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PANEL 4
NO ADVANCE PERMISSION REQUIRED: THE FUTURE OF COMPULSORY LICENSING

with ART LEVY,[1] KERRY MUSTICO,[2] KRISTELIA GARCIA,[3] COLIN RUSHING,[4] and ADAM PARNESS[5]

Our final panel in Copyright + Technology 2024, "No Advance Permission Required: The Future of Compulsory Licensing," was prompted by the recent dispute between music publishers and Spotify over the terms of the § 115 compulsory license for reproduction of musical works. It considered the rationales behind the several compulsory licenses that are unique to U.S. copyright law – and to what extent those rationales are still valid in an era where technological change can render the terms of such licenses obsolete too quickly for the law to keep up.

Art Levy: So, this panel is titled "No Advance Permission Required: the Future of Compulsory Licensing." We're going to take a look at compulsory licensing of music in the United States as an example of a compulsory license regime that's been enacted at scale, with the hope that we can apply that knowledge to potential future license regimes. And bucking the trend, I'm going to introduce the whole panel rather than having everyone do it themselves. So, I'll start on my end. My name is Art Levy. I'm VP of Business and Legal Affairs at Songtradr.[6]

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[2] Kerry Mustico serves as the Senior VP in Legal & Business Affairs at NMPA. *Kerry Mustico*, NMPA, https://www.nmpa.org/people/kerry-mustico/ (last visited Dec. 18, 2024).

[3] Kristelia García is an Anne Flening Research Professor at the Georgetown University Law Center, focusing on IP through the lens of law and economics. *Kristelia García*, GEORGETOWN LAW, https://www.law.georgetown.edu/faculty/kristelia-garcia/ (last visited Dec. 18, 2024).

[4] Collin Rushing is a seasoned music industry executive and lawyer, focusing on digital music rights, statutory licensing, collective management, and copyright and media law. *Collin Rushing*, THE COPYRIGHT SOCIETY, https://copyrightsociety.org/bio/colin-rushing/ (last visited Dec. 18, 2024).

[5] Adam Parness currently operates Adam Parness Music Consulting and served as a strategic advisor for notable music rights holders and global brands. *Adam Parness*, THE COPYRIGHT SOCIETY, https://copyrightsociety.org/bio/adam-parness/ (last visited Dec. 18, 2024).

[6] VP Business and Legal Affairs, Songtradr. *Art Levy*, *supra* note 1; Homepage, SONGTRADR, https://www.songtradr.com/ (last visited Dec. 18, 2024).

Songtradr is the world's largest B2B music licensing marketplace and is home to such brands as Bandcamp, 7 digital, MassiveMusic, Big Sync, Musicube, and Pretzel. I specialize in transactional legal issues within the music business. I'm also on the board of the New York chapter of the Association of Independent Music Publishers,[7] and I counsel select clients as a member of the Levy Firm.[8] And I suppose we don't need to note that we are here on our own behalves and recognizance.

To my left is Kristelia García. Professor García is the Ann Fleming Research Professor at the Georgetown University Law Center, my alma mater, where she teaches and researches in copyright with a focus on licensing.[9] She holds a JD from Yale Law School, a BA in Economics from Columbia, and prior to joining academia, she spent nearly a decade working on the recorded side of the music industry, both in firms and in-house.

To her left, Kerry Mustico is the Senior Vice President of Legal and Business Affairs at the National Music Publishers Association.[10] Kerry manages NMPA's copyright infringement litigation brought on behalf of NMPA members, including major publishers, and large and small independent publishers. Kerry also negotiates model industry license agreements and settlements with digital and other service providers and supports NMPA's overall legislative and policy initiatives. And prior to joining NMPA, Kerry was Senior Counsel with Oppenheim + Zebrak, a boutique law firm specializing in complex copyright, anti-piracy, and internet-related matters.[11]

Moving right along, we have Adam Parness, who is President of Adam Parness Music Consulting.[12] Adam has over 25 years of experience in the music and technology businesses, with specialized executive experience in building business affairs, licensing, strategy, operations, and creative relations teams. He previously was the Global Head of Music Publishing at Spotify and before that held positions at Pandora Media, Amazon, and Rhapsody International.[13]

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[7] Homepage, ASSOCIATION OF INDEPENDENT MUSIC PUBLISHERS, https://aimp.org/ (last visited Dec. 18, 2024).

[8] Homepage, THE LEVY FIRM, https://www.levyfirm.com/ (last visited Dec. 18, 2024).

[9] Anne Fleming Research Professor of Law, Georgetown University Law Center and Partner, Lex Lumina LLP. *See Kristelia García, supra* note 3; For an in-depth history on Anne Fleming's life and legacy, *see In Memoriam: Anne Fleming*, AMERICAN SOCIETY FOR LEGAL HISTORY, https://aslh.net/anne-fleming/ (last visited Dec. 18, 2024).

[10] SVP, Legal & Business Affairs, National Music Publishers' Association. *Kerry Mustico*, *supra* note 2.

[11] Senior Counsel, Litigation, Copyright & Content Protection, Brand Enforcement, Oppenheim + Zebrak LLP. *Id.*

[12] President, Adam Parness Music Consulting. *Adam Parness, supra* note 5.

[13] Global Head of Music Publishing, Spotify; Head of Publisher Licensing and Relations, Pandora; Principal Content Acquisition Manager, Amazon; Vice President of Music Licensing, Rhapsody International. *Id.*

And last but certainly not least, Colin Rushing is the Executive Vice President and General Counsel at DiMA, the Digital Music Association.[14] Colin was formerly the Chief Legal Officer at SoundExchange,[15] where he drove the company's legal and regulatory strategy and played a key role in a number of public policy initiatives, including the Music Modernization Act.[16] So, before I get started, how many people in the audience are familiar with the Music Modernization Act and Section 115 of the Copyright Act?[17] Not too bad, not too bad. A third, a quarter maybe? Well, in that case, we might need to give the rest of you a little bit of an overview. So, Kristelia, would you mind –

Kristelia García: Yes, absolutely. It's really difficult to do an entire background to music licensing and how the Music Modernization Act works. We can't do that in the 10 minutes I've been given. But I'll try to lay out a couple of general concepts so that we're all on the same page when we start talking. I really do think this is the potentially most dramatic panel of the day, because perhaps we could do compulsory licensing for the training of LLMs. Well, this is the most divisive comment I can think that we could come to today.

