BELGIUM'S IMPLEMENTATION OF THE EU COPYRIGHT DIRECTIVE: AN INVESTIGATION OF THE STATE OF EQUITABLE REMUNERATION

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ABSTRACT

As streaming becomes the dominant means of music consumption around the globe, songwriters have lost out to music publishers in the contracting process. Ultimately, songwriters are making less money than they used to. Some countries have opted to address this growing problem. Various European countries, including Belgium, have made great strides towards levelling the playing field, to the benefit of songwriters. The subject of equitable remuneration (ER) in the music industry is one that garners ever-more attention, particularly as streaming giants like Spotify win an ever-larger proportion of the music market. Thus far, ER regimes have focused largely on featured artists (performing artists), but it has also been applied to songwriters. Belgium has included an ER provision for featured artists as part of its implementation of the European Directive on Copyright in the Digital Single Market (2019). As recently as May 2024, the National Music Publishers Association asked Congress to make changes to the licensing framework in which songwriters operate.[1] This note seeks to provide alternatives to the blanket licensing system currently in place in the U.S. by comparing the Belgian and American systems – suggesting that the U.S. adopt the Belgian approach to ER by eliminating some of the intermediary bodies that siphon money away from songwriters. Ultimately, one of the most notable benefits of implementing an equitable remuneration (or equitable remuneration-like) system in the U.S. would be not only level the playing field between songwriters and the companies that use their songs, but also level the playing field between the industry's largest players and the many thousands of songwriters

[1] Aruni Soni, *Spotify Royalty Drama Casts Shadow over Songwriter Consensus*, BLOOMBERG L. (June 25, 2024), https://news.bloomberglaw.com/ip-law/spotify-royalty-drama-casts-shadow-over-songwriter-consensus [https://perma.cc/SJY2-DXC9].

who lack the institutional backing and clout of their more well-known peers.

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I. INTRODUCTION

It is hardly contestable that musical artists and songwriters deserve to be compensated for their work. As the talent behind music, they are irreplaceable—even with the rise of artificial intelligence.[2] Compensation should not be an issue that deters talented musicians from dedicating themselves to the profession full-time.[3] As music consumption habits change, having shifted from a predominantly physical-product oriented model (focused on CDs and the like) to streaming,[4] the way that artists and songwriters are remunerated should change accordingly.

The European Union's Directive on Copyright in the Digital Single Market (DSM Directive) addresses this need in Article 18. Article 18, addressing the "[p]rinciple of appropriate and proportionate remuneration," ensures "appropriate and proportionate remuneration" for creators who "license or transfer their exclusive rights for the exploitation of their works or other subject matter."[5] Article 18 grants each EU Member State the freedom to implement the Article into its domestic legal framework using "different mechanisms" that constitute a "fair balance of rights and interests."[6] While some European countries have transposed Article 18 rather directly into their legal systems without creating clear enforcement mechanisms, Belgium is unique for its thoughtful implementation.[7] Belgium has established clear, usable mechanisms that permit the realization of the DSM

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[2] Further discussion of artificial intelligence can be found later in the introduction of this note. *See infra* Part I.

[3] Peter Lee, *Reconceptualizing the Role of Intellectual Property Rights in Shaping Industry Structure*, 72 VAND. L. REV. 1197, 1251-52 (2019).

[4] INT'L FED'N OF THE PHONOGRAPHIC INDUS., GLOBAL MUSIC REPORT: STATE OF THE INDUSTRY 2024, at 12 (2024) https://www.ifpi.org/wp-content/uploads/2024/04/GMR_2024_State_of_the_Industry.pdf [https://perma.cc/8R7J-D8JJ] (global music streaming revenues grew by 10.4% in 2023 to a total of $19.3 billion. In 2023, streaming comprised 67.3% of total global music revenues).

[5] Council Directive 2019/790, art. 18, 2019 O.J. (L 130) 92, 121 (EU).

[6] *Id.*

[7] Evangelos Chatzoulis, *Follow Belgium and Implement Authors' Rights!*, SOC'Y AUDIOVISUAL AUTHORS (July 11, 2022), https://www.saa-authors.eu/en/blog/776-follow-belgium-and-implement-authors-rights [https://perma.cc/P4MK-Y4Y4].

Directive's goal of ensuring fair pay for creators. Having established the necessity of and fairness involved in paying both musical artists and songwriters, this note will propose a remedy for the problem, through a discussion limited to rights to reproduce and distribute musical works, without addressing issues regarding performance rights.

In copyright law all songs are bipartite. This is true in both Belgium and the United States.[8] A song has one copyright for the song as a written musical work—its music, lyrics, and arrangement—and a second copyright for the performance of the song, or the song's sound recording. Musical works are copyrightable pursuant to the U.S. Copyright Act of 1976 (the Copyright Act).[9] Sound recordings are also copyrightable under the Copyright Act, but fall under their own category.[10] This bipartite structure leads to many complications. For one thing, the two copyright tracks do not neatly co-exist: a songwriter may hold onto their copyright for its composition, assign it to a music publisher, or license it to a music publisher. By contrast, artists typically transfer their rights in sound recordings to record labels. On the songwriter and publisher side, copyright is often split into many different shares held by many different rights-holders. Determining which rights-holder owns which share is exceedingly difficult and often results in rights-holders not receiving proper payment.

Section 115 of the Copyright Act "establishes a compulsory license for the rights to reproduce and distribute…the underlying compositions embodied in sound recordings."[11] A compulsory license is a license that is established by law.[12] Compulsory licenses typically

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[8] *How to License Music? FAQ*, UNIVERSAL MUSIC BELG., https://universal-music.be/licensing-our-music/#:~:text=When%20you%20are%20looking%20to,remain%20at%20the%20same%20companies [https://perma.cc/FJX9-G5VF] (last visited Feb. 21, 2025); JEANNE C. FROMER & CHRISTOPHER JON SPRIGMAN, COPYRIGHT LAW: CASES AND MATERIALS 363-65 (6th ed. 2024) (which describes the licensing framework as being split between musical works (by publishers and songwriters) and sound recordings (by record labels and artists)).

[9] Subject Matter of Copyright: In General, 17 U.S.C. § 102(a)(2).

[10] 17 U.S.C. § 102(a)(7).

[11] Todd Larson, Jeremy Cain & Jeremy Auster, *Music Licensing Overhaul Signed Into Law*, WEIL, GOTSHAL & MANGES LLP (Oct. 11, 2018), https://www.weil.com/~/media/mailings/2018/q3/ip_media_alert_18_10_11_01.pdf [https://perma.cc/EV2L-NCJA].

[12] These stand in contrast to licenses that parties agree to in a licensing scheme, which are called voluntary licenses. *See* BILL ROSENBLATT, THE GLOBAL DIGITAL MUSIC LANDSCAPE, at 27 (2024).

have royalties that are also established by law,[13] which are known as statutory royalties. [14] The idea of establishing a compulsory license for mechanical rights emerged out of Congressional concerns that the music industry might develop into an overly-powerful monopoly. [15]To qualify for the § 115 compulsory license, which applies only to non-dramatic musical works,[16] there are several requirements: (1) a composition must be fixed in a record;[17] (2) that phonorecord must be created under the copyright owner of the musical composition's authority; (3) copies of the authorized phonorecord must be[18] distributed to the public;[19] and (4) the sound recording made under the compulsory license may not change the underlying composition's fundamental character or basic melody.[20]

This note begins with an introduction to copyright law and the U.S. music licensing regime while addressing artificial intelligence's role in the creative process. Part I focuses on the U.S. licensing and compensation regime, explaining its limits compared to a Belgian-like equitable remuneration (ER) style system.[21] It also explores how the

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[13] BILL ROSENBLATT, WIPO COMM. ON INTEL. PROP. AND DEV., THE GLOBAL DIGITAL MUSIC LANDSCAPE: AN OVERVIEW OF DISTRIBUTION, COPYRIGHT, AND RIGHTS ADMINISTRATION FOR MUSIC IN THE DIGITAL AGE 27 (2024).

[14] DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 229 (2015). *See also* the discussion of the player piano manufacturer Aeolian in JEANNE C. FROMER & CHRISTOPHER JON SPRIGMAN, COPYRIGHT LAW: CASES AND MATERIALS 367-68 (6th ed. 2024) (citing Kal Raustiala & Christopher Jon Sprigman, *Scales of Justice: How a Terrible Supreme Court Decision About Player Pianos Made the Cover Song What It Is Today*, SLATE, May 12, 2014, https://slate.com/technology/2014/05/white-smith-music-case-a-terrible-1908-supreme-court-decision-on-player-pianos.html.).

[15] 17 U.S.C. § 115.

[16] *Id. See* FROMER & SPRIGMAN, *supra* note 14; PASSMAN, *supra* note 14 at 229–30.

[17] 17 U.S.C. §§ 115(a)(1)(B)(i) & 115(a)(1)(A)(ii)(I).. *See* FROMER & SPRIGMAN, *supra* note 14 at 366.

[18] 17 U.S.C. § 115(a)(1)(A)(i). *See* FROMER & SPRIGMAN, *supra* note 14; PASSMAN, supra note 14 at 229–30.

[19] *Id*.

[20] 17 U.S.C. § 115(a)(2). *See* FROMER & SPRIGMAN, *supra* note 14; PASSMAN, *supra* note 14, at 229–30

[21] It is important to note that Belgium does not stand alone in its stance on equitable remuneration. Other European countries have taken up the ER mantle. Indeed, Spain's equitable remuneration regime predates the DSM Directive, showing admirable initiative.

U.S.'s current licensing system is failing songwriters and how that failure is exemplified by a recent Spotify lawsuit that may upend how songwriters are compensated for their work in the U.S. Part II argues that one of the most efficient and effective ways of acknowledging and taking into account the change in music consumption and its effect on the music industry, is establishing equitable remuneration (ER) for songwriters. That section will outline the advantages and disadvantages of implementing an ER system as well as the legal challenges faced in the Belgian Constitutional Court. The Belgian cases make the legal and non-legal arguments in favor of adopting an ER or ER-like approach. In Part III, this note will explore how songwriters in the U.S. have been inadequately compensated by the country's compensation regimes. Finally, Part III argues that the U.S. should consider taking up the equitable remuneration trend by adopting more equitable remuneration-like legislation to ensure that songwriters are rewarded for their work and are not driven out of the music industry.

