
COPYRIGHT JUMPS THE SHARK: THE MUSIC MODERNIZATION ACT

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ABSTRACT

The Music Modernization Act (“MMA”) codifies a host of compromises and licensing arrangements worked out among music publishers, record labels, and digital music services. It adds an extremely voluminous, complex, and detailed licensing regime for mechanical copies of musical works that is of particular importance to digital music services and music publishers. Promoted as a way to reduce transaction costs, the blanket license facilitates the use of all musical works, even those works whose copyright owners cannot be located. The MMA also brings pre-1972 sound recordings into the federal copyright regime and importantly subjects those sound recordings to the statutory licensing available under the Copyright Act. These innovations will aid the current state of rights surrounding digital music streaming services.

However, despite being promoted as a way to bring more equal treatment to the industry, in many ways the MMA increases the disparity in treatment between musical work copyright owners and sound recording copyright owners. While ultimately the royalties received by those two groups of copyright owners will likely become more similar, the way the MMA achieves that result is not through an equal treatment of the different copyrights. Additionally, while owners of pre-1972 sound recording rights will now have federal statutory rights that are similar to those enjoyed by owners of post-1972 sound recording copyrights, in many ways the artists who created those different works continue to be treated quite differently.

A special thank you to Professor Wendy J. Gordon, whose lifelong dedication to the field of copyright law has enriched the field for decades. Revisiting her body of work provided a variety of lenses that have helped organize the analysis of the MMA presented in this Article.

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INTRODUCTION

The story we tell about copyright involves encouraging progress in knowledge and learning by providing incentives for creative individuals to apply their time, energy, and talent to creating works of authorship.¹ But we also know that disseminators of works of authorship have used this incentive story for centuries to argue for stronger and longer alienable exclusive rights.² These arguments have persuaded legislators to support amendments and revisions to the Copyright Act that have increased protection in a one-way ratchet³ and that do not, in fact, enhance incentives for authorial creativity.⁴ In fact, the authors are not really in the picture, except as props used to justify greater rent-seeking by the distributors. We like to think that more money for the middlemen translates into more money for the authors and artists, but it is hard to know if this is really true or even if more money for authors and artists results in more or better quality works of authorship.⁵ And in the absence of evidence to support policy choices, our copyright rules are driven significantly by industry-led lobbying efforts.⁶

¹ This is the long-understood justification for copyright law in the United States. See *Mazer v. Stein*, 347 U.S. 201, 219 (1954). “The primary objective of copyright is not to reward the labor of authors, but ‘[t]o promote the Progress of Science and useful Arts.’” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (alteration in original) (quoting U.S. CONST. art. I, § 8, cl. 8); see also *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) (“The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.”). Some have argued that “progress” also means the dissemination or spread of knowledge. See, e.g., Malla Pollack, *What Is Congress Supposed to Promote?: Defining ‘Progress’ in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing the Progress Clause*, 80 NEB. L. REV. 754, 773 (2001). Professor Gordon has resisted that interpretation. See Wendy J. Gordon, *The Core of Copyright: Authors, Not Publishers*, 52 HOUS. L. REV. 613, 613 (2014).

² See L. RAY PATTERSON & STANLEY W. LINDBERG, *THE NATURE OF COPYRIGHT: A LAW OF USERS’ RIGHTS* 27-29 (1991).

³ See, e.g., Jessica Litman, *War Stories*, 20 CARDOZO ARTS & ENT. L.J. 337, 344 (2002) (“Recently, copyright legislation has seemed to be a one-way ratchet, increasing the subject matter, scope, and duration of copyright with every amendment.”); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 543 (2004) (“Legally, then, copyright has been a one-way ratchet, covering more works and granting more rights for a longer time.”).

⁴ See Gordon, *supra* note 1, at 625.

⁵ See Christopher Jon Sprigman, *Copyright and Creative Incentives: What We Know (and Don’t)*, 55 HOUS. L. REV. 451, 455 (2017). Professor Glynn Lunney has examined records from the music industry and demonstrates that more money actually may translate into the release of fewer songs. See GLYNN LUNNEY, *COPYRIGHT’S EXCESS: MONEY AND MUSIC IN THE US RECORDING INDUSTRY* 158 (2018).

⁶ Sprigman, *supra* note 5, at 455 (“Our copyright system is, for the moment, built mostly on speculation. And in the absence of evidence, we have a set of copyright rules driven mostly by interest group lobbying.”).

The most recent extensive amendment to the Copyright Act, the Orrin G. Hatch-Bob Goodlatte Music Modernization Act (“MMA”),⁷ has these same familiar dynamics, but on steroids. The absurdity that is this legislation illustrates a broken legislative system—one that ignores fundamental themes of copyright law that Professor Gordon has highlighted for decades. The MMA may indeed be the point at which U.S. copyright law “jumped the shark.”⁸

Part I of this Article describes how this extensive legislation is not about the tort of copyright infringement;⁹ instead, Title I of the Act—somewhat confusingly called the Musical Works Modernization Act (“MWMA”)¹⁰—is an extensive and complicated licensing agreement worked out by industry insiders and subsequently codified by Congress.¹¹ This process of copyright lawmaking through industry consensus is not new.¹² What is new is the length and complexity of the licensing deal now enshrined in Title 17 of the U.S. Code.¹³ Additionally, although the blanket license that the newly designated Music

⁷ Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (2018) (codified in scattered sections of 17 U.S.C.).

⁸ “Something is said to have ‘jumped the shark’ when it has reached its peak and begun a downhill slide to mediocrity or oblivion.” *Jump the Shark*, URBAN DICTIONARY, <https://www.urbandictionary.com/define.php?term=jump-the-shark> [https://perma.cc/7PGJ-MCKZ] (last visited Nov. 17, 2019).

⁹ See Wendy J. Gordon, *Copyright and Tort as Mirror Models: On Not Mistaking for the Right Hand What the Left Hand Is Doing*, in COMPARATIVE LAW AND ECONOMICS 311, 313 (Theodore Eisenberg & Giovanni B. Ramello eds., 2016) [hereinafter Gordon, *Copyright and Tort as Mirror Models*]; Wendy J. Gordon, *Copyright as Tort Law’s Mirror Image: “Harms,” “Benefits,” and the Uses and Limits of Analogy*, 34 McGEORGE L. REV. 533, 535 (2003) [hereinafter Gordon, *Copyright as Tort Law’s Mirror Image*]; Wendy J. Gordon, *Of Harms and Benefits: Torts, Restitution, and Intellectual Property*, 21 J. LEGAL STUD. 449, 482 (1992) [hereinafter Gordon, *Of Harms and Benefits*]; Wendy J. Gordon, *Trespass-Copyright Parallels and the Harm-Benefit Distinction*, 122 HARV. L. REV. F. 62, 63 (2009).

¹⁰ The name of Title I, the “Musical Works Modernization Act,” is not to be confused with the title of the entire Act, the “Orrin G. Hatch-Bob Goodlatte Music Modernization Act.”

¹¹ The inside baseball that drove this massive amendment to the Copyright Act did not even leave time for a formal conference committee report detailing the reconciliation that occurred between the House- and Senate-passed bills. Instead, the public is left with only a substitute report issued by Representative Bob Goodlatte, Chairman of the House Committee on the Judiciary. See H.R. REP. NO. 115-1551 (2018), <https://republicans-judiciary.house.gov/wp-content/uploads/2018/04/Music-Modernization-Act.pdf> [https://perma.cc/XD9D-5ZER] [hereinafter Substitute Conference Report].

¹² See JESSICA LITMAN, DIGITAL COPYRIGHT 22-63 (2001); Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 862 (1987) (“The legislative materials disclose a process of continuing negotiations among various industry representatives, designed and supervised by Congress and the Copyright Office and aimed at forging a modern copyright statute from a negotiated consensus.”).

¹³ See *infra* text accompanying notes 23-28 (discussing length of MMA).

Licensing Collective (“MLC”) will administer¹⁴ provides a solution to a transaction-cost problem,¹⁵ that problem was itself solidified by the MWMA’s codification of a problematic interpretation of what constitutes a mechanical copy.¹⁶

Part II of this Article examines Title II of the Act, called the Classics Protection and Access Act (“CPA Act”), which grants federal protection for a class of preexisting works—namely, sound recordings created prior to February 15, 1972. For many of these works, the artists who created them will not benefit from this new protection because those artists died long ago. Instead, the record companies that assert ownership in these works are alive and well—and the CPA Act provides them a path to greater rents through a grant of federal rights. This new protection fails Professor Gordon’s litmus test that “noncreative dissemination provides legitimate grounds for expanding copyright only when the dissemination assists authorial creativity.”¹⁷ Instead, although the protection granted by the CPA Act was promoted by campaigns that put the artists—even if dead—front and center,¹⁸ in reality the CPA Act was, again, a compromise worked out among industry insiders with a variety of special carveouts and deals. Part II also reflects on Professor Gordon’s urging that more work is needed to develop a coherent jurisprudence of benefits.¹⁹

¹⁴ On July 8, 2019, the Copyright Office designated the Mechanical Licensing Collective, Inc., as the mechanical licensing collective. *See* Designation of Music Licensing Collective and Digital Licensing Coordinator, 84 Fed. Reg. 32,274, 32,274 (July 8, 2019) (codified at 37 C.F.R. pt. 210); *Designation of Mechanical Licensing Collective and Digital Licensee Coordinator*, COPYRIGHT.GOV, [https://www.copyright.gov/rulemaking/mma-designations/\[https://perma.cc/8WT3-T43C\]](https://www.copyright.gov/rulemaking/mma-designations/[https://perma.cc/8WT3-T43C]) (last visited Nov. 17, 2019); *infra* note 27 and accompanying text.

¹⁵ On transaction-cost problems, see generally Wendy J. Gordon, *Excuse and Justification in the Law of Fair Use: Transaction Costs Have Always Been Part of the Story*, 13 J. COPYRIGHT SOC’Y U.S.A. 149 (2003) [hereinafter Gordon, *Excuse and Justification*]; Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600 (1982) [hereinafter Gordon, *Fair Use as Market Failure*].

