Full Stream Ahead: An Analysis of the Compulsory Mechanical License in the Evolving Music Distribution Landscape

By

Thomas Woolley*

*Student, University of Georgia, Athens GA 30602

Full Stream Ahead: An Analysis of the Compulsory License in the Evolving Music Distribution Landscape

Abstract:

Copyright law modulates the balance between incentivizing original works of authorship and allowing for the dissemination of these works to the public. Congress strives to maintain this balance by granting to authors a limited-time monopoly to exercise certain exclusive rights tied to their creation. In the music industry, these rights are often licensed out, creating different streams of income for a copyright owner and shaping the overall music marketplace. As distribution technology has developed over the last century, Congress has introduced and amended various tools to govern these licensing transactions. Historically, these amendments have sought to accommodate the current state of the music marketplace while minimizing the disruptive impact on established industry practices. However, this standard is no longer justifiable. Interactive streaming has revolutionized the music distribution landscape. Despite posing an initial threat to the music industry, digital distribution technology offers an unprecedented opportunity to disintermediate the supply chain for recorded music and align the competing priorities of copyright law. Congress must facilitate this progress by relinquishing outdated licensing practices and embracing the new digital reality.

I. Introduction

Music is particularly unusual amongst copyright goods as it embodies two, distinct copyright interests. First, there is the "musical work" which represents the collection of notes, lyrics, and melodies in a song, typically owned by a songwriter and their publisher. Additionally, there is the "sound recording" which represents the actual recorded, listenable version of the song. This right is typically controlled by a record company. Historically, Congress has governed the relationship between these two respective copyright owners with the compulsory mechanical license which authorizes *any* party to reproduce and distribute a musical work in the form of a sound recording. Despite major developments in the music marketplace, Congress has retained this license since its inception over a century ago. White its persistence has been called into question[1], as long as licensing transactions remained between music publishers and record companies, there was no compelling need for reform. However, this changed with the arrival of the digital era.

Digital duplication technology has uprooted established industry practices and led to record companies' descension in the supply chain for recorded music. Interactive streaming has emerged as a new, viable form of distribution; however, this development has been hindered by the outdated compulsory mechanical license. Congress addressed these deficiencies with the 2018 Music Modernization Act. While this legislation implemented some much-needed reform, it failed to truly modernize the licensing structure for musical works. Interactive streaming has presented a completely new reality; and with it, an opportunity to reconcile the disparities between creative and commercial success. Despite this potential for growth, licensing transactions are bound by the same antiquated procedures and intermediaries from the age of physical distribution. Moving forward, Congress must adopt a more efficient licensing structure to promote creation and dissemination in the age of digital distribution.

[1] *See infra* part II

Part I of this note will discuss the establishment of the compulsory mechanical license in the wake of early recording technology. Part II will explore the process and justification behind its amendment in the 1976 Copyright Act. Part III will examine the rise of interactive streaming and how the licensing structure for musical works has been adopted to the digital marketplace. Lastly, Part IV will analyze the efficacy of the Music Modernization Act in promoting the purpose of copyright law and discuss the future of the music distribution landscape.

II. The Copyright Act of 1909

While Congress has recognized exclusive rights in musical works since 1831, it wasn't until the turn of the 20th century that our modern music copyright system began to take form.[2] By this time, early types of recording technology, like the player piano and the phonograph, were gaining traction and dramatically increasing the availability of music to the public. These new distribution mediums allowed for the fixation of musical compositions so that they could be played repeatedly on demand. [3] This development spawned the momentous 1909 Copyright Act in which Congress extended authors' exclusive rights to include these "mechanical reproductions". [4] Yet, one very important condition was applied. Congress implemented the *compulsory mechanical license,* allowing *any* party to obtain the rights to reproduce and distribute a musical work once it is published, provided they submit a notice of intent through the U.S Copyright Office and supply the original author with the statutory royalty rate set by Congress. In 1909, this rate was set at a fixed 2-cents per copy. [5] At the time, the compulsory license was viewed as a mechanism to combat exclusive licensing deals that could have monopolized the early recording industry; [6] however, this justification has evolved, and remains a controversial topic to this day.

