

What the Music Modernization Act Missed, and Why Taylor Swift Has the Answer: Payments in Streaming Companies' Stock should be Dispersed Among all the Artists at the Label

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I. INTRODUCTION: THE DIGITIZATION OF THE MUSIC INDUSTRY

The music business is an evolving industry, given the vast technological changes constantly altering the way music is consumed. Copyright law governs the music industry, giving artists, including musical artists, property rights in the work they create.¹ In 1909, Congress enacted mechanical copyright laws to protect copyright owners' published work.² Nearly 80 years later, music is now consumed digitally.³

This Note will explore the issues encompassing music's digital era, specifically the tension between streaming companies desiring vast catalogues at little expense, and songwriters and music publishers who should be paid fairly for the work they create. This Note will analyze the likely effects of the Music Modernization Act (MMA) for copyright owners and streaming companies. Then, this Note recommends record labels and artists find contractual solutions to ensure artists are being paid adequately for their work. This is significant because the MMA does not address the issues with streaming services giving company equity to record labels, so the streaming services can pay less in royalty rates to labels.

Part II discusses the legal and business differences between non-interactive and interactive streaming services. This Part also explores the history of, purpose of, and changes brought by the MMA. Part III analyzes current copyright law and additional licensing laws Congress created with the MMA, Spotify's substitution of equity for royalties with record labels, and the role the record label has between a streaming company and copyright owner. Part IV argues legislation will not fix all of the music industry's issues with digital music streaming. This Note concludes by recommending a new industry standard: revenue-driving copyright owners and record labels should contract, so royalty revenues from revenue-driving artists are dispersed to the remaining artists at the label.⁴

1. Thomas M. Lenard & Lawrence J. White, *Moving Music Licensing into the Digital Era: More Competition and Less Regulation*, 23 UCLA ENT. L. REV. 133, 135 (2016).

2. *Id.*

3. *Id.* at 137–38.

4. *See infra* Part IV (arguing royalty revenues via negotiated stock between a streaming company and

II. BACKGROUND: DIFFERENCES IN STREAMING SERVICES AND THEIR BUSINESS MODELS, AND THE MMA EXPLAINED

A. Congress's Attempts to Update Copyright Laws in Music's Digital Age While Copyright Owners are Historically Under-Compensated

Copyright laws have not kept up with the digitalization of the music industry, in which music listeners turn to streaming platforms like Spotify, Apple Music, Pandora, and YouTube to consume music rather than buying albums, tapes, records, or individual songs.⁵ Unfortunately, some streaming companies ignore copyright law by failing to obtain mechanical licenses for musical works. However, Congress recognized the infringement models some streaming companies were operating under and proposed the MMA, creating a blanket licensing system, a copyright royalty board, and a collective body to amass mechanical royalties from streaming companies on behalf of musical publishers and songwriters.⁶ The MMA was supported widely by the music industry, including both music publishers and songwriters themselves.⁷

Previously, Congress tried to modernize copyright laws to reflect the movement from analogue music to digital music consumption through the Digital Performance Right in Sound Recordings Act of 1995 and the Digital Millennium Copyright Act of 1998.⁸ The legislation created a public performance royalty for musical works and sound recordings transmitted digitally, in addition to the mechanical royalty which Congress previously created.⁹

B. Differences Between Interactive and Non-Interactive Streaming Services

Streaming companies subscribe to either an interactive or non-interactive business model.¹⁰ The distinction between a non-interactive and interactive streaming service is based on the licensing requirements the company must comply with as-per copyright law.¹¹

The Copyright Act defines an interactive service as a service which allows a user to

record label).

5. Bill Rosenblatt, *The Big Push to Reform Music Copyright for the Digital Age*, FORBES (Feb. 25, 2018, 9:15 AM), <https://www.forbes.com/sites/billrosenblatt/2018/02/25/the-big-push-to-reform-music-copyright-for-the-digital-age/#35a5d96a2d6d> (“Music creators are paid royalties through an ad-hoc patchwork of laws, industry conventions and private deals The industry has struggled to . . . adapt . . . as music has transitioned to digital.”).

6. Orrin G. Hatch—Bob Goodlatte *Music Modernization Act*, COPYRIGHT.GOV, <https://www.copyright.gov/music-modernization/> (last visited Feb. 13, 2019) [hereinafter *Music Modernization Act*]; Ed Christman, *President Trump Signs Music Modernization Act into Law with Kid Rock, Sam Moore as Witnesses*, BILLBOARD (Oct. 11, 2018), <https://www.billboard.com/articles/business/8479476/president-trump-signs-music-modernization-act-law-bill-signing>; Jordan Bromley, *The Music Modernization Act: What Is It & Why Does It Matter?*, BILLBOARD (Feb. 23, 2018), <https://www.billboard.com/articles/business/8216857/music-modernization-act-what-is-it-why-does-it-matter-jordan-bromley>.

7. Nilay Patel, *How the Music Modernization Act Will Help Artists Get Paid More from Streaming*, THE VERGE (Oct. 3, 2018, 3:01 PM), <https://www.theverge.com/2018/10/2/17927852/music-modernization-act-streaming-monetization-meredith-rose-vergecast>.

8. Lenard & White, *supra* note 1, at 137.

9. *Id.*

10. Sofia Ritala, *Pandora & Spotify: Legal Issues and Licensing Requirements for Interactive and Non-Interactive Internet Radio Broadcasters*, 54 IDEA: INTELL. PROP. L. REV. 23, 25 (2014).

11. *Id.*

play a program specifically generated for the user or allows a user to listen to a sound recording chosen “on behalf” of the user.¹² Streaming companies like Spotify¹³ and Apple Music are interactive streaming platforms because subscribers and casual users to the platforms have access to and control of content they can seemingly play instantly.¹⁴

A streaming platform is not an interactive streaming service if the requested sound recording does not play within an hour of the request or at a time stipulated by the streaming platform or user.¹⁵ Non-interactive streaming services, like Pandora,¹⁶ provide users a music-consumption experience similar to radio recordings.¹⁷

C. Licensing Models for Interactive and Non-Interactive Streaming Services

Non-interactive and interactive streaming services provide different music consumption methods to users and subscribers, which result in different licensing schemes streaming companies follow to abide by the appropriate copyright law.

A non-interactive streaming service—Pandora for example—is required to obtain a public performance license for the sound recordings and musical works it plays for subscribers.¹⁸ The public performance copyright allows the license holder to “perform”¹⁹ or play the music publicly, and the copyright owner is paid and credited for the copyrighted musical work or sound recording.²⁰

Pandora obtains public performance licenses because Pandora provides musical works on a public platform through a “digital audio transmission.”²¹ Pandora does not reproduce or dispense the musical works and sound recordings to its subscribers like an interactive streaming service would because Pandora users do not control which musical works and sound recordings they listen to.²² Thus, non-interactive streaming services are required to obtain one license to abide by the Copyright Act lawfully: the public performance license.