¹⁶ As described in more detail in Section I.A, the idea of a “mechanical copy” began as a way to address copying of musical works in player piano rolls and evolved to include vinyl, cassettes, CDs, and eventually digital copies. Digital streaming of music generally was not considered a reproduction but rather a public performance. *See, e.g.,* United States v. Am. Soc’y of Composers, Authors & Publishers, 627 F.3d 64, 74 (2d Cir. 2010). The MWMA, however, defines one type of streaming—“interactive streaming”—as both a mechanical copy and a public performance. *See infra* text accompanying notes 30-33.

¹⁷ Gordon, *supra* note 1, at 614.

¹⁸ *See, e.g.,* Ben Sisario, ‘Respect’ Didn’t Pay Franklin Much: A Copyright Quirk Endures, N.Y. TIMES, Aug. 18, 2018, at A1.

¹⁹ *See* Wendy J. Gordon, *The Concept of “Harm” in Copyright*, in INTELLECTUAL PROPERTY AND THE COMMON LAW 452, 454 (Shyamkrishna Balganesh ed., 2013) (cautioning against imposing a harm requirement to establish prima facie case of copyright infringement “before the conceptual and policy issues inherent in ‘harm’ are fully fleshed out”).

Part III looks at the ways in which the MMA avoided doing what Professor Gordon has argued should be done: recognizing that the core of copyright should be the artists, not the disseminators of creative works.²⁰ She asserts that commonsense economics and morality could provide “helpful alignment for a copyright gyroscope.”²¹ As Part III explores, there are morality and fairness aspects to the MMA when looked at from a macro level. The bid for this legislation was aided by claims related to moral fairness by comparing different groups of creative artists. Title I can be seen as an attempt to provide a level of compensation for musical work copyright owners that is more similar to the level of compensation that sound recording copyright owners achieve for the most significant segment of the music industry today: digital streaming.²² Title II can be seen as an attempt to bring a kind of parity in rights between sound recordings created before February 15, 1972, and sound recordings created on or after February 15, 1972. But in many respects, the copyright gyroscope lacks the kind of alignment Professor Gordon urged. The devil is in the details and, as identified in Part III, the details carry with them continued significant unequal treatment between these different categories of artists and copyright owners.

Finally, Part III highlights aspects of copyright law that are author-centric, including the requirement of direct payment to performing artists for royalties collected. Part III then identifies the ways in which the MMA fails to stay author-focused by requiring that royalties collected for orphaned works be paid to identified copyright owners of *other* copyrighted works. Additionally, Title II’s grant of new federal protection did not carry with it the most author-friendly part of the Copyright Act: the ability for authors and their heirs to terminate assignments and licenses either when related to newly granted rights or after thirty-five years. These missed opportunities highlight the industry-driven special interests served by the new statute and demonstrate Congress’s failure to keep artists at the core of copyright.

I. MUSICAL WORKS MODERNIZATION ACT: A CODIFICATION OF A COMPLEX LICENSING REGIME

Professor Gordon has repeatedly explored and explained the tort of copyright infringement.²³ She explains why infringement should not be seen as primarily property-based but rather tort-based. Title I of the MMA, referred to as the

²⁰ See Gordon, *supra* note 1, at 613 (arguing that copyright law should serve creative authorship rather than noncreative labor).

²¹ *Id.* at 619.

²² Digital music streaming now accounts for 75% of music industry revenue. Neil Howe, *How Music Streaming Won Over Millennials*, FORBES (Jan. 16, 2019, 11:57 AM), <https://www.forbes.com/sites/neilhowe/2019/01/16/how-music-streaming-won-over-millennials/#2d7b9c2225c7> [<https://perma.cc/GE3R-3KJG>].

²³ See, e.g., Gordon, *Copyright and Tort as Mirror Models*, *supra* note 9, at 313; Gordon, *Copyright as Tort Law’s Mirror Image*, *supra* note 9, at 536; Gordon, *Of Harms and Benefits*, *supra* note 9, at 482.

Musical Works Modernization Act (“MWMA”), is about as far away from “copyright as tort” as a law can be. Instead, the MWMA is an extremely complicated and lengthy licensing agreement worked out by industry insiders and subsequently codified by Congress.²⁴

The MMA added 24,072 words to the Copyright Act.²⁵ For comparison purposes, the entire 1976 Copyright Act as originally enacted was 33,759 words.²⁶ Just what did we gain with this prolix addition to the Copyright Act? By far, the lengthiest addition comes from the MWMA, which alone added over 18,500 words to the Copyright Act. A major part of the MWMA addresses the creation, administration, activities, oversight, and funding of a new entity to be known as the Mechanical Licensing Collective (“MLC”).²⁷ The MLC will administer a new blanket license that authorizes the reproduction and distribution of copyrighted musical works by digital music services.²⁸ The

²⁴ Musical Works Modernization Act, Pub. L. No. 115-264, §§ 101-106, 132 Stat. 3676, 3676-727 (2018) (codified in scattered sections of 17 U.S.C.).

²⁵ The Music Modernization Act also deleted some words, but the number of words deleted is insignificant in comparison to the words added.

²⁶ Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101-810 (2018)). Previously, the most significant amendment to the 1976 Copyright Act was the Digital Millennium Copyright Act (“DMCA”). See Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C.). That law added less than 22,500 words to Title 17—*2000 fewer words* than the MMA. *Id.* Unlike the MMA, the DMCA affected a variety of different areas of copyright law, from providing safe harbors from copyright infringement liability for online service providers, *id.* § 202, 112 Stat. at 2877, to creating new chapters aimed at providing anticircumvention protection for technological measures used to protect copyrighted works, *id.* § 103, 112 Stat. at 2863 (adding Chapter 12), and at providing vessel hull design protection, *id.* § 502, 112 Stat. at 2905 (adding Chapter 13).

²⁷ Two different entities sought to be the MLC. See Paul Resnikoff, *Spotify, Apple, Amazon, Google Withhold Endorsement of the NMPA’s MLC Proposal*, DIGITAL MUSIC NEWS (Apr. 25, 2019), <https://www.digitalmusicnews.com/2019/04/25/spotify-apple-amazon-google-nmpa-mlc/>; *infra* text accompanying note 141. Not coincidentally, the first entity designated by the Copyright Office to perform these functions was named Music Licensing Collective, Inc. See Designation of Music Licensing Collective and Digital Licensing Coordinator, 84 Fed. Reg. 32,274, 32,274 (July 8, 2019) (codified at 37 C.F.R. pt. 210); *infra* text accompanying notes 142-43143.

²⁸ The MWMA muddies the distinction between Digital Phonorecord Deliveries (“DPDs”) implicating the reproduction and distribution rights, and digital streams implicating the public performance right. It does so by creating a new category—an “interactive stream”—that it expressly defines to be a DPD. Musical Works Modernization Act, Pub. L. No. 115-264, § 102, 132 Stat. 3676, 3719 (2018) (codified at 17 U.S.C. § 115(e)(13) (2018)). The blanket license to be granted by the MLC covers certain acts of reproduction and distribution that are “reasonable and necessary for the digital music provider to engage” in interactive streaming. *Id.* § 102, 132 Stat. at 3684 (codified in 17 U.S.C. § 115(d)(1)(B)(ii) (2018)). It expressly does not authorize anything other than reproduction and distribution (i.e., it does not authorize public performance). *Id.* (codified in 17 U.S.C. § 115(d)(1)(B)(iii) (2018)).

statutory provisions relating to the MLC and the blanket license are almost entirely in § 115 of the Copyright Act. Prior to the MWMA, § 115 was a mere 2742 words. After amendment, it increased over 6.5 times in length and now stands at 18,324 words.²⁹

A. *Interactive Streaming as Mechanical Copies and the Blanket License*

Section 115 concerns what are referred to as “mechanical copies” of musical works. This section, like its predecessor provision, permits anyone to create and distribute so-called “mechanical copies” of a musical work—copies that are embodied in sound recordings.³⁰ Section 115 allows anyone to make such copies under certain conditions, including the payment of the compulsory royalty rate.³¹ The genesis of this compulsory license in the 1909 Copyright Act involved player piano rolls and, over time, evolved to encompass other mechanical fixations of musical works embodied in sound recordings, including vinyl, CDs, and, eventually, digital copies of sound recordings—which are referred to as Digital Phonorecord Deliveries (“DPDs”) when digitally transmitted.³² The MWMA adds to the compulsory mechanical licensing provisions by creating a new blanket license.³³

Before delving into the details of the new blanket license, it is important to keep straight the two different types of copyrighted works that are involved in music copyrights and the different rights granted to copyright owners. First, there are musical work copyrights and sound recording copyrights. Musical works are created by songwriters and composers. The copyrights in musical

²⁹ The MWMA also added text to §§ 114, 801, and 804. *See* Musical Works Modernization Act, Pub. L. No. 115-264, § 102(b), 132 Stat. 3676 (2018) (codified in scattered sections of 17 U.S.C.) (detailing procedures to obtain compulsory license). A couple of comparisons drive home just how ridiculously lengthy this new law is. First, § 115 is now more than half as long as the *entire* 1976 Copyright Act (33,759 words). A second comparison is § 114, which, prior to the MMA, many considered to be one of the most dense, technical, and lengthy provisions in the Copyright Act. Section 114 was a mere 7387 words. Of course, the MMA added provisions to § 114 as well, but the net gain to § 114 was only about 700 words. Today, § 114 stands at 8054 words, less than half the length of the newly revised (I can’t bring myself to say “modernized”) § 115.

³⁰ *See* 17 U.S.C. § 115(a)(1)(A) (2018).

³¹ *Id.* (“A person may by complying with the provisions of this section obtain a compulsory license to make and distribute phonorecords of a nondramatic musical work, including by means of digital phonorecord delivery.”).

³² *See* Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673, 680-81, 686, 689 (2003); *see also* 17 U.S.C. § 115(e)(10) (defining a “digital phonorecord delivery”).

³³ 17 U.S.C. § 115(d)(1)(A) (“A digital music provider that qualifies for a compulsory license under subsection (a) may, by complying with the terms and conditions of this subsection, obtain a blanket license from copyright owners through the mechanical licensing collective to make and distribute digital phonorecord deliveries of musical works through one or more covered activities.”).

works are often transferred to music publishers. Sound recording copyrights are created by performers and sound engineers when renditions of musical works are captured in a recording.³⁴ The copyrights in sound recordings are often transferred to record labels.