III. The Copyright Act of 1976

The compulsory license played a critical role as the record industry developed throughout the first half of the 20th century. While the stringent federal licensing procedures were rarely used, the statutory royalty rate shadowed over private negotiations between record companies and music publishers.[7] The vast majority of these negotiations were administered through the Harry Fox Agency: an entity designated by the National Music Publishers Association to issue mechanical licenses on behalf of its members.[8] The courts have differed on whether HFA licenses constitute

---

[2] Robert P. Merges, *One Hundred Years of Solicitude Intellectual Property Law, 1900-2000*, 88 CALIF. L. REV. 2187, 2195 (2000); *see also* Act of Feb. 3, 1831, Ch. 16, Stat. 436.

[3] White-Smith Music Publishing Co. v. Apollo Co., 209 U.S. 1, 9-18 (1908).

[4] Act. of March 4, 1909, Ch. 320 § 1(e), 35 Stat. 1075, 1075-76 (repealed 1976).

[5] *Id.*

[6] Howard B. Abrams, *Copyright's First Compulsory License*, 26 SANTA CLARA COMPUTER & HIGH TECH L.J. 219-220 (2010) (explaining the conventional understanding that the license was created out of fears that a manufacturer of player piano rolls would monopolize the piano roll market and shut out competitors).

[7] Statement of Marybeth Peters, The Register of Copyrights before the Subcommittee on Courts, the Internet, and Intellectual Property, Committee on the Judiciary, 108th Congress. 2 (2004) ("It is my understanding that the 'mechanical' license as structured under the 1909 Copyright Act was infrequently used until the era of tape piracy in the late 1960s").

[8] Timothy A Cohan, *Ghost in the Attic: The Notice of Intention to Use and the Compulsory License in the Digital Era*, 33 COLUM. J.L & THE ARTS, 508 (2010) (explaining that the Harry Fox Agency was empowered by the National Music

a compulsory license under the provisions of the Copyright Act, or whether the negotiated modifications of these deals transform the contract into a voluntary agreement.[9] Regardless, the compulsory license played an important role in setting the bounds for mechanical licensing transactions throughout the 20th century.

In the late 1960's, the Copyright Office became flooded with notices of intent to obtain compulsory licenses. [10] This sudden uptick was driven by "tape-copyists" who had gained un unfavorable reputation amongst the music industry as "pirates" and "bootleggers".[11] Music publishers refused to accept these notices, contending that compulsory licensing did not extend to reproducing and distributing *exact* copies of records.[12] Congress affirmed this position by recognizing an exclusive copyright in the *fixation* of sound recordings, distinct from the pre-existing musical works copyright which covers the underlying melody and accompanying lyrics.[13] This distinction is a bit confusing and has played an important role in complicating the goals of dissemination that the compulsory license was designed to support. While some musical works and sound recordings are created simultaneously, others are produced years apart. Commonly a musical work will have multiple sound recording versions; for example, "Yesterday" by The Beatles has been reproduced and distributed by over 60 recording artists.[14]

Notably, Congress did not attach a statutory rate to the new sound recording copyright in 1971 as record companies, at the time, controlled all aspects of their distribution, interacting directly with the market, and essentially setting the price for recorded music.[15] But as this price rose steadily with inflation, their licensing obligations to contributing songwriters remained fixed at a mere 2 cents per copy. This rate grew increasingly controversial as the record industry flourished throughout the 20th century. [16]

Publishers Association to issue mechanical licenses on behalf of its members and has served as the broker for thousands of music publishers).

[9] *Id.* ("the courts have differed on whether the compulsory license is a practical tool or merely a "ghost in the attic").