I. The Necessity of Songwriters to the Copyright Regime

With the rise and increasing ubiquity of artificial intelligence, there is an argument to be made that a (human) songwriter's value is less than it once was and that, consequently, paying them more is illogical. The diminished songwriter's value is one argument to be made against implementing equitable remuneration or an equitable remuneration-like regime in the U.S. While a discussion of the creative contributions and importance of songwriters is unfortunately beyond the scope of this note, it is important to present a counterargument: copyright law insists on a human hand. It is not enough that the hand be a guiding one; the hand must be the author of the creative work.[22] In a report published in January 2025, the U.S. Copyright Office affirmed that human authorship is essential for copyright protection in the United States.[23] This stance is consistent with the Copyright Office's

[22] *Chapman Kelley v. Chicago Park District*, 635 F.3d 290 (7th Cir. 2011).

[23] UNITED STATES COPYRIGHT OFFICE, COPYRIGHT AND ARTIFICIAL INTELLIGENCE: PART 2: COPYRIGHTABILITY 7 (2025), available at https://www.copyright.gov/ai/Copyright-and-Artificial-Intelligence-Part-2-Copyrightability-Report.pdf [https://perma.cc/KH6J-WPN9]. This rule is based in the U.S. Constitution's Copyright Clause, which grants Congress the power "To promote the Progress of Science and useful Arts, by securing…to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8. The report goes on to reiterate the Supreme Court's holding that a copyrighted work's author 'is …*the person* who translates an idea into a fixed, tangible expression entitled to copyright protection.'" UNITED STATES COPYRIGHT OFFICE,

refusal to issue copyright protections for works generated with artificial intelligence where copyright applicants base their argument on the high number of prompts they submitted to achieve the final work product in question.[24]

Furthermore, no U.S. court has granted copyright to material created by any non-human being, and those courts that have considered non-human creation have deemed such a prospect impossible.[25] The Seventh Circuit has also ruled that the author of a copyrightable work must be a person.[26] The report does not fully close the door on copyrighting creative works that use artificial intelligence, explaining that "[w]here AI merely assists an author in the creative process, its use does not change the copyrightability of the output."[27] The extent to which a human needs to guide this creative process is a decision to be made case-by-case.[28] This note will not delve further into the evermore ubiquitous role of artificial intelligence in the song writing process or in the U.S. copyright regime more broadly. It seeks only to assert that artificial intelligence's increasing abilities do not justify underpaying human songwriters for their work.

II. THE COMPENSATION REGIME FOR SONGWRITERS IN THE

COPYRIGHT AND ARTIFICIAL INTELLIGENCE: PART 2: COPYRIGHTABILITY 7 (2025), accessible at https://www.copyright.gov/ai/Copyright-and-Artificial-Intelligence-Part-2-Copyrightability-Report.pdf (citing *Cmty. for Creative Non-Violence v. Reid* (*"CCNV"*), 490 U.S. 730, 737 (1989) (emphasis added by the report's authors).

[24] Ivan Moreno, *AI Art Needs Human Input For Copyrights, Gov't Report Says*, LAW360 (Jan. 29, 2025), https://www.law360.com/articles/2290102?nl_pk=d04f0f14-dc79-4642-84ce-6845cb34ec11&utm_source=newsletter&utm_medium=email&utm_campaign=special&utm_content=31600&read_main=1&nlsidx=0&nlaidx=6 [https://perma.cc/L6SQ-5NPC].

[25] UNITED STATES COPYRIGHT OFFICE, COPYRIGHT AND ARTIFICIAL INTELLIGENCE: PART 2: COPYRIGHTABILITY 7 (2025), accessible at https://www.copyright.gov/ai/Copyright-and-Artificial-Intelligence-Part-2-Copyrightability-Report.pdf [https://perma.cc/6D6C-H4U7].

[26] *Chapman Kelley v. Chicago Park District*, 635 F.3d 290, 304 (7th Cir. 2011).

[27] UNITED STATES COPYRIGHT OFFICE, COPYRIGHT AND ARTIFICIAL INTELLIGENCE: PART 2: COPYRIGHTABILITY 2 (2025), accessible at https://www.copyright.gov/ai/Copyright-and-Artificial-Intelligence-Part-2-Copyrightability-Report.pdf [https://perma.cc/L365-P5AL].

[28] *Id.*

UNITED STATES

In the U.S., there are two types of contracts that determine the compensation songwriters receive from streaming: the deals between songwriters and music publishers, and the licenses streaming services obtain – either from music publishers directly or via a statutory license. Songwriters' agreements with music publishers typically take one of six forms. These six forms are: (1) the Individual Song Agreement; (2) the Exclusive Songwriter's Agreement; (3) the Co-Publishing Agreement; (4) the Participation Agreement; (5) the Administration Agreement; and (6) the Foreign Sub-Publishing Agreement.[29] All six types of agreements observe writers transfer their copyright in one or more of their compositions. These transfers are generally to a publisher for a delineated amount of time in exchange for some of the income generated from use of those compositions. It is important to note, all six agreements contain different power dynamics between songwriters and publishers.[30]

Addressing and renegotiating these power dynamics is one of the strengths of equitable remuneration. While the Belgian system of equitable remuneration is designed to cover performers and songwriters alike, the U.S. system is more limited. This is partly because, where the Belgian system of equitable remuneration puts justice and collective rights at the center of the discussion, the U.S. system has adopted a more business-oriented approach.[31] Songwriters' voluntary and statutory licenses are borne of this approach. Section 115 of the Copyright Act (17 U.S.C. § 115) creates a compulsory license for rights of reproduction and distribution of the musical compositions "embodied" in

[29] There are also Songwriter/Performer Development deals, Joint Venture deals, and Co-Venture deals, but these are less common. Todd Brabec & Jeff Brabec, *SONGWRITER AND MUSIC PUBLISHER AGREEMENTS: A Relationship Necessary for Success*, ASCAP, https://www.ascap.com/help/music-business-101/200809#:~:text=There%20are%206%20basic%20types,the%20Foreign%20Sub%2DPublishing%20Agreement [https://perma.cc/DVX6-P9XB] (last visited Mar. 2, 2025).

[30] Individual Song Agreements and Exclusive Songwriter Agreements are the most common type of songwriter-publisher agreement. These types of agreements are popular in large part because of the financial security and predictability that they provide. For a more thorough explanation of the types of songwriter agreements, *see Id.*

[31] Lydia Pallas Loren, *Copyright Jumps the Shark: The Music Modernization Act*, 99 B.U. L. REV. 2519, 2521 (2019). This idea is discussed more fully in Section VI of this note.

sound recordings.[32] Previously, music licensing was carried out song-by-song in a way that has been both extremely risky and onerous for interactive streaming services, resulting in costly lawsuits for these DSPs.[33] This problem has driven the industry's push for a legislative remedy. That push for legislation resulted in the Music Modernization Act (MMA) of 2018.[34]

In 2018, the MMA was introduced in the U.S. with the goal of simplifying the licensing of works and royalty payments linked to mechanical licenses, which are related only to musical compositions, not sound recordings. Th MMA applies to musical works and covers downloads and streaming.[35] The Musical Works Modernization Act (MWMA) governs the U.S. compensation regime for songwriters.[36] The MWMA abandons the extant song-by-song structure of compulsory licensing that had governed the creation and distribution of musical works with a blanket licensing system.[37] A blanket license is a compulsory license to engage in activities covered by § 115.[38] Under the MWMA, a covered activity is the act of making a permanent download, a limited download, or an interactive stream.[39]

Digital music providers are able, though not compelled, to create and distribute interactive streams or downloads, using this blanket licensing system.[40] The blanket license only applies to the distribution

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[32] Todd Larson, Jeremy Cain & Jeremy Auster, *Music Licensing Overhaul Signed Into Law*, WEIL, GOTSHAL & MANGES (Oct. 11, 2018), https://www.weil.com/~/media/mailings/2018/q3/ip_media_alert_18_10_11_01.pdf [https://perma.cc/7Y4R-3XRB].

[33] *Id.*

[34] *The Music Modernization Act (2018)*, U.S. COPYRIGHT OFFICE, https://www.copyright.gov/music-modernization/ (last visited 21 September 2024).

[35] Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. 115-264, 132 Stat. 3676.

[36] *Id.*

[37] *Musical Works Modernization Act*, U.S. COPYRIGHT OFFICE, https://www.copyright.gov/music-modernization/115/, [https://perma.cc/4U9A-UT7V] (last accessed 21 September 2024); *see* Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. 115-264 §102 (2018).

[38] 17 U.S.C. § 115(d)(1)(A).

[39] 17 U.S.C. § 115(e)(7).

[40] *Musical Works Modernization Act*, U.S. COPYRIGHT OFFICE, https://www.copyright.gov/music-modernization/115/ [https://perma.cc/4U9A-UT7V] (last accessed 21 September 2024); *see* Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. 115-264 §102 (2018); *see also* Serona Elton, *Mechanical Licensing Before and After the Music Modernization Act*, MEIA J., Jan.

and reproduction of musical works.[41] Blanket license rates are set by the Copyright Royalty Board (CRB) in judicial proceedings, just as the proceedings in which rates and terms for existent Section 115 compulsory licenses are set.[42] This is not to say that these rates are the only option. Both DSPs and music publishers are still permitted to negotiate mechanical licenses for sound recordings on a non-statutory—that is, voluntary—basis, with works covered by voluntary licenses and the payouts related to these works set to be carved out from the blanket license.[43]

To make this blanket licensing system a reality, the MWMA authorizes the Mechanical Licensing Collective (MLC).[44] Digital music streaming services pay royalties to the MLC, which in turn is responsible for paying these royalties out to the proper rights-holder(s).[45] The

2019 at 13, 23 (2019) (explaining the reasons that DSPs need to secure blanket licenses).

[41] Neither public performance rights nor sync rights are applicable to a blanket license. Public performance rights are licensed separately through negotiations with performance rights organizations (PROs). Sync rights are to be licensed directly from the owner of the copyright of the musical composition. JEANNE C. FROMER & CHRISTOPHER JON SPRIGMAN, COPYRIGHT LAW: CASES AND MATERIALS 371 (6th ed. 2024).