Next, there are the different rights granted to copyright owners. Most relevant to the MWMA are the rights to reproduce and distribute a copyrighted work. The separate right to control the public performance of a copyrighted work is also extremely important in the music industry. For musical work copyrights, performing rights organizations (“PROs”) collectively license the public performance rights of large catalogs of musical works. For sound recording copyrights, the public performance right is more limited, covering only public performances by means of a digital audio transmission.³⁵ Additionally, the sound recording copyright owner’s public performance right is subject to a statutory license for noninteractive streaming services.³⁶

The new blanket license is very specific: it authorizes (1) reproductions and distributions of (2) musical works for (3) “covered activities.”³⁷ The blanket license does not authorize public performance of musical works. However, under the Copyright Act, digital streaming constitutes a public performance of the works being streamed. Thus, the new blanket license does not disturb the need for digital streaming services to obtain authorization and pay public performance royalties to the PROs for the services’ streaming activities. Additionally, the blanket license only applies to musical works, not sound recordings. However, because digital streaming of music involves sound recordings—sound recordings that embody musical works—digital streaming services must still obtain authorization and pay royalties for the use of those sound recordings.³⁸

³⁴ Technically, a sound recording does not have to be a recording of the performance of a musical work; it could be a recording of the reading of a literary work (an audio book) or a recording of ambient sounds or other noises. *See id.* § 101 (defining “sound recordings” as “works that result from the fixation of a series of musical, spoken, or other sounds”). But the vast majority of commercially valuable sound recordings are recordings of musical works and it is that type of sound recording at which the MMA is directed.

³⁵ *Id.* § 106(6) (“Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following . . . (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.”).

³⁶ *See id.* § 114(d)(2); *infra* notes 104-08 and accompanying text (describing evolution of sound recording public performance right and statutory license for noninteractive streaming).

³⁷ 17 U.S.C. § 115(d).

³⁸ Some digital streaming services (categorized as noninteractive) can obtain the authorization needed through the statutory license codified in § 114 and administered by SoundExchange. Meanwhile, other digital streaming services (categorized as interactive) must negotiate directly with sound recording copyright owners for authorization. *See Lydia Pallas Loren, The Dual Narratives in the Landscape of Music Copyright*, 52 HOUS. L. REV. 537, 574, 577 (2014).

Qualifying digital music services can rely on the new blanket license to authorize the reproduction and distribution of musical works that occurs in the course of a “covered activity.”³⁹ A “covered activity” is “the activity of making a digital phonorecord delivery of a musical work, including in the form of a permanent download, limited download, or interactive stream.”⁴⁰ Beginning in January 2021,⁴¹ qualifying digital music services can use the new § 115 blanket license to obtain authorization for reproductions and distributions that are “reasonable and necessary for the digital music provider to engage in” the covered activity.⁴²

Any blanket license reduces the transaction costs involved in obtaining licenses for each individual work encompassed within the blanket.⁴³ Transaction costs, as Professor Gordon reminds us, are one of the primary reasons for market failures in copyright law.⁴⁴ Because the Copyright Act grants several different exclusive rights in the same copyrighted work⁴⁵ and permits those rights to be transferred and licensed separately,⁴⁶ the transaction costs increase when a single activity can be characterized as implicating more than one of the rights: anyone engaged in that activity must clear rights in *the same work* from multiple entities.

The transaction costs that are reduced by the MWMA are, in many ways, created by the MWMA itself. It is the MWMA’s characterization of interactive streaming as requiring a license for mechanical copying that codified the increase in transaction costs: those engaged in interactive streaming now need authorization for reproduction and distribution in addition to authorization for public performances. The MWMA then reduces those newly solidified transaction costs by providing a blanket license.⁴⁷ This newly codified overlap

³⁹ 17 U.S.C. § 115(d)(1)(A).

⁴⁰ *Id.* § 115(e)(7) (defining “covered activity”).

⁴¹ The MWMA contains a two-year delay in order for the Copyright Office to designate the MLC entity and to allow it to get up and running. The blanket license will be effective on the “license availability date.” *Id.* § 115(d)(2)(B). The statute defines the license availability date as “January 1 following the expiration of the 2-year period beginning on the enactment date” of the MWMA. *Id.* § 115(e)(15). Since the MWMA’s date of enactment was October 11, 2018, the “license availability date” is January 1, 2021.

⁴² *Id.* § 115(d)(1)(B)(ii).

⁴³ Congress pointed to the reduced transaction costs as a justification for the blanket license. See Substitute Conference Report, *supra* note 11, at 3 (“Song-by-song licensing negotiations increase the transaction costs to the extent that only a limited amount of music would be worth engaging in such licensing discussions, depriving artists of revenue for less popular works and encouraging piracy of such works by customers looking for such music.”).

⁴⁴ Of course, transaction costs are not the only way in which markets fail. See Gordon, *Excuse and Justification*, *supra* note 15, at 150. See generally Gordon, *Fair Use as Market Failure*, *supra* note 15.

⁴⁵ 17 U.S.C. § 106.

⁴⁶ *Id.* § 201(d)(1) (“The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed . . .”).

⁴⁷ *Id.* § 115(d)(1)(B)(ii).

of rights (the same activity is both a copy and a public performance) creates higher transaction costs.

The express overlap of rights related to musical works and digital services began in 1995,⁴⁸ but the MWMA compounded this problem by defining an interactive stream as a type of DPD.⁴⁹ Since the advent of streaming, the music industry has pushed the position that certain types of streaming implicate the reproduction right in addition to the public performance right. Several rate-setting proceedings addressed this argument.⁵⁰ One of those proceedings resulted in a ruling—based on a settlement agreement worked out within the industry—that some digital music steaming services involved “incidental DPDs” and thus were a type of mechanical copy.⁵¹ However, it is the MWMA’s characterization of interactive streaming as a type of mechanical copy that codifies the requirement for those offering such streaming services to pay for mechanical copies in addition to public performances. While collective rights

⁴⁸ In 1995, Congress passed the Digital Performance Right in Sound Recordings Act (“DPRA”), extending the mechanical license to DPDs. It defined a DPD as:

each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein

Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, § 4, 109 Stat. 336, 348 (codified as amended at 17 U.S.C. § 115(e)(10) (2018)).

⁴⁹ Specifically the MWMA added this definition:

The term ‘interactive stream’ means a digital transmission of a sound recording of a musical work in the form of a stream, where the performance of the sound recording by means of such transmission is not exempt under section 114(d)(1) and does not in itself, or as a result of a program in which it is included, qualify for statutory licensing under section 114(d)(2). An interactive stream is a digital phonorecord delivery.

Musical Works Modernization Act, Pub. L. No. 115-264, § 102, 132 Stat. 3676, 3719 (2018) (codified at 17 U.S.C. § 115(e)(13) (2018)).

⁵⁰ See Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), 84 Fed. Reg. 1918, 1954-55 (Feb. 5, 2019) (codified at 37 C.F.R. pt. 385) (recounting earlier rate-setting proceedings related to “incidental DPDs”). Streaming music is generally understood to constitute a public performance, while transmission of a song for download is generally not. As explained by the Second Circuit:

A stream is an electronic transmission that renders the musical work audible as it is received by the client-computer’s temporary memory. This transmission, like a television or radio broadcast, is a performance because there is a playing of the song that is perceived simultaneously with the transmission. In contrast, downloads do not immediately produce sound; only after a file has been downloaded on a user’s hard drive can he perceive a performance by playing the downloaded song. Unlike musical works played during radio broadcasts and stream transmissions, downloaded musical works are transmitted at one point in time and performed at another. Transmittal without a performance does not constitute a “public performance.”

United States v. Am. Soc’y of Composers, Authors & Publishers, 627 F.3d 64, 74 (2d Cir. 2010) (citation omitted).

⁵¹ See Phonorecords III, 84 Fed. Reg. at 1954.

organizations (“CROs”) exist to collectively license the public performance right and thereby reduce the transaction costs involved in clearing those rights, no CROs exist to license the reproduction right. The blanket license administered by the MLC is the answer to that transaction-cost problem. Codifying a definition of an interactive stream as a type of reproduction results in interactive streaming services essentially having to pay the musical work copyright owner twice—once for the mechanical copy or copies and once for the public performance. When the payments go to different entities (e.g., one payment to the MLC for the mechanical copies and one payment to the American Society of Composers, Authors, and Publishers (“ASCAP”) for the public performance), the potential unfairness of that double payment is harder to see.⁵²

Importantly, the blanket license authorization covers all musical works, even ones whose copyright owners cannot be located. Thus, the primary benefit of the MWMA for digital music services is a reduction in litigation risk related to difficult-to-locate copyright owners of musical works.⁵³ Because of the earlier rate-setting proceedings, digital services had sought to obtain authorization for mechanical copies through private agreements with music publishers even prior to the MWMA. The three leading music publishers all had negotiated private licensing agreements with many of the major digital music services.⁵⁴ But private license agreements between the digital music services and all of the major music publishing companies do not, and cannot, authorize the use of musical works whose copyrights are not owned by those music publishing companies.⁵⁵ Codification of a blanket license was the only way for the digital music services to have assurances that *all* works would be covered. Congress

⁵² The double payment may be somewhat ameliorated by the way mechanical license royalty rates may be set. Recent rate settings related to streaming services have used an “all-in” rate that establishes the amount to be paid for musical works at a percentage of revenue. *Id.* at 1918. Then, the amount paid for the mechanical license is reduced by the amount paid for public performance licenses. *Id.* at 1920.

⁵³ Prior to the MMA, digital services were filing notices of intent (“NOIs”) to make a mechanical copy with the Copyright Office, a procedure permitted for works whose copyright owners could not be located. If a work was subject to an NOI, the service was required to begin making royalty payments only after the copyright owner declared its ownership. *See id.* at 1969. Spotify’s use of the NOI process resulted in litigation. *See generally* Bluewater Music Servs. Corp. v. Spotify USA Inc., No. 3:17-cv-01051, 2018 WL 4714812 (W.D. Tenn. Sept. 29, 2018).

⁵⁴ Eric Peckham, *The War over Music Copyrights*, TECHCRUNCH (Sept. 30, 2018), <https://techcrunch.com/2018/09/30/the-war-over-music-copyrights/> [<https://perma.cc/3EHF-DH88>].

⁵⁵ Additionally, the antitrust concerns raised by any industry-wide coordinated license agreement would have been significant.

achieved this with the MWMA by stepping in and designating a licensing agent, the MLC, for uncooperative or missing copyright owners.⁵⁶

The blanket license significantly reduces transaction costs because it encompasses all copyrighted musical works, including those for which the copyright owner cannot be located. Searching for those copyright owners can be time consuming and expensive. Because interactive streaming requires a mechanical license, this aspect of the blanket license is a significant benefit to the digital music services and a large reason why they supported passage of the MWMA.