[10]Abrams, *supra* note 6. ("When tape piracy was flourishing, the "pirates" inundated the Copyright Office with notices of intention, many of which contained hundreds of song titles").

[11] Peters, *supra* note *7.* (explaining that rulings in the early 1970's sought to reconcile whether tape-copying of pre-existing sound recordings was permitted under the compulsory licensing provisions of the Copyright Act, or whether tape-copyists were a common variety of bootleggers) also see Jacob Victor, *Reconceptualizing Compulsory Copyright Licenses*, 72 STANFORD LAW REVIEW, 943 (2020) (explaining that the record industry painted the tape industry as "pirates" who couldn't be trusted to abide by the compulsory licensing regime and Congress ultimately rejected the compulsory license proposal).

[12] Peters, *supra* note 7. ("music publishers refused to accept such notices and any proffered royalty payments since they did not believe that reproduction and duplication of an existing sound recording fell within the scope of the compulsory license").

[13] Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (amended 1976) (establishing copyright in sound recording for the first time).

[14] BMI Songview Repertoire Search (archived May 25th, 2021)

[15] S. Rep No. 92-72, at 6 (1971) (rejecting compulsory license proposals) ("It has been argued that such a provision would be an appropriate adjunct to the compulsory license provided the record industry by the mechanical royalty contained in the Copyright Act. The committee sees no valid parallel. The mechanical royalty the record company in effect receives the right to make use of raw material—in this instance a copyrighted song. The record label, the performing artist, musicians, and arrangers develop this song into the finished product—the recorded song. The committee sees no justification for the granting of a compulsory license to copy the finished product, which has been developed and promoted through the efforts of the record company and the artists").

[16]Victor, *supra* note 11. (explaining that the fixed rate was "unable to account for inflation" as access expanding technologies flourished throughout the 20th century).

Leading up to the overhaul of the Copyright Act in 1976, Congress considered the complete elimination of the compulsory licensing regime; contending that songwriters should be able to exploit the market value of their work as the threat of monopolization in the recording industry was no longer apparent.[17] This proposal was faced with backlash from various stakeholders in the music industry, most notably record companies, who argued that the elimination of statutory licensing would unnecessarily disrupt established industry practices. [18] As a result, the Judiciary Committee's focus shifted away from whether to retain the license, and toward amending its outdated provisions[19]. Congress executed this reform pursuant to the overhaul of the Copyright Act in 1976. Section 115 of the new Copyright Act updated the compulsory licensing regime by clarifying ambiguous provisions and altering the statutory ratemaking procedures. Congress eliminated the fixed 2-cent rate and established an administrative entity, The Copyright Royalty Tribunal[20], that would re-visit and adjust mechanical rates every 10 years based on a set of 4 policy-oriented factors. [21] Although the "relative roles" factor was cited as justification for keeping statutory rates artificially low[22], the section 115 compulsory license was widely viewed as an effective mechanism to govern mechanical licensing transactions over the next 2 decades. As Judge Marybeth Peters, one of the longest serving Registers of Copyrights in American history[23], acknowledged, "As long as the function of Section 115 was simply to set the rates for licenses between music publishers and record companies that wished to make and distribute sound recordings … there was no compelling need to change the system. "[24] With the arrival of the digital era, however, this dynamic was bound to change.

[17] H. Comm. on the Judiciary, 87-64, at 33 (1961) (explaining that, in 1961, following a 6-year study on the problems of the then existing Copyright Act, the Register of Copyrights proposed that the statutory mechanical licensing be abandoned. The Register noted that "the danger of a monopoly in the situation existing in 1909 was apparently the sole reason for the compulsory license" and that this reason was no longer valid).

[18] H. Comm. on the Judiciary, 89th Congress, Supplementary Report of the Register of Copyright on the General Revisions of U.S Copyright Law (1965), ("it became apparent that record producers, small and large alike, regard the compulsory license as too important to their industry to accept its outright elimination").