Interactive streaming companies—like Spotify and Apple Music—also obtain public performance licenses for musical works and sound recordings because interactive streaming services transmit works publicly through a digital platform.²³ However, interactive streaming companies allow users to control what musical works and sound recordings they listen to and play, so the streaming service must obtain another license to lawfully reproduce the music disseminated amongst its users: the mechanical license.²⁴

An interactive streaming service is required to obtain both a public performance license and a mechanical license because copyright owners of musical works and sound

12. 17 U.S.C. § 114(j)(7) (2010).

13. Spotify offers two modes for streaming, an interactive and non-interactive service. *See infra* Part II.D. (discussing Spotify’s business model); *see infra* Part II.B. (analyzing Spotify’s responsibilities as an interactive streaming service).

14. Ritala, *supra* note 10, at 44.

15. *Id.*

16. *See infra* Part II.D.

17. Ritala, *supra* note 10, at 44.

18. *Id.* at 27–28.

19. 17 U.S.C.A. § 114(j)(7) (2010).

20. *Id.*

21. 17 U.S.C.A. § 106(4) (2002); 17 U.S.C.A. § 106(6) (2002).

22. Ritala, *supra* note 10, at 27–28.

23. *Id.* at 25.

24. *Id.* at 45–47.

recordings have a right to “exclusive distribution and reproduction rights [of the work].”²⁵ An interactive service reproduces and distributes the work—when the service allows users to select music to play imminently—thus needing to obtain both licenses.

Unlike non-interactive streaming services, interactive streaming services cannot obtain public performance licenses through the same statutory scheme—17 U.S.C.A. § 114—because an interactive service must negotiate with the copyright owner or a sound recording performance rights association.²⁶ A copyright owner of a musical work or sound recording has the exclusive right to distribute and copy their work.²⁷ A mechanical license allows a copyright owner to make money from other entities distributing and copying the sound recording.²⁸ Interactive streaming services are required to negotiate with the copyright owners to distribute and copy the musical works or sound recordings (i.e. the mechanical license), so the streaming company can lawfully provide this music to users and subscribers at their request.²⁹ Thus, interactive streaming services have to negotiate with the copyright owner—or a sound recording performance rights association—twice to obtain the appropriate licenses to abide by the U.S. Copyright Act.

D. The Difference in Business Models Between Non-Interactive Services Like Pandora and Interactive Streaming Services Like Spotify

1. Pandora’s Business Model

Pandora is a non-interactive streaming platform operating under a compulsory licensing scheme abiding by the Digital Millennium Copyright Act of 1998 (DMCA).³⁰ Pandora was founded in 1999 and the Music Genome Project was its essential database.³¹ The Music Genome Database was a human-made database classifying each song created in the database.³² In 2005, Pandora altered its efforts from business dealings to the consumer market by creating a digital radio service.³³ Pandora uses algorithms through the Music Genome Project to determine user preferences for music consumption.³⁴

Pandora qualifies for a compulsory licensing scheme to play their music catalogue lawfully.³⁵ If a company qualifies for compulsory licenses, the company is not required to negotiate with every single copyright owner for every song on the streaming platform. Instead, Pandora follows the “willing buyer/willing seller” business framework, in which Pandora pays a higher sound recording royalty rate.³⁶ This framework ensures Pandora pays sound recording rights owners for the compulsory licenses, subject to royalty rates

25. *Id.* at 46.

26. *Id.* at 47.

27. Ritala, *supra* note 10, at 25.

28. *Id.* at 47.

29. *Id.*

30. James H. Richardson, *The Spotify Paradox: How the Creation of a Compulsory License Scheme for Streaming On-Demand Music Platforms Can Save the Music Industry*, 22 UCLA ENT. L. REV. 45, 53–55 (2014).

31. *Id.* at 63.

32. *Id.*

33. *Id.* at 64.

34. *Id.*

35. Richardson, *supra* note 30, at 55.

36. *Id.*

adjudicated by the Copyright Royalty Board.³⁷

2. *Spotify as a Streaming Service*

This Note focuses primarily on Spotify's business practices, largely because Spotify dominates the music streaming business.³⁸ Spotify is the biggest music company in the world, worth \$28 billion and with 71 million paying subscribers.³⁹ 35% of all streamed music is streamed through Spotify.⁴⁰

3. *Spotify's Business Model*

Spotify is a Swedish-based streaming service providing "on-demand" music consumption services to users.⁴¹ On April 3, 2019, Spotify debuted as a public company on the New York Stock Exchange.⁴² Spotify uses a "stream-lined user interface" and has applications for Apple and Android phones.⁴³ Spotify also developed a "freemium" service in which users play music for free and are interrupted after a certain metric of songs by an advertisement.⁴⁴ Spotify profits from their "freemium service" through these advertisements.⁴⁵ Spotify also offers a premium service giving users access to Spotify's catalogue without advertisements and profits from this model via subscribers' monthly fees.⁴⁶

Spotify is required to pay licensing fees for every song a user requests regardless if the user is a paying or non-paying user, which means Spotify has hefty licensing expenses—required by copyright law—because of the nearly 180 million users requesting songs.⁴⁷

Spotify has operated at a loss since the company debuted in 2008.⁴⁸ However, Spotify executives hope attracting more subscribers and users via Spotify's premium and freemium services respectively will eventually make Spotify profitable, or, at least, closer to profitable than it has been.⁴⁹

E. The MMA: Congress's Attempt to Strengthen Copyright Law and Make Music

37. *Id.*

38. Stephen Witt, *Spotify Is, for Now, the World's Most Valuable Music Company*, NPR (Apr. 4, 2018, 10:57 AM), <https://www.npr.org/sections/therecord/2018/04/04/599385111/spotify-is-for-now-the-worlds-most-valuable-music-company>.

39. *Id.*

40. *Id.*

41. Richardson, *supra* note 30, at 57.

42. Hamza Shaban & Renae Merle, *After Wall Street Debut, Spotify Valued at 26.5 Billion*, WASH. POST (Apr. 3, 2018, 5:03 PM), <https://www.washingtonpost.com/news/the-switch/wp/2018/04/02/spotify-ipo/>.

43. Richardson, *supra* note 30, at 57.

44. *Id.*

45. *Id.*

46. Richardson, *supra* note 30, at 57.

47. Amy X. Wang, *Spotify Hits 180 Million Users — And Loses Even More Money*, ROLLING STONE (July 26, 2018, 1:34 PM), <https://www.rollingstone.com/music/music-news/spotify-hits-180-million-users-and-loses-even-more-money-703781/>.