[42] 17 U.S.C. § 115(c)(1), (d)(8); Todd Larson, Jeremy Cain & Jeremy Auster, *Music Licensing Overhaul Signed Into Law*, WEIL, GOTSHAL & MANGES (Oct. 11, 2018), https://www.weil.com/~/media/mailings/2018/q3/ip_media_alert_18_10_11_01.pdf [https://perma.cc/CJ3T-DUHD.

[43] Todd Larson, Jeremy Cain & Jeremy Auster, *Music Licensing Overhaul Signed Into Law*, WEIL, GOTSHAL & MANGES (Oct. 11, 2018), https://www.weil.com/~/media/mailings/2018/q3/ip_media_alert_18_10_11_01.pdf [https://perma.cc/CJ3T-DUHD]..

[44] 17 U.S.C. § 115(d)(1)-(2); *U.S. Copyright Office & The MLC*, THE MLC, https://www.themlc.com/usco-and-mlc [https://perma.cc/MK9Y-XX3A] (last accessed 19 Sept. 2024). *See* Todd Larson, Jeremy Cain & Jeremy Auster, *Music Licensing Overhaul Signed Into Law*, WEIL, GOTSHAL & MANGES (Oct. 11, 2018), https://www.weil.com/~/media/mailings/2018/q3/ip_media_alert_18_10_11_01.pdf [https://perma.cc/CJ3T-DUHD].

[45] *U.S. Copyright Office & The MLC*, THE MLC, https://www.themlc.com/usco-and-mlc [https://perma.cc/MK9Y-XX3A] (last accessed 19 Sept. 2024); *Musical Works Modernization Act*, U.S. COPYRIGHT OFFICE, https://www.copyright.gov/music-modernization/115/ [https://perma.cc/4U9A-UT7V] (last accessed 21 Sept. 2024); Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. 115-264, 264 § 102 (2018); 17 U.S.C. § 115(d)(3). *See* Todd Larson, Jeremy Cain & Jeremy Auster, *Music Licensing Overhaul Signed Into Law*, WEIL, GOTSHAL & MANGES (Oct. 11, 2018),

MMA limits the MLC in that the MLC may offer and administer the blanket license, but it may not negotiate or price that license.[46] The imposition of this limit on the MLC is a response to a concern that the MLC may take advantage of its advantageous role in the music licensing regime to compete in other parts of the licensing process, including the licensing of musical works beyond the scope of the statutory license.[47]

Matching either a sound recording or song right to its proper owner is a thorny process. When streaming services license music, the record label, which owns the sound recording, transfers the metadata[48] of the track itself, including the underlying musical work (even though it is owned by someone else).[49] Key to the royalty payout process is ownership data: the track's creators, corporate partners, agreed-upon contractual terms, etc.[50] To help identify tracks' proper rights-holders, each track is given two identifiers: an International Standard Musical Works Code (ISWC) and an International Standard Recording Code (ISRC).[51] The value of a track's ISWC and ISRC are not to be underestimated when considering its role in the economics of the music streaming system because its (and its movements) determine who is paying how much, to whom, and for what reason(s).[52] Since, as described in Part II, *infra*, a track's recording and underlying composition rights are licensed separately and held by different—and often changing—parties, labels often neglect to provide ISWCs when it licenses music to streaming services, which can result in songwriters being frozen out and not receiving any sort of payout at all when their

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[https://perma.cc/CJ3T-DUHD] (Matching royalties to the appropriate copyright holders can be a labyrinthine process lacking in equity).

[46] Todd Larson, Jeremy Cain & Jeremy Auster, *Music Licensing Overhaul Signed Into Law*, WEIL, GOTSHAL & MANGES (Oct. 11, 2018), https://www.weil.com/~/media/mailings/2018/q3/ip_media_alert_18_10_11_01.pdf [https://perma.cc/CJ3T-DUHD].

[47] *Id.*

[48] Metadata is a set of data that provides information about data, in this case, the data connected to individual songs.

[49] HOUSE OF COMMONS DIGITAL, CULTURE, MEDIA AND SPORT COMMITTEE, ECONOMICS OF MUSIC STREAMING, SECOND REPORT OF SESSION 2021-2022 49 (2021) (citations omitted).

[50] *Id.*

[51] *Id.* at 50.

[52] *Id.*

songs are streamed.[53] This is not done primarily out of malice; it is the difficulty of tracking down rights-holders that prompts this failure.[54] The fault is largely due to the amount of data that labels have to deal with. However, streaming services also create unnecessary barriers, including a requirement that only exclusive rights-holders or their representatives can challenge incorrect metadata.[55] This requirement "prevents both third-party 'concerned citizens' from intervening and creates impracticalities" in instances where many performers, songwriters, and/or composers have contributed to a work.[56]

To fulfill its purpose of paying royalties to music publishers and songwriters, and in order to mitigate the ownership data problem described above, the MLC runs the Musical Works Database (MWD).[57] The MWD connects sound recordings to their underlying musical compositions, as well as data of the composition's rights-holder(s) and these parties' shares of ownership.[58] If a blanket licensee plays a song that the MLC cannot link to a copyright owner, the MMA requires that the MLC hold onto the royalties for three years in an account that accrues interest and to seek out the proper rights-holder(s) during that period. These royalties sit in a limbo known as 'black boxes.'[59] After the three-year period, royalties still awaiting claimants are set to be assigned and apportioned to recognized music publishers based on these

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[53] *Id.*

[54] HOUSE OF COMMONS DIGITAL, CULTURE, MEDIA AND SPORT COMMITTEE, ECONOMICS OF MUSIC STREAMING, SECOND REPORT OF SESSION 2021-2022 49 (2021) (citations omitted).

[55] *Id.*

[56] *Id.*

[57] 17 U.S.C. § 115(d)(3)(E); Todd Larson, Jeremy Cain & Jeremy Auster, *Music Licensing Overhaul Signed Into Law*, WEIL, GOTSHAL & MANGES (Oct. 11, 2018), https://www.weil.com/~/media/mailings/2018/q3/ip_media_alert_18_10_11_01.pdf [https://perma.cc/ER3Z-RCX4].

[58] Todd Larson, Jeremy Cain & Jeremy Auster, *Music Licensing Overhaul Signed Into Law*, WEIL, GOTSHAL & MANGES 1, at 2 (Oct. 11, 2018), https://www.weil.com/~/media/mailings/2018/q3/ip_media_alert_18_10_11_01.pdf [https://perma.cc/94GR-PBZ6].

[59] HOUSE OF COMMONS DIGITAL, CULTURE, MEDIA AND SPORT COMMITTEE, ECONOMICS OF MUSIC STREAMING at 51 (2021). In 2019, black boxes held $2.5 billion of unallocated royalty payments. Transcript of Oral Evidence at 5, Question 113, José Luis Sevillano, HOUSE OF COMMONS DIGITAL, CULTURE, MEDIA AND SPORT COMMITTEE, ORAL EVIDENCE: ECONOMICS OF MUSIC STREAMING, HC 868 5 (Dec. 8, 2020).

publishers' market shares.[60] This process by its nature is extremely favorable to larger publishers.[61] Indeed, the pro-rata assignment of royalties means that the parties behind the most listened to songs are, in effect, paid twice over: the first time for streams of their own work, and then a second time for streams that cannot be matched to their rights-holders.[62] Smaller songwriters and publishers who are less well-versed in the registration policies and requirements of the MLC are placed in a disadvantaged position.[63]

The MWMA blanket license authorizes reproduction and distribution of musical works for "covered activities."[64] "Covered activities" as a term is a vague, referring to 'the activity of making a digital phonorecord delivery of a musical work,' which can take the shape of an interactive stream, a permanent download, or a limited download.[65] Interactivity is an essential consideration of the U.S. licensing regime. If a stream is interactive, it means that the user has great control over their listening: the listener can choose how they want to listen, when they want to listen, and what they want to listen to.[66] If a stream is

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[60] Todd Larson, Jeremy Cain & Jeremy Auster, *Music Licensing Overhaul Signed Into Law*, WEIL, GOTSHAL & MANGES 1 at 2 (Oct. 11, 2018), https://www.weil.com/~/media/mailings/2018/q3/ip_media_alert_18_10_11_01.pdf [https://perma.cc/94GR-PBZ6]. *see* 17 U.S.C. § 115(d)(3)(H)-(J).

[61] Todd Larson, Jeremy Cain & Jeremy Auster, *Music Licensing Overhaul Signed Into Law*, WEIL, GOTSHAL & MANGES (Oct. 11, 2018), https://www.weil.com/~/media/mailings/2018/q3/ip_media_alert_18_10_11_01.pdf; *see* 17 U.S.C. § 115(d)(3)(H)-(J).

[62] THE IVORS ACADEMY OF MUSIC CREATORS, THE IVORS ACADEMY WRITTEN SUBMISSION TO THE DCMS SELECT COMMITTEE INQUIRY: THE ECONOMICS OF MUSIC STREAMING 41 (Nov. 2020), cited in HOUSE OF COMMONS DIGITAL, CULTURE, MEDIA AND SPORT COMMITTEE, ECONOMICS OF MUSIC STREAMING 51 (2021)

[63] Todd Larson, Jeremy Cain & Jeremy Auster, *Music Licensing Overhaul Signed Into Law*, WEIL, GOTSHAL & MANGES (Oct. 11, 2018), https://www.weil.com/~/media/mailings/2018/q3/ip_media_alert_18_10_11_01.pdf; *see* 17 U.S.C. § 115(d)(3)(H)-(J).

[64] 17 U.S.C. § 115(d). *See* Lydia Pallas Loren, *Copyright Jumps the Shark: The Music Modernization Act*, 99 B.U. L. REV. 2519, 2527 (2019).

[65] 17 U.S.C. § 115(e)(7) (providing the definition of "covered activity"); Lydia Pallas Loren, *Copyright Jumps the Shark: The Music Modernization Act*, 99 B.U. L. REV. 2519 2528 (2019).