[19] H. Rep. No. 94-1476, at 107 (1976), citing H. Rep. No. 83, at 70-67 (1967) ("a compulsory licensing system is still warranted as a condition for the rights of reproducing and distributing phonorecords of copyrighted music… but the present system is unfair and unnecessarily burdensome on copyright owners, and that the present statutory rate is too low").

[20] In 1993, Congress passed the Copyright Royalty Tribunal Reform Act of 1993, Pub. L. No. 103-198, 107 Stat. 2304, which eliminated the Copyright Royalty Tribunal and replaced it with a system of *ad hoc* Copyright Arbitration Royalty Panels (CARPs) administered by the Librarian of Congress. Then, in 2004, Congress passed The Copyright Royalty and Distribution Reform Act, Pub. L 108-419, 108 Stat. 2341, which replaced the arbitration panels with three, full-time Copyright Royalty Judges, known as the Copyright Royalty Board.

[21] An Act for the general revision of the Copyright Law, Pub. L. No. 94-553, 90 Stat. 2541 (1976; effective Jan. 1, 1978).

[22] Adjustment of Royalty Payable Under Compulsory License for Making and Distributing Phonorecords; Rates and Adjustment of Rates, 46 Fed. Reg. 10,466 (Feb. 3, 1981) (Though songwriters provide the "essential input in the form of the musical composition, the record labels' role was far greater when it came to the "opening of new markets for creative expression and media for its communication").

[23] U.S Copyright Office, *Marybeth Peters, 1944-2010*, https://www.copyright.gov/about/registers/peters/peters.html

[24] Statement of Marybeth Peters, The Register of Copyrights before the Subcommittee on Courts, the Internet, and Intellectual Property, Committee on the Judiciary, 109th Congress. 1 (2005), *Music Licensing Reform*

IV. The Music Modernization Act

By the mid 1990's, it seemed clear that the electronic transmission of sound recordings would revolutionize the music distribution landscape. Recognizing the implications of this new technology, Congress enacted the Digital Performance Rights Act of 1995 to broaden and clarify copyright owners' exclusive rights in the digital ream. This legislation coined a new term of art, the "digital phonorecord delivery" or "DPD", to describe a digital transmission that would require a license for both a sound recording and the underlying musical work.[25] Despite these added protections, record companies still lacked a viable way to monetize the digital duplication of sound recordings, leading to a 15-year structural decline in the music industry where accessibility soared, and compensation diminished.[26] But in the late 2000's viable forms of interactive streaming emerged as a promising alternative to illegal file-sharing, offering users unlimited access to high quality music in exchange for a monthly subscription fee . Ironically, the service that pioneered this model was Rhapsody, a company that merged with Napster: the "industry-destroying genie" largely responsible for the downturn of the early 2000's.[27] Eventually, services like Spotify and Apple Music followed in Rhapsody's wake, solidifying the subscription-model as a dominant form of music consumption.

By allowing users to make server copies of songs through 'streaming', these services simultaneously implicate the rights in both sound recordings *and* the underlying musical work. Thus, in 2009, the Copyright Royalty Board approved a settlement establishing that streaming services would pay mechanical royalties for on-demand streams and conditional downloads under the terms of the section 115 compulsory license in addition to licensing fees for the "master-use" of sound recordings. [28] Notably, this agreement dislodged the mechanical licensing relationship between record companies and music publishers. Unlike the digital *download* model in which record companies "pass-through" mechanical royalties on behalf of services like iTunes, *streaming* services compensate the owners of sound recording and musical works separately. This alteration to the licensing structure has complicated the relationship between songwriters and streaming services as the subscription-model has grown in prominence over the last decade.

Because a DPD constitutes both a performance *and* a mechanical reproduction of a musical work[29], streaming services are required to compensate songwriters through two separate royalty payments. While streaming services can efficiently clear songwriters' performance rights through

---

[25] Digital Performance Right in Sound Recordings Act of 1995, Pub L. No. 104-39, 109 Stat. 336.