In a nutshell, I'll tell you, for those who haven't been sort of entrenched in music licensing, one thing to know about music copyrights is that every song has two rights. There's one copyright on the underlying musical composition. This would be the sheet music or its equivalent. Then, there is a completely separate copyright for the sound recording. So, there could be lots of different sound recording copyrights for a single musical composition, but not vice versa.

To make things even more interesting, ownership of those copyrights is typically held by distinct parties. And not necessarily the parties that you would think, and not necessarily any one party. And they are administered, conveniently, also by completely different entities. The public performance rights for the musical composition copyright are typically administered by ASCAP or BMI, SESAC, and GMR.[18] These are collective rights organizations that many of you have probably heard of extensively. And on the sound recording side, SoundExchange administers non-interactive streaming royalties.[19] And

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[14] Executive Vice President and General Counsel, The Digital Media Association (DiMA). *Collin Rushing, supra* note 4.

[15] *Id.*

[16] Music Modernization Act, H.R. 5447, 115th Cong. (2018).

[17] 17 U.S.C. § 115 (2018).

[18] Homepage, AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, https://www.ascap.com/ (last visited Dec. 18, 2024); Homepage, BMI, https://www.bmi.com/ (last visited Dec. 18, 2024); Homepage, SESAC, https://www.sesac.com/ (last visited Dec. 18, 2024); Homepage, GLOBAL MUSIC RIGHTS, https://globalmusicrights.com/ (last visited Dec. 18, 2024).

[19] Homepage, SOUND EXCHANGE, https://www.soundexchange.com/ (last visited Dec. 18, 2024) (SoundExchange is a collective management organization that started within the RIAA in 2000 and spun out as an independent entity in 2003; it collects and distributes performance royalties on sound recordings for digital broadcasting services. It was established pursuant to the The Digital Performance Right in Sound Recordings Act (DPRA) of 1995.).

copyrights give the owners various exclusive rights, obviously, the right to copy, but also the right to derivative works, which has come into play quite extensively with the advent of AI, the right to distribute, the right to perform, and display.[20]

Before I keep going, I want to turn to Colin so he can jump in with a little bit about how the passage and advent of the Music Modernization Act, or the MMA, has impacted what we're seeing in music licensing.

Colin Rushing: Sure. Thank you. And so, as I get into that, the first thing I'll say is really just kind of to reiterate something Kristelia said, which is music is weird, as we all know in this room, because we have these two different rights incorporated into the same asset, the sound recording and the musical work. And as Kristelia said, they're also often controlled by two entirely different owners. That's actually the norm. And on the sound recording side, it's the label, and on the composition side, it's the publisher. Then there's an additional layer of complexity, which really exists mostly on the publishing side. It's the norm for ownership in that right to be divided among different people. And that is because you'll often have one, two, three, up to who knows how many writers on an individual work. And so, for reasons we may talk about on this panel, those are actually controlled by different entities often. To add a further layer of complexity, those rights are then further divided into at least three different other parts. And that's basically a function of industry practices.

And so, as Kristelia said, the performance right [for the musical composition] is typically controlled by performance rights organizations. In the United States, there are, I've sort of lost count of how many there are. They're four and counting.[21] Then something called the *mechanical right,* which is the subject of Section 115 [of the Copyright Act],and is controlled in the US in a couple of different ways, depending upon what the use is.[22] And then there's a third bucket of rights which are really controlled by the publishers, most commonly called *sync rights*.[23]

So, you have this one [musical composition] performance right that's divided among multiple owners and then among different sorts of paths of licensing. And what I'll say about the Music Modernization Act is it didn't change any of that. What it really did, and I don't know if there's another transition as we get into sort of details of compulsory licensing, it focused on taking the existing sort of

[20] 17 U.S.C. § 106 (2002).

[21] *See generally supra* note 18.

[22] Mechanical rights are rights to reproduce and distribute musical works. They were established for mechanical devices such as player pianos with the Copyright Act of 1909.

[23] Synchronization or sync (sometimes spelled "synch") rights are a music industry convention for the right to use music with video, games, or other types of media. *Music Public Performance vs. Synchronization Rights*, COPYRIGHT CLEARANCE CENTER, https://www.copyright.com/crc/wp-content/uploads/sites/2/Guidelines-Tips-Music-Public-Performance-vs-Sync-Rights.pdf (last visited Dec. 18, 2024).

industry practices and existing laws and making them work in the context of streaming.[24]

Kristelia García: Yeah, I'll tap back in when we get to Section 115 specifically. So what exactly is a compulsory license? A compulsory license is established by regulators to allow for uses of copyrighted works without the prior permission of or payment to the relevant rights holders. Instead, the statute typically lists a series of qualifications and reporting requirements, and you must comply with those statutory terms of the license, and you must pay the statutorily dictated royalties in the fashion in which it's specified. Now, the setting of these rates is typically assigned to an authorized body. In the case of the music compulsory license that we're going to be talking about today, that is the Copyright Royalty Board, largely an administrative judge role with three judges who set these rates.[25] They update them every five years, and they take public input and comment into determining what those rates are going to be.[26]

There are already a number of compulsory licenses in copyright. The couple highlighted up front are the music ones, which our music leaning panel is going to focus on. But just for completion, I wanted you to know that there are compulsory licenses in cable [television] for secondary transmissions by cable systems, and then two different compulsory licenses for secondary transmissions in the satellite [TV] context.[27] My understanding, which is limited in those areas, is that those actually work quite well in contrast to the music-side licenses, which I'm going to hit very lightly. I just wanted to let you know that they exist.