48. *Id.*

49. *Id.*

Streaming Profitable

Representatives Doug Collins (R-GA) and Hakeem Jeffries (D-NY) introduced the original MMA to the House of Representatives in December 2017.⁵⁰ Under the 2017 version of the Bill, the MMA sought to implement a blanket licensing system for streaming companies.⁵¹

Representative Collins explained that he introduced the bill to allow music licensing laws to reflect the music industry’s digitalization and developments concerning streaming musical works and sound recordings.⁵² Representative Jeffries envisioned the MMA would require streaming services to pay songwriters and music publishers through a “mechanical licensing collective.”⁵³ The MMA passed unanimously in the House of Representatives in April 2018.⁵⁴

The MMA also seeks to amend Section 115 by requiring the Copyright Royalty Board to use the “willing buyer/willing seller” business framework mirroring the model Pandora currently uses to set royalty rates rather than the legal standard.⁵⁵ The “willing buyer/willing seller” framework (or the wheel approach) constitutes the intersection point between the value a buyer is willing to pay and the value the seller is willing to earn for a copyrighted work.⁵⁶ Advocates for copyright owners push for the “willing buyer/willing seller” standard for digital music royalties, so artists can be compensated at the fair market value for their work,⁵⁷ rather than the royalty rates established by legislation and government regulation.⁵⁸

Copyright rate disputes would also be using the wheel approach under the MMA. The “willing buyer/willing seller” framework implements a system in which copyright royalty disputes—to determine penalties for copyright infringement—are assigned to a judge in the Southern District of New York, rather than allowing the same few judges to decide music royalty rates.⁵⁹ The arbitrary assignment of judges to royalty dispute cases would make the cases fact-specific for the royalty dispute at issue, rather than allowing judges to rely on precedent and past royalty rates of older cases to adjudicate current royalty disputes sanctioning infringement.⁶⁰ The MMA would prohibit copyright-dispute judges from using

50. Ed Christman, *Music Modernization Act Introduced in the House of Representatives, with Major Music Licensing Reform at Stake*, BILLBOARD (Dec. 21, 2017), <https://www.billboard.com/articles/business/8078543/music-modernization-act-house-of-representatives-licensing-reform>.

51. *Id.*

52. *Id.*

53. *Id.*

54. Brian Haack, *Music Modernization Act Passes House of Representative Unanimously*, GRAMMY (Apr. 25, 2018, 2:28 PM), <https://www.grammy.com/advocacy/news/music-modernization-act-passes-house-representatives-unanimously>.

55. Christman, *supra* note 50.

56. Brian Haack, *Willing Buyer/Willing Seller Standards Will Help Build a Sustainable Music Economy*, GRAMMY (Feb. 28, 2018, 4:03 PM), <https://www.grammy.com/advocacy/news/willing-buyerwilling-seller-standards-will-help-build-sustainable-music-economy>; *see generally* CTR. FOR TECH. INNOVATION AT BROOKINGS, *DIGITAL MUSIC BROADCAST ROYALTIES: THE CASE FOR A LEVEL PLAYING FIELD 5* (2012), https://www.brookings.edu/wp-content/uploads/2016/06/CTI_19_Villasenor.pdf.

57. Haack, *supra* note 56.

58. *Id.*

59. Christman, *supra* note 50.

60. *Id.*

sound recording royalty rates to set music publishing royalty rates, with the hope the judge would set rates higher in favor of the music publisher.⁶¹

Congress's aim to implement a blanket licensing system through the MMA would theoretically help companies like Spotify⁶² who negotiate with copyright owners twice, once to play musical works and sound recordings and again to reproduce the work on their streaming platform.⁶³

Following the House of Representatives' unanimous vote to pass the MMA in April 2018, the Senate passed their version of the MMA—The Orrin G. Hatch Music Modernization Act—on September 18, 2018.⁶⁴ The Senate's version of the MMA maintained the blanket mechanical licensing system for streaming companies and the Mechanical Licensing Collective, which streaming companies fund, comprising of songwriters and music publishers who reset royalty rates and ensure rate disputes will be heard by rotating judges in the Southern District of New York.⁶⁵

Labeled as a bipartisan success,⁶⁶ the House of Representatives unanimously passed the Senate's version of the MMA on September 25, 2018. On October 11, 2018, President Trump signed the MMA into law.⁶⁷ The legislation is considered a victory for songwriters, given their copyrighted works will be properly licensed by streaming companies, and the "willing buyer/willing seller" standard will be used to determine rate disputes.⁶⁸ Spotify specifically praised the legislation, claiming the MMA will allow songwriters to be compensated for creating works they are passionate about.⁶⁹ Spotify's Vice President, Horacio Gutierrez, commended the legislation: "The Music Modernization Act is a huge step towards making that a reality, modernizing the outdated licensing system to suit the digital world we live in. The MMA will benefit the music community and create a more transparent and streamlined approach to music licensing and payment for artists."⁷⁰ Streaming companies deem the MMA a benefit to business because when streaming companies abide by the MMA, copyright owners are prohibited from filing an infringement suit, which applies retroactively from January 1, 2018 to the present.⁷¹

The MMA passed without Congress defining one of the key components of the legislation: the Mechanical Licensing Collective (MLC).⁷² The MLC updates the music

61. *Id.*

62. *Id.*

63. Christman, *supra* note 50.

64. Andrew Flanagan, *A Music Industry Peace Treaty Passes Unanimously Through Congress*, NPR (Sept. 19, 2018, 5:17 PM), <https://www.npr.org/2018/09/19/649611777/a-music-industry-peace-treaty-passes-unanimously-through-congress>.

65. Ed Christman, *Music Modernization Act Passes in Senate with Unanimous Support*, BILLBOARD (Sept. 18, 2018), <https://www.billboard.com/articles/business/8475876/music-modernization-act-passes-senate-unanimous-support>.

66. Flanagan, *supra* note 64.

67. Amy X. Wang, *Trump Signs Landmark Music Bill into Law*, ROLLING STONE (Oct. 11, 2018), <https://www.rollingstone.com/music/music-news/trump-signs-music-modernization-act-736185/>.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. Amy X. Wang, *The Music Modernization Act's Biggest Battle is Still Ahead*, ROLLING STONE (Dec. 27, 2018, 3:24 PM), <https://www.rollingstone.com/music/music-news/music-modernization-act-congress-mma-bill-772981/>.

licensing landscape and will administer the blanket licenses to streaming companies.⁷³

However, on July 8, 2019, music publishers and songwriters established the MLC.⁷⁴ The U.S. Copyright Office delegated the MLC to oversee blanket licenses and administer rights to songwriters and publishers under the MMA.⁷⁵ The MLC's authority and obligations began immediately upon establishment,⁷⁶ although the MLC will not fully take effect until January 2021.⁷⁷ The MLC's responsibilities are: "negotiation of a budget with the digital streaming services (who, by law, must fund the collective), partnering with a vendor to provide administration and matching services, and development of a user portal through which publishers and songwriters will be able to manage rights and royalties."⁷⁸ The National Music Publishers' Association, the Nashville Songwriters Association International, and the Songwriters of North America support the MLC.⁷⁹ Alisa Coleman, Chief Operations Officer of the late Allen Klein's musical holdings (including the Rolling Stones' early catalogue), is the serving chairperson for the MLC.⁸⁰