[26] Lisa Yang, Heath P. Terry, Masaru Sugiyama, Simona Jankowski, and Heather Bellini, The Goldman Sachs Group Inc., "*Music in The Air*" (2020) ("as of prior to 2015, the recorded music industry had experienced a 15-year structural decline due to piracy").

[27] Steve Knopper, *Appetite for Self-Destruction: The Spectacular Crash of the Record Industry in the Digital Age* (2017) (calling Napster an "industry-destroying genie", also explaining that Napster correctly identified that the future of music was online).

[28] Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III) 82 Fed. Reg. 15,299 (March 28, 2017) (explaining that the 2009 CRB-approved Phonorecords I settlement between digital music services and the NMPA established that the section 115 compulsory license would cover on demand streams and conditional downloads).

[29] 37 CFR § 210.12(c). ("A digital phonorecord delivery means each individual delivery of a phonorecord by digital transmission of a sound recording that results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any musical work embodied therein").

blanket-licensing deals with Performance Rights Organizations, the lack of a similar infrastructure to facilitate mechanical licensing proved to be a costly omission. Services like Spotify and Apple turned to the Harry Fox Agency; however, the unprecedented amount of works available to the public, paired with the burdensome individual notice requirement, deterred their efficiency in obtaining the required licenses.[30] As a result, these streaming services accrued a 'black box' of unclaimed royalties and faced a series of costly litigation for their failure to compensate songwriters.[31]

Congress addressed this oversight by establishing the Mechanical Licensing Collective, commonly referred to as the MLC, pursuant to the 2018 Music Modernization Act.[32] The MLC is a non-profit organization, funded by eligible streaming services, designed to administer blanket mechanical licenses on behalf of songwriters. While the concept of blanket mechanical licensing was originally proposed by the U.S Copyright Office in 2006, the bill was never enacted, and thus expired.[33]12 years later, Congress has finally standardized the collective administration that commonly took place through the Harry Fox Agency; which, coincidentally, received a substantial contract to become the MLC's primary vendor.[34] In February of 2021, the MLC received its first payment of $424 million worth of historical, unmatched royalties from a collection of 20 different streaming services.[35] Clearly, collective administration will improve mechanical licensing transactions in the digital age; however, identifying songwriters was not the only complication with section 115's adoption to the streaming era.

As the Copyright Royalty Board recently acknowledged, the lack of a statutory rate for sound recordings has allowed record companies to extract more than their fair share of royalties in negotiations with streaming services.[36] While the mechanical rate often serves as an effective ceiling in negotiations for the use of musical works, sound recording owners are free to bargain the terms of 'master use' licenses with no statutory restrictions. [37] This discrepancy has become quite apparent as record labels have descended in the supply chain for recorded music, compelling Congress to replace its policy-oriented ratemaking approach with an across the board "willing-buyer/willing-seller standard".[38] This new, free-market benchmark is meant to reconcile the

---

[30] Erin M. Jacobson, *Spotify May Have to Pay Songwriters $345 Million*, Forbes (July 19th, 2017) https://www.forbes.com/sites/legalentertainment/2017/07/19/spotify-may-have-to-pay-songwriters-345-million/?sh=5a7c33f8193d.

[31] *Id.*

[32] The Mechanical Licensing Collective, *About Us,* https://www.themlc.com/our-story.

[33]Reforming Section 115 of the Copyright Act for the Digital Age, Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property, 109th Cong. (2007) (Statement of Marybeth Peters).

