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Marching to the Beat of the EU's Drum: Refining the Collective Management of Music Rights in the United States to Facilitate the Growth of Interactive Streaming

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Marching to the Beat of the EU's Drum: Refining the Collective Management of Music Rights in the United States to Facilitate the Growth of Interactive Streaming

GARY WARREN HUNT III*

ABSTRACT

In the digital era, interactive streaming is now the preferred method for music consumers to access their favorite albums and songs. The traditional copyright system used to administer music rights and royalties has not evolved accordingly, which not only impedes progress by music platform innovators, but also frustrates artist, labels, and composers who are unable to reap the benefits of their music rights.

This Note examines the complex process interactive streaming services undergo to obtain the rights necessary to stream music through their platforms, which involves a discussion of collective rights organizations. This Note then argues that the European Directive on collective rights management offers mechanisms that the United States Copyright Office should adopt to improve collective music rights management in the United States. Finally, this Note argues that creating a global authoritative rights database (GARD) that ties use to ownership is necessary to move the music rights administration process into the digital age.

INTRODUCTION

Online music service providers have changed the way consumers access music. There appears to be an irreversible trend in music distribution: users now prefer music-as-a-service over music-as-a-

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product.¹ Instead of going to the store to purchase a CD or downloading music on iTunes, consumers today primarily utilize online streaming services, such as Apple Music and Spotify,² to access their favorite albums and songs. In 2014, Nielsen's Music 360 study found that 164 billion on-demand tracks were streamed across audio and video platforms, an increase of about 54 percent from 2013.³ In 2015, digital music revenues overtook physical revenues for the first time, accounting for 45 percent of overall global industry revenues.⁴ Streaming comprises a majority of digital music revenues which now account for 50 percent of total recorded music revenues globally.⁵

Music streaming is not only prominent in the United States, where digital channels now account for 66 percent of the music market,⁶ but also throughout Europe, where music streaming revenue grew to 45.5 percent in 2016.⁷ Although digital streaming services tend to be user-friendly and convenient for consumers on the front-end, digital service providers must navigate a complex licensing process on the back-end to avoid infringing content owners' rights. The music industry leverages collective rights organizations, commonly referred to as performing rights organizations (PROs) in the United States and collective management organizations (CMOs) in the European Union (the EU), to streamline the licensing process, but there is still room for improvement given the innate complexity of music licensing, the continued lack of transparency, and the efficiency in the licensing process.

Today, the two primary types of digital streaming services are noninteractive and interactive.⁸ A noninteractive service is not wholly customizable by users. Instead of allowing users to stream a specific

1. RETHINK MUSIC, FAIR MUSIC: TRANSPARENCY AND PAYMENT FLOWS IN THE MUSIC INDUSTRY 6, <https://www.berklee.edu/sites/default/files/Fair%20Music%20-%20Transparency%20and%20Payment%20Flows%20in%20the%20Music%20Industry.pdf> (last visited Mar. 28, 2018).

2. INT'L FED'N OF THE PHONOGRAPHIC INDUS., GLOBAL MUSIC REPORT: MUSIC CONSUMPTION EXPLODING WORLDWIDE 38 (2016), <http://www.ifpi.org/downloads/GMR2016.pdf>.

3. *Everyone Listens to Music, But How We Listen Is Changing*, NIELSON (Jan. 22, 2015), <http://www.nielsen.com/us/en/insights/news/2015/everyone-listens-to-music-but-how-we-listen-is-changing.html>.

4. INT'L FED'N OF THE PHONOGRAPHIC INDUS., *supra* note 2, at 8.

5. INT'L FED'N OF THE PHONOGRAPHIC INDUS., GLOBAL MUSIC REPORT 2017: ANNUAL STATE OF THE INDUSTRY 10 (2017), <http://www.ifpi.org/downloads/GMR2017.pdf>.

6. INT'L FED'N OF THE PHONOGRAPHIC INDUS., *supra* note 2, at 11.

7. INT'L FED'N OF THE PHONOGRAPHIC INDUS., *supra* note 5, at 15.

8. Jason Koransky, *Digital Dilemmas: The Music Industry Confronts Licensing for On-Demand Streaming Services*, 8 LANDSLIDE, Jan.-Feb. 2016, at 2, https://www.americanbar.org/publications/landslide/2015-16/january-february/digital_dilemmas_music_industry_confronts_licensing_ondemand_streaming_services.html.

song, noninteractive services allow users to tailor the songs streamed for them by genre.⁹ An example of a noninteractive service is Pandora or any similar internet radio platform.¹⁰ An interactive service (also known as an on-demand service), in contrast, allows users to select and stream a specific song or album within the service's catalog.¹¹ Under Section 114 of the Copyright Act, an interactive service is defined as a service that "enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient."¹² The substantial and continuous increase in on-demand service revenue¹³ and streaming activity¹⁴ demonstrates the rising popularity of interactive music streaming services worldwide.