B. *Increasing Rents in the Name of Addressing Harm and Achieving Equal Treatment*

Another fundamental goal behind the MWMA was for digital music services to pay higher royalties to musical work copyright owners. But just what is the nature of those higher royalties? Professor Gordon has noted that in tort doctrine, “the common law has long been more willing to impose liability for harms done than it is to impose liability for benefits not paid for.”⁵⁷ Harm is important in shaping conceptions of proper legal rights “because harm matters to most people on a moral level, and prohibitions against doing harm are deeply embedded in our legal and cultural fabric.”⁵⁸ When exploring whether foregone licensing fees are the type of harm that can justify a legal right, Gordon explains that “[t]o have any normative bite for legal policy, harm must mean more than ‘a shortfall from a legal entitlement.’”⁵⁹

The harm that the MWMA seeks to remedy is, at best, “a shortfall from a legal entitlement”—a right to be paid for mechanical copies created in the process of interactive streaming. The legal entitlement to compensation for “copying” in the course of streaming activity itself was not codified until the MMA. Prior to the MWMA, streaming was generally thought to implicate the public performance right but not the reproduction or distribution rights.⁶⁰ The MWMA changed the definitions, expressly stating that “[a]n interactive stream is a digital

⁵⁶ More accurately, Congress authorized the Copyright Office to make that designation of the licensing agent. A more cynical way to view the blanket license, given that the three major publishers had already reached privately negotiated licensing agreements with the digital streaming services, is that the MWMA allows the major music publishers to capture more royalties. Those captured royalties for “unmatched works” are for works not owned by those publishers. *See infra* Section III.C (discussing royalty capture). Unlike the NOI, digital music services must begin collecting and paying royalties immediately, even if the copyright owner cannot be located. *See supra* note 53 (discussing NOIs).

⁵⁷ Gordon, *supra* note 19, at 459.

⁵⁸ *Id.* at 458-59 (emphasis omitted).

⁵⁹ *Id.* at 464-65.

⁶⁰ Musical work copyright owners resisted this general understanding and eventually succeeded in obtaining an administrative ruling that considered some streaming to implicate the reproduction right. *See supra* notes 50-51.

phonorecord delivery.”⁶¹ Notably, for musical works, a noninteractive stream remains outside of the definition of a DPD, so some streaming (interactive) is both a public performance and a mechanical copy, while other streaming (noninteractive) remains just a public performance.

Music publishers also pointed to the harm that comes from being treated differently to justify defining an interactive stream as a type of mechanical copy. Specifically, sound recording copyright owners were receiving significantly more in royalties from streaming services than musical work copyright owners.⁶² The harm that comes from being treated differently can be categorized as a type of subjective distress. Professor Gordon discusses subjective distress as a component of harm: “After the unconsented copying, plaintiffs feel worse than they felt before it; they feel anger or some other form of emotional reaction that to them feels like it requires recompense.”⁶³ In the context of the MMA, the subjective distress is significantly shaped by the comparison. Yet subjective distress “may lack the gravity that gives harm its usual moral significance.”⁶⁴ However, equal treatment is an important value that may have more resonance than other sources of subjective distress.⁶⁵

In the name of equal treatment, the MWMA adjusted the criteria that the Copyright Royalty Judges are to use in setting the license rates for mechanical copies.⁶⁶ Previously, the mechanical license royalty rates were to be set at a level calculated to achieve the following objectives:

- (A) To maximize the availability of creative works to the public.
- (B) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.
- (C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.
- (D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.⁶⁷

⁶¹ Musical Works Modernization Act, Pub. L. No. 115-264, § 102, 132 Stat. 3676, 3719 (2018) (codified at 17 U.S.C. § 115(e)(13) (2018)).

⁶² See Loren, *supra* note 38, at 542 (noting difference for noninteractive streaming royalties of 4% for musical works and 25-56% for sound recordings).

⁶³ Gordon, *supra* note 19, at 480.

⁶⁴ *Id.* As Professor Gordon notes later, her “own instinct is that subjective distress should not be counted as harm.” *Id.* at 482.

⁶⁵ As Gordon notes, “[f]eeling that one is taken advantage of unjustly is part of the emotional distress.” *Id.* at 481.

⁶⁶ Musical Works Modernization Act, Pub. L. No. 115-264, § 102, 132 Stat. 3676, 3680 (codified at 17 U.S.C. § 115(c)(1)(F) (2018)).

⁶⁷ 17 U.S.C. § 801(b)(1)(A)-(D) (2012) (amended 2018).

The MWMA eliminated the above criteria. Instead, the statute now directs the Copyright Royalty Judges to set rates for the blanket license based primarily on what “would have been negotiated in the marketplace between a willing buyer and a willing seller.”⁶⁸ The statute further provides that:

In determining such rates and terms for digital phonorecord deliveries, the Copyright Royalty Judges shall base their decision on economic, competitive, and programming information presented by the parties, including—(i) whether use of the compulsory licensee’s service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the musical work copyright owner’s other streams of revenue from its musical works; and (ii) the relative roles of the copyright owner and the compulsory licensee in the copyrighted work and the service made available to the public with respect to the relative creative contribution, technological contribution, capital investment, cost, and risk.⁶⁹

Notably missing from these factors is any consideration of attempting to “maximize the availability of creative works to the public”—previously the first criteria listed. Also eliminated was the two-sided criteria of affording “the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.” Previously this criteria allowed royalty judges to consider the interests of both the copyright owner and the digital music service provider.

The “willing buyer/willing seller” standard that the MWMA codified for the mechanical license mirrors the standard used for setting a different statutory license.⁷⁰ Indeed, the Substitute Conference Report describes this aspect of the MWMA as creating a “uniform willing buyer, willing seller rate standard.”⁷¹ While it is true that the statute now uses the same criteria for different types of rate-setting proceedings, the nature of what each of those statutory licenses covers is expressly different. The new MWMA blanket license standard covers interactive streaming for mechanical copies of musical works. The preexisting standard covers *non*interactive streaming both for public performances and for

⁶⁸ 17 U.S.C. § 115(c)(1)(F) (2018).

⁶⁹ *Id.*

⁷⁰ It seems that the royalties collected by SoundExchange may have already peaked and are now declining. Total royalties collected in 2015 were \$888 million, in 2016 were \$952 million, and in 2017 were \$717 million. Over the same three-year period, the administrative costs increased from \$41 million to \$53 million. *SoundExchange Annual Report for 2017 Provided Pursuant to 37 C.F.R. § 370.5(c)*, SOUND EXCHANGE, <https://www.soundexchange.com/wp-content/uploads/2016/09/2017-SoundExchange-Fiscal-Report-FINAL-Post-Audit-SXI-Only.pdf> [<https://perma.cc/G6BK-D6XW>] (last visited Nov. 17, 2019).

⁷¹ Substitute Conference Report, *supra* note 11, at 12. The Substitute Conference Report is silent, however, concerning the MWMA’s elimination of the public-facing aspects of the criteria. See Musical Works Modernization Act, Pub. L. No. 115-264, § 103, 132 Stat. 3676, 3723 (codified at 17 U.S.C. § 114(f) (2018)).

reproductions of sound recordings.⁷² The more accurate parallel for the blanket license administered by the MLC would be to royalties for *interactive* streaming of sound recordings. However, *interactive* streaming of sound recordings is not covered by any statutory license.⁷³

The MWMA also freed the Copyright Royalty Judges to consider the rates set for the public performance of sound recordings (for noninteractive streaming) when setting mechanical license rates for musical works (for interactive streaming). Previously, the statute had expressly prohibited such considerations.⁷⁴ The source of that prohibition, ironically, was the music publishers' fear that such consideration would result in lower royalties. Music publishers lobbied Congress for this prohibition, fearing "that the sound recording rates would be set below the public performance rates for compositions and drag down the latter."⁷⁵ Removing this prohibition may, in fact, help achieve greater parity between the royalty rates paid to musical work copyright owners and sound recording copyright owners. But that parity will be for different types of activities: interactive streaming for musical work copyright owners and noninteractive streaming for sound recording copyright owners.

In the end, the major industry players—both the music publishers and the digital music services—supported the MWMA because it was the culmination of a lengthy negotiation process among them. The resulting deal will, most likely, lead to higher overall royalties for music publishers and provide the digital music services with a clear path for licensing all musical works, including those whose copyright owners cannot be found. At the same time, the blanket license reduces the transaction costs for obtaining the required authorizations, albeit at the cost of increased complexity and further disparate treatment of interactive and noninteractive services.

⁷² The statutory license concerning public performances is located in § 114 of the Copyright Act. 17 U.S.C. § 114(f)(1)(B). The reproductions of sound recordings that might occur in the context of noninteractive streaming services are covered by a separate statutory license. That license also uses the "willing buyer/willing seller" standard. *Id.* § 112(e)(4).

⁷³ See Loren, *supra* note 38, at 577 ("Interactive services are not eligible for the statutory license."). The parallel of noninteractive streaming of sound recordings would be noninteractive streaming of musical works. But the definitions of what constitutes a mechanical copy or a "covered activity" under the MWMA do not include noninteractive streaming of musical works. Thus, such activities do not require authorization from the musical work copyright owners for any reproduction or distribution. Only public performance rights of musical work copyright owners are implicated by noninteractive streaming.

⁷⁴ 17 U.S.C. § 114(i) (2012) (amended 2018) ("License fees payable for the public performance of sound recordings under section 106(6) shall not be taken into account . . . to set or adjust the royalties payable to copyright owners of musical works for the public performance of their works.").

⁷⁵ Pandora Media, Inc. v. Am. Soc'y of Composers, Authors, & Publishers, 6 F. Supp. 3d 317, 333 n.30 (S.D.N.Y. 2014).