[66] W. Joseph Anderson, Suna Izgi & Alex Spring, *Better Know Your Neighboring Rights—A Simple Guide to a Confusing Income Stream (Guest Column)*, BILLBOARD (Jan. 11, 2024), https://www.billboard.com/pro/what-are-neighboring-

non-interactive, the user has far less power: listeners of non-interactive streams have their choice limited to which station they are tuning in to.[67] Non-interactive streaming services are not required to receive mechanical licenses because its use of musical works is considered a public performance, not a mechanical copy that can act as "a substitution for sales (i.e., distributions) the way interactive streaming is."[68] Interactive streaming's use of musical works is understood as a mechanical copy, obliging interactive streaming services to acquire mechanical licenses.[69]

An example of the tension between streaming services and songwriters is the lawsuit that the MLC brought against Spotify in the U.S..[70] Bundling is a combination of a subscription service that contains interactive streams and/or limited downloads plus "one or more other products or services [with] more than token value" that users buy in a single, packaged transaction.[71] The case comes in response to Spotify's decision to implement a restructuring of its premium services to include audiobooks.[72] The inclusion of audiobooks, Spotify argues, entitles it to lower its overall royalty payments—which it pays to the MLC.[73] Spotify noted that bundling music and audiobooks into

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rights-how-collected-explained/. Examples of streaming services offering interactive streaming are Spotify and Apple Music.

[67] Examples of non-interactive streams include Pandora and SiriusXM. W. Joseph Anderson, Suna Izgi & Alex Spring, *Better Know Your Neighboring Rights—A Simple Guide to a Confusing Income Stream (Guest Column)*, BILLBOARD (Jan. 11, 2024), https://www.billboard.com/pro/what-are-neighboring-rights-how-collected-explained/.

[68] Serona Elton, *Mechanical Licensing Before and After the Music Modernization Act*, MEIA J., 19 (2019).

[69] Lydia Pallas Loren, *Copyright Jumps the Shark: The Music Modernization Act*, 99 B.U. L. REV. 2519 (December 2019) 2542.

[70] Aruni Soni, *Spotify Royalty Drama Casts Shadow over Songwriter Consensus*, BLOOMBERG LAW (June 25, 2024), https://news.bloomberglaw.com/ip-law/spotify-royalty-drama-casts-shadow-over-songwriter-consensus; Aruni Soni, *Spotify Hit with Royalties Lawsuit from Licensing Collective*, BLOOMBERG LAW (May 17, 2024), https://news.bloomberglaw.com/ip-law/spotify-hit-with-royalties-lawsuit-from-licensing-collective.

[71] 37 CFR § 385.2.

[72] Aruni Soni, *Spotify Royalty Drama Casts Shadow over Songwriter Consensus*, BLOOMBERG LAW (June 25, 2024), https://news.bloomberglaw.com/ip-law/spotify-royalty-drama-casts-shadow-over-songwriter-consensus.

[73] Aruni Soni, *Spotify Royalty Drama Casts Shadow over Songwriter Consensus*, BLOOMBERG LAW (June 25, 2024), https://news.bloomberglaw.com/ip-law/spotify-royalty-drama-casts-shadow-over-songwriter-consensus.

one subscription would mean the company would be obliged to pay licensing costs for music and books from the same pool of money it had access to when its services were restricted to music alone.[74] Spotify reasoned that this new obligation would grant it the right, accordingly, to pay less for the music itself.[75]

From Spotify's viewpoint, this argument makes sense. The company is making the same profits but offering two different services where it used to provide only one. How can the payout for music, which now constitutes less than the entirety of Spotify's offering, be equal to what it was when music was all that was on offer? Spotify asserts that it is consequently permitted to pay a discounted rate called a "bundle rate" to songwriters for premium streams on the platform.[76] Questions surrounding the applicability and propriety of this bundle rate have proven contentious.

The process for establishing royalty rates for songwriters with the Copyright Royalty Board occurs every five years.[77] The NMPA, the Nashville Songwriters Association International (NSAI), and members of the Digital Media Association (DiMA), including Spotify and Apple Music, discussed how rates should be set.[78] The last session (for the 2023-2027 period, called Phonorecords IV or Phono IV), was

[74] Kristin Robinson, *Spotify to Pay Songwriters About $150 Million Less Next Year with Premium, Duo, Family Plan Changes*, BILLBOARD (May 9, 2024), https://www.billboard.com/business/streaming/spotify-songwriters-less-mechanical-royalties-audiobooks-bundle-1235673829/.

[75] Kristin Robinson, *Spotify to Pay Songwriters About $150 Million Less Next Year with Premium, Duo, Family Plan Changes*, BILLBOARD (May 9, 2024), https://www.billboard.com/business/streaming/spotify-songwriters-less-mechanical-royalties-audiobooks-bundle-1235673829/.

[76] Kristin Robinson, *Spotify to Pay Songwriters About $150 Million Less Next Year with Premium, Duo, Family Plan Changes*, BILLBOARD (May 9, 2024), https://www.billboard.com/business/streaming/spotify-songwriters-less-mechanical-royalties-audiobooks-bundle-1235673829/.

[77] Kristin Robinson, *Spotify to Pay Songwriters About $150 Million Less Next Year with Premium, Duo, Family Plan Changes*, BILLBOARD (May 9, 2024), https://www.billboard.com/business/streaming/spotify-songwriters-less-mechanical-royalties-audiobooks-bundle-1235673829/.

[78] Kristin Robinson, *Spotify to Pay Songwriters About $150 Million Less Next Year with Premium, Duo, Family Plan Changes*, BILLBOARD (May 9, 2024), https://www.billboard.com/business/streaming/spotify-songwriters-less-mechanical-royalties-audiobooks-bundle-1235673829/.

in 2022.[79] At the time, the parties came to a voluntary settlement that they presented to the Copyright Royalty Board.[80] This agreement contained the songwriters' concession regarding bundling, which was already considered a concession at the time of presentation.[81] Projections based on Spotify's rate sheets for 2023 indicate that the bundling will result in a reduction of $150 million in mechanical royalties in the first year of its implementation for songwriters.[82] While Spotify's reclassification only impacts the U.S. for now, many fear that if the company's plan survives its challenges, the plan will be implemented in other countries and markets.[83]

On January 29, 2025, U.S. District Court Judge, Analisa Torres, rejected the MLC's argument that Spotify's bundling policy was merely an underhanded effort to reduce pay-outs to copyright holders.[84] Judge Torres explained that Section 385.2 of the Code of Federal Regulations includes a 'plain and unambiguous'" definition of a bundle and that Spotify's combination of services matches this definition.[85]

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[79] Kristin Robinson, *Spotify to Pay Songwriters About $150 Million Less Next Year with Premium, Duo, Family Plan Changes*, BILLBOARD (May 9, 2024), https://www.billboard.com/business/streaming/spotify-songwriters-less-mechanical-royalties-audiobooks-bundle-1235673829/.

[80] Kristin Robinson, *Spotify to Pay Songwriters About $150 Million Less Next Year with Premium, Duo, Family Plan Changes*, BILLBOARD (May 9, 2024), https://www.billboard.com/business/streaming/spotify-songwriters-less-mechanical-royalties-audiobooks-bundle-1235673829/.

[81] Kristin Robinson, *Spotify to Pay Songwriters About $150 Million Less Next Year with Premium, Duo, Family Plan Changes*, BILLBOARD (May 9, 2024), https://www.billboard.com/business/streaming/spotify-songwriters-less-mechanical-royalties-audiobooks-bundle-1235673829/.

[82] Kristin Robinson, *Spotify to Pay Songwriters About $150 Million Less Next Year with Premium, Duo, Family Plan Changes*, BILLBOARD (May 9, 2024), https://www.billboard.com/business/streaming/spotify-songwriters-less-mechanical-royalties-audiobooks-bundle-1235673829/.

[83] Kristin Robinson, *Spotify to Pay Songwriters About $150 Million Less Next Year with Premium, Duo, Family Plan Changes*, BILLBOARD (May 9, 2024), https://www.billboard.com/business/streaming/spotify-songwriters-less-mechanical-royalties-audiobooks-bundle-1235673829/.

[84] Rachel Scharf, *Spotify Beats Suit Challenging 'Bundling' Royalty Structure*, LAW360 (Jan. 29, 2025), https://www.law360.com/ip/articles/2290745?nl_pk=d04f0f14-dc79-4642-84ce-6845cb34ec11&utm_source=newsletter&utm_medium=email&utm_campaign=ip&utm_content=2025-01-30&read_more=1&nlsidx=0&nlaidx=2.

[85] Rachel Scharf, *Spotify Beats Suit Challenging 'Bundling' Royalty Structure*, LAW360 (Jan. 29, 2025),

This time, the NMPA and Spotify find themselves on opposite sides of the table, but they have collaborated to great effect in the past.[86] In 2016, the two parties concluded a ground-breaking deal that simplified the process of matching songs on Spotify whose ownership was previously unknown with the independent music publishers who held the rights on those songs.[87] The deal held that royalties attached to songs that are still unmatched after the claiming period—those in the black box—were to be distributed to the publishers and songwriters who participated in the deal, while publishers and songwriters who declined to participate would not reap any benefits.[88] The NMPA-Spotify agreement contained language promising that Spotify and the NMPA would continue to work in tandem to put practices in place that would enable Spotify to match works' copyrights to their appropriate rights-holders in a more accurate and timely way.[89] The results of this deal have proven to be dissatisfactory to many songwriters and music publishers. The outcome of this case is indicative of the both the potential for collaboration and for competition between streaming services and songwriters.[90] Introducing equitable remuneration for songwriters would help clarify the relationship, disincentivize streaming services from trying to minimize their royalty pay-outs, and, ideally,

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https://www.law360.com/ip/articles/2290745?nl_pk=d04f0f14-dc79-4642-84ce-6845cb34ec11&utm_source=newsletter&utm_medium=email&utm_campaign=ip&utm_content=2025-01-30&read_more=1&nlsidx=0&nlaidx=2. *See* 37 CFR § 385.2.

[86] Kelly Knaub, *Spotify, Music Publishers Reach Deal Over Song Royalties*, LAW360 (Mar. 18, 2025), https://www.law360.com/articles/773323/spotify-music-publishers-reach-deal-over-song-royalties.

[87] Kelly Knaub, *Spotify, Music Publishers Reach Deal Over Song Royalties*, LAW360 (Mar. 18, 2025), https://www.law360.com/articles/773323/spotify-music-publishers-reach-deal-over-song-royalties.

[88] Kelly Knaub, *Spotify, Music Publishers Reach Deal Over Song Royalties*, LAW360 (Mar. 18, 2025), https://www.law360.com/articles/773323/spotify-music-publishers-reach-deal-over-song-royalties.