Section 115 is really the focus of this panel, and that is that mechanical license that Colin mentioned and that he's going to go through more in a second. Just the main thing I want to say about Sections 112 and 114 for our purposes, when we get to the dramatic finale that I promised, is that they work together to basically produce what is known as the digital audio transmission license for streaming. And it does divide into four classes of use, which later, I'm going to argue, looks like what we could do if we had compulsory licensing in an AI context. Here, this is different. Of course, it's not different categories of copyrighted works, but it shows that you can have different rates for different types of services and different uses. In the digital audio transmission context, it has non-interactive services, interactive services, preexisting ones versus new ones, and then preexisting

[24] As will be explained below, it replaced the existing onerous track-by-track mechanical licensing process with a blanket license that interactive streaming music services can take; it also established a mechanical licensing collective to process mechanical royalties for streaming from services that take the blanket license, so that the services no longer have to process the royalties themselves.

[25] Homepage, COPYRIGHT ROYALTY BOARD, https://www.crb.gov/ (last visited Dec. 18, 2024).

[26] *Rate Proceedings*, COPYRIGHT ROYALTY BOARD, https://www.crb.gov/rate/ (last visited Dec. 18, 2024).

[27] 17 U.S.C. §§ 111, 112, 114.

satellite radio as our fourth category.[28] The mechanical license, as it was traditionally envisioned, was sometimes referred to as the cover license.[29] On the physical side for non-digital uses, we had a –

Art Levy: Sorry, this is pre-MMA, Section 115.

Kristelia García: Pre-MMA, right. And it still holds for the non-digital uses. If you were just putting a song on vinyl or a CD for digital uses. And momentarily, I'll turn this back over to Colin. He can talk about the new blanket, new-ish blanket license that's offered by the MLC. As I told you, just like all the other compulsory licenses we see in copyright, this has a reporting requirement, and the rate is set and adjusted at periodic intervals by the CRB. So, I'll turn to Colin now to talk about [Section] 115, more specifically post-MMA.

Colin Rushing: And I think it's helpful for context of the sort of pre-MMA world as well, to talk about the kind of origin story of 115. And I'll try to keep this short. And probably folks in here have heard about the piano rolls.[30] That's the thing that led to the creation of the Section 115 mechanical.[31] In 1908, there was this problem of whether and how to provide copyright protection to basically reproductions of musical works that could only be read by a machine, namely piano rolls. The Supreme Court said at first, no, piano roll manufacturers weren't required to pay royalties to composers.[32] After that, the law was changed to create this new right, the mechanical reproduction right. Congress at the same time created this new right, but also coupled it with a compulsory license.[33] And that's actually pretty common.

Same thing was true with Section 114, which was the SoundExchange license that was created at the same time that the digital performance right was created.[34] So, this is kind of the way this works. These things have these origin stories. So, the original design of 115 was one that seems almost fanciful today, but probably made sense at the time. There was not a blanket license when Congress created this right. Instead, it was a compulsory rate set by the government, and then a process for providing notice to the rights owner that you intend to take advantage of that compulsory rate.[35]

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[28] The § 114 statutory license contains provisions for "preexisting subscription services" and "preexisting satellite digital audio radio services," meaning services (such as Sirius and XM satellite radio in the latter case) that came into existence on or before July 31, 1998.

[29] Meaning the right to make a "cover version" of a musical composition.

[30] The advent of piano rolls in the late 19th century led to the codification of the "mechanical" right (to reproduce a musical composition) in the Copyright Act of 1909.

[31] 17 U.S.C. § 115.

[32] *White-Smith Music Pub. Co. v. Apollo Co.,* 209 U.S. 1 (1908).

[33] The Copyright Act of 1909 created a right of mechanical reproduction without the copyright owner's prior consent, i.e., a compulsory license.

[34] *See generally supra* note 19.

[35] That is, a putative user of a musical composition (such as a record label, or more recently, a digital music service) had to send a form called a Notice of Intention, sometimes called

So, song by song, owner by owner, that's how the licensing worked in the context of piano rolls.[36] I think it worked basically fine, except when it didn't. But that was the system that emerged and basically took root over the course of 100 years.

Art Levy: And Colin, sorry to interrupt, but just at its base, that right, that was compulsorily given, was to create a cover recording.

Colin Rushing: Correct.

Art Levy: Yeah, that's what it was.

Colin Rushing: That's exactly right.

Art Levy: It is.

Colin Rushing: It is and was. It was to create a recording of a copy of a song that had been already released, not necessarily just a recording. It could have been because it doesn't matter. That's all sort of technical and weird. But you're right, that's why it's sort of known as the cover license. But in practice, that became the way that the reproductions were licensed. So, so far so good in the context of what record labels did. Where things went really sideways was in the advent of streaming, because this sort of song by song, rights owner by rights owner system of licensing individual works just did not work at the scale of streaming companies.

And this was a problem for everyone. And I encourage folks, if you're interested in this, go back and look at the filings that were made when the Copyright Office did their study of the music licensing system back in 2013, '14. I think, it came out in '15, was done in '14 whenever it was, basically, commerce was sort of generating all this friction and heat. It was pretty good for lawyers, but the systems that were in place were not facilitating the type of growth that people wanted to see. So, what happened in 2017? It was a near miracle in Washington, DC, basically, all the stakeholders got together and said, "Look, the current system doesn't work. We need something that works better.

Let's take this old song-by-song system and replace it with a new true blanket license, which, not coincidentally, looked a lot like how Section 114 worked for sound recordings."[37] Create a single one-stop shop to obtain all the rights that you need for the mechanical and then services had a single place to send all the money that was owed. You had a single organization, the mechanical licensing collective (MLC), that would take this money in from the DSPs [digital service providers],

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Notice of Intent (NOI), to the copyright owner, or if the owner could not be found, to the U.S. Copyright Office. *Notice of Use/Notice of Intention to Use,* UNITED STATES COPYRIGHT OFFICE, https://www.copyright.gov/historic-records/Notice%20of%20Use%20-%20Notice%20of%20Intention%20to%20Use.pdf (last visited Dec. 18, 2024).