II. CLASSICS PROTECTION AND ACCESS ACT: NEW PROTECTIONS FOR OLD WORKS

The Music Modernization Act's second major change in copyright law involves sound recordings created prior to 1972. Title II of the Act, called the Classics Protection and Access Act ("CPA Act"), grants a new form of federal protection for those older sound recordings.⁷⁶ Prior to 1972, sound recordings were only protected, if at all, by state law.⁷⁷ In 1971, Congress added sound recordings to the categories of work eligible for federal copyright protection,⁷⁸ but it did so only prospectively, providing federal protection for sound recordings first fixed, published, and copyrighted on or after the effective date of the Act: February 15, 1972.⁷⁹

In states that had addressed the protection available for sound recordings, the rights recognized were rights to control reproduction and dissemination.⁸⁰ In the digital streaming era of music consumption,⁸¹ reproduction and distribution rights are not nearly as valuable as public performance rights. More recent cases sought to establish a public performance right under state laws for those older recordings.⁸² While those lawsuits largely were unsuccessful at establishing such a right,⁸³ they created both litigation costs and ongoing uncertainty for

⁷⁶ See Classics Protection and Access Act, Pub. L. No. 115-264, § 202, 132 Stat. 3676, 3728 (2018) (codified at 17 U.S.C. § 1401 (2018)).

⁷⁷ Jeffery A. Abrahamson, *Tuning Up for a New Musical Age: Sound Recording Copyright Protection in a Digital Environment*, 25 AIPLA Q.J. 181, 188-90 (1997) ("Sound recordings were first granted federal copyright protection by the 1971 Sound Recording Act . . .").

⁷⁸ Act of Oct. 15, 1971, Pub. L. No. 92-140, § 1, 85 Stat. 391, 391 (codified as amended at 17 U.S.C. § 101 (2018)).

⁷⁹ *Id.* § 3, 85 Stat. 391, 392 (effective Feb. 15, 1972).

⁸⁰ Abrahamson, *supra* note 77, at 189 n.7 (noting state law copyright protections for sound recordings in Pennsylvania and New York prior to federal protections).

⁸¹ Digital music streaming now accounts for 75% of music industry revenue. Howe, *supra* note 22.

⁸² See, e.g., *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 229 So. 3d 305, 307 (Fla. 2017) ("The crucial question presented is whether Florida common law recognizes an exclusive right of public performance in pre-1972 sound recordings."); *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 70 N.E.3d 936, 937 (N.Y. 2016) ("The Second Circuit Court of Appeals has certified the following question to this Court: 'Is there a right of public performance for creators of sound recordings under New York law and, if so, what is the nature and scope of that right?'"). Both of these cases involved certified questions from the federal courts.

⁸³ See *Flo & Eddie, Inc.*, 229 So. 3d at 319; *Flo & Eddie, Inc.*, 70 N.E.3d at 949. One federal district court in California determined that California's statute granting a right of "exclusive ownership" to authors of pre-1972 sound recordings included the right to control public performances. See *Flo & Eddie Inc. v. Sirius XM Radio Inc.*, 2:13-cv-05693, 2014 WL 4725382, at *7 (C.D. Cal. Sept. 22, 2014) (interpreting CAL. CIV. CODE § 980(a)(2)). On appeal, the Ninth Circuit certified the question of state law to the California Supreme Court. See *Flo & Eddie, Inc. v. Pandora Media, Inc.*, 851 F.3d 950, 951 (9th Cir. 2017). Following

digital music services. The CPA Act brought certainty concerning the rights in these older sound recordings and, importantly, a path for digital music services to license pre-1972 sound recordings.

The CPA Act grants a right to sue when someone engages in a “covered activity,” which, for purposes of the CPA Act, is defined as “any activity that the copyright owner of a sound recording would have the exclusive right to do or authorize under section 106 or 602, or that would violate section 1201 or 1202, if the sound recording were fixed on or after February 15, 1972.”⁸⁴ Thus, while the CPA Act does not make pre-1972 sound recordings eligible for federal copyright protection directly, it effectively grants pre-1972 sound recording copyright owners rights similar to those enjoyed by post-1972 sound recording copyright owners.⁸⁵

Many artists who created sound recordings prior to 1972 will not benefit directly from this new protection. First, many of those artists may no longer be alive.⁸⁶ Second, even for those artists who are still alive, pre-1972 industry practice was such that the rights in the sound recordings were routinely assigned to the record labels.⁸⁷ The CPA Act grants these new rights to control activities

enactment of the CPA Act, the California litigation settled, leaving definitive interpretation of California’s statute uncertain.

⁸⁴ Classics Protection and Access Act, Pub. L. No. 115-264, § 202, 132 Stat. 3676, 3737 (2018) (codified at 17 U.S.C. § 1401(l)(a)(1) (2018)). Importantly, “covered activities” are defined differently in the provisions added to Title 17 of the U.S. Code by Title II of the MMA than in the provisions added to the Copyright Act by Title I of the MMA. *See supra* notes 39-40 and accompanying text.

⁸⁵ The Substitute Conference Report refers to the rights created by the CPA Act as “sui generis” and as a “new form of federal intellectual property right.” *See* Substitute Conference Report, *supra* note 11, at 15.

⁸⁶ If an artist was twenty-five years old at the time of the creation of a sound recording in January 1971, he or she would now be seventy-three years old. The average life expectancy in the United States is 78.6. Meilan Solly, *U.S. Life Expectancy Drops for Third Year in a Row, Reflecting Rising Drug Overdoses, Suicides*, SMITHSONIAN.COM (Dec. 3, 2018), <https://www.smithsonianmag.com/smart-news/us-life-expectancy-drops-third-year-row-reflecting-rising-drug-overdose-suicide-rates-180970942/> [<https://perma.cc/65CQ-KHTJ>]. It may be the case that those involved in the performing arts do not live as long. *See* Dianna Theadora Kenny, *Why a Musician’s Life Expectancy Depends on What Kind of Music She Plays*, WASH. POST (Mar. 31, 2015, 6:00 AM), <https://www.washingtonpost.com/posteverything/wp/2015/03/31/why-musicians-life-expectancy-depends-on-what-kind-of-music-they-play/>.

⁸⁷ The CPA Act does not require documentary proof of ownership to claim the new rights under federal law. Instead, the CPA Act simply defines a “rights owner” as “the person that has the exclusive right to reproduce a sound recording under the laws of any State, as of the day before the date of enactment of this section.” Classics Protection and Access Act, Pub. L. No. 115-264, § 202, 132 Stat. 3676, 3737 (codified at 17 U.S.C. § 1401(l)(2)(A) (2018)). While the Copyright Act requires a signed writing in order to transfer ownership of a copyright or to exclusive license rights in a copyright, *see* 17 U.S.C. § 204(a) (2018), the

involving these older sound recordings to “the person that has the exclusive right to reproduce a sound recording under the laws of any State, as of the day before the date of enactment of this section.”⁸⁸ Thus, the possibilities for increased remuneration created by the CPA Act will largely be reaped by record companies.⁸⁹

This new protection fails Professor Gordon’s litmus test that “noncreative dissemination provide[] legitimate grounds for expanding copyright only when the dissemination assists authorial creativity.”⁹⁰ The protections granted by the CPA Act were not in any way foreseeable at the time these sound recordings were created and, thus, granting these rights creates a windfall that is certainly inefficient and likely unfair. Instead, the protection offered by the CPA Act was urged through campaigns that put the artists—even if dead—front and center. The most prominent of those campaigns used the iconic song “Respect,” recorded by performing artist Aretha Franklin, who died two months before passage of the MMA.⁹¹ Similar to aspects of the Sonny Bono Copyright Term Extension Act and the Berne Convention Implementation Act of 1988, which were the focus of Professor Gordon’s earlier critique,⁹² this new federal protection for existing works of authorship did not create an incentive for authorial creativity. The idea that increased protection for works created over forty-five years earlier would somehow provide an incentive for the creation of new works is doubtful.⁹³ In reality the CPA Act was, again, a compromise worked out among industry insiders with a variety of special carveouts and deals.⁹⁴

assignment of pre-1972 sound recordings is governed by state law. In many states, the common law would govern whether a writing is required.

⁸⁸ Classics Protection and Access Act, Pub. L. No. 115-264, § 202, 132 Stat. 3676, 3737 (codified at 17 U.S.C. § 1401(l)(2)(A) (2018)). The CPA Act also specifies that subsequent transfers of the rights are now governed by §§ 201(d)-(e) and § 204 of the Copyright Act. *Id.* (codified at 17 U.S.C. §§ 1401(h)(1)(A), (l)(2)(B) (2018)).

⁸⁹ For some activities that are covered by statutory licenses, there are requirements that royalty payments be made directly to the performing artists. *See infra* Section III.B.

⁹⁰ Gordon, *supra* note 1, at 614.

⁹¹ *See, e.g.,* Sisario, *supra* note 18.

⁹² *See* Gordon, *supra* note 1, at 625, 655. Professor Gordon was focused on the Supreme Court cases that upheld the constitutionality of those two acts: *Eldred v. Ashcroft*, 537 U.S. 186, 194 (2003) (finding Copyright Term Extension Act constitutional) and *Golan v. Holder*, 565 U.S. 302, 313-16 (2012) (finding restoration of copyrights that had fallen into public domain constitutional).

⁹³ Although the Supreme Court has appeared to give some weight to the possibility of such a remote incentive. *See Eldred*, 537 U.S. at 215 (suggesting that “[n]othing in the Copyright Clause bars Congress from creating the same incentive” of guaranteeing that authors receive benefits of extending copyright term).

⁹⁴ The most notably clear carveout was the last-minute, five-year extension of a more favorable royalty rate for SiriusXM and MusicChoice to avoid those companies’ objections to the entire MMA. *See* Chris Cooke, *US Senate Passes Music Modernization Act*, COMPLETE

Professor Gordon articulated her litmus test as part of a critique of the Copyright Term Extension Act (“CTEA”).⁹⁵ One of the justifications for the CTEA relied on the potential investment in the restoration and greater dissemination of older creative works if they remained protected by federal copyright law.⁹⁶ In contrast, the CPA Act was focused on creating “substantial parity between pre-1972 recordings and other sound recordings (referred to as ‘post-1972’ recordings), ensuring that recordings fixed before and after the arbitrary date of February 15, 1972 will receive similar treatment under federal law.”⁹⁷ Restoration and the potential for greater dissemination were not focuses of, or justifications for, the legislation. As discussed below, there are several ways in which the performing artists who created sound recordings pre-1972 are treated quite differently from artists who created sound recordings post-1972.⁹⁸

Two important parity aspects that the CPA Act does achieve relate to the online use of sound recordings. Both concern the potential liability faced by companies offering digital music services. The first involves the safe harbor provisions of the Copyright Act, often referred to as “notice and takedown.” The second relates to the statutory licensing that is available for public performances of sound recordings.

