27 S. CAL. INTERDISC. L. J. 633, 635 (2018). A "public performance" includes a song played at a restaurant, a musical venue, or on the radio. *See, e.g.*, LaFrance, *supra* note 16, at 337.

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

41. Kronenberg, *supra* note 39, at 636.

42. *See Frequently Asked Questions: Blanket License*, ASCAP, https://www.ascap.com/search-results?q=blanket%20license (last visited Jan. 14, 2021) (defining a "blanket license" as "a license which allows the music user to perform any or all of the millions of works in the [PRO's] repertory,

royalties on behalf of the composers."[43] Soon, two PROs were managing the majority of performance rights in the United States: the American Society of Composers, Authors, and Publishers (ASCAP) and Broadcast Music, Inc. (BMI).[44]

In 1941, the Department of Justice (DOJ) challenged ASCAP's and BMI's business practices and eventually charged them for violating the antitrust laws by engaging in price-fixing.[45] As a result, the DOJ subjected ASCAP and BMI to consent decrees,[46] which continue to compel ASCAP and BMI to "offer non-exclusive blanket licenses . . . for a mutually agreeable flat fee or share of revenue."[47] Furthermore, the consent decrees stipulated that, in the event ASCAP or BMI fail to reach an agreement with a potential licensee, a federal judge will be designated to set the price and terms of the parties' blanket license agreement.[48] Thereafter, the DOJ assigned ASCAP and BMI each a judge from the Southern District of New York to hear and decide such disagreements.[49]

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as much or as little as they like").

43. Kronenberg, *supra* note 39, at 636. While a performance license grants a licensee the right to perform a single song, a blanket license grants a licensee the unlimited right to perform every song in a PRO's respective catalog. *See, e.g.*, *Blanket License*, ASCAP, https://www.ascap.com/search-results?q=blanket%20license (last visited Jan. 14, 2021).

44. *See* Randi B. Rosenblatt, *CBS, Inc. v. ASCAP*, 6 HOFSTRA L. REV. 445, 446 (1978).

45. *See id.* ("[T]he Department of Justice, concerned with ASCAP's 'overwhelming position in the entertainment field[,]' brought an antitrust action against ASCAP."); Glen Manishin, *Don't Revoke the Music Licensing Antitrust Decrees*, LAW360 (June 12, 2018, 12:49 PM), https://www.law360.com/articles/1052629/don-t-revoke-the-music-licensing-antitrust-decrees (explaining that when an oligopoly like BMI and ASCAP exists, i.e., when two monopolists share an entire market, the concern is that they will agree to set high prices rather than compete and set prices that correspond with consumers' demands). *See generally Antitrust Consent Decree Review—ASCAP and BMI 2019*, U.S. DEP'T OF JUST., https://www.justice.gov/atr/antitrust-consent-decree-review-ascap-and-bmi-2019 (last visited Jan. 14, 2021) (explaining the DOJ's review of Consent Decrees).

46. *See Consent Decree*, WIKIPEDIA, https://en.wikipedia.org/wiki/Consent_decree (last visited Jan. 14, 2021) (defining a "consent decree" as "an agreement" that "resolves a dispute between two parties" and requires the court to maintain supervision over it "to ensure that businesses and industries adhere to" it).

47. Kronenberg, *supra* note 39, at 636.

48. *Id.*

49. *Congress Steps into How Radio's ASCAP and BMI Rates Are Set.*, INSIDERADIO (Dec. 22, 2017), http://www.insideradio.com/free/congress-steps-into-how-radio-s-ascap-bmi-rates-are/article_06af4ecc-e6e6-11e7-96d7-0bce5532dfb4.html.

3. The Copyright Act of 1909's Mechanical Flaws

In spite of its virtues, the Act's extended protection quickly proved inadequate against developments in music technology.[50] For the purposes of this Comment, only two of these deficiencies will be addressed. First, the Act's stringent language failed to include "sound recordings" within its protective scope.[51] As a result, copyright owners struggled to enforce their mechanical rights against music piracy.[52] Second, the Act imposed compulsory rates on copyright owners' mechanical rights.[53] As a result, it undermined copyright owners' bargaining power by forcing them to license reproductions of their songs at a uniform price, often disproportionate to their fair market values.[54] Although Congress has yet to properly address these problems today, Congress's *first* attempts to amend them took place in the

50. *See* Chandler, *supra* note 15, at 56. Throughout the following sixty-eight years, Congress noted that the Act of 1909 was "based on the printing press as the prime disseminator of information." U.S. COPYRIGHT OFFICE, NO. 1979 0-281-C93/2815, GENERAL GUIDE TO THE COPYRIGHT ACT OF 1976 1:1 (1977). Since its enactment, "[s]ignificant changes in technology[] resulted in a wide range of new communications techniques," such as "radio, television, communications satellites, cable television, computers, photocopying machines, [and] videotape recorders." *Id.* "This growth in technology made revision of the Act of 1909 imperative." *Id.*

51. *See* Chandler, *supra* note 15, at 56. "Sound recordings" are a series of sounds fixed onto physical formats, called "phonorecords." *See* COPYRIGHT REGISTRATIONS, *supra* note 23. Phonorecords include tapes, LPs, CDs, and mp3s. *Id.*

52. *See Statement of Marybeth Peters 2004*, *supra* note 30; GENERAL GUIDE TO THE COPYRIGHT ACT OF 1976, *supra* note 50, at 2:2. "Music piracy" is the unauthorized or unlicensed duplication of a copyrighted song's sound recording, *and* the unauthorized and unlicensed fixing of that duplicated sound recording to a phonorecord. Ernest S. Meyers, *Sound Recordings and the Copyright Act*, 22 N.Y.U. L. REV. 573, 574–75 (1977).

53. *See Statement of Marybeth Peters: The Register of Copyrights Before the Subcomm. on Intell. Prop., Comm. on the Judiciary*, 109th Cong. (2005) [hereinafter *Statement of Marybeth Peters 2005*], https://www.copyright.gov/docs/regstat071205.html (last visited Jan. 14, 2021) (noting that the Act's "ceiling rate" of two cents for each mechanically reproduced composition remained in effect for sixty-eight years, regardless of external market factors).

54. *See supra* note 49 and accompanying text. With time, Congress wondered "whether it would further benefit the industry as a whole simply to repeal, yet not replace, the [mechanical] compulsory license. Then reproduction and distribution rights would truly be left to marketplace negotiations." *Statement of Marybeth Peters 2005*, *supra* note 53. In 2005, Marybeth Peters, the 11th U.S. Register of Copyrights, opined: "In principle, I favor this approach [i.e., repealing the compulsory mechanical rate]. After all, the Constitution speaks of authors' 'exclusive rights to their Writings,' and in general authors should be free to determine whether, under what conditions and at what price they will license the use of their works." *Id.* *See generally infra* Parts II.D.2., III.A (addressing further developments in compulsory mechanical rates).

1970s.[55]

C. *The Sound Recording Amendment of 1971 and the Copyright Act of 1976: Creating the Sound Recording Copyright (a Second Music Copyright)*

Finally, Congress implemented *some* protection for "sound recordings" through the Sound Recording Amendment of 1971 and the Copyright Act of 1976.[56] But rather than extend the protection to songwriters and their copyrighted musical works, Congress established a second kind of music copyright—the "sound recording copyright."[57] Thus, Congress only extended sound recording protection to sound recording copyright owners—*not* songwriters.[58] *Only* when a songwriter and performing artist are the same person does the Act provide both copyrights, and thus sound recording copyright protection.[59]

Appreciating the distinctions between a song's musical work copyright and its sound recording copyright is pivotal to understanding contemporary problems in music licensing.[60] These two separate copyrights (of a single song) have vastly different rights available to their owners.[61] For example, sound recording copyright protection is limited exclusively to the use of derivative sound recordings; that is, sound recordings that "directly or indirectly recapture[] the actual sounds fixed in [copyrighted sound]

55. *See infra* Part II.C (analyzing Congress' first effort).

56. *See generally* GENERAL GUIDE TO THE COPYRIGHT ACT OF 1976, *supra* note 50. Both pieces of legislation protected against the unauthorized reproduction of copyrighted sound recordings. *See* Sound Recording Act of 1971, Pub. L. 92–140, §§ 1, 101, 85 Stat. 391 (1970) (current version at 17 U.S.C. §§ 101–1401 (1978)); Copyright Act of 1976, Pub. L. 94–553, §§ 101–810, 90 Stat. 2541 (1978) (current version at 17 U.S.C. §§ 101–1401 (1978)).

57. *See* Daniel S. Hess, *The Waiting Is the Hardest Part: The Music Modernization Act's Attempt to Fix Music Licensing*, 2019 U. ILL. J.L. TECH. & POL'Y 187, 189 (2019). Typically, the songwriter who "composes a song retains [the] copyright in that written composition while the record company, and occasionally a recording artist with significant bargaining power, [] owns the copyright in the [sound] recording that is promoted and sold." *Id.*

58. *See supra* note 57 and accompanying text.

59. Hess, *supra* note 57, at 189–90. Conversely, when two performing artists record separate covers of the same song—for example Frank Sinatra and Nat King Cole both recorded their own renditions of *Fly Me to the Moon*—both artists can acquire separate sound recording copyright protection. *Id.*

60. *Id*. at 190.

61. *Id.*; *see also* Chandler, *supra* note 15, at 57.

recording[s]."[62] Thus, Congress did not extend the scope of sound recording copyright protection to public performances, because public performances do not involve "recaptur[ing] fixed sound."[63] Congress *only* provided protection of public performances to the musical work copyright.[64] A second distinction between the sound recording copyright and the musical work copyright is the disparity between their respective freedoms to bargain: while Congress permitted sound recording copyright owners to set their own licensing rates, Congress left musical work copyright owners bound by both the performance licensing consent decrees and compulsory mechanical licenses.[65] Thus, rather than alleviate some of the deficiencies produced by the 1909 Act, the Copyright Act of 1976 exacerbated them.[66]

D. The Digital Performance Right in Sound Recordings Act of 1995

In 1995, Congress again amended the Copyright Act in response to new, popular technologies altering music consumption: the internet and digital downloads.[67] The Digital Performance Right in Sound Recordings Act of 1995 (DPRA), however, didn't alleviate songwriters' problems; it perpetuated them.[68]

1. Digital Performance Licensing for the Sound Recording Copyright

First, the DPRA granted sound recording copyright owners a newfound performance right—the "digital performance right."[69] Unlike the preexisting performance right, the digital performance right was limited to interactive

62. Kronenberg, *supra* note 39, at 635.

63. *Id.* Notably, "[t]he public performance right was explicitly excluded from the 1971 Sound Recording Act because of lobbying on behalf of large radio broadcasters," who claimed "that sound recordings played over terrestrial radio should be exempt from copyright due to the promotional benefits artists and record labels receive from radio plays." *Id.* at 635–36.

64. *Id.*; *see also* Hess, *supra* note 57, at 190.

65. *See supra* notes 49, 54 and accompanying text.

66. *See supra* Part II.B.3 (summarizing the Copyright Act of 1909's deficiencies).

67. *See* Kronenberg, *supra* note 39, at 633–34.

68. *See infra* Part II.D.1–2. *See generally* Digital Performance Right in Sound Recordings Act of 1995 § 2, 17 U.S.C. § 106, https://www.govinfo.gov/content/pkg/PLAW-104publ39/pdf/PLAW-104publ39.pdf.