[89] Kelly Knaub, Spotify, Music Publishers Reach Deal Over Song Royalties, LAW360 (Mar. 18, 2025), https://www.law360.com/articles/773323/spotify-music-publishers-reach-deal-over-song-royalties.

[90] It should be noted that Spotify is paying music publishers record amounts. Spotify's most recent Loud & Clear Report (published in March 2025), notes that the company has paid music publishers almost $4.5 billion over the past two years and that 2024 publishing payouts achieved "double-digit percentage growth compared to 2023." SPOTIFY, *Our Annual Music Economics Report*, SPOTIFY LOUD & CLEAR, https://loudandclear.byspotify.com/#introduction (March 2025).

get creators and streaming services to pursue their goals in greater alignment.

Even though it was an participant in the MMA, the music publishing industry continues to call for reform. Independent songwriters have criticized the MLC for handling and distributing royalty payments ineffectively.[91] On May 21, 2024, the National Music Publishers Association ("NMPA") asked Congress to amend the licensing framework in which songwriters, specifically, operate.[92] A few weeks later, the NMPA added bite to its bark: it filed a complaint against Spotify with the Federal Trade Commission (FTC), accusing the company of implementing "a 'bait-and-switch subscription scheme.'"[93] Under American copyright law, the statutory rates under which songwriters are paid serve as a floor. These statutory rights are set by the CRB via the process described above.[94] Songwriters may still negotiate to achieve more favorable terms. Joseph Fishman, an intellectual property professor at Vanderbilt Law School, says that "the NMPA is attempting to 'lob a bomb into the middle of the whole music-licensing framework.'"[95] The bomb is songwriters' demand that they be given an option to opt out of the MLC's blanket license and permitted to determine the rates they are to be paid on the free market, instead."[96]

III. THE EUROPEAN SYSTEM AND THE ADVANTAGES &

[91] Aruni Soni, *Spotify Royalty Drama Casts Shadow over Songwriter Consensus*, BLOOMBERG LAW (June 25, 2024), https://news.bloomberglaw.com/ip-law/spotify-royalty-drama-casts-shadow-over-songwriter-consensus.

[92] Aruni Soni, *Spotify Royalty Drama Casts Shadow over Songwriter Consensus*, BLOOMBERG LAW (June 25, 2024), https://news.bloomberglaw.com/ip-law/spotify-royalty-drama-casts-shadow-over-songwriter-consensus.

[93] Aruni Soni, *Spotify Royalty Drama Casts Shadow over Songwriter Consensus*, BLOOMBERG LAW (June 25, 2024), https://news.bloomberglaw.com/ip-law/spotify-royalty-drama-casts-shadow-over-songwriter-consensus.

[94] *See* discussion of the Spotify case.

[95] Aruni Soni, *Spotify Royalty Drama Casts Shadow over Songwriter Consensus*, BLOOMBERG LAW (June 25, 2024), https://news.bloomberglaw.com/ip-law/spotify-royalty-drama-casts-shadow-over-songwriter-consensus.

[96] Aruni Soni, *Spotify Royalty Drama Casts Shadow over Songwriter Consensus*, BLOOMBERG LAW (June 25, 2024), https://news.bloomberglaw.com/ip-law/spotify-royalty-drama-casts-shadow-over-songwriter-consensus. For further discussion of the criteria that the Copyright Royalty Judges are to use when setting the license rates for mechanical licenses, *see* Part III, *infra*.

DISADVANTAGES OF EQUITABLE REMUNERATION

The call for musicians' remuneration to keep up with the shifting music consumption ecosystem has not gone unheeded. Around the world, interest in equitable remuneration is rising. Equitable remuneration is a type of royalty and a form of monetary compensation for the use of recorded music and underlying musical works that serves as a creator's right to be paid outside of a copyright license. Those responsible for paying equitable remuneration fees include broadcasters, as well as owners of businesses and venues that play music.[97]

Paying royalties out to individual artists piecemeal would be a highly decentralized and chaotic process[98]—enter collecting societies. Collecting societies are non-governmental bodies established by copyright law or through private agreements.[99] Collecting societies, also known as collective management organizations (CMOs),[100] exist to make the payout process more regular and efficient. Collecting societies are responsible for licensing copyright works on behalf of artists as well as dealing with collective rights management.[101] Collective rights management is collecting societies' practice of licensing copyright works on creators' behalf and manage these rights on a collective scale.[102] In the U.S., collective rights management only exists with respect to the public performance rights in musical works, not mechanical licenses. Outside the U.S., it is used far more prevalently for all copyrights in musical works.

Equitable remuneration is designed to take some of the burden off of musicians and songwriters to monitor use of their works themselves: musicians who create works are not required to authorize their right to

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[97] 8*Who Has to Pay the Equitable Remuneration?*, PLAYRIGHT, https://playright.be/en/who-has-to-pay-the-equitable-remuneration/ (last accessed May 20, 2025).

[98] This is the main reason the MMA was enacted.

[99] HOUSE OF COMMONS DIGITAL, CULTURE, MEDIA AND SPORT COMMITTEE, ECONOMICS OF MUSIC STREAMING, SECOND REPORT OF SESSION 2021-2022 95 (2021).

[100] They are also known as copyright societies, copyright agencies, licensing agencies, and copyright collecting societies.

[101] HOUSE OF COMMONS DIGITAL, CULTURE, MEDIA AND SPORT COMMITTEE, ECONOMICS OF MUSIC STREAMING, SECOND REPORT OF SESSION 2021-2022 95 (2021).

[102] HOUSE OF COMMONS DIGITAL, CULTURE, MEDIA AND SPORT COMMITTEE, ECONOMICS OF MUSIC STREAMING, SECOND REPORT OF SESSION 2021-2022 95 (2021).

profit off the use of their work; it is meant to happen automatically.[103] It is also the right that all artists, including non-featured artists, to "enjoy an automatic, unalienable, non-transferable statutory right to share in recording revenues."[104] In sum, equitable remuneration is a payment due to artists on the grounds that they are the creators of a work and that it is only due to their intervention that the work exists; thus, their right to profit from the use of the work cannot be taken away from them. Consequently, equitable remuneration, as a specific type of royalty, rests on a foundation of justice for the creators of intellectual property.

This idea of justice pervades arguments in favor of equitable remuneration. Advantages of equitable remuneration include increased revenues to artists and songwriters, and particularly for performers with a low share of streaming revenues in their contracts, since equitable remuneration would provide them with a certain level of guaranteed revenue from streaming platforms that use their work.[105] Equitable remuneration also creates greater transparency in the notoriously complex music licensing system, as collective management organizations share more of their data.[106] Equitable remuneration leads to greater collective bargaining power for artists and songwriters because CMOs can negotiate on their behalf, which helps level the playing field in which record labels, streaming platforms, and digital service providers ("DSPs") have the upper hand.[107] Many proponents of equitable remuneration regimes highlight the involvement of streaming platforms, noting that they are often players in the model and in negotiations,

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[103] *Musicians: Understand Neighbouring Rights*, PLAYRIGHT, https://playright.be/en/musicians-understand-neighbouring-rights/#:~:text=The%20equitable%20remuneration%20is%20a,of%20the%20musicians%20and%20producers (last accessed Jan. 12, 2025).

[104] HOUSE OF COMMONS DIGITAL, CULTURE, MEDIA AND SPORT COMMITTEE, ECONOMICS OF MUSIC STREAMING, SECOND REPORT OF SESSION 2021-2022 96 (2021).

[105] DANIEL JOHANSSON, STREAMS & DREAMS PART 1 – A FAIR MUSIC ECONOMY FOR ALL 27 (IAO & AEPO-ARTIS, 2022), https://www.iaomusic.org/wp-content/uploads/2022/09/STREAMS-AND-DREAMS_PART-1.pdf.

[106] DANIEL JOHANSSON, STREAMS & DREAMS PART 1 – A FAIR MUSIC ECONOMY FOR ALL 27 (IAO & AEPO-ARTIS, 2022), https://www.iaomusic.org/wp-content/uploads/2022/09/STREAMS-AND-DREAMS_PART-1.pdf.

[107] DANIEL JOHANSSON, STREAMS & DREAMS PART 1 – A FAIR MUSIC ECONOMY FOR ALL 27-28 (IAO & AEPO-ARTIS, 2022), https://www.iaomusic.org/wp-content/uploads/2022/09/STREAMS-AND-DREAMS_PART-1.pdf.

underscoring that streaming platforms' control of the market makes them instrumental players in determining musicians' compensation.[108] Furthermore, the data that CMOs gather from streaming platforms often serve to create more efficient economic allocation indices than those currently used when distributing pay-outs.[109]

Detractors, however, argue that equitable remuneration systems actually reduce freedoms for all parties involved. One key argument is that, as a "mandatory solution," it binds all artists and songwriters to the system, regardless of whether or not they are satisfied with their current remuneration system and would prefer not to be paid through their CMO.[110] Critics also posit that labels and distributors could see bargaining power lessened vis-à-vis streaming platforms, which could use new equitable remuneration obligations as a reason to lower payments.[111] Ultimately, critics of equitable remuneration worry that the system does not resolve the foundational problem at play: the underpayment of songwriters and performers, and that streaming platforms are set to be unfairly burdened with resolving an issue that is not of their creation.[112]

A. Belgium's Take on Songwriter & Performer Remuneration

The trouble for streaming platforms and online content-sharing service providers (OCSSPs) began in 2019, when the European Union

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[108] DANIEL JOHANSSON, STREAMS & DREAMS PART 1 – A FAIR MUSIC ECONOMY FOR ALL 27 (IAO & AEPO-ARTIS, 2022), https://www.iaomusic.org/wp-content/uploads/2022/09/STREAMS-AND-DREAMS_PART-1.pdf.

[109] DANIEL JOHANSSON, STREAMS & DREAMS PART 1 – A FAIR MUSIC ECONOMY FOR ALL 28 (IAO & AEPO-ARTIS, 2022), https://www.iaomusic.org/wp-content/uploads/2022/09/STREAMS-AND-DREAMS_PART-1.pdf [https://perma.cc/SY4E-7FT4].