[36] A separate NOI had to be filed for each musical composition. *Id.* As explained below, this solution became impractical in the age of streaming music.

[37] That is, a blanket license (a single license to all material, replacing the composition-by-composition licensing process) and royalty rates set through Copyright Royalty Board proceedings were created, just as with the § 114 licenses for digital radio. *Rate Proceedings, supra* note 26.

pay it out to the proper people. So, that was the key difference. It sort of seems small to talk about it in practice. It was completely revolutionary and it completely transformed how mechanical licensing works in the United States.

The other big thing that the Music Modernization Act did was it changed essentially the rate standards that were used by the Copyright Royalty Board in setting the rates.[38] I really can't overstate how important it was to create this new blanket license in the United States. It has allowed the streaming market to operate.

Art Levy: So the revolution happened. It happened about five years ago. Under the MMA, after five years, there's a review of the designations of the MLC and the DLC, which is the Digital Licensee Coordinator.[39] It's the counterpart to the MLC. I suppose we should say that the MLC, this body that collects royalties and pays them out, is paid for by the DSPs, the companies that are using this music, and DiMA [The Digital Media Association] and the DLC, are related entities, shall we say?[40] Colin, you can correct me if I'm saying that slightly incorrectly. In any case, there's a redesignation process that happens every five years.[41] That's happening right now. The Copyright Office has asked stakeholders for comments.

I think this is probably the best spot for Kerry for you to talk a little bit about what those stakeholders are saying and what are some of the challenges that we're seeing five years in after the revolution?

Kerry Mustico: So the comment period has closed now, and so we're just waiting to hear from the Copyright Office on whether they will redesignate The MLC.[42] Our hope is that they will, because I think we, and I hope, I think it's fair to say the majority of the commenters believe The MLC has done what it sought to achieve and in a spectacular fashion. And I agree with Colin in that the MMA was pretty groundbreaking, and it has solved a lot of the problems that it sought

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[38] Copyright Royalty Board proceedings for Determination of Rates and Terms for Making and Distributing Phonorecords. *See., e.g., Rate Proceedings, supra* note 26.

[39] Homepage, DIGITAL LICENSEE COORDINATOR, https://digitallicenseecoordinator.org/ (last visited Dec. 18, 2024). The DLC represents the interests of digital service providers (DSPs) in overseeing the operation of the MLC and educating DSPs about its operation and that of the Music Modernization Act.

[40] DiMA is a trade organization that represents audio streaming companies. Homepage, DIMA, https://dima.org/ (last visited Dec. 18, 2024).

[41] The Music Modernization Act calls for the U.S. Copyright Office to "designate" (select) the entity that serves a five-year term as the mechanical licensing collective specified in the MMA. Music Modernization Act, H.R. 5447, 115th Cong. (2018). The current designee is The Mechanical Licensing Collective, Inc. ("The MLC"), based in Nashville, TN. To avoid ambiguity, we refer to the "mechanical licensing collective" provided for in the MMA in lower case and "The MLC," the corporation that currently serves in that capacity, in upper case. Homepage, THE MLC, https://www.themlc.com/ (last visited Dec. 18, 2024).

[42] *See, i.e.,* whether the Copyright Office will re-designate The MLC to serve as the mechanical licensing collective, pursuant to the MMA, for another five years, or alternatively, designate another entity to serve in that capacity. *Id.*

to solve. But, of course, there are still challenges, and there's lots of challenges. So, I'll talk about just a few of those.

I think, from our perspective, the music publishers' perspective, and the songwriters they represent, the CRB was created in the early 2000s to make the rate-setting process more efficient, more expeditious. But unfortunately, we're at a period where it's anything but. We are now coming up on the fifth rate setting procedure, and each one has been very different. The Phono III[43] rate-setting procedure was very long, very drawn out, and very, very expensive, and I don't think that's what Congress had in mind. And it actually lasted well into the Phono IV[44] period.

And so, while the rates are supposed to be for a five-year period, which is another challenge, actually, because five years to set a rate is very long, most deals are for a year, two years in the music industry. So, five years is more than double what the average deal length is. So, yeah, I mean, it should be five years, but that's under the best-case scenario. I think most DSPs paid 2012 rates for upwards of nine years while the Phono III appeal lasted. And even sitting here today, I don't believe that publishers have received the adjustments for the Phono III period, which, by the way, the Phono III period is 2018 to 2022.

I don't think they've received those adjustments for the large DSPs, and that's because they weren't required to make those adjustments until February 2024. I know this is very technical, but it matters to publishers because it's a lot of money. They weren't required to make those adjustments once the rates were finally set after the appeal, and the remand was done until February 2024. And then the MLC, of course, has to do its job, which is to match the funds[45] and then distribute them. So, all of that takes time. So, those are some of the major challenges.

I think also one of another challenge we run into is just the fact that in compulsory licensing in general, you were missing the practical safeguards or practical considerations. When we're negotiating licenses, I often hear from the other party about wanting to be a good partner, and I think that's a natural incentive to act reasonably. But when you have a compulsory license, those sort of safeguards go away because you can be as unreasonable or as aggressive as you want, and you'll take it to the absolute limit because you know that you'll be before potentially new CRB judges in five years, and judges generally tend to be tried to be impartial and aren't going to hold you to your arguably unreasonable positions in the last rate setting. Whereas if you were in a free market negotiation, if you're being absolutely unreasonable or overly aggressive, you might not get another chance for two years when your deal is up.

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[43] Third Determination of Rates and Terms for Making and Distributing Phonorecords (Phonorecords III, nicknamed "Phono III"). *Historical Royalties*, THE MLC, https://www.themlc.com/historical-unmatched-royalties (last visited Dec. 18, 2024).

[44] Fourth Determination of Rates and Terms for Making and Distributing Phonorecords (Phonorecords IV, nicknamed "Phono IV"). *Id.*

[45] That is, to take the feeds of data from DSPs about sound recording uses, match them to the musical compositions performed on the sound recordings, and identify the holders of rights in those compositions.