69. Chandler, *supra* note 15, at 57; *see also* Digital Performance Right in Sound Recordings Act of 1995 §§ 2, 3, https://www.govinfo.gov/content/pkg/PLAW-104publ39/pdf/PLAW-104publ39.pdf.

digital streaming services (Interactives) and excluded non-interactive streaming services (Non-Interactives).[70] The DPRA classified streaming services that "allow listeners to choose the recordings they hear" or "enable users to predict which songs are most likely to be played" as Interactives;[71] in contrast, the DPRA classified streaming services that do not permit listener participation as Non-Interactives.[72]

As a result of the DPRA, anytime an Interactive includes a song on its services, it must obtain two separate performance licenses: (1) a digital performance license from the song's sound recording copyright owner, and (2) a performance license from the song's musical work copyright owner.[73] Because the DOJ only imposed consent decrees on the musical work copyright, sound recording copyright owners remain free to negotiate the rates and terms of their performances licenses.[74] Consequently, sound recording copyright owners generally bargain for and receive *significantly higher* performance royalties than do musical work copyright owners.[75]

2. Digital Mechanical Licensing for the Musical Work Copyright

Second, the DPRA established the "digital mechanical right"—an important victory for songwriters.[76] Prior to its passage, the musical work copyright's mechanical right extended only to the mechanical reproduction of songs (e.g., CDs, cassette tapes, and vinyl records).[77] With the DPRA, the musical work copyright gained a "mechanical right" to the digital reproduction of songs as "digital phonorecord deliveries" or "digital

70. LaFrance, *supra* note 16, at 314.

71. *Id.* (classifying Pandora, Apple Music, and Spotify as Interactives).

72. *Id.* (classifying Sirius XM, iHeart Radio, and Pandora Free as Non-Interactives).

73. *See id.* Congress held interactive streaming services "to this more demanding standard because they are more likely to displace sales of physical records and digital downloads." *Id.* In comparison, when a song is performed by a non-digital entity (such as terrestrial radio), that entity is still only required to obtain a performance right from the song's musical work copyright owner. Kronenberg, *supra* note 39, at 636; *see also* Hess, *supra* note 57, at 190.

74. *See* Kronenberg, *supra* note 39, at 635; LaFrance, *supra* note 16, at 314.

75. LaFrance, *supra* note 16, at 315, 317. The consent decrees that the DOJ imposed on the musical work copyright's performance rights in the 1940s remain active today. *Id.*

76. *See generally* Digital Performance Right in Sound Recordings Act of 1995 § 4, 17 U.S.C. § 115.

77. *See* Copyright Act of 1909, ch. 320, § 1(a), (e) 35 Stat. 1075, 1075 (1909) (repealed 1976) (extending protection for the composition copyright to the process of mechanically reproducing it onto any physical form).

downloads," such as those purchasable on iTunes.[78] The DPRA also established the Copyright Royalty Board (CRB),[79] a three-judge panel responsible for adjusting the royalty rate of digital mechanical rights every five years pursuant to a "reasonable rate" standard.[80] Though the DPRA, like its predecessors, precluded musical work copyright owners (i.e., songwriters) from freely negotiating their mechanical rates, it at least ensured that such rates would not be left frozen in decades past.[81]

After the DPRA's enactment, however, Interactives found it challenging to adhere to the DPRA's digital mechanical licensing scheme.[82] Consequently, while record labels made record profits, songwriters received fractions of the pay their copyrights merited.[83] The DPRA's newly established scheme obliged record labels to obtain a mechanical license from a song's musical work copyright owner prior to making and distributing that song as a digital download.[84] Then, because of the compulsory nature of

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78. *See* Digital Performance Right in Sound Recording Act of 1995 § 4. The DPRA uses "digital phonorecord deliveries" in lieu of "digital downloads." *Id.*

79. "The CRB is the administrative body responsible for establishing statutory rates and terms under the section 115 license, a process that by statute takes place every five years. . . . [It's] made up of three judges appointed by the Librarian of Congress." Chandler, *supra* note 15, at 64–65; *see also* COPYRIGHT AND THE MARKETPLACE, *infra* note 79.

> [E]ach [CRB] judge must have a law degree and at least seven years' legal experience. In addition, one judge must have significant knowledge of copyright law, one must have significant knowledge of economics, and one must have a minimum of five years' judicial or quasi-judicial experience. [Presently t]he board of Judges consists of Judge Jesse M. Feder (chief judge), Judge David R. Strickler (economics), and Judge Steve Ruwe (copyright). Judge Feder's current term ends in January 2024; Judge Strickler's current term ends in January 2022; and Judge Ruwe's current term ends in December 2025.

About Us, U.S. COPYRIGHT ROYALTY BD., https://www.crb.gov/ (last visited Jan. 14, 2021).

80. *See* U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE 29 (2015), http://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf. The "reasonable rate" standard consisted of four, vague factors: (1) maximizing availability of creative works to the public; (2) affording copyright owners a fair return and licensees a fair income; (3) reflecting the relative roles of the copyright owner and licensee in making the product publicly available; and (4) minimizing disruptive impacts on the industries involved and on generally prevailing industry practices. *Id.* In the years following the DPRA's passage, the CRB's "reasonable rate" standard would prove to be too elusive. *See* Music Modernization Act, 17 U.S.C. § 115(a)(2) (2018) (substituting the "reasonable rate" standard).

81. *Cf. Statement of Marybeth Peters 2005*, *supra* note 53. Prior to the DPRA's passage, the mechanical rate had remained at "two cents for each such part manufactured" since 1909. *Id.*; *see also* Copyright Act of 1909 § 1(a), (e).

82. LaFrance, *supra* note 16, at 315.

83. *See id.*

84. *Id.* at 314.

mechanical licenses,[85] record labels were empowered to license a song's digital download to Interactives and Non-interactives alike without seeking further approval from that song's songwriter (i.e., musical work copyright owner)—provided that the subsequent licensees filed a notice of intent with the Copyright Office and paid the compulsory mechanical rate.[86] Interactives alone were responsible for performing these last steps: locating and paying the compulsory mechanical rates warranted by the thousands of songwriters whose songs they had acquired from record labels.[87] However, Interactives didn't pay songwriters their outstanding mechanical rates because they found tracking and identifying them costly and difficult.[88] And, because the DPRA failed to define the term "digital phonorecord deliveries," some Interactives disputed whether the Act even intended to govern "streaming," or simply "digital downloads."[89] These Interactives then exploited this ambiguity to evade paying songwriters *any* of the mechanical royalties owed to them from streaming.[90]

III. "MODERN" MUSIC COPYRIGHT LAW: THE MUSIC MODERNIZATION ACT

By 2018, interactive streaming had replaced digital downloads as the preferred means of music consumption, making up 75% of the music industry's revenue.[91] Accordingly, clarifying the DPRA's ambiguous digital phonorecord deliveries term and ensuring that Interactives pay Songwriters fairly and uniformly for their rights became vital for the songwriting

85. *See Statement of Marybeth Peters 2014*, *supra* note 30. Mechanical licenses are compulsory because, when Congress first created them in 1909, they feared piano players would otherwise monopolize the industry. *See supra* Part II.B.1. Thus, anytime a composition's mechanical right is licensed, prospective licensees are automatically authorized to license it as well, so long as they pay the compulsory mechanical rate. *See Compulsory License*, WIKIPEDIA, https://en.wikipedia.org/wiki/Compulsory_license (last visited Jan. 14, 2021).

86. LaFrance, *supra* note 16, at 314.

87. *Id.* at 315–16.

88. *Id.*

89. *Id.* at 314. Interactives argue that digital phonorecord deliveries only encompassed digital downloads and excluded streaming. *Id.*

90. Chandler, *supra* note 15, at 58; *see also* LaFrance, *supra* note 16, at 316.

91. *RIAA 2018 Year-End Music Industry Revenue Report*, RIAA, http://www.riaa.com/wp-content/uploads/2019/02/RIAA-2018-Year-End-Music-Industry-Revenue-Report.pdf (last visited Jan. 14, 2021) (noting that in 2018 streaming made up 75% of the music industry's revenue, while digital downloads made up only 11%).

community.[92] For this reason, Congress enacted the Orrin G. Hatch-Bob-Goodlatte Music Modernization Act (MMA).[93]

A. Mechanical Licensing for Interactive Streaming

The MMA clarified some of the ambiguities in its 1995 predecessor.[94] First, it stated that Interactives *must* obtain mechanical licenses.[95] Second, the MMA stipulated certain procedures—particular to Interactives—which Interactives *must* observe to obtain mechanical licenses.[96] Third, the MMA re-emphasized that mechanical licenses are only available if a song's sound recording was originally made "with express consent" of its Songwriter(s).[97]

Most importantly,[98] fourth, the MMA dictated to the CRB a new standard for determining the royalty rate for mechanical licenses—the "willing buyer/willing seller."[99] Now, rather than apply the DPRA's complex "reasonable rate" factors,[100] the MMA instructs the CRB to apply new "willing buyer/willing seller" factors.[101] These new factors "require the

92. *See supra* Part II.D.2 (summarizing the DPRA's shortcomings).

93. *See generally* Music Modernization Act, 17 U.S.C. § 115 (2018), https://www.copyright.gov/legislation/mma_conference_report.pdf; *see also* LaFrance, *supra* note 16, at 321.

94. *See generally* Music Modernization Act § 115.

95. *Id.* at § 115(b)(1). Specifically, the MMA stated that all digital platforms "other than digital phonorecord deliveries," must obtain mechanical licenses. *Id.* The grouping, "other than digital phonorecord deliveries," includes Interactives. LaFrance, *supra* note 16, at 322.

96. Music Modernization Act § 115(b)(1) The MMA "authorizes the copyright owners of musical works to form a nonprofit mechanical licensing collective that will (1) issue blanket mechanical licenses to digital music services, (2) collect those mechanical royalties, and (3) distribute the royalties to the copyright owners." *Id.* As was aforementioned, prior to the MMA, if an Interactive could not identify a song's musical work copyright owner, that Interactive would typically just *not* payout the outstanding mechanical royalties. *Id.* "To remedy this, the MWMA requires . . . [Interactives] to serve notice on the mechanical licensing collective." *Id.* "Therefore, even if the streaming service cannot identify the copyright owner(s) or determine their respective royalty shares, it must still pay the mechanical royalty to the licensing collective," and "the collective itself will undertake the task of identifying the copyright owners." *Id.*

97. *See* Music Modernization Act § 115(a)(2).

98. *See infra* Part IV (for the purposes of the comment, the "willing buyer/willing seller" standard is the most important MMA provision).

99. *See* Music Modernization Act § 115(c)(1)(F).

100. *See supra* note 80 and accompanying text (defining the "reasonable rate" standard).

101. *See* Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), 84 Fed. Reg. 1918, 1955 (Feb. 5, 2019) [hereinafter 2018–2022 Rate Determinations] (to be codified at 37 C.F.R. pt. 385). These four "willing buyer/willing seller" factors

[CRB] Judges to exercise 'legislative discretion'" to make "independent policy determinations that balance the interests of [Songwriters] and [Interactives]."[102] In other words, the willing buyer/willing seller factors *supposedly* produce mechanical rates that reflect songs' "fair market value."[103] Notably, recent applications of the willing buyer/willing seller standard have resulted in unprecedentedly high royalty rates for songwriters.[104]

B. Performance Licensing for Interactive Streaming

To ensure that "more economically accurate" fees were paid to Songwriters, the MMA also changed the rules governing the Southern District of New York's ("rate courts'") oversight of performance blanket licenses.[105] First, the MMA permitted the rate court to consider the terms and rates negotiated between Interactives and record labels for sound recordings' digital performance rights.[106] "[This] was intended to prevent the sound recording

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considered by the CRB are (1) "maximizing the availability of creative works" (maximizing availability); (2) "affording copyright user fair income and copyright owner a fair return" (fair income); (3) "reflecting the relative roles of copyright owners and copyright users with respect to creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression" (relative roles); and (4) "minimizing disruptive improvements on the structure of the industries involved and on generally prevailing industry practices" (minimizing disruption). *Id.*; *see also* Music Modernization Act § 801(b)(1) (instructing the CRB on how to determine the royalty rate).

102. *See* 2018–2022 Rate Determinations, *supra* note 101, at 1955.

103. *See* Chandler, *supra* note 15, at 66; *see also* James Chen, *Fair Market Value*, INVESTOPEDIA, https://www.investopedia.com/terms/f/fairmarketvalue.asp (last updated Sept. 29, 2020) ("In its simplest sense, fair market value (FMV) is the price that an asset would sell for on the open market. . . . [A]n asset's fair market value should represent an accurate valuation of or assessment of its worth.").