MLC's board consists of several music publishing executives and SVP and EVPs for Peermusic, Sony/ATV, and Warner Bros. Records, songwriters, producers, and the Co-CEO of Pulse Music Group.⁸¹ Other board members include the EVP and CFO of Warner Chapell, Universal Music Publishing's chief counsel, Concord's VP of Legal and Business Affairs, and the General Manager for the former Big Machine Music Label.⁸²

The Music Licensing Collective, said "buildup black-box"⁸³ royalty payments would not be distributed before 2023.⁸⁴ This pronouncement clarifies language in the MMA saying, "the first such distribution [of black-box royalties] shall occur on or after January 1 of the second full calendar year to commence after the license availability date."⁸⁵ These 2023 payment disbursements will repay songwriters dating back from 2014, whose royalty payments built up with no disbursement because "digital music services . . . are unable to match compositions to recordings, either due to poor or inadequate metadata or a lack of registration by DIY indie artists and songwriters with the Copyright Office."⁸⁶

F. Taylor Swift's Contract with Universal Music Group Indicates Copyright Owners are

73. *Id.*

74. *Designation of Music Licensing Collective and Digital Licensee Coordinator*, COPYRIGHT OFFICE (July 8, 2019), <https://www.federalregister.gov/documents/2019/07/08/2019-14376/designation-of-music-licensing-collective-and-digital-licensee-coordinator>.

75. Roy Trakin, *Who Are the Powerhouse Music Execs on the Mechanical Licensing Collective*, VARIETY (July 8, 2019, 1:49 PM), <https://variety.com/2019/biz/news/who-are-publishing-execs-mechanical-licensing-collective-1203261510/>.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. Trakin, *supra* note 75.

81. *Id.*

82. *Id.*

83. *See infra* Part III.B. (describing royalties paid to publishers as a "black box" of royalties).

84. Ed Christman, *House Judiciary Hearing on Copyright Office Reviews Music Modernization Act, Black Box Royalty Concerns*, BILLBOARD (June 26, 2019), <https://www.billboard.com/articles/business/8517787/house-judiciary-hearing-on-copyright-office-music-modernization-act>.

85. *Id.*

86. *Id.*

Beginning to Negotiate Streaming Revenues with Record Labels

Taylor Swift, via Instagram, announced she was leaving her original label, Big Machine Records, for Universal Music Group.⁸⁷ In addition to ownership of her future master recordings with Universal, Swift negotiated for “any sale of their Spotify shares [to] result in a distribution of money to their artists, non-recoupable.”⁸⁸ Swift asserted Universal agreed to her terms, and “[Universal] believe[s] [what they pay artists] will be much better terms than paid out previously by other major labels.”⁸⁹

In March 2018, before the deal with Swift and before Spotify’s entrance on the New York Stock Exchange, Universal contracted for shares with Spotify, ultimately owning 3.5%—worth around \$1 billion—of the company.⁹⁰ Universal claimed there would be a share sale of the Universal-owned Spotify stock, and artists would have a “share in the proceeds,” although no official plans were made.⁹¹ Swift’s deal solidified Universal’s promise to all artists at Universal, including artists “in the red with [Universal] for unrecovered advances.”⁹²

Taylor Swift noted in her Instagram post the payments to other Universal artists from Universal’s ownership in Spotify “meant more to [her] than any other deal point.”⁹³ Taylor previously championed for creators’ rights when she wrote a letter to Apple Music before its debut as a company, arguing for artists to be paid for the music subscribers streamed, influencing Apple to compensate copyright owners.⁹⁴ Part IV, Sections E. and F, of this Note will examine how artists should model Swift’s strategy.

III. ANALYSIS

A. The Inconsistencies of the MMA

The MMA is a step toward updating music licensing laws.⁹⁵ The MMA will implement a blanket licensing system, so interactive streaming companies do not have to negotiate twice for the same musical work, instead negotiating with the songwriter for the mechanical license and the sound recording rights association for the public performance license.⁹⁶ However, the MMA could be interpreted differently. The following interpretation is vehemently opposed by songwriters and music publishers.⁹⁷

87. Taylor Swift (@taylorswift), INSTAGRAM (Nov. 19, 2018), https://www.instagram.com/p/BqXgDJB1z7d/?utm_source=ig_web_copy_link.

88. *Id.*

89. *Id.*

90. Amy X. Wang, *Taylor Swift’s New Record Deal Affects Thousands of Other Musicians*, ROLLING STONE (Nov. 19, 2018, 4:56 PM), <https://www.rollingstone.com/music/music-news/taylor-swift-universal-republic-deal-spotify-758102/>.

91. *Id.*

92. *Id.* (contrasting Sony and Warner’s policies regarding payments from their Spotify stock and the distribution of said stock payments or lack thereof to their artists: “Sony gave those terms to its artists when it cashed out in Spotify shares earlier this year, but Warner declined to ignore artist balances, meaning that much of the money Warner gave out just went back to the label.”).

93. Swift, *supra* note 87; Wang, *supra* note 90.

94. Wang, *supra* note 90.

95. *See supra* Part II.D.

96. *Id.*

97. Eriq Gardner, *The Justice Department Quietly Backs Away from a Hard Line on Music Licensing*, HOLLYWOOD REP. (Nov. 27, 2017, 11:16 AM), <https://www.hollywoodreporter.com/thr-esq/justice-department->

I. MMA Legislation Could Be Interpreted to Offer “Full-Works” Licensing Only Because of Congress’s Attitude Toward Consent Decrees

A consent decree is an agreement between BMI or ASCAP (the two major performance rights organizations or PROs)⁹⁸ and the government, which regulates the responsibilities a PRO has to its licensees, regulates the PRO’s relationship with composers, songwriters, and publishers, and creates a rate dispute court adjudicating cases regarding copyright disputes and violations of the licensing agreement.⁹⁹ Consent decrees were authorized after lawsuits between the Department of Justice (DOJ) and ASCAP and BMI in 1941.¹⁰⁰ The lawsuits stemmed from litigation between both PROs because the PROs were worried about each other’s competitive space in the market after each had obtained expansive public performance rights held by the members in ASCAP and BMI.¹⁰¹ The DOJ asserted “full-works licensing” was required under the consent decree,¹⁰² meaning a work could be licensed only if a songwriter and producer were from the same publishing house.¹⁰³ The performance rights associations could not have a fractional license in the copyrighted work.¹⁰⁴ Only “full works,” i.e. copyrighted works in which songwriters and producers use the same publisher—BMI or ASCAP for example¹⁰⁵—could be licensed.¹⁰⁶ Semi-recently, the DOJ reviewed consent decrees¹⁰⁷ in light of the digital music era, but decided to keep the outdated decrees.¹⁰⁸

This framework could be interpreted to understand the MMA, except the DOJ could decide a blanket license for mechanical and public performance rights would have to be from the same copyright owner. This interpretation would be consistent with the MMA’s aim for interactive streaming companies to negotiate one time to license a musical work, but would be inconsistent with the MMA’s goal to compensate songwriters and music publishers for the work they create and copyright.¹⁰⁹ The MMA does not assert against this interpretation, and thereby creates an ambiguity in the legislation.