The Copyright Act contains a safe harbor provision for online service providers that shelters companies like Facebook and Google from monetary liability for infringing content that is posted by users of those services.⁹⁹ In order to maintain the protection from liability, a service provider must not have knowledge of specific infringing material and must remove material when a copyright owner notifies the service provider that the material is infringing.¹⁰⁰ Because pre-1972 sound recordings were not eligible for federal copyright protection, it was unclear whether the safe harbor protection offered by the Copyright Act applied to claims of state law infringement.¹⁰¹ The CPA Act ends that debate by expressly making claims under the new federal protection subject to the safe harbor provisions¹⁰² and expressly preempting almost all claims based

MUSIC UPDATE (Sept. 19, 2018), <https://completemusicupdate.com/article/us-senate-passes-music-modernization-act/> [<https://perma.cc/W84F-5FW5>].

⁹⁵ Gordon, *supra* note 1, at 613 (“[C]opyright must serve creative authorship rather than noncreative labor.”).

⁹⁶ See *Eldred*, 537 U.S. at 215 (discussing justification).

⁹⁷ Substitute Conference Report, *supra* note 11, at 15.

⁹⁸ See *infra* Section III.A (exploring themes of fairness and equal treatment in MMA).

⁹⁹ 17 U.S.C. § 512 (2018).

¹⁰⁰ *Id.* §§ 512(c)-(d).

¹⁰¹ *Compare* Capitol Records, LLC v. Vimeo, LLC, 826 F.3d 78, 82 (2d Cir. 2016) (holding that § 512 safe harbors “include infringement of state laws of copyright”), *with* UMG Recordings, Inc. v. Escape Media Grp., 964 N.Y.S.2d 106, 112 (App. Div. 2013) (holding that § 512 safe harbors do not apply to state law copyright infringement claims).

¹⁰² Classics Protection and Access Act, Pub. L. No. 115-264, § 202, 132 Stat. 3676, 3735 (2018) (codified at 17 U.S.C. § 1401(f)(3) (2018)).

on state law.¹⁰³ As a result, liabilities for potentially infringing rights in pre-1972 and post-1972 sound recordings are treated the same in this context.

The second aspect of parity involves the public performance right. Sound recording copyright owners have long desired to have a general public performance right. A general public performance right would allow sound recording copyright owners (largely record labels) to seek license fees for terrestrial radio station broadcasts as well as general public performances that occur when recorded music is played in restaurants, bars, and retail stores. For decades, the powerful broadcast industry has successfully lobbied Congress to resist these calls for protection.¹⁰⁴ Instead, in 1995 when the internet began developing into something with the potential to decrease sales of physical copies of sound recordings, Congress added a more limited digital performance right.¹⁰⁵ The implementation of that limited public performance right for sound recording copyright owners involved a new statutory license, codified in § 114 of the Copyright Act and administered through SoundExchange.¹⁰⁶ That statutory license is available for noninteractive streaming activity.¹⁰⁷ In making older sound recordings eligible for federal protection, the CPA Act also made those sound recordings subject to the statutory license of § 114.¹⁰⁸ For noninteractive streaming services, the path to a statutory license reduced the uncertainty of litigation-related damages if a court determined that the state protection included a public performance right.

A final aspect to consider in the context of granting new federal protection for works created over forty-five years ago is whether a benefit theory supports such an expansion of rights. In her writings, Professor Gordon has urged the need for a coherent jurisprudence of benefits.¹⁰⁹ When is it appropriate for the law to

¹⁰³ *Id.* § 202, 132 Stat. at 3728 (codified at 17 U.S.C. § 301(c) (2018)). For a discussion of the limited state law causes of action not preempted by the CPA Act, see Tyler Ochoa, *An Analysis of Title II of Public Law 115-264: The Classics Protection and Access Act*, TECH. & MARKETING L. BLOG (Oct. 24, 2018), <https://blog.ericgoldman.org/archives/2018/10/an-analysis-of-title-ii-of-public-law-115-264-the-classics-protection-and-access-act-guest-blog-post.htm> [<https://perma.cc/L9E4-ZFYF>].

¹⁰⁴ See Loren, *supra* note 38, at 568-70 (describing failed efforts of sound recording copyright owners to add a general public performance right).

¹⁰⁵ *Id.* (detailing limited digital performance right enacted, which granted the exclusive right only “to perform the copyrighted work publicly by means of a digital audio transmission” (quoting Digital Performance Right in Sound Recordings Act of 1995, § 2, Pub. L. No. 104-39, 109 Stat. 336 (amending 17 U.S.C. § 106(6) (2012)))).

¹⁰⁶ 17 U.S.C. § 114 (2018).

¹⁰⁷ See Loren, *supra* note 38, at 574-76.

¹⁰⁸ 17 U.S.C. § 1401(b)(2). They are also subject to the statutory license available for ephemeral copies contained in § 112(e) of the Act. *Id.*

¹⁰⁹ See, e.g., Gordon, *Of Harms and Benefits*, *supra* note 9, at 479 (“[I]ntellectual-property statutes—which do give injunctive powers—appear to exceed what the logic of a benefits-oriented jurisprudence itself would grant.”); Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 VA. L. REV. 149, 161 (1992)

recognize and protect a right based not on a harm that an individual suffers but rather based on a benefit that might accrue to another? The CPA Act confers a greater set of federal rights on those who previously may have had only a more limited set of rights under state law. A justification for granting these expanded rights could be a recognition that benefits accrue to those who publicly perform pre-1972 sound recordings and that benefits should not be enjoyed for free. The parity argument with newer sound recordings bolsters this argument because the use of post-1972 sound recordings does not occur without payment for that use. But is conferring a benefit a sufficient justification for granting rights? Professor Gordon's work in this area, seeking to probe the use of benefit-conferring justifications for rights recognition, remains relevant to the fundamental question of the normative value of the new rights created by the CPA Act.

The parity argument for benefit-conferring activities can be applied to a different comparison, supporting a different result. What should we make of the fact that there are those who are able to publicly perform sound recordings via terrestrial broadcasts or in bars or restaurants without paying for that benefit? Because sound recording copyright owners only have a right to control public performances that occur by means of a digital audio transmission,¹¹⁰ those nondigital public performance benefits are enjoyed without payment. Professor Gordon argues that not all benefits need to be paid for; indeed "some benefits should be allowed to flow without court-ordered recapture or payment."¹¹¹ Arguments about parity of treatment fall flat when some public performances require payment while others do not.

The evolution of copyright protection for sound recordings has sought to assure a level of compensation for rights holders as technology has changed and music consumption patterns have shifted. Congress first added the digital audio public performance right for sound recordings as album sales began to be affected by the digital availability of music. The addition of federal rights for pre-1972 sound recordings comes at a time when seventy-five percent of music industry revenue is derived from digital streaming.¹¹² Without federal recognition of a right to compensation for digital streaming, owners of rights in pre-1972 sound recordings would be left with very little revenue. In that sense, as a descriptive matter, the changes in copyright law have little to do with theories of benefits and everything to do with market preservation.

[hereinafter Gordon, *On Owning Information*] ("[T]he jurisprudence of benefits has not yet received the fine tuning that courts and commentators have lavished on tort law.").

¹¹⁰ 17 U.S.C. § 106(6).

¹¹¹ Gordon, *On Owning Information*, *supra* note 109, at 161 (arguing that "restitution-for-benefits rule" should not be "absolute").

¹¹² See Howe, *supra* note 22.

III. EQUAL TREATMENT AND FAILING TO BENEFIT ARTISTS DIRECTLY

Professor Gordon has urged that the creative individuals who generate works of authorship should be the focus of copyright protection.¹¹³ Part of respecting the contributions that those individuals make to culture involves an equality of treatment. Parity of rights was certainly a touted benefit of the MMA. However, as Section A of this Part explores, there are several aspects of the MMA that created more inequality in the rights recognized under federal law. At the same time, Section B of this Part describes how the MMA expanded an important monetary protection for performing artists by requiring direct payment to artists of royalties collected and distributed by SoundExchange. Direct payments to artists are important because the money does not pass through the record companies and, thus, is not subjected to various set-offs, recoupments, and adjustment that record deals are notorious for including. But, as Section B identifies, in the expansion of direct payment obligations, the MMA created a further inequality in treatment. Additionally, the MMA missed opportunities to keep the core of copyright focused on authors¹¹⁴ by creating a large potential wealth transfer to already-wealthy copyright owners, as Section C of this Part explores, and also by failing to afford a termination right for the newly created federal rights in pre-1972 sound recordings, as Section D of this Part addresses.

A. *Themes of Fairness and Equal Treatment*

Much of the MMA was justified by claims of creating equal treatment and parity in rights. Whether it was to provide a mechanism for musical work copyright owners to achieve royalties on par with sound recording copyright owners or for pre-1972 sound recording rights holders to be treated similar to post-1972 sound recording copyright owners, the MMA was celebrated as the right thing to do to bring equal treatment to the music industry.

One of the ways in which the MMA furthered equal treatment was by establishing that the Copyright Royalty Judges are to use the same set of criteria for setting compulsory royalties for musical works (mechanical copies under § 115) as for the statutory license for sound recordings (digital public performances under § 114).¹¹⁵ While that may seem like parity in treatment, in fact it is not. The inequality is clear when you focus on the distinction between interactive and noninteractive streaming and the different treatment of sound recordings versus musical works for those streaming activities.

For musical works, interactive streaming is a “covered activity” eligible for the new § 115 blanket license to be administered by the MLC. But, for sound recordings, interactive streaming is *not* subject to the statutory license. Instead, digital streaming services engaged in interactive streaming must negotiate

¹¹³ See, e.g., Gordon, *supra* note 1, at 613 (“[C]opyright must serve creative authorship rather than noncreative labor.”).

¹¹⁴ Gordon, *supra* note 1, at 613.

¹¹⁵ See *supra* notes 67-73 and accompanying text.

directly with the sound recording copyright owners for permission to publicly perform the sound recordings digitally. To have equality, authorization for use of sound recordings in interactive streaming would have to be subject to a statutory license using the same criteria, rather than left to private negotiation.