104. *See* Chandler, *supra* note 15, at 65–66. In 2019, this resulted in the CRB's 44% rate increase of mechanical royalties. Chris Robley, *44% increase in mechanical royalty rates for streams in the USA*, DIY MUSICIAN (Jan. 29, 2018), https://diymusician.cdbaby.com/news/44-increase-mechanical-royalty-rates-usa/. *See generally infra* Part III.C (discussing the CRB's projected rate increase). This 44% rate increase is what spurred Spotify's appeal. *See generally supra* Part I (discussing Spotify's rate increase appeal). Spotify, along with other Interactives, argues whether such rates are in fact reflective of their copyrights' fair market value. *See generally infra* Part IV (analyzing Spotify's argument that the new mechanical rates do not reflect the musical work copyright's fair market value).

105. Hess, *supra* note 57, at 196–97; *see also* LaFrance, *supra* note 16, at 324–25.

106. *See* Music Modernization Act § 114 (f)(1)(B)(ii). Recall, there are no consent decrees imposed upon sound recordings' digital performance rights; thus, record labels are free "to negotiate for market rates." LaFrance, *supra* note 16, at 324. *See generally supra* Part II.D.I (discussing the DPRA). For example, Spotify has individually negotiated blanket sound recording performance licenses with the three biggest record labels: Universal, Sony, and Warner Music Group. Hess, *supra* note 57, at 193.

[digital] performance royalties from having a depressing effect on the [Songwriters' musical works] performance royalties."[107] Additionally, rather than assign a single judge to oversee all licensing disputes concerning a particular PRO, the MMA instituted a rotating system.[108] This "wheel approach" was intended to cure inconsistent rate determinations between the different PROs, and likewise, increase the musical work copyright's performance royalty rates.[109]

C. The Music Modernization Act in Effect: The Copyright Royalty Board's 2018–2022 Mechanical Royalty Rate Determinations

On January 27, 2018, soon after the MMA went into effect, Songwriters got their first taste of victory.[110] The Copyright Royalty Board announced its mechanical rate determinations for the period of January 1, 2018 through December 31, 2022.[111] In a 2–1 vote, the CRB held that all mechanical royalties paid to Songwriters would increase incrementally over the five year period of 2018–2022—ultimately, mechanical royalties will equal 15.1% of Interactives' annual revenue (Percent of Revenue).[112]

107. LaFrance, *supra* note 16, at 324.

108. *See* Hess, *supra* note 57, at 196–97 (noting that the MMA repealed 17 U.S.C. § 114(i) (1978), which assigned one judge per PRO).

109. Ed Christman, *Music Modernization Act Introduced In the House of Representatives, With Major Music Licensing Reform At Stake*, BILLBOARD (Dec. 21, 2017), https://www.billboard.com/articles/business/8078543/music-modernization-act-house-of-representatives-licensing-reform ("This wheel approach ensures that the judge will find the facts afresh for each rate case based on the record in that particular case, without impressions derived from prior cases.").

110. *See generally* 2018–2022 Rate Determinations, *supra* note 101 (explaining the new mechanical rate determinations).

111. *Id.*

112. Callie P. Borgmann, *The Future of Streaming Music: The Music Modernization Act and New Copyright Royalties Regulations*, 21 U. DENV. SPORTS & ENT. L.J. 19, 20 (2018); *Appeal Ruling on Publisher Royalty Rate Hike Looks Like It Favors Digital Services Contentions: Sources*, MIMICNEWS (Aug. 8, 2020), https://mimicnews.com/appeal-ruling-on-publisher-royalty-rate-hike-looks-like-it-favors-digital-services-contentions-sources.

1. A 2–1 Vote in Favor of a 44% Mechanical Royalty Rate Increase for Songwriters

Previously, under the DPRA's "reasonable rate" standard,[113] Interactives were only required to pay Songwriters approximately 10% of revenue in mechanical licenses.[114] This 44% rate increase is the largest in the history of the CRB.[115] In fact, should the total content cost (TCC)—i.e., the total cost of payments made by Interactives to record labels for their sound recording rights—exceed the new Percent of Revenue rates, the CRB set an alternative payment rate.[116] The following table reflects this "greater of" approach:

2018–2022 All-In Royalty Rates[117]					
Year	**2018**	**2019**	**2020**	**2021**	**2022**
Percent of Revenue	11.4	12.3	13.3	14.2	15.1
Percent of TCC	22.0	23.1	24.1	25.2	26.2

Thus, should an Interactive's Percent of Revenue exceed its TCC in 2022, it must pay a musical work's copyright owner approximately fifteen cents for every dollar earned.[118]

To arrive at the newly determined rates, the CRB applied the MMA's new "willing buyer/willing seller" factors to "balance the interests of copyright owners and users."[119] If the evidence (presented by Songwriters and Interactives) had demonstrated that the current rates addressed these policy considerations, the judges would have left the rates unadjusted.[120] However,

113. *See supra* note 80 and accompanying text (defining the "reasonable rate" standard).
114. *See* Borgmann, *supra* note 112, at 19–20.
115. Robley, *supra* note 104.
116. 2018–2022 Rate Determinations, *supra* note 101, at 1936.
117. *Id.* at 1918.
118. *See id.* at 1955.
119. *Id.*; *see also* text accompanying *supra* note 101.
120. *See* 2018–2022 Rate Determinations, *supra* note 101, at 1955. *See generally* Statements of

because the judges found they did not, they "adjust[e]d the reasonable, market-based rate appropriately."[121]

2. Spotify Appeals

Soon after the CRB announced its Mechanical Royalty Rate Determinations, Spotify announced its intent to appeal:

> Music services, artists, songwriters and all other rightsholders share the same revenue stream, and it's natural for everyone to want a bigger piece of that pie. But that cannot come at the expense of continuing to grow the industry via streaming. The CRB judges set the new publishing rates by assuming that record labels would react by reducing their licensing rates, but their assumption is incorrect.[122]

Evidently, Spotify is taking a pro-competitive, pro-business position.[123] Ironically, so are the Songwriters.[124]

IV. SONGWRITERS V. SPOTIFY: WHAT'S THE PROBLEM, AND HOW DO WE SOLVE IT?

During the CRB's 2018 mechanical royalty rate proceedings, Spotify testified that it cannot afford to pay Songwriters a higher royalty rate,[125] whereas Songwriters testified that they cannot afford to carry on songwriting

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Copyright Owners, *supra* note 3; Introductory Memorandum to the Written Direct Statement of Spotify USA Inc., No. 16-CRB-0003-PR at 1 (2018–2022) [hereinafter Statement of Spotify], https://www.crb.gov/rate/16-CRB-0003-PR/statements/spotify/introductory-memorandum.pdf.

121. *See* 2018–2022 Rate Determinations, *supra* note 101, at 1955.

122. SPOTIFY ARTISTS NEWS, *supra* note 5.

123. *See id. See generally* Statement of Spotify, *supra* note 120 (arguing that Spotify's reasonable business concerns and essential business practices weigh in favor of *not increasing* the mechanical royalty rates).

124. *See* Harley Brown, *Spotify's Secret Genius Songwriters Pen Letter to Daniel Ek Over CRB Rate Appeal: 'You Have Used Us'*, BILLBOARD (Apr. 9, 2019), https://www.billboard.com/articles/business/8506466/spotify-secret-genius-songwriters-letter-daniel-crb-rate-appeal. In a letter to Spotify, the industry's leading songwriters (e.g., Ali Tamposi and Bryan Lee, who wrote Camilla Cabello's "Havana," and Evan Bogart, who wrote Rihanna's "SOS") accuse Spotify of precluding them from having stable careers. *Id. See generally* Statements of Copyright Owners, *supra* note 3 (arguing that Songwriters' reasonable financial concerns and the fact that their songs are essential to Interactives' business models weigh in favor of *increasing* the mechanical royalty rates).

125. *See generally* Statement of Spotify, *supra* note 120; *infra* Part IV.A.

at the current rate.[126]

A. *Spotify's Problem: A Costly Business Model*

To determine the appropriate mechanical royalty rate, Spotify proposed to the CRB that it consider: (1) the essence of its business—"grow[ing] its listener base, [to] thereby increase[] the exposure and dissemination of [songs] to the public and decreas[e] piracy"—and (2) its costly operating expenses.[127] Particularly, Spotify argued and presented expert testimony demonstrating that an increase in the mechanical rate would inhibit its ability to make the "substantial and necessary investments in technology, personnel, sales, and marketing" to allow it to "continue providing the benefits and revenues it brings to [S]ongwriters and the music industry."[128]

At the heart of Spotify's argument is the assertion that Spotify's margins (and growth) are at the mercy of music copyright owners.[129] Spotify's fixed costs, such as software development and music licensing, are already costly.[130] Furthermore, unlike other streaming platforms, Spotify has no complementary businesses with which to deepen its pockets and offset its losses.[131] Thus, Spotify argued that maintaining or decreasing the current royalty rates is necessary for ensuring "a fair income to Spotify," "more money for copyright owners," and the "sustainab[ility]" of the music market.[132]

126. *See generally* Statements of Copyright Owners, *supra* note 3.
127. *See generally* Statement of Spotify, *supra* note 120, at 2.
128. *Id.* at 6.
129. *Id.* at 4 (demonstrating copyright owners' control of rates).
130. *Id.* at 6.
131. *See* Michelle Castillo, *As Spotify Prepares to Go Public, There's No Obvious Solution to Its Shaky Business Model*, CNBC (Feb. 28, 2018, 5:32 PM), https://www.cnbc.com/2018/02/28/spotify-ipo-business-model-flaws.html. Amazon Music and Apple Music, unlike Spotify, are complementary businesses to much more profitable businesses, which offset their expenses and permit them to operate at losses if necessary. *Id.*
132. Statement of Spotify, *supra* note 120, at 6–8.

1. The Cost of Music Licensing

According to its 2018 F-1 SEC filing,[133] Spotify reported annual revenue of $4.09 billion.[134] In fact, Spotify has only ever reported operating at a profit *twice* since its launch in 2008[135]—and it's not just Spotify that's operating at a loss.[136] Interactive streaming services "remain famously unprofitable," even those belonging to the world's leading companies, like Apple and Amazon.[137] However, unlike these larger companies, Spotify is not using its streaming service as a loss leader for generating sales of expensive complementary hardware to its consumers.[138] Thus, unlike these competitors wielding their complementary businesses to keep themselves afloat, Spotify will not be able to operate forever at a loss.[139]

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133. *See* Adam Hayes, *SEC Form F-1*, INVESTOPEDIA, https://www.investopedia.com/terms/s/sec-form-f-1.asp (explaining that a "Form F-1, which is also known as a Registration Statement, is a requirement under the Securities Exchange Act of 1933) (last updated Jun. 9, 2020). The Securities Exchange "[A]ct—often referred to as the 'truth in securities' law—requires that these forms, providing essential facts, are filed to disclose important information upon registration of a company's securities." *Id*; *see also* Securities & Exchange Act, 15 U.S.C. § 80(B) (1934).

134. Spotify Tech. S.A., Registration Statement (Form F-1) (Feb. 28, 2018) [hereinafter Registration Statement], https://www.sec.gov/Archives/edgar/data/1639920/000119312518063434/d494294df1.htm#rom494294_7; *see also* Statement of Spotify, *supra* note 120, at 8 (stating that Spotify's "losses are largely driven by high royalty costs that consume more than 70 cents of every dollar that Spotify earns"). In 2018, the stats were no different—74% of Spotify's annual revenue was paid out to copyright owners. Dmitry Pastukhov, *How Music Streaming Works and the Popular Music Streaming Trends of Today*, SOUNDCHARTS (June 13, 2019), https://soundcharts.com/blog/how-music-streaming-works-trends.

135. *See* Tim Ingham, *Spotify is Profitable. How Did That Happen?*, ROLLING STONE (Nov. 12, 2019, 12:31 PM), https://www.rollingstone.com/music/music-features/spotify-profitable-how-happen-910456/. In quarter three of 2019, Spotify reported an operating profit of $60.4 million, but only a year-to-date operating profit of $4.5 million. *Id.* In quarter four of 2018, Spotify reported operating at a $107 million profit, but a year-to-date operating profit of $1 million. *See Spotify Shareholder Letter for Q4 2018*, SPOTIFY (Feb. 6, 2019), http://q4live.s22.clientfiles.s3-website-us-east-1.amazonaws.com/540910603/files/doc_financials/quarterly/2018/q4/Shareholder-Letter-Q4-2018.pdf.; *Company Info*, SPOTIFY (Feb. 6, 2019), https://newsroom.spotify.com/company-info/ (last visited Jan. 14, 2021) (explaining that Spotify was launched in 2008).