B. Policy Issues Regarding the MMA

The MMA fails to achieve one of the legislators’ important aims: to compensate

quietly-backs-away-a-hard-line-music-licensing-1061500.

98. Dae Bogan, *What’s the Difference Between ASCAP, BMI, SESAC, and SoundExchange?*, DIY MUSICIAN (Dec. 19, 2014), <https://diymusician.cdbaby.com/musician-tips/the-difference-between-ascap-bmi-sesac-and-soundexchange/>.

99. BMI, CHANGE IS NOW: WHAT IS THE CONSENT DECREE?, https://www.bmi.com/pdfs/advocacy/about_bmi_consent_decree.pdf (last visited Oct. 29, 2019).

100. *Antitrust Consent Decree Review*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/atr/ascap-bmi-decree-review> (last visited Feb. 13, 2019).

101. *Id.*

102. Gardner, *supra* note 97.

103. *Id.*

104. *Id.*

105. *Id.*

106. This scenario is the factual situation for the case *DOJ v. ASCAP & BMI*. This case is outside the scope of this Note, although the case is another facet of law and regulation music publishers encounter.

107. *Antitrust Consent Decree Review*, *supra* note 100 (discussing how consent decrees were used by the DOJ to regulate public performance rights for copyrighted musical works).

108. Gardner, *supra* note 97.

109. *See supra* Part I.D.

songwriters appropriately for the work they create and copyright.¹¹⁰ The MMA seeks to regulate streaming companies' activities, but does not determine how music publishers handle the additional royalties streaming companies will pay out for an artist or producer's copyrighted works.¹¹¹ Ensuring a blanket licensing system does eliminate numerous requirements streaming companies have to follow to distribute music on their platform and standardizes who to pay mechanical and public performance royalties to.¹¹² However, the MMA only dictates what streaming companies have to do, i.e. obtain the appropriate blanket licenses and pay the music publisher or songwriter for every stream.¹¹³ The MMA does not determine how music publishers and record labels should act in regard to streaming royalties.¹¹⁴

Music publishers assert if a songwriter does not file a claim for royalties within 36 months of performance, "100% of the royalties from those streams will instead be paid to the top publishers (and some of their biggest writers) via the world's largest 'black box' of royalties."¹¹⁵ A songwriter or producer is on uneven footing with dominant publishing houses when they are forced to file a claim for rights to their work, while the publishing house is likely to receive these royalties regardless.¹¹⁶ The MMA updates music licensing laws, forcing streaming companies to comply with copyright law.¹¹⁷ However, the MMA does not ensure the royalties will be paid to the correct person; instead it only ensures these new royalties will exist, indicating the legislation will not fix the problems with artist compensation because streaming companies and record labels are already not distributing royalties properly.

C. Spotify's Relationship with Copyright Law

Spotify, an interactive streaming service, has a complicated business model because Spotify has to negotiate with a plethora of international copyright owners involving several record labels.¹¹⁸ Spotify does not always obtain mechanical licenses, and thus does not always pay mechanical royalties.¹¹⁹ Since 2015, Spotify was involved in several class-action lawsuits because of the inevitable infringement claims resulting from not obtaining mechanical licenses.¹²⁰ Such judicial action suggests Spotify's initial business model was "infringe now, apologize later."¹²¹ Spotify's infringement is not necessarily willful or

110. Phil Galdston & David Wolfert, *The Music Modernization Act Misses the Mark*, VARIETY (Mar. 16, 2018, 12:22 PM), <https://variety.com/2018/biz/news/the-music-modernization-act-misses-the-mark-guest-column-1202728994/>.

111. *Id.*

112. *See supra* Part II.

113. *Id.*

114. Galdston & Wolfert, *supra* note 110 ("The problem is that the major music publishers . . . us[e] the MMA to install themselves as the gatekeeper for tens of millions of dollars in unclaimed royalties from digital music services[.]").

115. *Id.*

116. Joseph Dimont, *Royalty Inequity: Why Music Streaming Services Should Switch to a Per-Subscriber Model*, 69 HASTINGS L.J. 675, 690–92 (2018).

117. *See supra* Part II.E (describing the MMA).

118. Richardson, *supra* note 30, at 51.

119. Dimont, *supra* note 116, at 681.

120. *Id.*

121. Ryan Sullivan, *Infringe Now—Apologize Later: Is Class Action a Viable Remedy for Songwriters Claiming Copyright Infringement by Spotify?*, B.C. INTELL. PROP. & TECH. F. 1, 6 (2016).

intentional. Rather, as Spotify explained to the U.S. Copyright Office, Spotify has “difficulty in identifying and locating the co-authors of each of the tens of millions of copyrighted musical works throughout its streaming platform.”¹²²

In their lawsuits, Spotify suggested the streaming service does not need to obtain mechanical licenses and pay mechanical royalties.¹²³ This argument suggests Spotify chooses not to obtain mechanical licenses to avoid monetary loss,¹²⁴ under the guise they are a non-interactive streaming service, as well as because of the lack of data to match every musical work with the appropriate songwriters.

Spotify contends they are paying enough to record labels—nearly \$2 billion in 2014—and the record label should distribute the royalties to the deserving artists, songwriters, and producers accordingly.¹²⁵ The issue is Spotify expects record labels to pay out existing royalties to the appropriate parties, and the record label is also preoccupied with remaining profitable. If Spotify is not paying the royalties they are lawfully required to pay, then record labels are receiving less royalty payments and are likely not going to pay the appropriate royalties to the songwriter.

Spotify’s “infringe now, pay later” practice is so well-known, Epiq, created a service for any copyright owner who may have had their work infringed by Spotify between 2012 and 2017, as a result of a class action suit filed against Spotify for failing to obtain mechanical licenses.¹²⁶ The court in the class action suit did not determine if Spotify willfully infringed, but recognized infringement did happen on Spotify’s behalf.¹²⁷ Spotify likely decided obtaining half the licenses they needed to operate lawfully and settling with copyright owners bringing suits limited their expenses, compared to obtaining both public performance licenses and mechanical licenses as required by copyright law.¹²⁸

D. Wixen v. Spotify Addresses Spotify’s “Infringe Now, Pay Later” Model, and Spotify Settles with Copyright Owners Out of Court

In their complaint against Spotify, Wixen Publishing House attacks Spotify for not obtaining the proper licenses.¹²⁹ Wixen asserts Spotify took a “short cut”¹³⁰ by launching in the United States, knowing they had not applied for mechanical licenses despite Spotify’s “vast music library of over 30 million popular songs from all genres and types of artists.”¹³¹ Wixen requested Spotify operate lawfully and obtain both public performance

122. Eriq Gardner, *Spotify Settles Copyright Lawsuits Brought by Songwriters*, HOLLYWOOD REP. (June 27, 2019, 9:28 AM), <https://www.hollywoodreporter.com/thr-esq/spotify-settles-copyright-lawsuits-brought-by-songwriters-1221403>.