[110] DANIEL JOHANSSON, STREAMS & DREAMS PART 1 – A FAIR MUSIC ECONOMY FOR ALL 28 (IAO & AEPO-ARTIS, 2022), https://www.iaomusic.org/wp-content/uploads/2022/09/STREAMS-AND-DREAMS_PART-1.pdf [https://perma.cc/SY4E-7FT4].

[111] DANIEL JOHANSSON, STREAMS & DREAMS PART 1 – A FAIR MUSIC ECONOMY FOR ALL 28 (IAO & AEPO-ARTIS, 2022), https://www.iaomusic.org/wp-content/uploads/2022/09/STREAMS-AND-DREAMS_PART-1.pdf [https://perma.cc/SY4E-7FT4]. Case in point: The MLC's case against Spotify. *See supra*, Section I.

[112] *Id,*

(EU) passed the DSM Directive.[113] An OCSSP is a content site that hosts user-generated content. The DSM Directive comes twenty-eight years into the EU's long-term project of harmonizing EU countries' copyright regimes.[114] The DSM Directive is loyal to the EU's legacy of copyright legislation and seeks to realize the same goals: protecting rights-holders, smoothing the licensing process, and "creat[ing] a level playing field for the exploitation of works and other protected subject matter."[115] This note focuses on Article 18, which lays out terms regarding equitable remuneration for songwriters and musicians. Article 18 requires Member States to ensure that when authors and performers license or transfer their rights to the exploitation of their work, they retain their entitlement to fair and proportionate remuneration.[116] Article 18 thus emphasizes the inalienability and non-transferability of creators' rights to equitable remuneration, the idea that, at a fundamental level, as the source or origin of the work, they have the right to be rewarded for the work's use. This obligation, however, is vague: the law prescribes no tangible or specific mechanisms for how to realize this goal.[117] Instead, each EU country may use whichever mechanisms it considers appropriate in its consideration of the theory of contractual freedom and its balance between rights and interests.[118] In so

[113]The EU DSM Directive defines an OCSSP as "a service provider of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected content uploaded by its users," which it uses to make a profit. Tobias Kempas, *The New Copyright Directive: Are OCSSPs Now Required to Carry Certain Content?*, LEXOLOGY (Oct. 23, 2019), https://www.lexology.com/library/detail.aspx?g=efb1d490-adb8-4058-be28-52adbb3d3bc4 [[https://perma.cc/CBU8-XE2X]].

[114]The EU embarked on its process of copyright harmonization in 1991 with the Software Directive 91/250, which concerned computer programs. Eleonora Rosati, *Copyright in the Digital Single Market: A Taster*, WIPO (Dec. 2021), https://www.wipo.int/wipo_magazine/en/2021/04/article_0009.html#:~:text=The%20Directive%20pursues%20the%20same,and%20other%20protected%20subject%20matter[https://perma.cc/M4TH-CQ2A].

[115]*Id.*

[116]Council Directive 2019/790, art. 18, 2019 O.J. (L 130/92) 92, 121, available at https://eur-lex.europa.eu/eli/dir/2019/790/oj [https://perma.cc/9ADN-PT7T].

[117]Anastasiia Kyrylenko, *Spotify, Sony Music and Streamz challenge the Belgium's copyright reform in front of the Constitutional Court*, IPKAT (June 18, 2023), https://ipkitten.blogspot.com/2023/06/spotify-sony-music-and-streamz.html#:~:text=On%20June%2019%2C%202022%2C%20Belgium,%C2%A7%201 [https://perma.cc/HMM6-CP3Q].

[118]Council Directive 2019/790, 2019 O.J. (L 130/92) 121.

doing, Article 18 thereby grants Member States relative autonomy in determining how to realize the goal of appropriate and proportionate remuneration.[119] During the Directive's negotiation process, some European Parliament members suggested that statutory mechanisms were the strongest tool, arguing that it would give authors and performers inalienable rights to their works.[120] This option is what Belgium has chosen.[121]

The Belgian approach shows a real commitment to the goals of the DSM Directive. Unlike other EU members that have largely "copied-and-pasted" Article 18 into their domestic laws, Belgium has used this moment to consider what authors and performers need in a more thoughtful way.[122] Belgium transposed EU Directive 2019/790 via the law of June 19, 2022 (19J).[123] Of particular relevance is Article 54, which prescribes that when authors or artists assign their right (via their agreement with their label or publisher) to authorize or forbid communication of their work to the public to an OCSSP, that writer/artist maintains the right to remuneration for the OCSSP's communication of their work to the public.[124] This remuneration right is

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[119]This autonomy is in line with the fact that there is no international standard that governs copyright and its connected neighboring rights. Typifying this approach are the Berne Convention and the TRIPS Agreement, neither of which treats the collective management of exclusive rights[,] such as the right of public performance…Instead, they basically allow each country to take its own approach." Daphne A. Bugelli & Daniel J. Gervais, *How Collective Management Organizations Remunerate Musicians Worldwide: A Guide for U.S.-Based Songwriters and Performers*, 9 LANDSLIDE 56 (May/June 2017).

[120]Kyrylenko, *supra* note 117.

[121]Belgian copyright law already guaranteed equitable remuneration to performers and producers when their audiovisual works were lawfully reproduced or broadcast. Loi du 30 juin 1994 relative au droit d'auteur et aux droits voisins (modifiée par la loi du 3 avril 1995 [Law on Copyright and Neighboring Rights], M.B., June 30, 1994, art. 42 (Belg.), https://gallilex.cfwb.be/sites/default/files/imports/24758_000.pdf [https://perma.cc/L285-R7KR].

[122]Evangelos Chatzoulis, *Follow Belgium and Implement Authors' Rights!*, SAA: SOCIETY OF AUDIOVISUAL AUTHORS (July 11, 2022), https://www.saa-authors.eu/en/blog/776-follow-belgium-and-implement-authors-rights [https://perma.cc/PM5R-7RQD].

[123] The EU Directive is Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC.

[124] CC [Constitutional Court] (Belg.), June 19, 2022, n° 189/2022, M.B., Aug. 1, 2022, (p. 60188),. European law uses the term "communication to the

non-transferable and may not be renounced by the author or artist.[125] Article 54 goes on to say that the management of this remuneration right may only be exercised by management societies and/or collective management bodies that represent authors or artists, as the case may be.[126] These requirements are non-negotiable.[127] The vigor of Belgium's transposition of Article 18 (Article XI.228/4 and Article XI.228/11), in particular, has been met with hostility by music service providers, record companies, search engines, and social media companies.

B. How the Courts Have Viewed the Topic

Various streaming companies and OCSSPs, including Google (Case 7922), Spotify (Case 7924), Meta (Case 7925), Streamz (Case 7926), as well as record companies including Sony Music Entertainment Belgium; Universal Music; Warner Music Benelux; Play It Again, Sam; North, East, West, and South; and CNR Records, filed suit in Belgium's Constitutional Court against the June 2022 law, questioning its validity.[128] Another applicant in Case 7927 is the nonprofit Belgian Recorded Music Association (BRMA), which represents distributors and music producers registered in Belgium.[129] BRMA represents, advises, and advances the interests of the Belgian music industry and seeks to protect its values.[130] BRMA argues that the aforementioned Articles interfere in an unjustifiable manner with the complex and delicate equilibrium of the music sector's contractual relations.[131]

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public" where U.S. law uses public performance when discussing copyright. Rosenblatt, *supra* note 12, at 25.

[125] CC [Constitutional Court] n° 189/2022, p. 60188 (Belg.).

[126] *Id.*

[127] *Id.*

[128] CC [Constitutional Court], Sept. 26, 2024, n° 98/2024, https://www.const-court.be/public/f/2024/2024-098f.pdf [https://perma.cc/X648-YFTU].

[129] BRMA, https://www.brma.be/ [https://perma.cc/LQ6D-RYKF] (last visited Mar. 11, 2025).

[130] *Id.*

[131] CC [Constitutional Court], n° 98/2024, p. 9; *see also* ¶ A.5.2 (Case 7927: Record companies & ASBL), *in* CC [Constitutional Court], Sept. 26, 2024, n° 98/2024, p. 10.

The complainants are specifically challenging the provision governing the remuneration for online exploitation on content-sharing platforms and streaming platforms (under Art. XI.229/4 and Art. XI.228/11 of the Code of Economic Law, in particular). Defenders of the law can and do point to similar laws and practices in other EU countries: French artists and record labels have made a deal regarding streaming remuneration,[132] while Spanish copyright law already enshrines a remuneration right for performers whose work is exploited online.[133] Furthermore, while EU Directive 2019/790 does not explicitly require the right to remuneration for online exploitation on content sharing and streaming platform, Belgium's implementation can be understood as fulfilling the Directive's Article 18.[134]

The complainants do not contest that this constitutes Belgium's transposition of Article 18. Rather, they object the way the transposition seeks to achieve appropriate and proportionate remuneration for songwriters and music performers. The streaming services, OCSSPs, and record labels have joined each other's cases as intervening parties, leaving the affair tangled. Correspondingly, the Belgian Constitutional Court's decision, handed down on September 26th, 2025, consolidating the five cases to provide an all-encompassing addressal of the parties' concerns.

The parties raise three principal concerns. First, they argue that the law requires streaming platforms to pay a right to authorization and a right to remuneration to artists because that obligation forces platforms to make two distinct agreements for the same content.[135]

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[132] Mandy Dalugdug, *Macron Calls for Fairer Music Streaming Model after France Imposes 'Music Streaming Tax'*, MUSIC BUS. WORLDWIDE (Oct. 14, 2024), https://www.musicbusinessworldwide.com/macron-calls-for-fairer-music-streaming-model-after-france-imposes-music-streaming-tax/ [https://perma.cc/9JWA-G6JC].

[133] Cristina Perpiñá-Robert Navarro & Adrian Strain, *Spain's Audiovisual Sector: Fair Remuneration and Economic Growth*, INT'L CONFED'N SOC'Y'S AUTHORS & COMPOSERS (June 18, 2021), https://www.cisac.org/Newsroom/articles/spains-audiovisual-sector-fair-remuneration-and-economic-growth [https://perma.cc/K9SD-PV9P].

[134] Anastasiia Kyrylenko, *Spotify, Sony Music and Streamz Challenge the Belgium's Copyright Reform in Front of the Constitutional Court*, IPKAT (June 18, 2023), https://ipkitten.blogspot.com/2023/06/spotify-sony-music-and-streamz.html#:~:text=On%20June%2019%2C%202022%2C%20Belgium,%C2%A7%201[https://perma.cc/W2UW-N85R].