For musical works, noninteractive streaming is not within the definition of a mechanical copy (it is not a DPD), so no payment need be made to the copyright owner of the musical work for mechanical copies.¹¹⁶ But for sound recordings, noninteractive streaming is the activity that is licensed by the § 114 statutory license. Digital streaming services engaged in noninteractive streaming rely on the statutory license for authorization related to sound recordings, but they must obtain authorization from the performing rights organizations to publicly perform musical works.

The charts below depict the disparate treatment of the different types of copyright owners (musical works and sound recordings) relative to the different rights (of reproduction and distribution, and of public performance) for both interactive and noninteractive streaming.

Table 1. Reproduction and Distribution Rights.

	Interactive Streaming	Noninteractive Streaming
Musical Works	Defined as a mechanical copy Rate standard for statutory license: willing buyer/willing seller	Not a mechanical copy—no license needed
Sound Recordings	Privately negotiated agreements	Statutory license Rate standard: willing buyer/willing seller

¹¹⁶ Note that authorization to engage in a public performance of the musical work will still be needed.

Table 2. Public Performance Rights.

	Interactive Streaming	Noninteractive Streaming	Nondigital Public Performance
Musical Works	Within © owners' rights Licenses available from PROs	Within © owners' rights Licenses available from PROs	Within © owners' rights Licenses available from PROs
Sound Recordings	Within © owners' rights Licenses through privately negotiated agreements	Within © owners' rights Statutory License Rate standard: willing buyer/ willing seller	Not within © owners' rights

There are additional ways in which the MMA codified unequal treatment. As explained in more detail in the next section, pre-1972 performing artists are treated better because the direct payment requirement is applicable to voluntary licenses for those works, whereas the direct payment requirement for post-1972 works only applies to royalties collected pursuant to statutory licenses.¹¹⁷ At the same time, as Section D of this Part details, pre-1972 performing artists are worse off because they have no termination rights—either for the newly added protections (akin to termination rights codified in § 304 of the Copyright Act) or for new contracts (akin to termination rights codified in § 203 of the Copyright Act).¹¹⁸

Table 3. Comparison of Pre- and Post-1972 Sound-Recording Rights.

	Interactive Streaming Royalties	Noninteractive Streaming Royalties	Termination Rights
Pre-1972	Direct payments to performing artists	Direct payments to performing artists	None
Post-1972	No requirements (privately negotiated agreements)	Direct payments to performing artists	1972-1976: § 304 terminations § 203 terminations 1978-present: § 203 terminations

¹¹⁷ See *infra* Section III.B.

¹¹⁸ See *infra* Section III.D.

There are also other smaller ways in which pre- and post-1972 sound recording copyright owners are treated differently. Pre-1972 sound recordings are treated more favorably than some post-1972 sound recordings because they do not lose protection for failure to have included a copyright notice on previously published copies. Sound recordings published between 1972 and 1989 needed proper copyright notice on distributed copies to retain federal protection.¹¹⁹ Pre-1972 sound recordings are also treated more favorably than all other types of copyrighted works because pre-1972 sound recordings have no requirement to file with the Copyright Office for a “renewal” of their copyrights. Instead, pre-1972 sound recordings automatically receive federal protection for ninety-five years from the date of first publication, with an additional three to fifteen years of transition protection.¹²⁰ All other U.S. works published prior to 1964 were required to file a renewal application after twenty-eight years in order to gain a full ninety-five years of copyright protection.¹²¹ Additionally, instead of either twenty-eight years (if no renewal was filed) or ninety-five years (if a renewal was filed pre-1964, or was not needed post-1964), the protection for pre-1972 sound recordings lasts for a minimum of ninety-eight years and a maximum of one hundred and ten years.¹²²

In the end, while those supporting passage of the MMA promoted the parity it would bring to the music industry, such parity is far from the reality. Many aspects of the protections offered remain quite different for different categories of works—different for musical works and sound recordings, and different for pre-1972 and post-1972 sound recordings.

B. *Paying Artists Directly*

With the passage of the CPA Act, the statutory license that authorizes the digital public performance of sound recordings for noninteractive streaming now includes both pre- and post-1972 recordings.¹²³ Importantly, the royalties received pursuant to that statutory license are distributed through a regime that includes a requirement for direct payment to the creative individuals involved in

¹¹⁹ JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 660 (4th ed. 2015).

¹²⁰ Classics Protection and Access Act, Pub. L. No. 115-264, § 202, 132 Stat. 3676, 3728-29 (2018) (codified at 17 U.S.C. § 1401(a)(2)(A) (2018)). The transition protection is three years from 2018 for sound recordings published before 1923, five years for sound recordings first published in 1923-1946, and fifteen years for sound recordings first published in 1947-1956. All other sound recordings get a transition period that expires on February 15, 2067. *Id.* § 202, 132 Stat. at 3729 (codified at 17 U.S.C. § 1401(a)(2)(B) (2018)).

¹²¹ Without completing the required renewal filing, works first copyrighted before 1964 had a copyright term of only twenty-eight years. COHEN, *supra* note 119, at 666-68.

¹²² See Ochoa, *supra* note 103 (discussing transition period and resulting duration of protection for pre-1972 sound recordings).

¹²³ 17 U.S.C. § 1401(b) (2018).

the creation of that sound recording.¹²⁴ The statute allocates 45% of the royalty to the featured artist or artists, 2.5% to the nonfeatured musicians, and 2.5% to the nonfeatured vocalists.¹²⁵ The statute allocates the remaining 50% to the sound recording copyright owner—often the record label.¹²⁶ Direct payment to artists prevents the record labels from applying any royalties to various set-offs, recoupments, and adjustments that record deals are notorious for including.

Under the CPA Act, the direct payment requirements are applicable to royalties collected for use of pre-1972 sound recordings. The statutory license royalties for noninteractive streaming of both pre- and post-1972 sound recordings are directly within the regime administered by SoundExchange. However, under the CPA Act, the direct payment requirement for pre-1972 sound recordings is made applicable also to voluntarily negotiated licenses (including those for interactive streaming).¹²⁷ For post-1972 sound recordings, the statute states that when it comes to voluntarily negotiated licenses, both featured and nonfeatured artists are to “receive payments from the copyright owner of the sound recording in accordance with the terms” of the artist’s contract.¹²⁸ In this way, pre-1972 performing artists are actually afforded greater protections than newer performing artists.

¹²⁴ *Id.* § 114(g)(2).

¹²⁵ *Id.*

¹²⁶ *Id.* Under Title III of the MMA, called the Allocation for Music Producers Act (“AMP Act”), it is possible for a portion of the amount due to either the sound recording copyright owner or the featured artists to instead be paid to producers, mixers, and sound engineers. *See* Allocation for Music Producers Act, Pub. L. No. 115-264, § 302, 132 Stat. 3676, 3737 (2018) (codified at 17 U.S.C. § 114(g)(5)-(6) (2018)). That payment possibility, however, is something that would need to be negotiated for, as the AMP Act requires that either the sound recording copyright owner or the featured artist file with SoundExchange a “letter of direction” for such payments. 17 U.S.C. § 114(g)(5). Sound recordings created prior to 1995 have a different, more complicated set of rules in order for payments to be made to producers, mixers, and sound engineers. *Id.* § 114(g)(6).

¹²⁷ *Id.* § 1401(d). As helpfully explained by Professor Tyler Ochoa:

Under the CPA Act, for voluntary agreements entered into on or after the date of enactment, subsection 1401(d)(2) provides that the licensee shall pay “50 percent of the performance royalties for that transmission due under the license” to “the collective designated to distribute receipts from” the §114(f) statutory license (currently SoundExchange); and those payments “shall be fully credited as payments due under the license.” [§1401(d)(2)(A)] These royalties are to be distributed to featured artists and non-featured musicians and vocalists in the same proportions as under §114(g). [§1401(d)(3)] This accomplishes the same split of royalties that governs digital audio transmissions for post-1972 sound recordings, but it avoids calling the rights owner of a pre-1972 sound recording a “copyright owner.”

Ochoa, *supra* note 103 (alterations in original).

¹²⁸ 17 U.S.C. §§ 114(g)(1)(A)-(B). Subsection (B) provides that nonfeatured artists are to receive payments in accordance with their contract “or other applicable agreement.” *Id.* § 114(g)(1)(B). Presumably, “other applicable agreement” includes union contracts or session musician contracts.

While Title II of the MMA preserved and even expanded the requirement of direct payment to performing artists, Congress did not take the opportunity to do the same for songwriters. The royalties collected pursuant to the blanket license administered by the MLC are to be distributed only to copyright owners.¹²⁹ There is no provision for any percentage of the royalties to be paid directly to the songwriters who authored the musical works being used pursuant to the blanket license.¹³⁰ This was a missed opportunity for Congress to keep the creative artists at the core of copyright.

C. *Collected Royalties for “Unmatched Works” Distributed to Existing Copyright Owners*

As described above,¹³¹ the blanket license available under the Musical Works Modernization Act includes all musical works, even those whose copyright owners cannot be located, which the MWMA calls “unmatched” works.¹³² The category of unmatched works is a type of “orphan work.”¹³³ Orphan works are a problem for those who would like to use them. Because the copyright owner cannot be located, someone engaging in a use that infringes on the copyright owner’s rights risks a lawsuit if the owner surfaces.¹³⁴ Under the blanket license,

¹²⁹ The MWMA dictates that the MLC shall “distribute royalties to copyright owners in accordance with the usage and other information contained in [usage] reports” received from digital music services relying on the blanket license. Musical Works Modernization Act, Pub. L. No. 115-264, § 102, 132 Stat. 3676, 3694 (2018) (codified at 17 U.S.C. § 115(d)(3)(G)(i)(II) (2018)). Additionally, the Act provides that “[t]o be entitled to receive royalties under a compulsory license obtained under subsection (b)(1) the copyright owner must be identified in the registration or other public records of the Copyright Office.” *Id.* § 102, 132 Stat. at 3679 (codified at 17 U.S.C. § 115(c)(1)(A) (2018)).