123. Robert Levine, *Spotify’s Motion Denied in Legal Tussle Over Mechanical Rights Payments*, BILLBOARD (Sept. 15, 2017), <https://www.billboard.com/articles/business/7965766/spotify-motion-denied-legal-battle-mechanical-rights-payments>.

124. *See supra* Part II.B.

125. *See supra* Part III.B.

126. *Ferrick v. Spotify USA Inc.*, EPIQ, <http://www.spotifypublishingsettlement.com> (last visited Oct. 29, 2019).

127. *Id.*

128. Sullivan, *supra* note 121, at 2–3 (“Spotify is not only infringing upon copyrights, but that infringement is the basis for their business model.”).

129. *Wixen Music Publ’g, Inc. v. Spotify USA Inc.*, No. 2:17-cv-09288, 2017 WL 6663826, at *1 (C.D. Cal. Dec. 29, 2017).

130. *Id.*

131. *Id.*

and mechanical licenses.¹³² Wixen Publishing believes Spotify should pay \$150,000 per willful infringement.¹³³ Wixen likely opted out of the settlement because the court did not determine Spotify willfully infringed, despite Spotify not obtaining mechanical licenses with the knowledge they are an interactive streaming service.¹³⁴ Wixen withdrew from the class-action suit because the music publishing company believed the class action suit would not result in proper compensation for Spotify's infringement.¹³⁵ Wixen filed their complaint in December 2017, after opting out of a Spotify class action suit, to garner more royalties and to combat any preemption by the MMA, which limits lawsuits for mechanical royalties.¹³⁶ Wixen filed the suit against Spotify before Congress passed the MMA because the legislation seemingly bars suits against streaming companies in favor of a blanket licensing system and database clearly indicating which owners actually own copyrighted works.¹³⁷

Wixen Publishing and Spotify settled their lawsuit on December 29, 2018 regarding Spotify playing Wixen's copyrighted material without mechanical licenses.¹³⁸ The Wixen settlement continues Spotify's trend of settling cases for copyright infringement, without necessarily calling on Spotify to obtain mechanical licenses.

E. Spotify Incentivizes Record Labels to Accept Lower Royalty Payments in Exchange for Equity in Spotify

Given Spotify's business practices¹³⁹ and their arguments in class-action suits,¹⁴⁰ record labels should also be filing suits demanding royalties owed to them and the artists, producers, and songwriters they represent. However, in a leaked contract with Sony, Spotify negotiated with Sony for its entire catalogue in exchange for millions of dollars in advance payments in 2011.¹⁴¹ Spotify contracted with Sony before Spotify profited or paid any royalties to any copyright owners,¹⁴² and the money was eliminated from Spotify's gross revenue.¹⁴³ The contract also allowed for revenue share fees of 60% for Spotify's

132. *Id.*

133. *Id.*

134. *Wixen*, 2017 WL 6663826, at *1; Eriq Gardner, *Spotify Hit with \$1.6B Copyright Lawsuit Over Tom Petty, Weezer, Neil Young Songs*, HOLLYWOOD REP. (Jan. 2, 2018, 10:57 AM), <https://www.hollywoodreporter.com/thr-esq/spotify-hit-16-billion-copyright-lawsuit-tom-petty-weezer-neil-young-songs-1070960> (“The Settlement Agreement . . . prevents meaningful participation by rights holders and offers them an unfair dollar amount in light of Spotify’s ongoing, willful copyright infringement of their works.”).

135. Andrew Flanagan, *New Music Law Expedites a \$1.6 Billion Lawsuit Against Spotify*, NPR (Jan. 3, 2018, 5:35 PM), <https://www.npr.org/sections/therecord/2018/01/03/575368674/sweeping-new-music-law-expedites-a-1-6-billion-lawsuit-against-spotify>.

136. See generally Eriq Gardner, *Spotify Wins Approval of \$112.5 Million Deal to Settle Copyright Class Action*, HOLLYWOOD REP. (May 23, 2018, 8:42 AM), <https://www.hollywoodreporter.com/thr-esq/spotify-wins-approval-1125-million-deal-settle-copyright-class-action-1114307> (detailing the limitations on further copyright lawsuits).

137. *Id.*

138. *Id.*

139. See *supra* Part II.B.

140. *Id.*

141. Dimont, *supra* note 116, at 690.

142. *Id.*

143. *Id.*

monthly gross revenue “multiplied by Sony Music’s percentage of overall streams,”¹⁴⁴ and the opportunity to amass royalties on a user and subscriber basis.¹⁴⁵

The Spotify-Sony contract is just one example of Spotify negotiating with one record label. The other major labels, Warner Music Group and Universal Music Group, likely have advance payment contracts also, meaning a large sum of money streaming companies make and should use to distribute royalties are lost to record labels profiting from deals with the streaming company.¹⁴⁶ Record labels are indifferent to infringement because the labels likely have already profited.¹⁴⁷ The contracts streaming companies make with Sony, Universal, and Warner negate the copyright protections Congress constructed which incentivizes artists, producers, and songwriters to create. Streaming companies essentially give record labels equity in the streaming company in exchange for lower royalty rates and unofficial approval to infringe copyrighted works.¹⁴⁸

The MMA does not speak to the contracts between streaming companies and record labels, and the opportunities for a record label’s stake in a streaming company.¹⁴⁹ Despite streaming companies obtaining one license under the MMA, record labels will likely continue negotiating with streaming companies for exclusive content, company shares, and lower royalty rates.¹⁵⁰ The MMA was a needed update to music licensing laws. However, because streaming companies negotiated with record labels for equity in the company, issues with artist compensation will likely continue in music’s digital era.¹⁵¹

F. The Record Label’s Role in the Digital Era as a Powerful Middleman between the Copyright Owner and Streaming Company

Prior to music’s digital era, a record label and artist had a similar interest: to sell the most records.¹⁵² However, in music’s digital era, the artists’ and the labels’ interests are seemingly more polarized.¹⁵³ After the internet dominated the way music was consumed, album sales declined, and artists began making more money from “touring, publishing, and merchandising.”¹⁵⁴

Artists now enter into 360 deals with a record label, in which the record label oversees

144. *Id.*

145. *Id.*

146. Dimont, *supra* note 116, at 690–91.

147. *Id.*

148. Bryan Lesser, Note, *Record Labels Shot the Artists, But They Did Not Share the Equity*, 16 GEO. J. L. & PUB. POL’Y 289, 291 (2018).

149. *See supra* Part II.E.

150. The MMA does allow for royalty disputes to be heard, although the MMA does not create a set rate. Given Spotify’s relationship with record labels, it is likely that some negotiating will still continue between the streaming company and record labels.