[135] CC [Constitutional Court], n° 98/2024, p. 5-6, at ¶ A.1.2 (Belg.) (discussing Case 7922).

From this, the parties argue, the law creates a risk of double-paying songwriters and musicians for the same content.[136] Another complaint is that some of the parties were explicitly mentioned in 19J's *travaux préparatoires*, documents created and used in the process of negotiating and writing the law, from which the parties argue that they have been specifically targeted by the remuneration rights.[137] The parties also take issue with the new obligation to pay management societies and collective management societies, which the parties see as an undue burden due to the fact that they already pay licenses, remuneration, and neighboring rights to rights-holders directly.[138] In essence, services do not get anything in return from creators for paying ER.

The parties argue that 19J imposes a direct negative influence on liberty of contract, their commercial obligations, and their ability to provide services in Belgium.[139] The parties take issue with Articles 54 and Articles 60-62. Article 62 states that when a creator has assigned the right to permit or forbid communication of their work to the public by an OCSSP to another party, the creator retains the right to be remunerated if and when an OCSSP communicates said work to the public.[140] In the absence of a collective agreement, management of the creator's remuneration right may only be handled by management societies and/or collective management organizations that represent songwriters.[141] Article 61 states that Article 62 applies to OCSSPs operating for profit and working with large quantities of sound or audiovisual works.[142] The parties argue that Articles 54 and Articles 60-62 interfere to an unacceptable extent with their freedom of enterprise, including the ability to terminate licensing agreements that correspond with their commercial interests and those of the parties they represent.[143] Meta specifically raises the issue that since the reproduction and distribution of musical works cannot always be anticipated or even

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[136] *Id.*

[137] *Id.* ¶ A.2.1 (Case 7924: Spotify).

[138] *Id.*

[139] *Id.*

[140] CC [Constitutional Court], Jun. 19, 2022, n° 189/2022, M.B., Aug. 1, 2022, (p. 60191), https://www.ejustice.just.fgov.be/mopdf/2022/08/01_1.pdf#page=9.

[141] CC [Constitutional Court], Jun. 19, 2022, n° 189/2022, M.B., Aug. 1, 2022, p. 60191, [https://perma.cc/6BR8-NMEH].

[142] ¶A.5.1 (Case 7927: Record companies & ASBL) in CC [Constitutional Court], Sept. 26, 2024, n° 98/2024, https://perma.cc/EL9Q-XP7T.

[143] *Id.* ¶A.3.2 (Case 7925: Meta).

known by service providers, it can be difficult to acquire permissions and issue remunerations to the correct rightsholders.[144]

The Council of Ministers' response to the parties' arguments shows great deference to the principle of subsidiarity,[145] the idea that the EU should intervene in legislation only when Member States cannot manage the issue at a lower level of government, and to the goals that guided the writing of the EU Directive in the first place, including ensuring greater parity in terms of contracting and negotiating power for musicians.[146] In one instance, the Court points to empirical evidence demonstrating that rights-holders' current remuneration in the digital market is not appropriate and proportional and argues that the remuneration right under attack in the cases at hand is the most suitable solution to the problem.[147] Concerning the parties' focus on the risk of double payments, the Council responds that unique, appropriate, and proportionate remuneration payments do not require platforms to pay

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[144] *Id.*

[145] The principle of subsidiarity, which authorizes differences between national legislation, is part of the bedrock on which the harmonization of national copyright rights within the EU rests. The European Parliament defines it as "rul[ing] out [European] Union intervention when an issue can be dealt with effectively by Member States themselves at central, regional or local level." *The Principle of Subsidiarity*, EUROPEAN PARLIAMENT, https://www.europarl.europa.eu/factsheets/en/sheet/7/the-principle-of-subsidiarity (last visited May 20, 2025).

[146] ¶A.156.3 (Cases, 7922, 7924, 7925, and 7927) in CC [Constitutional Court], Sept. 26, 2024, n° 98/2024, https://www.const-court.be/public/f/2024/2024-098f.pdf [https://perma.cc/PQX3-QUPQ]; Council Directive 2019/790, 2019 O.J. (L. 130/92), https://eur-lex.europa.eu/eli/dir/2019/790/oj [https://perma.cc/7HDM-FADN]. Article 18.2 of the EU Directive establishes that "Member States shall be free to use different mechanisms and take into account the principle of contractual freedom and a fair balance of rights and interests."

[147] ¶A.156.3 (Cases, 7922, 7924, 7925, and 7927) in CC [Constitutional Court], Sept. 26, 2024, n° 98/2024, https://www.const-court.be/public/f/2024/2024-098f.pdf [https://perma.cc/PQX3-QUPQ]. *See* DANIEL JOHANSSON, STREAMS & DREAMS PART 2 – THE IMPACT OF THE DSM DIRECTIVE ON EU ARTISTS AND MUSICIANS 48 (IAO & AEPO-ARTIS, 2024), 48, https://www.aepo-artis.org/wp-content/uploads/2024/06/STREAMS_AND_DREAMS_PART_2.pdf [https://perma.cc/A8N8-A743]. Johansson writes that 81.48% of Belgian artists are either dissatisfied (33.33%) or very dissatisfied (48.15%) with the revenues they receive from streaming. 86.96% of Belgian artists think that the way steaming revenues are shared with artists is unfair, in contrast to 13.04% of them who think that it is fair.

twice for the same product.[148] Furthermore, OCSSPs can always decide not to distribute musical works to the public if the potential profits are not economically viable. The Council underlines that musicians are in a weak contracting position vis-à-vis streaming platforms and music producers; and, freedom of contract plays against creators.[149] The Council recounts one of the goals of the Belgian mechanism and of the EU Directive: the reinforcement of musicians' negotiating positions and the re-establishment of equilibrium in the music industry's power dynamics through the creation of a non-transferable remuneration right and mandatory collective management.

The Council responded directly to the parties' taking umbrage with being targeted in the *travaux préparatoires* of 19J, explaining that the Belgian legislature thinks that the remuneration right must target streaming platforms because streaming is the dominant online commercial model for music.[150] Furthermore, the necessity of ensuring appropriate and proportionate remuneration for musicians in the streaming context is derived from studies that attest to the current disproportionate remuneration that musicians receive. The Council goes on to reference the Spanish system of equitable remuneration, which has not been deemed invalid, arguing that Articles 60-62 make equitable remuneration for musicians possible, in line with the European Parliament and European Commission's calls for collective management mechanisms for equitable remuneration rights.[151] The Council strengthens its case on why 19J must target streaming platforms by noting that the platforms are not the only targets; Article 18 applies as much to OCSSPs as it does to streaming platforms.[152]

The Council has much to say regarding the parties' argument that the obligation to negotiate with and pay collective management bodies harms streaming platforms and OCSSPs' liberty of contract, freedom of enterprise, and ability to provide services in Belgium. The Council discusses how the Belgian legislature's goal was to guarantee

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[148] ¶¶A.167.3-167.4 (Case 7926: Streamz) in CC [Constitutional Court], Sept. 26, 2024, n° 98/2024, https://www.const-court.be/public/f/2024/2024-098f.pdf [https://perma.cc/DHR4-C3ZE].

[149] *Id.*

[150] ¶A.163.2 (Cases, 7922, 7924, 7925, and 7927) in CC [Constitutional Court], Sept. 26, 2024, n° 98/2024, https://www.const-court.be/public/f/2024/2024-098f.pdf [https://perma.cc/PQX3-QUPQ].

[151] *Id.*

[152] *Id.*

musicians appropriate and equitable remuneration for the exploitation of their works and services by streaming platforms.[153] The legislature sought to establish an equilibrium between OCSSPs and streaming platforms, on one hand, and musicians on the other. The legislature not only wanted to evaluate musicians' remuneration right, but also facilitate the payout of this remuneration by identifying a unique point of contact—the collective management societies.[154]

The Council argues that there is no reason to complain about a lack of liberty of contract because the only obligation that 19J introduces is that of negotiating in good faith.[155] If service providers think the remuneration requested is too high, they can always contract with another press editor.[156] The Council also asserts that the non-transferable right to remuneration provided for by Article 54 of 19J does not fail to recognize or disproportionately limit freedom of enterprise.[157] Article 54, the Council argues, is the only effective mechanism that is likely to assure musicians of fair remuneration for the exploitation of their work by OCSSPs in Belgium in line with Article 18 of the EU Directive. The Council notes the provision's clarity and precision. It also addresses the parties' concern about being able to determine who owns which rights and is thus entitled to remuneration. The Council observes that service providers do not need to research each individual rightsholder because the providers will have a single point of contact, the collective management societies, which will verify if a musician has effectively ceded their right to authorize or refuse communication of their work to the public.[158]

In any case, the Council writes, the onus of proving one's right to dispose of or manage a remuneration is on the party that claims to be the

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[153] *Id.*

[154] Cour constitutionnelle [CC] [Constitutional Court] decision No. 98/2024, Sept. 26, 2024, 1, 103 (¶A.165.2) (Fr.) [https://perma.cc/UT6C-9CQD].

[155] *Id.*

[156] ¶A.148.2 (Cases, 7922, 7924, 7925, and 7927) in CC [Constitutional Court], Sept. 26, 2024, n° 98/2024, https://www.const-court.be/public/f/2024/2024-098f.pdf.

[157] ¶A.161.2 (Cases, 7922, 7924, 7925, and 7927) in CC [Constitutional Court], Sept. 26, 2024, n° 98/2024, https://www.const-court.be/public/f/2024/2024-098f.pdf.