Art Levy: And just as an aside, I have some clients who are small publishers, and they sometimes have trouble just navigating the MLC's website and getting themselves set up to properly collect their fair share. It usually has to do with manpower and just not being able to do the matching that's required,[46] some of which is pretty manual. But that's what rights holders are facing.

What about DSPs? And Adam, I'd love to get you involved here if you can.

Adam Parness: Yeah, so I think it's funny, when we were talking as a group a couple of weeks ago, I think one of the things that I said, as far as the personal view I hold on the compulsory license, is that I'm not a fan of how the statutory rates are set, namely the Copyright Royalty Board process. But I am a fan of the much-improved process that has come about via the passage of the Music Modernization Act in 2018 and the formation of the mechanical licensing collective, including the fact that as of January 1st, 2021, parties that qualify for certain aspects of the Section 115 license can go and get a blanket license.

I've worked for a number of streaming services, and before the passage of the MMA, we oftentimes lamented, why can't we have a Section 114 SoundExchange[47] type entity for Section 115 mechanical licenses? Because the process that existed before, and Colin talked about it a bit, it was viewed as the thing that you get for cover licenses. There were even businesses that were out there that functioned to serve customers who were just trying to get a cover license to release a cover version on a CD or whatnot.

But the truth is that even the labels who might have used the compulsory process in the 1950s and 1960s, that process had largely been supplemented in the 1980s and the 1990s when record labels started releasing a lot more product, by the availability of a mechanical license that you can get via the Harry Fox Agency.[48] There were some labels that would use the compulsory process for certain things, but by and large, most commerce was being facilitated for tracks that were being released via CD and cassettes and then via digital downloads a la iTunes. Largely, that was happening via the Harry Fox Agency and the direct deals between record labels and music publishers, and even intra-company between labels and publishers within their own group, which increased as labels started consolidating even further in the 90s and the 2000s.

So, what happened when streaming came along is that, I mean, we're years well past the point where more music started being released in a single day than we used to release in a single year. Now, the reality of the customer value of a streaming service is that for $10, $11, $12, whatever the price is – when I first

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[46] That is, to provide the MLC with information about the musical compositions that are embodied in sound recordings so that it can match plays of sound recordings to those compositions and distribute royalties to rightsholders.

[47] *See* SOUND EXCHANGE, *supra* note 19.

[48] The Harry Fox Agency (HFA), then a subsidiary of the National Music Publishers Association, was (and remains) a clearinghouse for mechanical licenses. It was usually possible to obtain a mechanical license for purposes such as making physical recording products through HFA instead of through the composition's rightsholder(s). *History of HFA*, HARRY FOX AGENCY, https://www.harryfox.com/history (last visited Dec. 18, 2024).

started out at Rhapsody, I think we were at 3 million songs in the library, something like that. Now it's hundreds of millions. And at the time when the Music Modernization Act was passed in 2018, I think it was roughly 30,000, 40,000, 50,000 songs being added per day to most music subscription services, something in that range. I think we're approaching quadruple that volume. So, one of the things about the Music Modernization Act is that it could not have come along a moment sooner. If we didn't have it, the problems that we were dealing with in 2016 and 2017, and 2018 or so, when we were all lobbying to get it passed, those problems became further and further compounded. And thankfully, we now have the blanket [license] to do it.

But the process for music subscription services or anyone using that license, they couldn't just go to the Harry Fox Agency and get mechanical licenses for everything. They had to go way deeper down the long tail of content, which meant that you had to use the compulsory licensing process. Now, there were certain ways to contract around that. A digital music service could go to music publishers, whether majors or independent publishers, and enter into a direct blanket license. That way, music service A could contract with publisher B, they get the rights to use all the works in publisher B's catalog. That's a blanket license just for that catalog.

The compulsory license itself is really a track-by-track license, meaning that other than if you contract directly, digital music services had to license everything compulsory on a track-by-track basis. And without going too much into the nuance, you had to do things like try to locate the publisher by searching the records of the Copyright Office. And if you can find the records in the Copyright Office, you can send what's called an NOI or a notice of intention[49] directly to the publisher, comply with certain obligations, including accountings and royalty reporting, and you've got a compulsory license from that publisher.

If the records weren't in the Copyright Office, you can then file the notice of intention on the copyright office [electronically]. But the Copyright Office wasn't set up, I think, until about 2016 or so, to accept bulk files. So, all this, as you can see, in a world, even back in 2016, 2017, when there were tens of thousands of tracks being added to a music service per day, that is not a scalable process. And what happened, unfortunately, is that even well-meaning actors found themselves on the business end of litigation because there were just frankly too many loopholes in that process. Of course, now we're in a world where there's more than 100,000 tracks that are uploaded to services every day, so that is clearly not a scalable process.

So, the process we have now, where you have a blanket license available via the Music Modernization Act, the Mechanical Licensing Collective, and the Music Modernization Act, that is much more form fit for the music subscription environment.

Art Levy: But that also speaks to the challenges of the MLC, which is that they have to deal with that massive volume of just individual transactions each

[49] *Notice of Use/Notice of Intention to Use, supra* note 35.

and every day. Colin, do you have anything further about the challenges that the DSPs are seeing in implementing the MMA and in the way that it's been implemented?

Colin Rushing: Implementing the MMA? Oh, it's funny. I'm going to start with pre-MMA first, if that's all right, because I think it does relate to the conversation about the MMA as well. So, this is sort of what I alluded to at the beginning. One of the interesting facts of the way musical works are licensed in the United States and really kind of worldwide, but I only really know about the United States, so don't ask me any questions about Europe, because I won't be able to answer them.

And maybe it's because of 115, and maybe it's because of the PROs, maybe it's for other factors, but the industry reality is that when it comes to licensing musical works, there isn't a supply chain that provides information about the musical works, what their recordings are associated with, who owns them, who the writers were, what the splits are. That's not part of the supply chain in any sort of scalable, systematic way. And so, when you're talking to anyone, whether it's labels or anyone else, right, but especially with streaming services, it is vastly complicated just to get that basic information.