Although the future of the music industry may look promising, any growth or innovation will likely be stifled by the archaic music licensing system, particularly if it fails to adapt to the digital age. Increased digital accessibility has financially affected the music industry,¹⁵ but interactive music services currently operate in a copyright system that was designed before the notion of digitally accessible music was remotely conceivable.¹⁶ The time has come to modernize the copyright system and develop an efficient process for digital music licensing.

Historically, copyright law was leveraged in the music industry to protect the exclusive right of artists and composers to copy their works, such as sheet music and, later, sound recordings.¹⁷ Today, copies of digital media are easily created and distributed without proper and protected compensation for artists. Thus, the copyright system needs to be adjusted to give artists the financial incentive to continue to make and distribute their music.¹⁸

Issues with the current music licensing system are evidenced by the negative connotation artists have toward online music services.¹⁹ Artists

9. Bruce H. Kobayashi, *Opening Pandora's Black Box: A Coasian 1937 View of Performance Rights Organizations in 2014*, 22 GEO. MASON L. REV. 925, 929 (2015).

10. Koransky, *supra* note 8, at 2.

11. *Id.*

12. 17 U.S.C.S. § 114(j)(7) (LEXIS through Pub. L. No. 115-140).

13. Koransky, *supra* note 8, at 2.

14. *See, e.g.*, INT'L FED'N OF THE PHONOGRAPHIC INDUS., *supra* note 2, at 4.

15. *See* INT'L FED'N OF THE PHONOGRAPHIC INDUS., *supra* note 5, at 11.

16. Koransky, *supra* note 8, at 2.

17. *Id.*

18. *See id.* at 7.

19. *See* Charlotte Hassan, *Reasons Why Some Artists Hate Spotify*, DIGITAL MUSIC NEWS (Mar. 21, 2016), <https://www.digitalmusicnews.com/2016/03/21/why-artists-pull-their-music-from-spotify-but-not-youtube/> (noting, for example, that artists believe Spotify destroys album sales and devalues music).

are hesitant to use online services to distribute their music because they feel that they are “grossly underpaid when their compositions and sound recordings are streamed [online].”²⁰ The data that artists receive regarding the use of their works is often difficult to comprehend²¹ and lacks the necessary details for artists to compute the frequency at which their music is streamed.²² Royalties are often paid to the wrong party because a number of individuals may be involved in the production of a musical piece and may claim rights to its revenue.²³ In certain circumstances, royalties end up in what is commonly referred to as a “black box,” where the content owners entitled to royalties are not identified and compensated due to the deficient system currently used to reconcile usage with ownership.²⁴

In addition to the frustrations experienced by artists and composers, the current complexity of music licensing limits the uptake of new, innovative digital music services. Copyright exists “[t]o promote the Progress of Science and useful arts”²⁵ and to allow artists and composers to earn a return on their creations to encourage their creative efforts.²⁶ Instead, inefficiencies in music licensing in the United States are hindering innovation and creativity in the music industry. For example, Spotify, perhaps the most popular international on-demand music service provider, has operated at a loss for much of its existence.²⁷ Although technology can be a valuable resource for increasing the distribution of music throughout the world, the current problems associated with music licensing may defeat the purpose of copyright law and limit dissemination and innovation in the music industry at large.

Considering the increasing popularity of interactive music streaming, this note will examine the music licensing process for on-demand service providers to uncover ways to improve the licensing process and increase transparency and efficiency. Part I discusses the different licenses an on-demand music service provider must obtain to stream music to consumers. Part II examines the role that collective rights organizations play in music licensing in the United States and

20. *Id.* at 4.

21. RETHINK MUSIC, *supra* note 1, at 3.

22. *Id.*

23. *Id.*

24. *Id.* at 4.

25. U.S. CONST. art. I, § 8, cl. 8.

26. THOMAS M. LENARD & LAWRENCE J. WHITE, MOVING MUSIC LICENSING INTO THE DIGITAL ERA: MORE COMPETITION AND LESS REGULATION 3 (2015), <https://techpolicyinstitute.org/wp-content/uploads/2015/12/moving-music-licensing-digital-era.pdf>.