[158] ¶A.161.2 (Cases, 7922, 7924, 7925, and 7927) in CC [Constitutional Court], Sept. 26, 2024, n° 98/2024, https://www.const-court.be/public/f/2024/2024-098f.pdf.

rightsholder, not on the party that seeks to make use of the right.[159] Additionally, since the value of musicians' remuneration rights are the object of negotiation between different parties, the provisions of 19J under attack, in this case, are actually beneficial for OCSSPs and streaming platforms in that they can avoid negotiating with each musician individually. Individual negotiation would entail significant costs, incentivizing working directly with the collective management societies.[160] In so doing, the Council argues, the legislature has created a strong balance between the rights of musicians and the rights of OCSSPs and streaming platforms.[161]

The Belgian Constitutional Court refrained from handing down a decision in this case and has instead sent the case to the European Union Court of Justice.[162] The Court asks the CJEU to answer several questions regarding the interpretation of the EU Directive and Belgian law.[163] The core issue is whether those instruments preclude national legislation that grants musicians mandatory, non-waivable, and non-transferable remuneration rights.[164] This question arises in cases where musicians have ceded their right to authorize or prohibit communication to the public to an OCSSP and where the remuneration right may be exercised only through a mandatory collective rights management mechanism.

IV. A CALL FOR THE U.S. TO ADOPT EQUITABLE REMUNERATION FOR SONGWRITERS TO COMPENSATE FOR

[159] ¶A.161.2 (Cases, 7922, 7924, 7925, and 7927) in CC [Constitutional Court], Sept. 26, 2024, n° 98/2024, https://www.const-court.be/public/f/2024/2024-098f.pdf.

[160] ¶165.2 (Cases, 7922, 7924, 7925, and 7927) in CC [Constitutional Court], Sept. 26, 2024, n° 98/2024, https://www.const-court.be/public/f/2024/2024-098f.pdf.

[161] ¶165.2 (Cases, 7922, 7924, 7925, and 7927) in CC [Constitutional Court], Sept. 26, 2024, n° 98/2024, https://www.const-court.be/public/f/2024/2024-098f.pdf.

[162] In 2023, the average length of proceedings in the CJEU's Court of Justice was 16.1 months and 18.1 months in the CJEU's General Court. Cornelia Riehle, *CJEU: Judicial Statistics 2023*, EUCRIM, https://eucrim.eu/news/cjeu-judicial-statistics-2023/ (May 16, 2024). Based on these statistics, a decision is likely to be published in the first half of 2026.

[163] CC [Constitutional Court], Sept. 26, 2024, n° 98/2024, at 177–80, https://www.const-court.be/public/f/2024/2024-098f.pdf.

[164] *Id.*

THE WEAKNESSES IN SECTION 115

The US should consider taking up the ER trend and adopting more ER-like legislation for songwriters to make sure that they are rewarded for their work. Key flaws of the current U.S. regime include the regime's failure to consider interactive streams as royalty generators and the consequent disparity in revenues generated by streaming services and pay-outs received by songwriters;[165] the aforementioned piecemeal licensing system that prompted the MMA; and the strong position that intermediaries, such as music publishers, hold. The MWMA authorizes the MLC to implement the blanket license and, in turn, to make the mechanical licensing process more efficient. However, the MLC also creates costs. If the U.S. were to adopt legislation that brings the country's system more in line with that found in Belgium, the practical implications and positive consequences for songwriters are reason alone to consider adopting an ER-like regime.
Beyond these, though, the U.S. would do well to emulate the Belgian legislation's driving motivations: levelling the playing field for songwriters and ensuring that they are fairly compensated for the work they do. Belgium's motivation in implementing the DSM Directive was identifying rightsholders and ensuring that they are fairly compensated. As it stands, the U.S.'s motivation in implementing the MWMA is to smooth things out for the music industry's largest players, not to support and bolster the rights of the individuals without whom the music industry would lose much of its soul. Implementing equitable remuneration and investing songwriters with certain inalienable rights would ensure that regardless of their size or clout, they will not find themselves shut out of making a profit from the songs they author. The MMA was drafted with music publishers, not songwriters, in mind, and thus adopting an equitable remuneration-based regime could help rectify the power disparity between individual songwriters and powerful music publishers.

[165] W. Joseph Anderson, Suna Izgi & Alex Spring, *Better Know Your Neighboring Rights—A Simple Guide to a Confusing Income Stream (Guest Column)*, BILLBOARD (Jan. 11, 2024), https://www.billboard.com/pro/what-are-neighboring-rights-how-collected-explained/; Lydia Pallas Loren, Copyright Jumps the Shark: The Music Modernization Act, 99 B.U. L. REV. 2519 (December 2019) 2527.

One central way in which this is true is the aforementioned process by which the Copyright Royalty Board establishes statutory rates for license rates for mechanical copies. Before the MWMA, mechanical license royalty rates were set at a level that was estimated to achieve four objectives: (1) "maximiz[ing] the availability of creative works to the public," (2) "afford[ing]" the copyright owners fair returns on their work and "the copyright user a fair income under existing economic conditions," (3) "reflect[ing]" the copyright owner and copyright user's relative contributions to the product being made publicly available in terms of "creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication," and (4) "minimiz[ing] any disruptive impact on the structure of the industries involved and on generally prevailing industry practices."[166]

While the process of statutory rate negotiation has stayed the same, the MWMA changed the criteria Copyright Royalty Judges use when deciding on the license rate for mechanical copies.[167] Ostensibly, the decision was based in a desire to create greater fairness in remuneration for both songwriters and musicians. Priorities have shifted away from fairly compensating creatives and ensuring access to creative works towards a more market-based approach. The MWMA instructs Copyright Royalty Judges to establish blanket license rates with a focus on what would be freely negotiated 'between a willing buyer and a willing seller.'"[168] This stands in contrast to the foci mentioned in Belgium's legislation and the DSM Directive, which focus on establishing a more even playing field between musicians and songwriters, on the one hand, and service providers and record labels, on the other– explicitly noting that the former have much weaker powers of contract

[166] Lydia Pallas Loren, *Copyright Jumps the Shark: The Music Modernization Act*, 99 B.U. L. REV. 2519, 2532 (citing 17 U.S.C. § 801(b)(1)(A)-(D) (2012) (amended 2018).)

[167] Lydia Pallas Loren, *Copyright Jumps the Shark: The Music Modernization Act*, 99 B.U. L. REV. 2519, 2532 (2019) (citing Musical Works Modernization Act, Pub. L. No. 115-264, § 102, 132 Stat. 3676, 3680 (codified at 17 U.S.C. .115(c)(1)(F)(2018))).

[168] Lydia Pallas Loren, *Copyright Jumps the Shark: The Music Modernization Act*, 99 B.U. L. REV. 2519, 2533 (2019) (citing 17 U.S.C. § 115(C)(1)(F)(2018)).

and negotiation.[169] The new rate-setting criteria gloss over the existing stark power disparity between songwriters and their publishers.

Lending support to songwriters and performing artists in the contracting process is one of the strongest arguments for adopting an equitable remuneration or equitable remuneration-like system in the United States. Adopting equitable remuneration in the U.S. would lend much-needed support to the smaller players in the song writing ecosystem who currently lack the reputation, audience, or market share to proclaim their rights in the negotiating process by creating a non-transferable statutory right to share in revenues that result in the use of their works.

The non-transferable and inalienable aspect of equitable remuneration would be a boon for U.S.-based songwriters in a second way, namely, that it would help address the perennial issue of the black box, discussed *infra* in Part I, which is an undeniable burden. Determining who the rightful rightsholders are often proves difficult, and answering this question when metadata is incorrect can require finding one's way through a labyrinth of rights transfers. Since songwriters would have a non-transferable and inalienable right to compensation for the use of their works, pro rata assignments of royalties waiting in the limbo that is the black box would not be permissible because it entails knowingly denying some songwriters their rights. Again, the foundation of equitable remuneration lies in the phrase's first word, equitable. The black box is a known problem. There is currently no viable solution for it and an improved system is yet to be devised.[170] Given the dearth of

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[169] CC [Constitutional Court], Sept. 26, 2024, n° 98/2024, A.156.3 at pages 96-99, https://www.const-court.be/public/f/2024/2024-098f.pdf.

[170] In 2011, the WIPO called for the creation of a global music database, the International Music Registry (IMR). The purpose of the IMR would be to generate and record correct and trustworthy information connected to sound recordings, musical works, and music videos. Daphne A. Bugelli & Daniel J. Gervais, *How Collective Management Organizations Remunerate Musicians Worldwide: A Guide for U.S.-Based Songwriters and Performers*, 9 LANDSLIDE 58 (May/June 2017) (citing WORLD INTELL. PROP. ORG. [WIPO], *What Copyright Infrastructure Is Needed to Facilitate the Licensing of Copyrighted Works in the Digital Age: The International Music Registry?*, at 5, WIPO/IP/AUT/GE/11/T12 (Sept. 23, 2011), http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=183060. The movement to establish the Global Repertoire Database (GRD) (2008-2014), also ended in failure. Paul Resnikoff, *Global Repertoire Database Declared a Global Failure…*, DIGITAL MUSIC NEWS (July 10, 2014), https://www.digitalmusicnews.com/2014/07/10/global-repertoire-database-declared-global-failure/. The ultimate failure of the plans to establish the IMR and GRD heightens the urgency

reliable metadata for musical works, equitable remuneration can ensure that songwriters do not get frozen out of the royalty pay-out process.

V. CONCLUSION

This note established songwriters' value as key contributors to the music creation ecosystem. Songwriters' centrality in music should be, but is not yet, reflected in the U.S.'s compensation regime under the Music Modernization Act of 2018. Songwriters in the U.S. would benefit enormously from an adoption of equitable remuneration or an equitable remuneration-like regime. The motivations of the EU's DSM Directive, including, importantly, levelling of the contracting playing field and ensuring that creators are compensated for their work. Imbuing songwriters with inalienable and non-transferrable rights would ensure that regardless of means and resources, songwriters of all kinds are rewarded for their craft and are not driven from the music industry. Equitable remuneration would also help protect songwriters in the absence of a long-term solution to the illumination of the black box and the matching of royalties to copyright holders by ensuring that songwriters receive at least some compensation instead of losing out entirely. As Lydia Pallas Loren, notes, one hopes that ensuring more money for music publishers means that songwriters receive more money, as well, "it is hard to know if this is really true. … And in the absence of evidence to support policy choices, our copyright rules are driven significantly by industry-led lobbying efforts."[171] Adopting equitable remuneration in the U.S. will bolster songwriters and ensure that they have a fighting chance at getting the compensation they deserve.

for the adoption of alternative measures to protect songwriters' rights, including the adoption of equitable remuneration.

[171] Lydia Pallas Loren, *Copyright Jumps the Shark: The Music Modernization Act*, 99 B.U. L. REV. 2519 (December 2019) 2521.