¹³⁰ The MWMA does contain a provision that may result in some payments to songwriters, but it is not a direct payment and the payments relate to “unmatched works.” *See infra* Section III.C. Because these payments are for unmatched works, the songwriters who will receive these payments did not author the works for which the payment is being made. Additionally, for the royalties related to unmatched works, the statute requires copyright owners to “pay or credit a portion to songwriters” and provides that “in no case shall the payment or credit to an individual songwriter be less than 50 percent of the payment received by the copyright owner.” 17 U.S.C. § 115(d)(3)(J)(iv)(II). But the statute also states that such payments are to be made “in accordance with applicable contractual terms, but notwithstanding any agreement to the contrary.” *Id.* § 115(d)(3)(J)(iv). Thus, this minimum 50% payment requirement is not a direct payment requirement for the individuals responsible for creating the musical works to which the collected royalties are attributable.

¹³¹ *See supra* Section I.A (describing MWMA’s new blanket license).

¹³² Musical Works Modernization Act, Pub. L. No. 115-264, § 102, 132 Stat. 3676, 3721 (2018) (codified at 17 U.S.C. § 115(e)(35) (2018)).

¹³³ *See, e.g.,* Ochoa, *supra* note 103 (referring to unmatched works as “orphan works”).

¹³⁴ As the Copyright Office has noted, “anyone using an orphan work does so under a legal cloud, as there is always the possibility that the copyright owner could emerge after the use has commenced and seek substantial infringement damages, an injunction, and/or attorneys’ fees.” U.S. COPYRIGHT OFF., ORPHAN WORKS AND MASS DIGITIZATION 2 (2015),

users of musical works have authorization to use unmatched works. The royalties collected for covered activities involving unmatched works are to be held by the MLC for three years¹³⁵ in hopes that the copyright owners will surface and claim their ownership interests.¹³⁶ If the copyright owners have not been located, the money is to be distributed to “known copyright owners.”¹³⁷ While the MWMA charges an oversight committee within the MLC with establishing policies and procedures for the distribution of royalties collected for unmatched works,¹³⁸ it also clearly states that the royalties for unmatched works are to be “equitably distributed to known copyright owners.”¹³⁹ Most assume that this will mean those royalties will be distributed based on market share, which means the lion’s share will be paid to the copyright owners of the most popular musical works.

Those “unmatched work” royalties could have been used to help creative songwriters of the type most likely to end up in the unmatched category, i.e., those whose works did not gain widespread acclaim. Other countries have used these types of royalties in innovative ways, facilitating the production of new works and aiding artists directly.¹⁴⁰ Instead, Congress chose to increase the revenues of the most successful composers and songwriters and their music publishers.

The distribution of royalties for unmatched works was a major issue in the battle for which entity the Copyright Office would designate as the MLC. Two different entities sought the designation.¹⁴¹ The Copyright Office selected the

<https://www.copyright.gov/orphan/reports/orphan-works2015.pdf> [<https://perma.cc/N5FV-M749>] [hereinafter ORPHAN WORK REPORT].

¹³⁵ 17 U.S.C. § 115(d)(3)(H)(i).

¹³⁶ The statute requires that the MLC “engage in diligent, good-faith efforts to publicize . . . the ability [and procedures] to claim unclaimed accrued royalties for unmatched musical works.” *Id.* § 115(d)(3)(J)(iii)(II).

¹³⁷ *Id.* § 115(d)(3)(C)(i)(V); *see also id.* § 115(d)(3)(J)(i). The loss of those royalties is a type of penalty default. Copyright owners of musical works need to register with the MLC in order to claim their royalties. *Id.* § 115 (c)(1)(A). The penalty for failure to register is the loss of past royalties. *See id.* § 115(d)(3)(J)(i). While it is hoped that this penalty will create an incentive for registration, what happens to those unclaimed royalties is likely to have little impact on the magnitude of the incentive the penalty creates.

¹³⁸ *Id.* § 115(d)(3)(J)(ii).

¹³⁹ *Id.* § 115(d)(3)(C)(i)(V).

¹⁴⁰ For example, the United Kingdom permits royalties collected for orphan works to be used to fund “social, cultural, and educational activities.” ORPHAN WORK REPORT, *supra* note 134, at 29.

¹⁴¹ *See* Kyle Jahner, *Big Music Publishers, Songwriters Win Digital Collective Bid*, BLOOMBERG LAW (July 5, 2019, 12:40 PM), <https://news.bloomberglaw.com/ip-law/big-music-publishers-songwriters-win-digital-collective-bid> (explaining that American Music Licensing Collective (“AMLC”) criticized Mechanical Licensing Collective, Inc. (“MLCI”) for being “ beholden to large music publishers” and “conflicted because its members would

entity sponsored by the National Music Publishers Association¹⁴² and was supported by many of the major players in the industry.¹⁴³ The other entity had insisted that it was better positioned to aid in reducing the amount of unmatched works.¹⁴⁴

D. *Termination Rights Not Granted to Pre-1972 Sound Recording Artists*

One of the most author-centric provisions of the current Copyright Act is the inalienable right of authors to terminate certain grants or licenses of their copyrights.¹⁴⁵ These termination rights cannot be contracted around.¹⁴⁶ One termination right is applicable to agreements entered into before January 1, 1978.¹⁴⁷ A second termination right applies to agreements entered into on or after January 1, 1978.¹⁴⁸ The termination rights granted in the Copyright Act serve a variety of purposes, but fundamentally they afford creative individuals¹⁴⁹ whose talent results in works of lasting value a chance to recapture copyright rights.¹⁵⁰

For agreements entered into before the effective date of the 1976 Copyright Act, Congress provided a termination right related to the additional years of

benefit the most whenever the Mechanical Licensing Collective can't determine where royalties should go").

¹⁴² *Id.*

¹⁴³ The Copyright Office designated MLCI as the MLC. Designation of Music Licensing Collective and Digital Licensee Coordinator, 84 Fed. Reg. 32,274, 32,286 (Feb. 25, 2019) (codified at 37 C.F.R. pt. 210) (finding that "under both the proper metric of market share, and the alternative metric of number of copyright owners, MLCI is the [MLC] candidate that satisfies the endorsement requirement").

¹⁴⁴ Ed Christman, *AMLC Tells Nashville It Is Best Pick to Form Mechanical Licensing Collective, Arguing NMPA-Led Group Has Too Many Conflicts*, BILLBOARD (Apr. 11, 2019), <https://www.billboard.com/articles/business/8506723/amlc-nashville-mechanical-licensing-collective-nmpa> [<https://perma.cc/5SRA-HHH4>].

¹⁴⁵ "Affording creators a mechanism to regain some control of the exploitation of their works could shore up copyright's legitimacy by strengthening the connection between creators and copyrights throughout the long copyright term." Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 37 (2010).

¹⁴⁶ 17 U.S.C. § 203(a)(5) (2018) (stating, in the case of grants of transfer or license of copyright executed by author on or after January 1, 1978, that "[t]ermination of the grant may be effected notwithstanding any agreement to the contrary"); *id.* § 304(c)(5) (providing similar prohibition for grants executed before January 1, 1978).

¹⁴⁷ *Id.* §§ 304(c)-(d). January 1, 1978, is the effective date of the 1976 Copyright Act.

¹⁴⁸ *Id.* § 203.

¹⁴⁹ If the author is dead, ownership of the termination right passes to the author's widow or widower, children, and grandchildren—or, if none of these relatives are living, the author's executor, administrator, personal representative, or trustee. *Id.* §§ 203(a)(2), 304(c)(2).

¹⁵⁰ See Lydia Pallas Loren, *Renegotiating the Copyright Deal in the Shadow of the "Inalienable" Right to Terminate*, 62 FLA. L. REV. 1329, 1342-52 (2010).

copyright protection that Congress added to existing copyrights.¹⁵¹ Transferees or licensees that had bargained for copyrights with a certain duration were granted those additional years of protection, with one important caveat: Congress gave the authors an opportunity to be the beneficiaries of those additional years of protection by allowing them to terminate the prior transfers of ownership.¹⁵² Congress did not extend that same logic to the new federal protections it created for pre-1972 sound recordings with the CPA Act. Despite the CPA Act's careful delineations of the various provisions of the Copyright Act that would apply to the new federal protections granted to the owners of the reproduction and distribution rights under state law, no termination rights were created. This assures that the beneficiaries of these new federal protections are the transferees of those rights. There is no ability for the artists to directly control these new federal rights if they had previously transferred their state law rights.

The 1976 Copyright Act also created a separate termination right for those agreements entered into after the effective date of the Act. This termination right permits an author to terminate a transfer of copyright thirty-five years after the date of the transfer.¹⁵³ Again, Congress did not extend this author-centric provision to creators of pre-1972 sound recordings. Thus, even an agreement entered into after the CPA Act concerning a pre-1972 sound recording does not carry with it a termination right. But artists entering into agreements assigning rights in post-1972 sound recordings do have such a termination right. This is another way in which the MMA codified unequal treatment of performing artists.

The termination right is potentially an important way to keep authors at the core of copyright. In addition to creating a disparity in treatment, the lack of a termination right in the MMA shows that Congress was not really concerned with that central mission of copyright law.

CONCLUSION

The Music Modernization Act codifies a host of compromises and licensing arrangements worked out among music publishers, record labels, and digital music services. It adds an extremely complex and detailed licensing regime for mechanical copies of musical works that is of particular importance to digital music services and music publishers. Promoted as a way to reduce transaction costs, the blanket license facilitates the use of all musical works—even those works whose copyright owners cannot be located. The MMA also brings pre-1972 sound recordings into the federal copyright regime and importantly subjects those sound recordings to the statutory licensing available under the

¹⁵¹ 17 U.S.C. § 304(c). For a discussion of author termination rights, see Loren, *supra* note 150, at 1333-34.

¹⁵² Loren, *supra* note 150, at 1333-34.

¹⁵³ 17 U.S.C. § 203. The rules concerning terminations of transfers are complex. For a helpful explanation, see COHEN ET AL., *supra* note 119, at 695-96.

Copyright Act. These innovations will aid the current state of rights surrounding digital music streaming services.

However, despite being promoted as a way to bring more equal treatment to the industry, in many ways the MMA increases the disparity in treatment between musical work copyright owners and sound recording copyright owners. While ultimately the royalties received by those two groups of copyright owners will likely become more similar, the way the MMA achieves that result is not through equal treatment of the different copyrights. Additionally, while owners of pre-1972 sound recording rights now have federal statutory rights that are similar to those granted to owners of post-1972 sound recording copyrights, in many ways the artists who created those different works are treated quite differently.

In the end, the fundamental themes of copyright law highlighted throughout Professor Gordon's rich body of scholarly work seem largely absent from this voluminous addition to the Copyright Act.