And going a step further, in the case of streaming services, the supply chain is from record labels to the streaming services, they say, "Here is the content we're delivering." It is often the case, it's very common that the publishing information is unknown, that the splits may not even – between the various owners of the composition – may not have even been worked out at the time of the release. This is just a fact of the industry. I don't mean that as a criticism, just a fact of life. And when it comes to the sort of overall music industry, it depends on the delivery of sound recordings and the money flowing to them. And for, I would say probably 99.9% of musical works, it's more or less a passive business of receiving income. So, the question is, what's the best sort of infrastructure to get in place to address that?

I wanted to just build on a point that you mentioned about small publishers navigating The MLC. One of the benefits of a blanket compulsory is small publishers and large, they're all in the same sort of playing field, basically. They are all exactly getting the same deal, but also the small publishers have a place to go. I think one of the things those of you in the room probably remember that were dealing with music before the MMA, and even to this day, outside of 115, it still is the case, it can be incredibly complicated just to know where to go either to get the rights you need or to get paid for the use of your music.

As far as the challenges post-MMA, it's an entirely different set of challenges related to the implementation of this new system. From my perspective, they're mostly in the details. I don't want to spend a ton of time on the CRB process unless people have questions. The rate setting, I agree with Kerry, could be better. Like all litigation, it's sort of complicated. One of the things that was a real success story was, however, again, in the wake of the MMA, the publishers and the DSPs actually reached a settlement. So, the current rates and terms were actually the

product of a settlement.[50] That's kind of how the system ideally would work. I think that's more or less what Congress hoped would happen, is that people would just settle these cases. Unfortunately, it's more rare than that.

Art Levy: And just because it's in the description of this panel, it seems like one of the challenges relating to rate setting is the subject of the Spotify suit.[51] I really don't want to dwell on it because I don't think that it's a sort of larger structural issue, but because we've talked about it Kerry, do you want to just give us a quick 60-second précis of what's going on there?

Kerry Mustico: Sure. So, one of the regulations that go along with the rates, the compulsory licensing rates, provide that a service can bundle music with other content, and if they do so, they can offer it for a discounted price.[52] And there's a formula that they can arrive at to pay a discounted rate. Spotify started adding audiobooks to their premium music service in 2023.[53] They first did that as a free add-on to their premium music service in November 2023, and then as of March 2024, they rolled out a standalone audiobook-only service.[54] Actually, I don't even know if it's dependent on there being an audiobook-only service. But what it essentially allowed them to do is to say that this is a bundled offering now, because there's a separate content with the music, so now it's a bundle. So, what was before a premium music service, subscription service, and they were paying a certain rate for it, now that music service is bundled with audiobooks, therefore they're paying less. And when you do that calculation, I think it's actually hard to sort of determine exactly how much less it is because the rate, the formulas are very complicated, but news accounts sort of estimate that it'll be somewhere of around 150 million or potentially more this year alone in less royalty rates that they will pay for publishers.[55]

Art Levy: Suffice to say that looking at the MMA and the problems with it can get real granular, real quick.

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[50] SETTLEMENT AGREEMENT, *In re* Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords IV), Docket No. 21-CRB-0001-PR (2023-2027).

[51] *Mech. Licensing Collective v. Spotify USA Inc.*, Docket No. 24-CV-03809 (S.D.N.Y. May 16, 2024).

[52] 37 C.F.R. § 385.2 (2019).

[53] *Spotify Premium Will Include Instant Access to 150,000+ Audiobooks,* SPOTIFY (Oct. 3, 2023), https://newsroom.spotify.com/2023-10-03/audiobooks-included-in-spotify-premium/.

[54] *Spotify's New Audiobooks Access Tier Gives Booklovers More Listening Options*, SPOTIFY (Mar. 1, 2024), https://newsroom.spotify.com/2024-03-01/spotifys-new-audiobooks-access-tier-gives-booklovers-more-listening-options/.

[55] *See, e.g.,* Murray Stassen, *The MLC Urges Court to Deny Spotify's Motion to Dismiss 'Bundling' Lawsuit,* MUSIC BUSINESS WORLDWIDE (Sept. 24, 2024), https://www.musicbusinessworldwide.com/the-mlc-urges-court-to-deny-spotifys-motion-to-dismiss-bundling-lawsuit/; *see also* PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE COMPLAINT, *Mech. Licensing Collective v. Spotify USA Inc.*, Docket No. 24-CV-03809 (2024).

Adam Parness: I'll say that without going into the case, the fact that there is even a dispute this large that has risen to the level of a litigation actually illustrates a problem in the Copyright Royalty Board process itself. And that, yes, like Kerry said, we have rules in every Phonorecords proceeding thus far, including the Phono IV settlement, that talk about the terms under which different services can qualify, essentially to say, "We're not reporting as a standalone service, we're reporting this product as a bundled service."[56] And I think there's two bundled options defined in there.

But I think when you look at it, the fact that there is a dispute that's gotten this far, it shows how the Copyright Royalty Board process is very divorced from commercial reality as far as what happened, because in the Copyright Royalty Board, what happens is that the service participants come in and they have to, as part of a larger either agreement or the outcome of litigation, take all the bundled services that many different companies offer, that are different from each other. Some of them are service bundles, some of them are product or hardware bundles or hybrids in between, and set the rules for a five-year period in a market that's very quickly evolving and try and lock those in and then hope that people don't disagree on the interpretation of it at some time during that five-year period, which is exactly what's happened. That's not what happens in regular commercial deal-making.

What happens when any of the same digital services have to negotiate with a record label or a performing rights organization or even the same general groups of music publishers outside the United States, you get into a more real-world conversation where a service will come and say, "We have, or we want to introduce this product, and it's a bundle for XYZ reasons. Here's the commercial value proposition. Here's why we think it'll bring more consumers to the marketplace or help us compete better," or whatever the case may be. And you get into a real-world conversation of should there be a bundle discount, if so, by what mechanism, and all the terms around it. And that doesn't really happen in the Copyright Royalty Board. And when a dispute arises, as it has, to me, it shows where there's just sort of glaring problems in the Copyright Royalty Board rate-setting process itself.