136. *See infra* notes 136–137 and accompanying text.

137. Murray Stassen, *Spotify's Market Cap Value Has Fallen By $15BN In 14 Months. Is Declining ARPU Freaking Investors As Much As Record Companies?*, MUSIC BUS. WORLDWIDE (Oct. 4, 2019), https://www.musicbusinessworldwide.com/spotifys-market-cap-value-has-fallen-by-15bn-in-14-months-is-declining-arpu-freaking-investors-as-much-as-record-companies/.

138. *See* Castillo, *supra* note 131 (stating that Spotify's main competitors, Apple Music and Amazon Music, "can afford to operate music services forever without making a dime").

139. *See supra* notes 137–138 and accompanying text.

Interactive streaming services share one major expense: copyright.[140] "Music rights are expensive, and since there are only a few major record labels, [Interactives have] limited negotiating power."[141] If an Interactive fails to "cut a deal" with one of these record labels, it stands to lose up to a third of its music libraries and, inevitably, its subscribers.[142] In fact, under the "Risk Factors" of its IPO filing, Spotify acknowledged this industry vulnerability:

> [T]here is no guarantee that the licenses available to us now will continue to be available in the future at rates and on terms that are favorable or commercially reasonable or at all. The terms of these licenses, including the royalty rates that we are required to pay pursuant to them, may change as a result of changes in our bargaining power, changes in the industry, changes in the law, or for other reasons.[143]

To include a song on its platform, an Interactive must license three parts of that song: (1) the musical work copyright's mechanical right, (2) the musical work copyright's performance right, and (3) the sound recording copyright's digital performance right.[144] What's costly to Interactives, however, is not the need to license all three rights; rather, it's the differences in how these rights' royalty rates are regulated.[145] While the musical work copyright's mechanical and performance rights are regulated by their respective regulatory bodies (the CRB and the rate courts), the sound recording copyright's digital performance right is freely negotiated between the record labels and Interactives.[146] As a result of this dynamic, sound recording copyright owners generally bargain for and receive *significantly*

140. *See* Castillo, *supra* note 131.

141. *Id.* The majority of music streamed on Interactives worldwide is licensed from three to four major record labels—Universal, Sony, and Warner, and the indie music agency, Merlin. *See* Andrew Nusca, *Spotify Saved the Music Industry. Now What?*, FORTUNE (Oct. 21, 2019, 1:30 AM), https://fortune.com/longform/spotify-music-industry-profits-apple-amazon/.

142. *See* Castillo, *supra* note 131.

143. Registration Statement, *supra* note 134.

144. *See generally supra* Parts III.A–B (discussing mechanical and performance licensing requirements for Interactive streaming).

145. *See* Nusca, *supra* note 141. *See generally supra* Parts III.A–B (discussing the different regulations for Interactive streaming and the different royalty rates that apply).

146. *See* Nusca, *supra* note 141. *See generally supra* Parts III.A–B.

higher royalties than do musical work copyright owners.[147]

The disparity in payments made by Interactives to the separate copyrights is exacerbated by the fact that the majority of music streamed worldwide is licensed from, and monopolized by, four major record labels.[148] Spotify, for example, reports that 87% of its streams are of songs whose sound recording rights are owned by these major labels.[149] Additionally, of the annual revenue Spotify reportedly pays out to copyright owners, 50% is paid to sound recording copyright owners[150]—which means that 43.5% of Spotify's music licensing expenses are collectively paid to Universal, Sony, Warner, and Merlin.[151]

Clearly, these major record labels have unregulated monopoly power[152] over the price of popular streamed music and, thus, can prevent Interactives from ever being profitable.[153] Considering the growing popularity of Interactives, and the systematic dependency between Interactives and these major record labels, it is unlikely that the cost of sound recording licensing will decrease; rather, it will likely continue to scale as Interactives do.[154] Thus, Spotify's concerns over

147. *See* LaFrance, *supra* note 16, at 315, 317–18.

148. *See* Nusca, *supra* note 141; *see also* Peter Kafka & Rani Molla, *Spotify Is Still Burning an Enormous Amount of Cash, but the Bigger It Gets, the Better It Looks*, VOX (Feb. 28, 2018, 3:26 PM), https://www.vox.com/2018/2/28/17063892/spotify-ipo-margins-music-labels-streaming.

149. *See* Registration Statement, *supra* note 134, at 16–17. In its 2018 IPO Registration Statement, Spotify reported that 87% of its content came from Universal Music Group, Sony Music Entertainment, Warner, and Merlin. *Id.*

150. *See Mechanical Royalties Guide 2019*, ROYALTY EXCH. (Jan. 17, 2019), https://www.royaltyexchange.com/blog/mechanical-royalties#sthash.gJV6xrux.knQbcrT0.dpbs. The remaining 50% is split between the various kinds of musical work copyright licenses. *Id.*

151. *See id.*; *see also* Registration Statement, *supra* note 134, at 16–17.

152. *See Monopoly Power and Market Power in Antitrust Law*, U.S. DEP'T OF JUSTICE, (quoting *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 392 (1956)), https://www.justice.gov/atr/monopoly-power-and-market-power-antitrust-law (last visited Jan. 14, 2021) (defining "monopoly power" as "the power to control prices or exclude competition").

153. *See* Registration Statement, *supra* note 134, at 16. Spotify, in fact, warned prospective shareholders that the "high level of concentration" in the music industry posed a risk for its business, because "one or a small number of entities . . . [could] take actions that [would] adversely affect [their] business." *Id.*

154. *See* Marc Hogan, *The Record Industry Expects a Windfall. Where Will the Money Go?*, PITCHFORK (May 30, 2019), https://pitchfork.com/features/article/the-record-industry-expects-a-windfall-where-will-the-money-go/.

> In recent years, several financial institutions have predicted [that] record labels will soon be celebrating annual revenues that begin to approach, if not surpass, their late-1990s

increased mechanical royalties are warranted[155] because an increase in mechanical royalty rates will only result in higher music licensing expenses and greater annual losses for Spotify.[156] And because Spotify does not own a complementary business or sell complementary products to offset its losses, "there's no guarantee that [it] will hold [on]."[157]

2. The Cost of Research and Development

In addition to spending 70% of its annual revenue on music licensing, Spotify spends another 9–10% of its annual revenue on research and development (R&D).[158] Since its 2008 launch, Spotify has developed unprecedented and sophisticated uses for big data, artificial intelligence, and machine learning.[159] Some of these uses include: (1) artist access to live,

> peaks: What was an inflation-adjusted $25 billion-per-year business before the millennium could bring in more than $41 billion annually by 2030, according to Goldman Sachs.

Id. As a result, Universal, for example, is speculated to be worth approximately $50 billion. *Id.*

155. *See* SPOTIFY ARTISTS NEWS, *supra* note 5. In a statement following their notice of intent to appeal, Spotify accurately identified this concern:

> Music services, artists, songwriters and all other rightsholders share the same revenue stream, and it's natural for everyone to want a bigger piece of that pie. . . . The CRB judges set the new publishing rates by assuming that record labels would react by reducing their licensing rates, but their assumption is incorrect."

Id.

156. *Cf.* Nusca, *supra* note 141 (finding it doubtful Spotify will survive and noting that, since the CRB published its 2018–2022 rate determinations, Spotify's shares have fallen 30% in spite of a 15% gain for the Nasdaq). In fact, economist Judge Strickler emphasized the validity of Spotify's music licensing concerns in his dissent. *See* 2018–2022 Rate Determinations, *supra* note 101, at 2022–31. Particularly, Strickler discussed Spotify's profit margins, its limited bargaining power with the record labels, and the differences between Spotify and Big Tech Interactives, like Apple. *Id.* Strickler concluded that Interactives, like Spotify, will not be able to sustain the rate increase without sacrificing their business models or product quality (i.e., the very things they leverage to compete with Big Tech). *Id.*; *see infra* Part IV.A.2 (analyzing Spotify's costly product research and development).

157. Nusca, *supra* note 141; *see also* Statement of Spotify, *supra* note 120, at 8 (claiming that the CRB should *not* increase mechanical rates because (1) Spotify operates at a loss and (2) Spotify's losses are already "largely driven by high royalty costs").

158. *See* Pastukhov, *supra* note 134 (deducting the amount Spotify pays for music licensing); Spotify Tech. S.A., Annual Report (Form 20-F) 50 (Dec. 31, 2018), https://s22.q4cdn.com/540910603/files/doc_financials/annual/SPOT_20F_Master-Master_Exhibits_HTML.pdf (indicating that Spotify has spent from 9–10% in R&D since 2017).

159. *See* Barnard Marr, *The Amazing Ways Spotify Uses Big Data, AI and Machine Learning to Drive Business Success*, FORBES (Oct. 30, 2017, 12:28 AM), https://www.forbes.com/sites/bernardmarr/2017/10/30/the-amazing-ways-spotify-uses-big-data-ai-and-machine-learning-to-

comprehensive analytics (Spotify for Artists); (2) customized playlists that recommend undiscovered music to subscribers based on their activity (Discovery Weekly); and (3) subscriber access to sociological insights derived from Spotify's data (Spotify Insights).[160] More recently, Spotify launched a beta project directed at creating podcaster access to analytics (Spotify for Podcasters).[161] Spotify also opened an R&D headquarters in London, where it intends to employ over five hundred software developers.[162]

While Songwriters may argue that these developments are superfluous expenses that fail to justify Spotify's position, the reality is that Spotify needs to invest in these unique user experiences to compete with its deep-pocketed competitors.[163] Indeed, because of Spotify's unique product, it has managed to remain a world leader in its industry despite its inability to compete in price wars.[164] Additionally, all music industry participants—including Songwriters—should be wary of discouraging Interactives from reinvesting in their user experiences and, even more so, of discounting the value of their user experiences.[165] In fact, it was these efforts that succeeded in "saving" the

drive-business-success/#297b85fb4bd2; *see also* RPARK, *Spotify May Know You Better Than You Realize*, HARVARD BUS. SCH. DIGIT. INITIATIVE, https://digital.hbs.edu/platform-digit/submission/spotify-may-know-you-better-than-you-realize/ (updated Apr. 8, 2018).

160. *See generally* Statement of Spotify, *supra* note 120, at 6–7, 14.

161. *See* Ashley Carman, *Spotify's Pitch to Podcasters: Valuable Listener Data*, THE VERGE (Aug. 13, 2019, 9:30 AM), https://www.theverge.com/2019/8/13/20802018/spotify-for-podcasters-dashboard-live-beta-analytics.

162. *See* Daniel Sanchez, *Spotify Formally Opens Its R&D Center in London, Creating 300 New Jobs*, DIGIT. MUSIC NEWS (Apr. 17, 2019), https://www.digitalmusicnews.com/2019/04/17/spotify-rd-center-london/.

163. *See* Aisha Hassan, *Spotify Plants to Get Ahead of Amazon, Google, and Apple on Their Own Turf*, QUARTZ (Nov. 2, 2018), https://qz.com/1449609/spotify-plans-to-beat-amazon-google-apple-on-their-own-turf/. To compete with Amazon, Google, and Apple, Spotify invests in its "user experience at the expense of profits." *Id.*

164. *See, e.g.*, Tim Ingham, *Streaming Price War Breaks Out as Google Offers 4 Free Months of Play*, MUSIC BUS. WORLDWIDE (Nov. 25, 2016), https://www.musicbusinessworldwide.com/streaming-price-war-breaks-out-as-google-offers-4-free-months-of-play/ (describing a 2016 price war between Google, Amazon, Apple, and Spotify, in which Spotify proved the least capable of lowering prices).