151. *See generally* Levine, *supra* note 123; Lauren Black, *Taylor Swift Signs New Global Record Deal with Universal Music Group*, FORBES (Nov. 19, 2018, 11:30 AM), <https://www.forbes.com/sites/laurenjoblack/2018/11/19/taylor-swift-signs-new-global-record-deal-with-universal-music-group/#5db1119b224c> (discussing Swift’s new contract with UMG, in which she owns her future master recordings and royalties she generates via UMG’s equity in Spotify will be dispersed to lower revenue-generating artists).

152. Lesser, *supra* note 148, at 296.

153. *Id.*

154. *Id.* (quoting Douglas Okorochoa, *A Full 360: How the 360 Deal Challenges the Historical Resistance to Establishing a Fiduciary Duty Between Artist and Label*, 18 UCLA ENT. L. REV. 1, 9 (2011)).

virtually all parts of the artists' career.¹⁵⁵ In a 360 deal, or a "multiple rights agreement," the record label has a right to a portion of all the revenue an artist generates.¹⁵⁶ Record labels take 10%–35% of artists' non-music sale induced revenue.¹⁵⁷ The record label aims to profit from as much of artists' work as possible, "at the expense of the artists," which led to record labels offering artists' works to streaming companies at a reduced rate in exchange for stock in the streaming company.¹⁵⁸ Courts do not interfere with the equity-royalty deals because the artist and record labels create contractual agreements governing this revenue, rather than copyright law governing these deals for stock in streaming companies.¹⁵⁹

Artists' social media use and branding has lessened the power of record labels because artists no longer need a record label to brand themselves.¹⁶⁰ Yet, record labels are earning more revenue for artist representation given the 360 contracts.¹⁶¹ Thus, a record label is less important for an artist to build their brand.¹⁶² However, record labels still withhold and offer reduced royalties, while benefitting from tour profits and acting deals, at the cost of the artist.¹⁶³

IV. RECOMMENDATION

A. Spotify's "Infringe Now, Pay Later" Business Model Indicates the MMA was a Much-Needed Update to Copyright Law

Spotify operating on an infringement basis for seven years¹⁶⁴ indicates the statutory scheme for music licensing was improper and outdated.¹⁶⁵ Companies should not disregard the copyright statutory scheme. Infringement by streaming companies lessens the integrity of copyright laws, which undermines America's legal system. Congress recognized the issues with the copyright statutory scheme, coupled with streaming companies not obtaining the needed music licenses, and appropriately passed the MMA.

B. Legislation Is a Step Toward Updating Musical Licensing Laws, but Will Not Fix or Regulate Major Problems Between Streaming Companies, Artists, and Labels

Passing the MMA is a positive step for copyright law in the music industry.¹⁶⁶ A blanket licensing system makes it easier for streaming companies to negotiate with copyright owners one time, rather than several times.¹⁶⁷ Arbitrary judges adjudicating copyright disputes while determining royalties independent from sound recording royalty

155. *Id.*

156. *Id.* at 297.

157. Lesser, *supra* note 148, at 297.

158. *Id.* at 296.

159. *Id.*

160. *Id.* at 297.

161. *Id.*

162. Lesser, *supra* note 148, at 297.

163. *Id.*

164. *Id.* at 294.

165. *See supra* Part III.C.

166. *Supra* Part II.F.

167. *See supra* Part II.

rates will likely compensate copyright owners filing suit after their work was infringed.¹⁶⁸

However, the MMA does not address issues with record labels and equity in a streaming company.¹⁶⁹ The MMA also does not address the record label pocketing profit meant for the copyright owner.¹⁷⁰ Record labels receive advance payments from streaming companies. The streaming service then plays the copyrighted material of the artist, whom the label represents, without doling out traditional royalties or obtaining mechanical licenses.

Contract law and remedies would be better suited to protect artists and copyright owners from record labels withholding compensation: like facilitating negotiations between streaming companies and copyright owners to license works, and filing lawsuits for breach of those agreements made, in addition to infringement claims.

C. Record Labels Should Contract with Their Artists for Fair Compensation

Statutes regulate copyrighted material.¹⁷¹ The current statutory scheme regulates streaming companies and their duties to compensate copyright owners.¹⁷² This practice should continue, so artists are compensated for the work they create. The current scheme does not explain how a record label and artist should contract to ensure the artist is properly compensated.¹⁷³

Music publishers (the record label) have seemingly monopolized the industry by consolidating into three major labels, Universal, Sony, and Warner.¹⁷⁴ The labels make money through the copyright owners (usually the artist and songwriter) they represent. As an agent to the artist, the label distributes the copyrighted work to streaming companies and receives the royalty payments from the streaming company, keeping some of the royalties for itself.¹⁷⁵ Labels receiving advance payments are keeping those entire payments, despite streaming companies asserting the advanced payments are the payments in place of mechanical royalties to the copyright owner.¹⁷⁶

However, the hiccups with artist compensation could likely be regulated via contract law. Contract law would be applicable to ensure labels are compensating artists if the label chooses to receive advance payments or have equity in a streaming company. However, boilerplate contracts are seemingly common in the music industry,¹⁷⁷ which gives labels greater bargaining power.

Revenue-generating artists should use their profit-making leverage with the company to obtain their master recordings (or portions of the value) and share their royalties via

168. *See supra* Part II.F.

169. *Id.* The crux of the MMA is to create a blanket licensing system for streaming companies.

170. *Id.*

171. 17 U.S.C.A. § 114(j)(7) (2010); 17 U.S.C.A. § 106(4) (2002); 17 U.S.C.A. § 106(6) (2002).

172. *Id.*

173. *Id.*

174. *See generally* Dorian Lynskey, *The ‘Big Three’ Record Labels are About to Make a lot of Noise*, GQ (Nov. 17, 2018), <https://www.gq-magazine.co.uk/article/major-record-labels> (“the Big Three . . . Sony . . . Universal Music Group (UMG) and . . . Warner Music Group”).

175. *See supra* Part II.F.

176. *See id.*

177. *See generally* AM. BAR ASS’N, ARTIST RECORDING CONTRACT SAMPLE, https://www.americanbar.org/content/dam/aba/migrated/2011_build/entertainment_sports/artist_recording_contract.authcheckdam.pdf (last visited Oct. 29, 2019).

equity with other artists at the label.¹⁷⁸ This process would open potential opportunities for artists to sign with labels (like UMG's deal with Taylor Swift) that adopt a dispersing equity standard, giving artists some leverage to request equity-derived royalties for other artists.¹⁷⁹

D. Contract Law Is a More Efficient Legal Tool for Compensation Issues in the Digital Music Era

Contract law remedies are more efficient for a copyright owner to recover if their work is infringed or played illegally. A copyright owner would merely need to file a claim and wait for their day in the court for their issue to be heard.