Kerry Mustico: And it should, because under the MMA, one of the things that we really was supposed to be a win, at least from our perspective, was this new standard for rate-setting, which was willing buyer, and willing seller, which is difficult because we've been under compulsory licensing since 1909, and there has never been a willing buyer, willing seller scenario. But to your point, that's not what would likely happen.

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[56] That is, every Phonorecords rate structure since Phonorecords I has provided a "bundled" rate for services that bundle music with other content. *Compare* Adjustment of Determination of Compulsory License Rates for Mechanical and Digital Phonorecords, 78 Fed. Reg. 67,938 (Nov. 13, 2013) (to be codified at 37 C.F.R. pt. 385) *with* Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords IV); Corrections, 89 Fed. Reg. 19,274 (Mar. 18, 2024) (to be codified at 37 C.F.R. pt. 385).

Art Levy: Yeah. And Colin, you had something just very briefly, because we gotta move on.

Colin Rushing: Yeah, sure. I'll just say, and again, also, I don't want to talk about the specifics of the litigation itself. I'll just make this point: disputes are very common in a commercial context. People disagree about contracts all the time, and you know what? You just do what you do, that flows naturally from the nature of commercial relationships. The other point is this, and is the point I made earlier, this whole thing was a product of a settlement.[57] We're not talking about a litigated thing. We're talking about a settlement done again in the shadow of this whole system. But just to sort of set that particular record straight. Finally, this is just a general observation that I would make about compulsory licenses, I don't think there's anyone that I'm aware of that thinks there should be a compulsory license for all of music rights. I think that's not something anyone's advocating. The reality, though, of Section 115 is that it is a part of the landscape. It's something that we've got. Entire institutions and business practices are based on it. There's no way to replace it, or certainly get rid of it without introducing serious problems around questions of competition, and effectiveness of the marketplace, all these sorts of issues. So, it's something that's part of the landscape.

So, given that, and given that it basically applies to 100% of music streaming services in this country, I think it's important that it be approached as a part of commerce. And we don't want services that are using this license to find themselves constrained. They need to be able to develop commercially relevant, commercially popular, and thriving offerings. And it's just important to remember that until 2016, record industry revenues were going this way [flat]. And because of the birth of streaming, those revenues are back up and have surpassed, I believe, where they were at their peak.[58] So, anyway, I just wanted to make sure to get those points across.

Adam Parness: And we should probably just add, just because I think not everybody here is versed in music, that we're talking about Section 115, the MLC, and whatnot. And yeah, the majority of the services that qualify for the compulsory and use the MLC are largely audio-only music subscription services. Whether they're subscription in nature or advertising-driven, there is a marketplace of large digital platforms that can't, that don't qualify for the Section 115 compulsory, can't avail themselves of the 115 blanket license, the MLC, largely because they're incorporating audiovisual content at some sort of scale

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[57] *See supra* note 51.

[58] Not when adjusted for inflation. For example, the RIAA reported $17.1 billion in U.S. recorded music revenue in 2023, surpassing the previous peak of $14.6 billion in 1999. But once adjusted, the latter is equal to $26.7 billion in 2023 dollars. *See U.S. Music Revenue Database*, THE RECORDING INDUSTRY ASSOCIATION OF AMERICA, https://www.riaa.com/u-s-sales-database/ (last visited Dec. 18, 2024).

into their service.[59] So, think of YouTube, TikTok, Snapchat, Meta, Instagram, and Facebook that do have to go out and do direct licenses or collective licenses or combinations of their sorts have their own processes to handle recording. There's a number of services out there that are third-party back offices that help companies facilitate their publishing back office or their sound recording back office.[60] But just for everybody's edification, there is a marketplace of very large-scale digital platforms.

Again, not the Spotifys and the Apple Musics and the Amazons of the world, [but other services] that do go out and have a direct licensing process and their own reporting that exists wholly outside of the 115 compulsory process, because they actually don't qualify to the letter of the law to use that process.[61]

Art Levy: We want to pull back a little bit and talk about compulsory licenses generally, as opposed to this specific example of the MMA. In the study that Colin referred to that the Copyright Office put out in 2015, they listed a series of key principles that they were following when they sort of considered this regime. And those were that music creators should be fairly compensated for their contributions. The licensing process should be more efficient. Market participants should have access to authoritative data to identify and license sound recordings in musical works, which prior to that point had been sort of scattered around in fairly disparate areas. And finally, that usage and payment information should be transparent and accessible. So, I guess the question is, now that we've looked at how the MMA was implemented and some of the challenges there, are those sort of four points what we should be thinking about in the context of compulsory licenses?

Kristelia García: I think that those still hold. I think those are the principles that guided it. And generally speaking, when we set up a compulsory licensing scheme, we've heard quite a bit from our panelists on ways in which it doesn't always work out well. There are some things that are much more difficult logistically than they are theoretically, in terms of actually sorting the rates and getting people paid. And no one's happy with the rates on either side and want the rates to be higher or lower or have different categories and other exceptions. But the underlying principles of setting up the compulsory licenses, I think, and one of the guiding principles should continue to be, as we think about the future of them and whether they might apply in other contexts going forward, is that of access. The underlying notion was, "Listen, we have a market failure." That's very

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[59] For example, YouTube's free service cannot avail itself of the blanket license because of its audiovisual content, whereas the subscription YouTube Music service can and does. *See generally* U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE (2nd ed. 2016), https://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf.

[60] For example, the Harry Fox Agency and Music Reports, Inc. *See* HFA, *supra* note 48, and Homepage, MUSIC REPORTS, https://www.musicreports.com/ (last visited Dec. 18, 2024).

[61] For example, their primary offerings are not "nondramatic musical works" as defined in § 115.

debatable, of course, but it's supposed to start from there, it would otherwise be a market failure but with this compulsory license in place, we might correct for that. We are checking, for example, that we're not directly competing in the market so that we're not undercutting services, but at the same time allowing new entry into a market that otherwise wouldn't be able to do it.