165. *See* Andrew Flanagan, *'Songwriters Are Not Treated Fairly': Nile Rodgers on Streaming's Present and Future*, NPR (Apr. 12, 2019, 4:49 PM), https://www.npr.org/2019/04/12/712777873/nile-rodgers-streaming-payments-songwriters-letter-spotify. In an interview with NPR, the celebrated songwriter, artist, and current chairman of the Songwriters Hall of Fame, Nile Rodgers, said, "people do not pay $10 a month to be able to push buttons on their technology—they spend their money to listen to The Beatles, Dua Lipa, Led Zeppelin, Beyoncé." *Id.* On one hand, Rodgers is correct: music is central to the business of Interactives. *Id.* However, without the appeal of their

music industry from its devastating, multi-decade battle against music piracy.[166] By engaging music listeners who would otherwise pirate, Interactives "increased royalty payments to music publishers [and Songwriters], where such publishers were previously receiving zero royalties from illegal sources."[167]

B. Songwriters' Problem: Inadequate Compensation

On the other side of this "war" is the National Music Publishers Association (the NMPA), a non-profit organization composed of songwriters, publishers, and lawyers.[168] The NMPA has been the primary advocate for musical work copyright owners throughout the CRB's 2018–2022 mechanical rate determinations and subsequent appeal.[169] In response to Spotify's intent to appeal, the NMPA published a blog post "fact-checking" Spotify's claims and accusing Spotify of "falsehood," "decei[t]," and "attack[ing]

innovative, user-friendly platforms and "buttons," the music industry would likely still be fighting to survive the surge of music piracy it was experiencing prior to the popularity of Interactives. *See generally* Nusca, *supra* note 141 (stating Spotify was pitched as a potential solution to music piracy). And although Rodgers may "hope for a swift resolution that has no impact on [the] growth" of Interactives, his hope is but a pipedream. Flanagan, *supra*; s*ee also supra* note 131 and accompanying text (discussing Spotify's unlikelihood to change its business model). The only Interactives whose growth will not be stunted are those, unlike Spotify, that are bolstered by deep pockets and least incentivized to compete on product quality. *See* Stefan Etienne, *The Best Music Streaming Service*, THE VERGE (Oct. 5, 2018, 9:00 AM), https://www.theverge.com/this-is-my-next/2018/10/5/17927798/best-music-streaming-service-price-comparison-features (finding Spotify is the "best streaming music service for a variety of reasons" because it "has the best app experience," and finding Apple Music to be second best because of its library, despite its subpar user experience).

166. *See* Roxana Maddahi, *The Music Industry: From Piracy to Profits*, FORBES (July 10, 2018, 8:00 AM), https://www.forbes.com/sites/forbesfinancecouncil/2018/07/10/the-music-industry-from-piracy-to-profits/#3625fb8070f8 ("After being crushed by piracy for nearly two decades, streaming is allowing users to have the experience they want at a price they can afford. . . . [T]he past two years have been the first years of material growth since the [1999] peak with an increase in industry revenues of 16.5% in 2017."). In 2006 (the year Spotify launched), the music industry's annual revenue was only 80% of the annual revenue in 1999. *See* Nusca, *supra* note 141.

167. Statement of Spotify, *supra* note 120, at 11. In a memorandum presented before the CRB, Spotify's expert witnesses testified that Interactives have benefitted the music industry by decreasing piracy and increasing royalty payments to copyright owners. *Id.*

168. *See* Introductory Memorandum of National Music Publishers' Association and Nashville Songwriters Association International at 1, No. 16-CRB-0003-PR (2018–2022) [hereinafter Statement of Songwriters Vol. 1], https://www.crb.gov/rate/16-CRB-0003-PR/statements/copyright-owners/volume1.pdf.

169. *See id.* at 3.

songwriters."[170] It read:

> Ok—there is spin, and then there is black and white falsehood. Spotify alleges the CRB judges "assumed" record labels would react to the publisher rate increase by reducing their rates. Not only is that not true, the judges wrote the opposite in their opinion. For those who want to fact check, read footnote 75 on page 35 of the CRB's Final Determination.[171] . . . Simple solution—let songwriters and publishers negotiate the value of their copyright the same way that record labels do—but Spotify opposes that.[172]

During the CRB's initial proceedings, the NMPA made similar accusations.[173] They stated: "[T]he songwriters and publishers, because they are constrained by the compulsory license, have been subsidizing these tech giants' other business strategies."[174] The NMPA specifically accused Spotify

170. *See Spotify Blog Post Insults Songwriters by Attempting to Deceive Them—A Fact Check*, NMPA MEDIA [hereinafter *A Fact Check*], http://nmpa.org/spotify-blog-post-insults-songwriters-by-attempting-to-deceive-them-a-fact-check/ (last visited Jan. 14, 2021).

171. *See* 2018–2022 Rate Determinations, *supra* note 101, at 1934 n.75. Footnote 75 of the CRB's Rate Determinations *actually* states:

> Google notes, concerning its proposal, that the removal of a cap on TCC "does leave the services exposed to the labels' market power, and would warrant close watching if adopted." While true, Google fails to note that the services are already exposed to the labels' market power. Record companies could, if they so chose, put the Services out of business entirely. Uncapping the TCC rate prong does not change that. Nor can any decision by this tribunal. While the possibility of the record companies using their market power in a way that harms the Services is a real concern, the Judges cannot allow that concern to grow into a form of paralysis, where any change from the status quo is deemed too dangerous to contemplate. Any increase in mechanical royalty rates, whether or not they are computed with reference to record company royalties, has the potential of leading to a bad outcome for the Services. Even maintaining the status quo could lead to a bad outcome for the Services, as it surely would for the songwriters and publishers. Ultimately the Judges must go where the evidence leads them and, as with any economic exercise, trust in the rational self-interest of the market participants.

Id. (citation omitted).

172. *A Fact Check*, *supra* note 170. While the NMPA was correct in stating that the manner in which Interactives and record labels negotiate payment "has no relationship to the value of the songs," the NMPA failed to note the final sentence in footnote seventy-five, where the CRB places "trust in the rational self-interest of the market participants"—which can reasonably be interpreted to mean the CRB hopes or *assumes* "the record companies [will not use] their market power in a way that harms [Interactives]." *Id.*; 2018–2022 Rate Determinations, *supra* note 101, at 1934 n.75.

173. *See generally* Statement of Songwriters Vol. 1, *supra* note 168.

174. *Id.* at A-4.

of "mak[ing] its owners very wealthy" and "increasing [the value of] its $8.5 billion enterprise" at the cost of Songwriters and their publishers.[175]

However, while Songwriters are most definitely systemic victims and entitled to better pay, the same argument can be made for Spotify.[176] While increasing mechanical rates by 44% may console Songwriters in the short-term, the *but-for cause*[177]—the prejudicial treatment of sound recording rights—will subsist in the long run.[178] On a macro level, this heightened cost of entry is a legitimate concern: are we paving the way for "Big Tech" to assume unfettered control of yet another industry?[179] Or, if not for them, for "the major record labels—which already hold an equity stake in Spotify [and] could take over [Spotify] if it fails?"[180]

1. The Cost of Publishing

Interactives are becoming the primary source of mechanical income—a legitimate concern for Songwriters and their publishers.[181] As mentioned

175. *Id.* at A-3–4.

176. *See generally supra* Part IV.A.1 (discussing the cost of music licensing). Spotify, like the Songwriters, is forced to operate within a system marked by inequitably valued copyrights (of the same song) and evergreen competitors (who are assuming control of their industry and innumerable other ones). *See supra* Part IV.A.1.

177. *See Proximate Cause*, FREE DICTIONARY, https://legal-dictionary.thefreedictionary.com/But+for+causation (last visited Jan. 14, 2021) (defining a "but-for cause," i.e., proximate cause, as an "act from which an injury results as a natural, direct, uninterrupted consequence and without which the injury would not have occurred").

178. *See generally supra* Parts II.D–III.B (considering the sound recordings Act of 1995 and the Music Modernization Act).

179. *See* Farhad Manjoo, *Can Washington Stop Big Tech Companies? Don't Bet on It*, N.Y. TIMES (Oct. 25, 2017), https://www.nytimes.com/2017/10/25/technology/regulating-tech-companies.html ("We are now at another great turning point in the global economy. A handful of technology companies, the Frightful Five—Apple, Google, Microsoft, Facebook and Amazon, the largest American corporations by stock-market value—control the technological platforms that will dominate life for the foreseeable future."). It's impressive that Spotify has endured this long, given the tech landscape. *Cf. How 5 Tech Giants Have Become More Like Governments Than Companies*, NPR (Oct. 26, 2017, 4:20 PM), https://www.npr.org /2017/10/26/560136311/how-5-tech-giants-have-become-more-like-governments-than-companies ("[O]ne of the things that these five companies have done . . . masterfully is create these platforms that startups have to use to get to customers.").

180. ALAN B. KRUEGER, ROCKONOMICS 201 (2019). Krueger notes: "[T]hat would create an obvious conflict of interest, as they would have an incentive to promote their own music over that from independent labels" and their artists. *Id.*

181. *See* Amy X. Wang, *Album Sales Are Dying as Fast as Streaming Services Are Rising*, ROLLING STONE (Jan. 3, 2019, 5:11 PM), https://www.rollingstone.com/music/music-news/album-sales-dying-as-fast-as-streaming-services-rising-774563/. *But see 2018–2022 Rate Determinations*, *supra* note

above, the CRB sets the price of both physical and digital mechanical licenses.[182] Currently, the mechanical license rate for physical sales/digital downloads is priced at 9.1 cents, while that of interactive streaming is priced at a mere fraction of a cent.[183] Considering the rate at which physical and digital sales are falling (18–29% annually) and the rapid rate at which interactive streaming is growing (41–42% annually), listeners' preferences indicate that "music consumption itself is permanently changed."[184] Musical work copyright owners will make increasingly less money from mechanical licenses as purchasers convert into streamers.[185]

In a memorandum before the CRB, Songwriters foretold: "The result will be that music publishers will no longer be able to make the early-stage investments in songwriters that are necessary to develop the next generation of great songwriters to add to the American songbook."[186] Though hyperbolic, this statement at its root is sound.[187] Due to the purchaser-streamer conversion rate, in a vacuum, publishers will make less money annually—money that could otherwise be used to pay Songwriters' advances

101, at 1922 (stating that in 2012, 36% of publishers' royalties came from mechanical royalties; in 2014, 23% of publishers' royalties came from mechanical royalties; but publishing revenue *actually increased* overall from 2014 to 2015).

182. *See supra* Parts II.D.2, III.A.

183. *See Mechanical Royalties Guide 2019*, *supra* note 150 ("The mechanical streaming rate is about $0.06 per 100 streams, or $0.0006 per stream.").

184. *See* Wang, *supra* note 181 (internal quotation marks omitted).

185. *Cf. id.* ("The dwindling popularity of music purchases—which is driven by listener preference as well as the music industry's shift of focus away from sales, giving it a knock-on effect for retailers and buyers—can also be seen in the shares of total album consumption in 2018.").

186. *See* Statement of Songwriters Vol. 1, *supra* note 168, at A-4.

187. *See The Songwriter and Music Publisher Relationship: Part I*, ROYALTY EXCH. (Dec. 26, 2017), https://www.royaltyexchange.com/blog/the-songwriter-and-music-publisher-relationship-pt-1#sthash.Ts1SM3Sj.dpbs. Under the typical publishing deal between a beginner songwriter and a music publisher, a songwriter will sign over 50% of its future copyright ownership for a term or series of terms. *Id.* In return, publishers will typically pay them an advance of, for example, $50,000.00. *Id.* In fact, "the costs and investments that publishers make in finding and developing songwriters" nearly match the costs and investments record labels make "in finding and developing recording artists." *See* Witness Statement of David M. Israelite at 29, No. 16-CRB-0003-PR (2018–2022), https://www.crb.gov/rate/16-CRB-0003-PR/statements/copyright-owners/volume1.pdf. For example,

> in the UK, record labels spent £178 million on A&R [(i.e., artist development)] in 2014, while music publishers spent £162 million. Yet, as it has also been publicly reported, [Interactives] generally pay the record labels between 55% and 60% of their revenues, and songwriters and publishers a fraction of that amount.