Contract law would also be more applicable to artist compensation issues because contract law is more adaptable to changes in the industry.¹⁸⁰ Statute-based remedies typically take a long time to have the force of law because the statute needs to be drafted, the Senate and the House need to vote on it, and, if it passes both chambers, the President will need to sign the bill. Congress cannot anticipate changes in the music industry or technology. Given that the last copyright update was in 1976, creating a statutory scheme for a rapidly-changing music industry is not feasible.¹⁸¹

The music industry changed briskly and will likely continue to do so with technological advances.¹⁸² Contract law will efficiently apply to artist compensation issues, complimented by copyright protections for creating musical works.

E. Artists and Labels Should Negotiate Equity Interests in Streaming Companies Before the Artist Signs with the Label

Negotiating royalty payments through a contract will allow more options for artists to maximize their protection from potential infringement of their work.¹⁸³ With the passage of the MMA, it is uncertain whether record labels will receive advance payouts in exchange for the streaming company to distribute the copyrighted work. The royalty board should not take advance payments in exchange for royalties because the blanket licensing system under the MMA ensured negotiating for both the performance and distribution right of a copyrighted work would be easier.¹⁸⁴ However, if the record labels profit from their equity in streaming companies, the relationship is likely to continue. If record labels do contract with streaming companies for early royalty payouts, record labels should be limited in their "freedom of contract" right by being required to pay a certain percentage of royalty payouts to artists at their label.

178. Swift, *supra* note 87.

179. See, e.g., Swift, *supra* note 87 (describing Swift's motivation for adopting this revenue dispersal system).

180. LAWYERS FOR THE CREATIVE ARTS, LEGAL ISSUES INVOLVED IN THE MUSIC INDUSTRY 5 (2005), https://law-arts.org/pdf/Legal_Issues_in_the_Music_Industry.pdf; see *supra* Part II.F.

181. See *supra* Part II.F (discussing the switch, led by Swift, to contractual provisions for distributing streaming revenues).

182. See Lenard & White, *supra* note 1, at 137 (describing Congress's struggle to follow the music industry's transition from the analog to the digital era).

183. Swift, *supra* note 87.

184. *Music Modernization Act*, *supra* note 6.

F. Taylor Swift's Deal with Universal Music Group and Equity Sharing Should Serve as an Industry Standard in Music's Digital Age

Revenue-driving artists should negotiate to spread their royalties via equity payments to under-compensated artists at the record label. Taylor Swift, using her status as a “revenue-driving”¹⁸⁵ copyright owner to advocate for better compensation to creators, should be the standard going forward to accommodate for the MMA’s oversight concerning record labels and their stock in streaming companies. Well-known artists would need to be willing to give their portion of royalties via equity from their record label’s stock to better compensate artists across the label, giving artists and creators the proper bargaining power to sign with labels and earn royalties.

A way to incentivize a revenue-generating artist to do this would be to sign or contract with an artist, granting the artist greater ownership shares—or complete ownership—of their future master recordings. Recent developments indicate Taylor Swift’s ability to obtain her future master recordings with Universal is atypical—but should not be—in the music industry: “Many artists do not own or control their recordings or the copyrights associated with them, which does not prevent them from making money through sales or streaming royalties.”¹⁸⁶ Revenue-generating artists like Swift usually do not even own the copyrights to their entire catalogues, as evidenced by agent Scooter Braun buying Big Machine Records—which includes Swift’s master recordings from her first six albums.¹⁸⁷ A master recording, the first recording of a musical work,¹⁸⁸ is usually the property of the record label, which generates substantial revenue because of the value of the first recording.¹⁸⁹ Thus, offering artists with a lot of leverage (because of the revenue they generate) their master recordings should incentivize them to disperse their royalties, because they will likely earn more from their master recordings.

However, some artists, like Swift, genuinely believe in protecting copyrights and their work, and may be incentivized to give their royalty payments to other artists for the sake of creating. These artists realize greater compensation is likely generated by touring, merchandising, and branding.¹⁹⁰ Some artists could be incentivized by being recognized as a champion for copyright practices in the streaming era, like Swift was with Apple Music in 2015.¹⁹¹ In 2019, Swift continues to champion artist control of their own work, this time for herself, by announcing she will re-record her first five albums beginning November 2020.¹⁹²

Record labels could negotiate for a trickle-down effect in music royalties. The

185. Wang, *supra* note 90.

186. Joe Coscarelli, *Taylor Swift on Scooter Braun Buying Her Old Label: 'My Worst Case Scenario'*, N.Y. TIMES (June 30, 2019), <https://www.nytimes.com/2019/06/30/arts/music/taylor-swift-music-scooter-braun.html>.

187. *Id.*

188. Chris Eggertsen, *What Are Masters and Why Do Taylor Swift & Other Artists Keep Fighting for Them?*, BILLBOARD (July 3, 2019), <https://www.billboard.com/articles/business/8518722/taylor-swift-masters-artists-ownership-labels-rights-prince>.

189. *Id.*

190. Lesser, *supra* note 148, at 297 (“As profits from the sale of recorded music dropped, labels conceived of a music industry driven by artist branding rather than music.”).

191. Wang, *supra* note 90 (discussing Swift’s letter advocating for artists’ royalty payments during Apple Music’s free trials).

192. Anastasia Tsioulcas, *Look What They Made Her Do: Taylor Swift to Re-Record Her Catalog*, NPR (Aug. 22, 2019, 11:14 AM), <https://www.npr.org/2019/08/22/753393630/look-what-they-made-her-do-taylor-swift-to-re-record-her-catalog>.

revenue-driving artists create profit for the record label, which the label is required to divide between itself, the revenue-generating artists, and the other artists at the label. In return, revenue-generating artists sign and brand with the label, while the label maintains an ownership interest in the revenue-generating artists' work and retains equity in streaming companies. In the digital era, with streaming companies shaping music consumption, the copyright owner should have power similarly held by record labels to determine their compensation, along with the rights derived to artists through the MMA's blanket licensing system.¹⁹³

V. CONCLUSION

In the digital music era, copyright laws were updated with the MMA's passage. The MMA requires a blanket licensing system, a wheel approach to rate disputes, and the "willing buyer/willing seller" standard to settle copyright infringement claims.

The MMA should regulate streaming companies "infringe now, pay later" business models. However, the MMA is not the answer to under-compensation issues for copyright owners. Spotify, the largest streaming company in the world, allows record labels to take stock in the company in exchange for royalties or access to the label's catalogue. Other streaming services likely have similar contracts with other record labels. The MMA does not address this issue of negotiated shares between record labels and streaming companies.

This Note suggests a new industry standard should be adopted to correct the omission from the MMA regarding record labels with stock ownership. Copyright owners and record labels should mirror the UMG and Taylor Swift deal, ensuring payments stemming from a revenue-driving artist's royalties are dispersed, via stock, to all artists at the label. In the digital music age, power needs to shift from the record label to the copyright owner to ensure both the copyright owner and the streaming company remain profitable.

193. See, e.g., Swift, *supra* note 87.