So, as we look towards the future of compulsory licensing in other places, I think the principal thing to consider is if we rely completely on free market negotiation, then we're going to see the bigger, more resourced entities securing licenses. But we will not necessarily see opportunities for startups and new entrants into a market or people with more experimental business ideas being able to secure similar licenses, certainly not on similar terms. We could also face the problem of a lack of transparency, which is another thing that compulsory licenses bring, panelists talked about earlier, where people just feel better knowing that they're getting the same deal as everyone else.

We don't have that anywhere outside of the compulsory licensing context, not even in collective licensing. Blanket licenses are supposed to be offered to similarly situated entities in the same way. But for all the lawyers in the room, we know that could mean anything. So, we really only get that in the compulsory licensing space. So, I think for competition purposes, that might be the underlying principle.

Art Levy: All right, so the last question before we go to Q&A, I'll throw this out to all of you. Given the challenges that have been presented by some previous panels on the licensing of AI, let's say we looked at a compulsory licensing regime for AI. Specifically, I'm thinking about licensing of content for use in training AI models. Is that something that would be ripe or could be usefully licensed using a compulsory license regime? And does it make sense to do that? Let's go down the line, because I think everyone has an opinion here. Kristelia, you want to go first?

Kristelia García: I already know what's coming up down the line, so I will caveat my comments by saying, I don't know that it's a good idea, but I'm going to play devil's advocate because someone has to sort of be like, "What could this look like?" Well, if what we're trying to do is not stifle innovation, because we want the AI companies to continue to develop and innovate, and we don't want a stalemate, in which we're forcing people into negotiations, then we could set up a compulsory license. Much, much easier said than done. We'll have to have a bunch of different categories of different works, and everyone's going to be unhappy with the rates.

But it would arguably continue to pay content owners and creators while also allowing companies to go forward and allowing new entrants, the folks who are going to be competing with the household names of AI that we know now, to also enter the market at the same time. So, I think that there's a lot of logistics behind it, but I think that it is something that we should be considering seriously.

Kerry Mustico: I would say no. Not surprisingly, I think. From music publishers' perspectives, we've been under compulsory licensing for well over 100 years. And I have to ask, why at this point are we still under compulsory licensing? And if we go back to the history, Congress was concerned about a piano

manufacturer who was getting exclusive licenses for piano rolls.[62] What are we concerned about now? Why are we going to tie music publishers' hands? I think there are other ways to address the concerns that you raised.

Adam Parness: Yeah, I would also probably, also not surprisingly, say no, it's not something we need or should do. And I say that also, having spent 20 years or so of my career having sat inside technology companies. The reality is that whether for bad or worse, when we make something compulsory, whether it's record labels and recording artists under Section 114 and publishers and songwriters under 115, when you do that, we're effectively restricting choice, in some cases wholly suppressing the choice that creators have. And especially when it comes to a topic as loaded as AI, creators should have a choice and shouldn't have to be forced to license at whatever specific rates what might be said through some sort of process. We don't need more things. And I feel this genuinely, and having sat on both sides of the table, we don't need more rights taken away from creators and having choices taken away from them.

And I think, like I said before, we have enough data, enough evidence of all sorts of free market negotiations that do work in the music space how record labels are able to license their content, but for certain things in Section 114, how publishers work in the synchronization marketplace, how they work in the audiovisual marketplace, how they work in the audiovisual and UGC and social media at scale for things that don't qualify for Section 115. So, the idea that, in order for AI to flourish, that we would need to put it under a compulsory license, that's something I don't think we need to do, and we don't need to do it. I think it's unfair to writers and creators, and it's also not something that we genuinely need to make sure that innovation flourishes.

Art Levy: All right, Colin give the last word.

Colin Rushing: All right. I don't know if I want the last word on this 'cause I'm not going to answer your question, but I'm going to make a couple of observations. First, in the United States, most compulsory licenses are pretty focused, right, on particular types of rights. And when we're talking about AI training, it's a vast sort of array of content that we're talking about. So, that's a complexity as we're having these discussions. The other observation is that the actual rights landscape is super unclear, right? Compulsory license for what? So, that's a question that I think has got to be part of the discussion.

And the other observation, I'll just say, and I don't mean this as a comparison --it's just an interesting sort of footnote--earlier today, I think it was Tom [Rubin] who talked about, or maybe it was in the introduction to Tom's talk referred to the Audio Home Recording Act that was addressing this concern that people had in

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[62] The Aeolian Company, makers of Pianola brand player pianos. Zvi S. Rosen, *Player Pianos and the Origins of Compulsory Licensing — Some Details of its Origins*, MOSTLY IP HISTORY (Apr. 27, 2018), https://mostlyiphistory.com/2018/04/27/player-pianos-and-the-origins-of-compulsory-licensing-some-details-of-its-origins/.

the early 90s of digital audio tapes.[63] And so, there was this whole levy model that was established to address that question. It was in the pretty early days of digital reproduction, and that revenue stream, I think, dwindled to the thousands of dollars over time.[64] Just an observation. Do with that what you will. So, that's my answer to that. It's a very complex question, and certainly, I'm sure people will be talking about that frequently.

Art Levy: And if the Spotify case is illustrative of anything, it's that we can't always think through all of the options. I think with that, I can thank all of our panelists. Really great. I really appreciate it.

[63] The Audio Home Recording Act (AHRA) of 1992, which included levies on recording devices and blank media as well as mandates for copy protection technology. Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237 (1992) (codified as 17 U.S.C. §§ 1001-1010).

[64] The products toward which the AHRA was targeted, such as the Digital Audio Tape (DAT) developed by Sony, did not succeed as consumer media formats. *See generally* Derek E. Bambauer, *Everything You Want: The Paradox of Customized Intellectual Property Regimes*, 39(1) BERKELEY TECH. L.J. 205 (2024), Geoffrey Hull, *The Audio Home Recording Act of 1992: A Digital Dead Duck, or Finally Coming Home to Roost?*, 2(1) J. MUSIC & ENT. INDUSTRY EDUCATORS ASS'N 76 (2002).