Id. (footnote omitted).

and operating expenses.[188] Therefore, in order to sustain this evolution in listener consumption, *something* must change: if not the mechanical rate, perhaps music copyright law.[189]

2. The Cost of Living

Most Songwriters are struggling financially, particularly those Songwriters whose only source of income is music.[190] In support of increasing the mechanical rate, Songwriters described financial hardships faced by a majority of songwriters in today's streaming economy:

> The middle class of songwriters now struggles to earn a decent living. [Once] [s]uccessful songwriters are leaving the business because they cannot support their families on the dramatically reduced mechanical income they earn from interactive streaming. The few superstar songwriters (largely recording artist-songwriters)[,] who are still earning substantial mechanical income from interactive streaming based on hundreds of millions of streams[,] also are earning significantly less than they were earning from album sales and downloads.[191]

"Songwriters are creators."[192] Without their lyrics and compositions, we would have no music.[193] Because society values music, Congress sought to financially incentivize its creation through copyright protection.[194] Logically,

188. *See supra* text accompanying note 181; Wang, *supra* note 181.

189. *See infra* Part V (proposing restructuring music copyright law to solve Songwriters' compensation problems); *accord* Paula Mejía, *The Success of Streaming Has Been Great for Some, But Is There a Better Way?*, NPR (July 22, 2019, 6:00 AM), https://www.npr.org/2019/07/22/743775196/the-success-of-streaming-has-been-great-for-some-but-is-there-a-better-way ("While streaming is the music industry's most visible economic driver these days, its problems are historical in proportion. 'Capitalism has a role in this problem . . . . But I think also how our legal system is built is that instead of usually rewriting something, they'll just build on it. And we've been putting Band-Aids on this for I don't know, 100 years?'").

190. *See, e.g.*, Witness Statement of Peter S. Brodsky at 40, No. 16-CRB-0003-PR (2018–2022) [hereinafter Statement of Peter Brodsky], https://www.crb.gov/rate/16-CRB-0003-PR/statements/copyright-owners/volume2.pdf.

191. *See* Statement of Songwriters Vol. 1, *supra* note 168, at A-4.

192. KRUEGER, *supra* note 180, at 208.

193. *Id.*

194. *Id.* at 207.

it follows then that Songwriters would create less music if their financial incentives were inadequate—but modern studies indicate otherwise.[195] During the 2000's Napster era, economist Joel Waldfogel studied the weakening effect of music piracy on copyright protection.[196] Waldfogel discovered that, although musicians were unable to enforce copyright protection, "the total volume of music produced actually increased, rather than decreased."[197] Modern musicians—for reasons economists Waldfogel and Allen Krueger can only hypothesize—seem to create high-quality music absent the assurance of copyright protection.[198] So clearly, what incentivizes songwriters to create music is more complicated than the promise of copyright protection and financial gain.[199]

Nonetheless, the fact is that Congress exercised its Article I powers and created music copyright protection to compensate its creators and, ultimately, promote music.[200] Yet modern copyright law does not compensate songwriters (i.e., the creators of songs) as well as it compensates the record labels exploiting their creations.[201] Thus, although it's likely Songwriters will continue producing music in spite of copyright reform, it's also true that music copyright protection disproportionately compensates, and arguably promotes,

195. *Id.* at 209. Basic to economics is the belief that property rights are essential for societal function. *Id.* "Why would you invest in something if you were unsure of whether you could share in the returns?" *Id.*

196. *Id.* at 211.

197. *Id.*

198. *Id.* at 211–12. Waldfogel and Krueger proposed that music production increased, despite lacking copyright protection, because of coinciding, low-cost developments in technology. *Id.* There is, however, a study of nineteenth century Italian music copyright protection that shows an empirical correlation between copyright protection and musical output. *Id.* at 212–13. Economists Michela Giorcelli and Petra Moser concluded that operatic composers in states that adopted copyright protection, like Lombardy and Venice, increased operatic production by 150%, compared to those states where compositions were unprotected. *Id.*

199. *Id.* at 213. Although it may be true that songwriters, *in some cases*, are being forced to "leav[e] the [music] business because they cannot support their families," Statements of Copyright Owners, *supra* note 3, at A-4, this fact does not support the contention that increasing the mechanical rate will result in maximum music production and availability at the macrolevel. *See* Statement of Peter Brodsky, *supra* note 190, at 40.

200. *See generally supra* Part II.A. As explained *supra*, Congress created copyright law to promote "useful arts," a power rooted in Article I of the Constitution. *See* U.S. CONST. art. I, § 8, cl. 8.

201. *See generally supra* Parts II.D–III.A. In regard to interactive digital streaming, the composition copyright (the kind of music copyright owned by songwriters) is limited by statutory regulation, while the sound recording copyright is unlimited and, thus, can technically be priced at whatever its owner deems appropriate. *See generally supra* Parts II.D–III.A.

the exploitation of songs, not their creation.[202] In 2019, this distinction played a central role in the CRB's 2018–2022 mechanical rate determinations.[203]

C. The Copyright Royalty Board Analyzes Spotify's and Songwriters' Problems and Determines a 44% Mechanical Rate Increase for 2018–2022

To determine the 2018–2022 mechanical rates, the CRB applied the MMA's new "willing buyer/willing seller" factors: (1) maximizing the availability of creative works (maximizing availability); (2) affording copyright user fair income and copyright owner a fair return (fair income); (3) reflecting on the relative roles of copyright owners and copyright users with respect to creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression (relative roles); and (4) minimizing disruptive improvements on the structure of the industries involved and on generally prevailing industry practices (minimizing disruption).[204] After considering the parties' arguments and expert testimony, the majority of the CRB[205] determined that the willing buyer/willing seller factors weighed strongly in favor of a 44% mechanical rate increase, contrary to the dissenting opinion of their economics expert, Judge Strickler.[206]

Despite strong evidence to the contrary,[207] the majority concluded that the first factor, maximizing availability, weighed in favor of increasing the

202. *See supra* note 187 and accompanying text. *Compare* Statement of Songwriters Vol. 1, *supra* note 168, at A-4 (noting that some songwriters are leaving the business due to insufficient compensation), *with* 2018–2022 Rate Determinations, *supra* note 101, at 1935 (noting the need to balance the "protection of the songwriter's livelihood" *in light of their contributions* with the "[]fair impact on the income of the copyright users").

203. *See infra* Part IV.C.1. *See generally* 2018–2022 Rate Determinations, *supra* note 101.

204. *See* 2018–2022 Rate Determinations, *supra* note 101, at 1955; *see also* Music Modernization Act, *supra* note 93, at § 801(b)(1).

205. *See* 2018–2022 Rate Determinations, *supra* note 101, at 1958. In 2018, the majority CRB was comprised of Judge Barnett (the chief judge) and Judge Feder (the copyright law expert). *Id.* at 1963; *see also About Us*, *supra* note 79 and accompanying text (delineating the roles within the CRB). Judge Strickler (the economics expert) held the sole dissenting opinion. *See* 2018–2022 Rate Determinations, *supra* note 101, at 1963; *see also About Us*, *supra* note 79 and accompanying text (noting the differing roles within the CRB and the Judges' individual backgrounds).

206. *See infra* Parts IV.C.1–4.

207. *See supra* note 198 and accompanying text (discussing modern empirical studies that suggest that Songwriters will likely continue producing music in spite of copyright reform).

mechanical rate.[208] In its analysis, the majority noted that the Songwriters' claim that higher mechanical rates correlated with increased music production was "largely anecdotal and unsupported."[209] The majority also noted that higher mechanical rates would (1) mean greater licensing expenses for *all* Interactives, and (2) force *some* Interactives, like Spotify, to limit or eliminate their "affordable" and "free" subscription options to offset the additional licensing costs.[210] Thus, the majority acknowledged that, by reducing consumers' "affordable access" to Interactives, a mechanical rate increase would minimize, *not maximize*, the availability of music to many consumers.[211] Still, despite all their findings, the majority somehow reached

208. *See* 2018–2022 Rate Determinations, *supra* note 101, at 1958.

209. *See* 2018–2022 Rate Determinations, *supra* note 101, at 1958. In spite of the evidence, the majority judges puzzlingly concluded:

> Although largely anecdotal and unsupported by sophisticated surveys, studies, or economic theories[,] . . . [the Songwriters' cost of publishing and cost of living] 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 ["maximizing availability" factor's] objective in this respect as well.

Id.

210. *See id.* Spotify, for example, offers its consumers five subscription tiers: (1) Spotify Free, which is significantly less interactive than its Premium options and is ad-supported; (2) Premium Individual for $9.99 a month; (3) Premium Duo for $12.99 a month; (4) Premium Family for $14.99 a month, which includes six separate family member accounts; and (5) Premium Student for $4.99 a month. *See Why Go Premium?*, SPOTIFY, https://www.spotify.com/us/premium (last visited Jan. 14, 2021). The practice of offering a service at varying prices depending on what each customer can pay is called "price discrimination." *See* Alexandra Twin, *Price Discrimination*, INVESTOPEDIA (last updated Jul. 4, 2020), https://www.investopedia.com/terms/p/price_discrimination.asp (defining "price discrimination" as "a selling strategy that charges customers different prices for the same product or service based on what the seller thinks they can get the customer to agree to," i.e., "the seller charges each customer the maximum price he or she will pay"). But price discriminating practices, such as Spotify's tiered-subscription model, are only possible when businesses have "financial flexibility." *See* Soku Byoun, *Financial Flexibility, Firm Size and Capital Structure*, HANKAMER SCH. BUS., BAYLOR U. (Oct. 2007), https://www.baylor.edu/business/finance/doc.php/230999.pdf (defining "financial flexibility" as the "ability to leverage capital"). Because increasing the mechanical royalty rate means greater licensing expenses for Interactives, increasing the mechanical royalty rate also means limiting Interactives' capital gains and thereby financial flexibility. *Cf. id.* Therefore, increasing the mechanical royalty rate would limit Interactives' abilities to offer affordable, price-discriminating subscription options. *Cf.* 2018–2022 Rate Determinations, *supra* note 101, at 1958 (stating that "maximizing availability," meaning "expand[ing] the overall consumption of music," requires a "rate structure that enhances the ability of the [Interactives] to engage in downstream price discrimination").

211. *See* 2018–2022 Rate Determinations, *supra* note 101, at 1958 (concluding that "a price discriminatory model," such as Spotify's model, which offers multi-tiered subscription options, would in fact "maximize[] [music] availability"). In February 2020, Spotify reported that nearly 54% of its

the conclusion that increasing the mechanical rate was consistent with the "maximizing availability" factor.[212]

The majority CRB combined its analysis of the second and third factors, "fair income" and "relative roles," using an approach modeled after a game theory called the Shapley value.[213] The Shapley value assumes all parties to "the bargain"—in this case, Interactives, Songwriters, and record labels—are cooperating.[214] Based on that assumption, the Shapley value assigns each party to the bargain a "fair" value based on the parties' contributions to the bargain process, where a fair value is defined as the plausible outcome of a "competitive bargaining process."[215] In practice, however, the majority CRB applied a quasi-Shapley value approach that established a mechanical rate unrepresentative of a "fair" bargain between Songwriters and Interactives, including Spotify.[216]

Dissenting, Judge Strickler—the economics expert on the CRB panel—correctly recognized two major ways in which the majority's combined

271 million active users accessed its streaming services through Spotify Free. *See Spotify Reports Fourth Quarter and Full-Year 2019 Earnings*, SPOTIFY: FOR THE RECORD (Feb. 5, 2020), https://newsroom.spotify.com/2020-02-05/spotify-reports-fourth-quarter-and-full-year-2019-earnings/. Moreover, Spotify reported that its Spotify Premium subscribers grew by 29% in 2019, largely because Spotify had the financial flexibility to offer its new Premium subscribers varied payment options and three months free. *See id.*

212. *See* 2018–2022 Rate Determinations, *supra* note 101, at 1958. In his dissent, economist Judge Strickler cited the majority analysis and criticized the majority's contradictory finding that the "maximizing availability" factor weighed in favor of increasing the mechanical rate. *Id.* at 2017–18.