27. See Ben Sisario, *Spotify's Revenue Is Growing, but So Are Its Losses*, N.Y. TIMES (May 8, 2015), <http://www.nytimes.com/2015/05/09/business/media/as-spotify-expands-revenue-rises-and-losses-deepen.html>.

the European Union, and the current inefficiencies that exist. Part III reviews the 2014 European Union Directive on collective rights management and the implications it has for European collective management organizations (CMOs) that manage music rights. Part IV proposes solutions for refining music licensing in the United States, such as establishing a transparency and governance framework similar to that adopted by Europe, and by creating collective rights organizations that manage both performance and mechanical rights in music. Part IV also argues that, to optimize music licensing, the creation of a global authoritative rights database (GARD) is necessary and will benefit all stakeholders in the music licensing process, from content creators to collective rights organizations to current and prospective interactive music service providers.

I. LICENSES REQUIRED FOR INTERACTIVE MUSIC STREAMING SERVICES

In the United States, there are two separately copyrightable components of every song: the sound recording and the musical composition.²⁸ Under the Copyright Act, any person or entity that wants to publicly perform a piece of music must obtain a license for both the sound recording and the musical work.²⁹ This licensing system previously worked well for the traditional means of distributing music, such as vinyl records and CDs, but as the digital delivery of music has increased, this seemingly simplistic licensing scheme has resulted in many complications.

Interactive services allow users to seamlessly select a specific song or album to stream, and in certain circumstances, users can temporarily access their favorite music offline via these services.³⁰ Although on-demand streaming is convenient for users, the licensing process to distribute music via interactive streaming is convoluted, and each interactive service must obtain licenses for the following four rights: (1) the right to perform the sound recording; (2) the right to reproduce and distribute the sound recording; (3) the right to perform the musical

28. Rick Marshall, *Oh Mercy: How On-Demand Interactive Streaming Services Navigate the Digital Music Rights Licensing Landscape*, 13 U. DENVER SPORTS & ENT. L.J. 23, 28 (2012).

29. Cody Duncan, *The Case for CAPSL: Architectural Solutions to Licensing and Distribution in Emerging Music Markets*, 13 DUKE L. & TECH. REV. 162, 165 (2015).

30. Sofia Ritala, *Pandora & Spotify: Legal Issues and Licensing Requirements for Interactive and Non-Interactive Internet Radio Broadcasters*, 54 IDEA 23, 45 (2013).

composition; and (4) the right to reproduce and distribute the musical composition.³¹

The first and second rights, which pertain to sound recordings, are implicated each time an interactive service streams a song because streaming requires reproduction of the song and distribution of a temporary copy to each user.³² Sound recordings are typically the work of artists, and the sound recording rights mentioned above are typically owned by the respective artist's recording label.³³ Currently, there are no collective rights organizations that aggregate sound recording rights for interactive services.³⁴ Thus, for on-demand music services to gain authorization to make copies and publicly perform sound recordings through digital transmissions, they must obtain a master-use license by negotiating directly with the owner of the sound recording.³⁵

The third right involves musical compositions, which are the works of songwriters and consist of the music that the songwriter fixes in a tangible medium of expression, including any accompanying lyrics.³⁶ The musical composition public performance right authorizes licensees to play the song to the public³⁷ and is implicated by an interactive service each time the service distributes a digital transmission of a song that contains an author's musical composition.³⁸ It is relatively easy to obtain a license for this third right due to the existence of performing rights organizations (PROs). PROs offer public performance licenses for musical compositions and collect royalties for most musical composition right holders in the United States.³⁹ On-demand music service providers may obtain blanket licenses from a PRO for all musical compositions in the PRO's catalog.⁴⁰

The fourth right presents the greatest difficulties for interactive music service providers. The mechanical rights of a musical composition, which are implicated each time an interactive streaming service reproduces a digital copy of a musical composition and

31. DANIEL S. PARK, JENNIFER LYNCH, & JENNIFER URBAN, STREAMLINING MUSIC LICENSING TO FACILITATE DIGITAL MUSIC DELIVERY 5–6 (2011), https://www.publicknowledge.org/assets/uploads/blog/6_Music_Licensing.pdf.

32. Skyla Mitchell, Note, *Reforming Section 115: Escape from the Byzantine World of Mechanical Licensing*, 24 CARDOZO ARTS & ENT. L.J. 1239, 1250–51 (2007).

33. See Lenard & White, *supra* note 26, at 9.

34. See PARK, LYNCH, & URBAN, *supra* note 31, at 3 (highlighting that there are no entities that offer blanket licenses for the rights to all musical works).