[34] Paul Resnikoff, *Mechanical Licensing Collective Hands Juicy Contract to HFA*, Digital Music News, (Nov. 27th, 2019). *available at:* https://www.digitalmusicnews.com/2019/11/27/hfa-mechanical-licensing-collective-contract/

[35] Chris Eggertson, *The MLC Receives over $424 Million in Unmatched 'Black-Box' Streaming Royalties*, Billboard, (Feb. 16th, 2021). *available at:* https://www.billboard.com/articles/business/publishing/9526741/mechanical-licensing-collective-receives-over-424-million-unmatched-royalties-streaming-services

[36] *Johnson v. Copyright Royalty Board,* No. 19-1028 (D.C Cir. 2020). ("The Board found that the Phonorecords II mechanical license royalties were too low and that the sound recording rightsholders were extracting more than their fair share of royalties").

[37] *Id.*

[38] Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. 115-264 § 102(a)(1)(B), 132 Stat. 3676, 3680 (2018) (codified at 17 U.S.C § 115(c)(1)(F)(2018) (the amendments to subsection (c) change the current rate-setting standard from that currently found at 801(b) to the "willing buyer / willing seller" standard).

disparity between musical works and sound recording royalties by increasing statutory rates by 44% over the next 5 years. [39]

This altered rate making approach, paired with the formation of the Mechanical Licensing Collective, further contributes to the evolving function of the compulsory mechanical license in regulating music distribution. While historically, this license has supported both antitrust and policy-oriented goals; recent legislation has indicated a strictly, liability-rules based justification for the retention of the licensing regime.[40] Under this rationale, section 115 persists solely to bypass costly or unfeasible licensing transactions in situations that would otherwise lead to market failures. Although this justification is consistent with prevailing theories for compulsory licensing in other Copyright industries[41], it raises questions over the efficacy of recent, legislative reform.

V. Analysis of the Compulsory Mechanical License in the Digital Age

Virtually every other country that at one point offered a similar compulsory licensing regime has eliminated that provision in favor of collective administration.[42] Foreign collective management organizations like GEMA and CISAC, are authorized to negotiate licenses and collect royalties for most, if not all, of the exclusive rights for the Copyright owners that they represent.[43] The creation of such an organization aligns with Marybeth Peters' 2005 Music Reform Act Proposal in which she suggested that existing Performance Rights Organizations evolve to become 'Music Rights Organizations' that handle licensing negotiations for digital performances, reproduction, and distribution of musical works.[44] The formation of an "MRO" would help realign our licensing structure with the global framework for digital transactions *and* ease the burden on streaming services by creating a "one-stop shop" for all, privately negotiated licenses.

While the Music Modernization Act rightfully established collective licensing, it did not consolidate the administration of rights in musical works. While performance and mechanical reproduction are distinct rights and have historically been treated as such; in the world of interactive streaming, they both fall under the classification of a DPD. The designation of a distinct, *mechanical* licensing collective seems unnecessary considering the existing connection between songwriters and streaming services (PROs). Additionally, in ratemaking decisions, the Copyright Royalty Board calculates an "all-in" rate, effectively combining public performance and mechanical royalties into one payable pool. Ultimately, both royalty payments end up in the hands

---

[39] Music Business Worldwide, *Major Victory for Songwriters as U.S Streaming Royalty Rates Rise 44%*, (January 27th, 2018). *available at:* https://www.musicbusinessworldwide.com/major-victory-songwriters-us-mechanical-rates-will-rise-44-2018/

[40] Victor, *supra* note 11. (explaining that policymakers now seem to view compulsory licensing as justified only in the face of transaction-cost-based market failures and have begun privileging market mimicking over copyright policy when choosing royalty rates) *see also Ian* Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Cosean Trade*, 104 YALE L.J 1027, 1032 (1995) (explaining that the conventional understanding is that liability rules are "market-mimicking").

[41] 17 U.S.C § 111 (1976) (establishing cable and satellite rebroadcast compulsory licenses).

[42] Peters, *supra* note 1. *("*"Virtually all other countries which at one time provided a compulsory license for reproduction and distribution of phonorecords of nondramatic musical works have eliminated that provision in favor of private negotiations and collective licensing administration").