213. *See id.* at 1958–59. This approach is a modification of what economists call the "Shapley value approach," which is used "primarily in situations when the contributions of each actor are unequal, but each player works in cooperation with each other to obtain" a profit. *See* Will Kenton, *Shapley Value*, INVESTOPEDIA (Nov. 13, 2019), https://www.investopedia.com/terms/s/shapley-value.asp. "The bargain," in this case, is the collective term for the separate licensing agreements between Interactives and sound recording copyright owners, and between Interactives and Songwriters. *See* 2018–2022 Rate Determinations, *supra* note 101, at 2020.

214. *Contra* 2018–2022 Rate Determinations, *supra* note 101, at 2022–24. Notably, the dissent found that the majority's approach was faulty because it assumed that record labels would cooperate and accommodate the imposition of higher mechanical rates on Interactives by negotiating for lower sound recording fees. *Id.*

215. *See id.* at 1959 n.156 (defining "fairness" as the "outcome of [the] competitive market"). In other words, the Shapley value approach is intended to simulate a "fair" bargain, or a bargain where all parties involved have equal, competitive bargaining power. *Id.* Thus, the Shapley approach assumes each party to the bargain "add[s] value by *agreeing* to [partake in] the bargain, and then [it distributes] to each party their average contribution to the *cooperative* bargain." *Id.* at 1946.

216. *See supra* Part IV.C.

approach[217] failed to produce a Shapley-value-derived rate: (1) the approach approximated the ratio of profits all copyright owners should make (i.e., Songwriters to record labels) by accounting *only* for the costs incurred by copyright owners and completely discounting the costs incurred by Interactives;[218] and (2) the approach failed to nullify the massive bargaining power possessed by the major record labels.[219]

First, by failing to account for the Interactives' essential operating costs, such as music licensing and R&D,[220] the majority failed to determine a "fair" rate that accurately reflects *all* the parties' "roles."[221] If a "fair" rate is the rate that both Interactives and Songwriters would have bargained for in a "competitive bargain," then the majority should have accounted for the Interactives' costs, just as it accounted for the copyright owners' costs, because the goal of a "competitive bargain" is to offset *all* the bargainers' costs and "maximize [their] gains."[222] Thus, by failing to account for the costs accrued by Interactives downstream,[223] the majority's approach failed to

217. *See* 2018–2022 Rate Determinations, *supra* note 101, at 2026 (dissenting and concluding that the "model fails to incorporate sufficiently the reasonableness requirements and the 'fairness' and 'relative roles' elements of section 801(b)(1)").

218. *Id.* The dissent found the majority provided no "convincing evidence to explain why the Judges should rely on a model that omits from consideration the very licensees who would be paying the royalties pursuant to [the] rate" imposed. *Id.* As a result, the applied ratio requires [I]nteractives "to pay total royalties (sound recording and musical works) greater than their total revenue, leading to losses despite their undisputed contribution to the total surplus available for distribution." *Id.*

219. *Id.* To derive the ratio for TCC (the ratio of *total content cost* owed by an Interactive to composition and sound recording copyright holders), the model utilized profits acquired through the unregulated, superior bargaining power of record labels. *Id.* Thus, the approach seemingly resulted in a fair ratio to Songwriters, assuming either (1) the record labels would negotiate lower sound recording performance rates to offset the increased mechanical rates and mitigate the Interactives' increased costs, or (2) the Interactives would absorb the financial burden. *Id.* at 2029 (dissenting and recognizing the rate increase's "disruptive impact" on the Interactives).

220. *See supra* Parts IV.A.1–2 (detailing Spotify's costly business model).

221. *See* 2018–2022 Rate Determinations, *supra* note 101, at 1959 n.156.

222. *See* Gary Goodpaster, *Primer on Competitive Bargaining*, J. DISP. RESOL. 325, 326 (1996); *see also* 2018–2022 Rate Determinations, *supra* note 101, at 1959 n.156. *See generally supra* Parts IV.A.1–2 (explaining Spotify's principal costs: music licensing and R&D).

223. James Chen, *Downstream*, INVESTOPEDIA (Nov. 5, 2019), https://www.investopedia.com/terms/d/downstream.asp (defining "downstream" as the "processes involved in converting" an industrial material "into the finished product" (i.e., converting oil into gas)). In this context, the losses accrued by Interactives downstream refers to the losses accrued by Interactives in the process of acquiring and converting sound recordings into digitally stream-able formats. *Cf.* 2018–2022 Rate Determinations, *supra* note 101, at 1925 (describing the Interactives' business model as the "downstream business model").

produce a "fairly" bargained for distribution of mechanical royalties to Songwriters upstream.[224]

Second, because the majority failed to account for the record labels' bargaining power in its calculations, the majority failed to derive an accurate Shapley value.[225] The Shapley value approach "assumes" the parties are bargaining in a "perfectly competitive market[]"; that is, a market where *all* parties to the bargain (i.e., Songwriters, Interactives, and record labels) are willingly and cooperatively negotiating a price that "fairly" balances the "marginal benefit" of music (or, its "demand" value) with the marginal cost of producing music (or, its "supply" cost).[226] Here, the parties are not bargaining in a perfectly competitive market; rather, they are bargaining in an "imperfect market,"[227] where the record labels exploit their monopoly power and coerce Interactives into paying sound recording rates that far outweigh their supply costs.[228] Thus, because the majority's analysis did not account or adjust for the record labels' collective monopoly power, the majority's final rate determination was not an accurate Shapley value and "was inconsistent with affording [Interactives] a fair income."[229]

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224. James Chen, *Upstream*, INVESTOPEDIA (June 25, 2019), https://www.investopedia.com/terms/u/upstream.asp (defining "upstream" as the "exploration and production" operations in an industry). In this context, the "distribution of profits to Songwriters upstream" refers to the rate of interactive streaming revenue paid by Interactives to musical work copyright owners. *See* 2018–2022 Rate Determinations, *supra* note 101, at 1925 (referring to the copyright owners' rate structure as the "upstream rate structure").

225. *See Shapley Value*, *supra* note 213 and accompanying text.

226. *See* 2018–2022 Rate Determinations, *supra* note 101, at 1966, 1977, 2020 n.335; *see also Monopoly Power and Market Power in Antitrust Law*, *supra* note 152.

227. *See* 2018–2022 Rate Determinations, *supra* note 101, at 1977 n.225.

228. *Id.*

229. *Cf. id.* at 2028 n.356. Dissenting Judge Strickler reached a similar conclusion:

> As a matter of economic theory, *given the present interactive streaming market structure*, the record companies already have the economic power to put [Interactives] out of business, because the market in which record companies and interactive streaming services negotiate is unregulated. So, I recognize that—given the present interactive streaming market structure—the record companies apparently find it in their self-interest to maintain the presence of interactive licensees. . . . [And], if mechanical royalty rates [are] to increase to a level that significantly reduce[s] the profits of the record companies from streaming, there is no evidence in the record . . . that indicates [that] the record companies [will] . . . docilely accept such a revenue loss. . . . [***Such an outcome is] inconsistent with affording [Interactives] a fair income.***

Id. (emphasis added).

Unlike Judge Strickler, the majority was untroubled by the fact that Interactives, "like Pandora, Spotify, and Rhapsody" may not survive the "existing competitive conditions." *Id.* at 1960. In fact, The fourth factor, "minimizing disruptions,"[230] was not substantively discussed by the majority because the majority felt that, in any case, "[t]he [Interactives'] inability to become profitable w[ould] persist" throughout the streaming era.[231] Thus, the majority did not discuss mechanical rates that would minimize music industry disruption; rather, the majority *merely* recommended that Interactives "adequately adapt to the changed circumstance produced by the rate change."[232] The majority further concluded that the Interactives' unprofitability is not owed to the high cost of licensing, but to their "lack of scale"; thus, the majority suggested that the Interactives divide their market share among fewer competitors.[233] In other words, the majority suggested that the Interactives' unprofitability be mitigated by further concentrating the music industry, rather than by amending music copyright law.[234] The majority is at best naively optimistic.[235] If interactive streaming becomes highly concentrated in the hands of Big Tech (i.e., Apple, Google, and Amazon) and the few major record labels (i.e., Sony, Universal, and Warner Music), Interactives will have the monopoly power to extract unfavorable rights deals from music copyright owners who hold significantly less market power, including the Songwriters.[236] Accordingly, in its analysis of the fourth factor, the dissent concluded that any mechanical rate increase would be disruptive to Interactives, especially those with capacity costs,[237]

the majority acknowledged in its analysis that the final rate determinations left the Interactives "exposed to the labels' market power" and in a position of "real concern." *Id.* at 1934 n.75.

230. *See* 2018–2022 Rate Determinations, *supra* note 101, at 1959 (defining a disruptive rate as one that "directly produces an adverse impact that is substantial, immediate and irreversible in the short-run because there is insufficient time for either [party] to adequately adapt to the changed circumstance produced by the rate change and, as a consequence, such adverse impacts threaten the viability of the music delivery service currently offered to consumers under this license").

231. *Id.* at 1960.

232. *Id*.

233. *Id.*; *cf. id.* at 1944 n.107 (recognizing that "an increase in the rates might affect different interactive streaming services in different ways" and result in further concentration of the industry).

234. *Id.* at 1960.

235. *See id.* How could it *ever* benefit musicians to have their music subjected to a few mega conglomerates like Google or Apple? *See* David Pakman, *Who Holds the Power in Media—Content or Distribution?*, PAKMAN (Oct. 6, 2012), https://pakman.com/who-holds-the-power-in-media-content-or-distribution-4cb3decfe2a ("Highly concentrated [distribution of] popular content allows [distributors] to extract unprofitable rights deals.").

236. *See* ELI M. NOAM, MEDIA OWNERSHIP AND CONCENTRATION IN AMERICA 135 (2009) (stating that concentrated distribution of music "creates a fundamentally unstable situation" and "creates enormous incentives for companies to engage in oligopolistic price setting").

237. *What is Capacity Cost?*, LAW DICTIONARY, https://thelawdictionary.org/capacity-cost/ (last

like Spotify.[238] Rather than increase the mechanical rate, the dissent proposed a reinstatement of the CRB's 2012 mechanical rate benchmark, which the dissent concluded would not be disruptive to Songwriters, Interactives, and the music industry at large.[239] While not wrong, the dissent's proposal is still inadequate because it fails to address the Songwriters' lack of adequate pay.[240]

In sum, Spotify's appeal is warranted because the majority's mechanical rate determination failed to embody the objectives of the mandatory willing buyer/willing seller standard.[241] First, the majority blatantly disregarded the essential role Interactives play in maximizing the availability of music in the *streaming* era.[242] Second, because the majority misapplied the Shapley value approach, it derived a mechanical rate that was neither a fair income for the Interactives nor reflective of Interactives' relative roles.[243] Third, the majority failed to consider less disruptive alternatives to the mechanical rate increase because it *assumed* that further concentration and disruption of the music economy was inevitable.[244] In light of the foregoing, the majority's

visited Jan. 14, 2021) (defining "capacity cost" as "[a] fixed expense incurred by a company or organization in order to provide for or increase its ability to conduct business operations," and explaining that capacity costs "generally do not vary with production levels and can be reduced or avoided only be shutting down business locations or outsourcing").

238. *See* 2018–2022 Rate Determinations, *supra* note 101, at 2029 ("Although the [Interactives] appear able to withstand current rates, a rate increase of the magnitude sought by the [Songwriters] would run the very real risk of preventing [most Interactives] from surviving the 'short-run,' threatening the type of disruption Factor [4] is intended to prevent. Moreover, the 44% rate increase adopted by the majority likewise places [Interactives] in quite uncharted waters regarding the disruptive impact of that increase."); *see also id.* ("Without a record to consider the impact of that rate increase, the majority may simply be substituting a slow bleed for a fatal blow."). *Even the majority* recognized that Big Tech Interactives, like Amazon and Apple, will be the only Interactives capable of sustaining the mechanical rate increase, since their interactive streaming services operate as loss leaders. *Id.* at 1944 n.107. "The majority actually recognize[d] that the [rate] increase is so draconian that it cannot be implemented immediately." *Id.* at 2029; *see also id.* at 1960 (acknowledging that "[i]n order to mitigate the risk of short-term market disruption . . . the Judges will phase in the new rate in equal annual increments over the rate period").