[43] GEMA, Statutes and Distribution Plan (Sept. 30th, 2020) *available at:* https://www.gema.de/en/statutes-distribution-plan. *see also* CISAC, Statutes, (May 28th, 2020) *available at*: https://www.cisac.org/services/business-and-governance/statutes

[44] Peters, *supra* note 1.

of songwriters; the creation of an additional intermediary seems to just clog up more money in the administrative process. Streaming services now face the added burden of funding the MLC and songwriters must register their works in an additional database. Simply appointing PROs as the designated agent for all streaming royalties could have improved the welfare of both parties *and* made it easier to truly restore the free market for the use musical works.

As previously mentioned, liability-rules based compulsory licensing is justified in situations where individual negotiations with numerous, disparate rightsholders is either too costly or unfeasible. However, collective administration eliminates this concern through the use of blanket licensing. Despite both being subject to collective administration, performance and mechanical royalty rates are still determined by statutory decisions. Perhaps the persistence of statutory ratemaking is not out of necessity, but rather, fear as to what would happen if *two* separate entities were suddenly able to engage in free-market negotiations. Designating PROs as the "one-stop shop" for interactive streaming services to license musical works would help eliminate this uncertainty.

While the "market-mimicking" standard represents a much-needed improvement for songwriter royalties, the resulting 44% increase in mechanical rates has dangerous implications on the sustainability of streaming services which have historically failed to register profitability.[45] As Judge David Strickler, one of the three acting members of the Copyright Royalty Board, recently acknowledged: the increase in mechanical rates could imperil the existence of streaming services altogether if record companies decide to keep their rates artificially high.[46] The mounting tension between record companies and streaming services contributes to the growing potential for disintermediation in the supply chain for recorded music.

As we have witnessed in the video industry, copyright owners have increasingly retained their rights by releasing content directly to consumers on digital platforms. A similar development in the music industry could unfold in one of two ways. Record companies could increase their equity in streaming services[47] and gradually regain control over distribution. As Judge David Strickler noted, the recent uncapping of the "all-in" royalty rate could accelerate this course of development. On the other hand, artists could bypass record companies altogether by releasing music directly on digital platforms. Digital technology has eliminated many of the barriers associated with creating and distributing music to the public. This option may be preferable for artists looking to dissociate from the established industry titans. Regardless of how it unfolds, this sort of disintermediation would provide more direct and transparent licensing transactions by re-establishing sound recording owners as the primary distributors of recorded music. This development would help align the interests of the parties responsible for creating and disseminating music to the public. As the digital distribution landscape evolves, Congress must ensure that the licensing structure for musical works is positioned to accommodate this progress.

[45] Tim Ingham, *Spotify is Profitable. How did That Happen*?, Rolling Stone, (Nov. 12th, 2019).

[46] Phonorecords III, *Supra* note 27. ("Judge Strickler further reasoned that uncapping the total content cost prong could imperil the existence of the interactive streaming services. Specifically, the sound recording copyright owners 'may decide to keep their rates high despite the increase in mechanical rates').

[47] In 2008, Spotify issued stock to the three major record labels and some independents as part of their licensing agreements.

VI. Conclusion

While compulsory licensing may still have an application in other areas of the music industry, it is no longer justifiable to govern the digital reproduction and distribution of musical works. The existence of the compulsory mechanical license has impaired the relationship between songwriters and streaming services and its retention will merely continue this trend. Digital distribution technology has the potential to grant artists with unprecedented control over the distribution of their work and consumers with unprecedented access to high-quality music. Congress must recognize this opportunity to optimize the competing priorities of copyright law by relinquishing outdated licensing practices and, in turn, the intermediaries that continue to preclude the alignment of creative and commercial success. The treatment of the compulsory mechanical license will critically influence this development and determine whether our vibrant music industry will continue to flourish well into the digital era.