239. *Id.* at 2029.

240. *See infra* Part IV.D (proposing an amendment to music copyright law and a re-adjustment of the music licensing scheme for the sound recording and musical work copyrights); *supra* Part IV.B (describing Songwriters' problems concerning inadequate compensation).

241. *See supra* Part IV.C (analyzing the majority's application of the four willing buyer/willing seller factors).

242. *See supra* Part IV.C (analyzing majority's application of the maximizing availability factor).

243. *See supra* Part IV.C (analyzing majority's application of the fair income and relative roles factors).

244. *See supra* Part IV.C (analyzing majority's application of the fair income and relative roles factors).

reasonable, market-based rate is not so reasonable.[245]

D. *Solving Spotify's and Songwriters' Problems Without Increasing the Mechanical Rate*

"All value in the music industry begins with songs."[246] The value of songs' sound recordings and the value of Interactives are both derived from the existence of songs.[247] Thus, it *is* unfair that the current licensing scheme results in record labels being better compensated than the creators of songs, and it *is* unfair that most Songwriters make a meager living.[248] However, the unfairness does *not* stem from Interactives' unwillingness to pay Songwriters more for their songs.[249] In reality, "under current economic conditions," most Interactives *can't* pay Songwriters more for their songs.[250] The root of the Songwriters' inadequate pay is the disproportionate, statutory regulation of their songs' dual copyrights.[251]

Streaming is the dominant form of music consumption.[252] Yet, most of the relevant music copyright laws were written before streaming technology was commonly used.[253] Failure to acknowledge the nuances of streaming

245. *Contra* 2018–2022 Rate Determinations, *supra* note 101, at 1955 (claiming to have determined a reasonable, market-based rate).

246. Statement of Peter Brodsky, *supra* note 190, at 40.

247. *See id.*

248. *See id.* (stating that "the current rate structure results in songwriters and publishers being undercompensated for the value they provide"); Statement of Songwriters Vol. 1, *supra* note 167, at A-4 ("The middle class of songwriters now struggles to earn a decent living.").

249. *See, e.g.*, SPOTIFY ARTISTS NEWS, *supra* note 5 ("Does Spotify think [S]ongwriters deserve to be paid more? Yes—this is important to [S]ongwriters and it's important to Spotify.").

250. *See* 2018–2022 Rate Determinations, *supra* note 101, at 2022–31 (finding that Interactives, like Spotify, will not be able to sustain the rate increase without sacrificing their business models or product quality (i.e., the very things they leverage to compete with Big Tech)). *See generally id.* at 1958–59 (explaining that a fair income under the willing buyer/willing seller standard requires providing Songwriters with a fair return for their songs and Interactives with a fair income "under existing economic conditions").

251. *See* SPOTIFY ARTISTS NEWS, *supra* note 5 ("The industry needs to continue evolving to ensure that the people who create the music we all love—artists and [S]ongwriters—can earn a living. The question is how best to achieve that goal."); *cf.* Mejía, *supra* note 189 ("[I]nstead of [] rewriting [music copyright law], they'll just build on it. And we've been putting Band-Aids on this for I don't know, 100 years?"). *See generally supra* Parts I–III (explaining the origin and monetization of a song's dual copyrights: the musical work copyright and the sound recording copyright).

252. LaFrance, *supra* note 16, at 311.

253. Arthur Chang, *Outdated and Ineffective: The Problems with Copyright Law*, CLAREMONT J. L. & PUB. POL'Y (Apr. 11, 2018), https://5clpp.com/2018/04/11/outdated-and-ineffective-the-

technology and to adjust music copyright law accordingly culminated into a problematic system that inadequately compensates Songwriters.[254] While Songwriters' musical work copyrights continue being subjected to century-old compulsory mechanical rates and performance consent decrees,[255] record labels' sound recording copyrights are subjected to *zero* rate regulation and thus remain freely negotiable.[256]

> If the failure to pay [Songwriters] fair and reasonable royalties persists, the music industry will inevitably lose creatives, who are the very heart of the industry. If [Songwriters] are unable to support themselves as fulltime musicians, they will be forced to commit less time and effort to producing the music. Not only will this be extremely detrimental to the quality of music and entertainment, but it will also negatively affect the [Interactives that] underpay these musicians. In fact, it is in the best interest of the entire music industry to properly compensate [Songwriters], as they create the music that sustains the business.[257]

In order to better compensate Songwriters, "legislation must be amended."[258]

Congress could amend music copyright law in the following two ways: (1) Congress could strengthen Songwriters' bargaining power by deregulating the musical work copyright and allowing Songwriters to freely negotiate their mechanical rights with Interactives,[259] or (2) Congress could lessen the record labels' bargaining power by assigning a regulatory body to oversee the rates

problems-with-copyright-law/; *see also* LaFrance, *supra* note 16, at 311.

254. *See* Chang, *supra* note 253.

255. *See supra* Part II.B (explaining the legislative origins of compulsory mechanical licenses and performance consent decrees during the early twentieth century).

256. *See supra* Part II.C (explaining the legislative origin of the unregulated sound recording copyright during the 1970s).

257. *See* Chang, *supra* note 253.

258. *Id.* ("To preserve the music industry and its constituents, Congress must work in conjunction with the private sector to rectify the shortcomings of copyright legislation and modernize the existing law.").

259. *Cf.* Scott Hanus, *Deregulating the Music Industry: A Push to Give Power Back to the Songwriters*, 16 DEPAUL BUS. & COM. L. J. 18, 36 (2018) (advocating an amendment to music copyright law that "would allow the songwriters and publishers to negotiate directly with streaming services for licensing fees, as well as allow them more freedom in determining who can license their music").

and terms of the sound recording copyright.[260] In either case, Songwriters would theoretically have the opportunity to claim or bargain for a larger cut of Interactives' revenues, without increasing Interactives' operating expenses.[261]

However, while the music industry awaits legislative reform,[262] Songwriters should also organize and assert themselves to gain fairer pay through sound recording royalties.[263] Currently, record labels are sharing a fraction of their sound recording royalties with music producers.[264] Additionally, because music producers are often songwriters, they also receive the same musical work royalties as songwriters.[265] Since owning a song's sound recording copyright is "really the only way you make money [through] streaming," some music industry executives, music producers, and songwriters are also advocating for songwriters to receive a share of sound

260. *Cf.* Chang, *supra* note 253 (noting "the absence of a uniform rate-setting standard for statutory license fees" and recommending "an overhauled single rate standard that will reflect the fair market value of copyrighted works").

261. *See supra* Part IV.A (describing Spotify's operating expenses: music licensing and R&D).

262. *See* Chang, *supra* note 253 ("As technology continually develops and evolves, it is constantly changing the scope of copyright law. Consequently, legal delay is an inherent complication, as copyright law inevitably will struggle to maintain stride with technology. Nevertheless, it is unreasonable to expect Congress, through its intentionally arduous and deliberate legislative process, to constantly alter laws at the rapid pace of technological dissemination. Indeed, few bills and amendments have recently been passed in order to adjust to advancements in technology utilized in the consumption of copyrighted works, creating opportunity for firms to capitalize on outdated regulations.").

263. *See* Rhian Jones, *It Should Be Standard for Songwriters to Get a Share of Master Rights*, MUSIC BUS. WORLDWIDE (Dec. 16, 2019), https://www.musicbusinessworldwide.com/it-should-be-standard-for-songwriters-to-get-a-share-of-master-rights/*; see also How Does a Producer Get Paid*, MUSIC CONTRACTS [hereinafter MUSIC CONTRACTS], https://www.musiccontracts.com/blog/2018/4/23/first-steps-to-setting-up-a-label-sjk55 (last visited Jan. 14, 2021) (noting that music producers, unlike songwriters, can be paid both in sound recording royalties and musical work royalties).

> Aside from [mechanical royalties] and his or her fee, the producer, like the artist, will receive a [sound] record[ing] royalty. . . . How does this work? If the recording agreement says the [recording] artist is to receive a [sound recording] royalty of 15%[,] . . . the artist actually will get only . . . 12%, or 'twelve points[,]' . . . [and] three points [are] paid to the producer . . . . [The three points] will be taken out of the artist's 15 royalty points.

Id.

264. *See* Karl Fowlkes, *The Basics: How Do Songwriters and Producers Get Paid?*, MEDIUM (Feb. 13, 2019), https://medium.com/the-courtroom/the-basics-how-do-songwriters-and-producers-get-paid-5d5debef25c7?; *see also* MUSIC CONTRACTS, *supra* note 263.

265. *See* MUSIC CONTRACTS, *supra* note 263.

recording royalties.[266] If Songwriters gain a share of sound recording royalties, this too will assuage their compensation problems without increasing Interactives' operating expenses.[267]

V. CONCLUSION

Today, streaming is the prevailing mode of music consumption.[268] Yet, Interactives are struggling to turn a profit.[269] Additionally, in the streaming era, where Interactives' mechanical royalty payments are among Songwriters' largest sources of income, Songwriters too are facing financial challenges.[270] All the while, record labels are collecting the majority of streaming revenue and seeing record profits.[271]

The MMA attempted to address Songwriters' and Interactives' problems by requiring the CRB to apply a willing buyer/willing seller standard in its mechanical rate determinations.[272]

The objective of this new standard is to establish reasonable, market-based mechanical rates that "balance the interests of [Songwriters] and [Interactives]."[273] Thus, a proper application necessitates considering both Songwriters' and Interactives' financial concerns.[274] During the CRB's 2018–2022 mechanical rate determinations, the CRB acknowledged both parties' interests.[275] However, because the majority believed that the Interactives' unprofitability would persist under current legislative conditions, the majority disregarded Interactives' financial interests to determine the 44% mechanical rate increase.[276] Additionally, the majority proposed even further

266. *See* Jones, *supra* note 263 ("[M]ost songwriters don't have [sound recording] points or share. We are fighting for people to be able to get that because it's not standard and I think it should be. [Sound recordings] are really the only way you make money in streaming.").

267. *See supra* Part IV.A (describing Spotify's operating expenses: music licensing and R&D).

268. LaFrance, *supra* note 16, at 311.

269. *See supra* notes 137–138 and accompanying text.

270. *See generally* Statement of Songwriters Vol. 1, *supra* note 168.

271. *See* Nusca, *supra* note 141; *see also* Kafka & Molla, *supra* note 148.

272. *See* Music Modernization Act, 17 U.S.C. § 115(c) (2018).

273. *See* 2018–2022 Rate Determinations, *supra* note 101, at 1955.

274. *See supra* Part IV.C (analyzing the CRB's application of the "willing buyer/willing seller standard," which entailed considering the parties' financial concerns).

275. *See generally supra* Part IV.C (summarizing the CRB's 2018–2022 mechanical rate proceedings).

276. *See* 2018–2022 Rate Determinations, *supra* note 101, at 1944 n.107 (recognizing that "an increase in the rates might affect different interactive streaming services in different ways" and result

consolidation of the music industry in order for Interactives to sustain the mechanical rate increase.[277] Thus, Spotify's appeal is not predicated on greed, but on legitimate concerns regarding the sustainability of its business and the CRB's proceedings.[278]

However, adjusting the mechanical rate is not a practical solution to Spotify's and Songwriters' problems because, while Spotify cannot afford to increase its licensing expenses, Songwriters deserve more pay for their work.[279] Only legislative reform will solve the cause of both parties' financial problems—a copyright system that disproportionately benefits record labels and inadequately compensates Songwriters.[280]

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in further concentration of the industry); *see also id.* at 1960.

277. *Id.* at 1960.

278. *See supra* Part IV.C (analyzing the CRB's 2018–2022 rate proceedings and Spotify's appeal in light of the CRB's final rate determinations).

279. *See supra* Parts IV.A–B (summarizing Spotify's and Songwriters' financial challenges).

280. *See* Parts II–IV.B (analyzing the evolution of modern music copyright law and its impact on Songwriters and Interactives today).

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