35. RETHINK MUSIC, *supra* note 1, at 10.

36. Marshall, *supra* note 27, at 29.

37. PARK, LYNCH, & URBAN, *supra* note 31, at 6–7.

38. Marshall, *supra* note 28, at 35.

39. See Ritala, *supra* note 30, at 46–47.

40. Koransky, *supra* note 8, at 3.

temporarily distributes it to a user, is also known as the right to reproduce and distribute a musical composition.⁴¹

Currently, there are three ways an on-demand service provider can obtain mechanical rights licenses for musical compositions. One option is to negotiate directly with the musical composition owner, typically the songwriter, for the mechanical rights.⁴² This option, however, is generally avoided because it requires on-demand services to find and negotiate direct licenses with thousands of songwriters and publishers,⁴³ which can be extremely inefficient and costly.⁴⁴ The second way to obtain a license to the mechanical rights of a musical composition is through the Harry Fox Agency (HFA), which administers mechanical rights that parallel the rights administered by PROs for public performance of musical compositions.⁴⁵ HFA licenses mechanical rights through compulsory licenses authorized under Section 115 of the Copyright Act,⁴⁶ which is discussed in greater detail below. A major issue with HFA, however, is that it has only consolidated mechanical rights for 60 to 65 percent of the market.⁴⁷ Additionally, licensees have complained that the HFA application and approval process is arduous and often results in denial of applications without explanation.⁴⁸ Furthermore, HFA does not guarantee the database's accuracy because publishers can opt out of HFA's coverage at any time.⁴⁹ This lack of accuracy subjects licensees to potential legal ramifications for copyright infringement.⁵⁰

If an interactive service provider wants to obtain the rights for a musical composition not within HFA's catalog, a third and final option is to apply for a compulsory mechanical license. Under Section 115, copyright holders that do not utilize HFA's service are required to issue mechanical licenses to any party that wants to distribute its musical compositions to the public for private use.⁵¹ This option requires the licensee to comply with certain preconditions and pay the statutory rate

41. Marshall, *supra* note 28, at 36.

42. See PARK, LYNCH, & URBAN, *supra* note 31, at 8.

43. *Id.* at 3.

44. See *id.* at 4 (noting that the monetary and transaction costs of mechanical rights licensing are high).

45. See Park, Lynch, & Urban, *supra* note 31, at 7.

46. 17 U.S.C.S. § 115(a) (LEXIS through Pub. L. No. 115-140).

47. Park, Lynch, & Urban, *supra* note 31, at 7.

48. *Id.* at 7-8.

49. *Id.*

50. See 17 U.S.C.S. § 504 (LEXIS Pub. L. No. 115-140) (detailing the statutory penalties for copyright infringement).

51. See 17 U.S.C.S. § 115(a) (LEXIS through Pub. L. No. 115-140).

set by the Copyright Royalty Board (CRB).⁵² One example of a precondition for a compulsory mechanical license under Section 115 is the notice of intention requirement, which states that the licensee must inform all owners of the composition that it intends to acquire the mechanical rights license.⁵³ The practicality of the notice of intention requirement is debatable. The identity of the composer may be unknown or the musical composition owner may be difficult to find, so providing notice to all composition owners tends to be an onerous task. The uncertainty of providing sufficient notice to these parties makes it difficult for interactive services to comply with the requirements of obtaining statutory mechanical licenses. Overall, obtaining compulsory mechanical licenses from independent copyright holders is disfavored due to the burdensome preconditions, not to mention the high ceiling on the rates that the CRB promulgates.⁵⁴

Due to the complexity of music licensing, it may be easier to understand the requisite licenses for interactive music streaming services graphically rather than verbally. Accordingly, the chart below details each right implicated through interactive streaming and the different options available to service providers for securing the necessary licenses.

Table 1: License Requirements for Interactive Music Services

	Type of Right	Options for Obtaining License
Sound Recording	Public Performance Right	1. Negotiate Directly with the Rights Holder
	Right to Reproduce & Right to Distribute (Mechanical Rights)	1. Negotiate Directly with the Rights Holder
Musical Composition	Public Performance Right	1. Utilize a Performing Rights Organization (e.g., ASCAP, BMI, SESAC)
		2. Negotiate Directly with the Rights Holder

52. *Id.*

53. 17 U.S.C.S. § 115(b) (LEXIS through Pub. L. No. 115-140).

54. Marshall, *supra* note 28, at 37.

Musical Composition	Right to Reproduce & Right to Distribute (Mechanical Rights)	1. Utilize the Harry Fox Agency (HFA)
		2. Apply for a Compulsory Mechanical Rights License Under § 115 of the Copyright Act
		3. Negotiate Directly with the Rights Holder

II. BACKGROUND ON COLLECTIVE RIGHTS ORGANIZATIONS IN THE
EUROPEAN UNION AND THE UNITED STATES

A. The Role of Collective Rights Organizations in the United States

Although music rights holders can choose between individual management or collective rights management,⁵⁵ artists and composers with numerous works rely on collective management out of practicality.⁵⁶ Without collective rights organizations, such as PROs and the HFA, delegating rights to each musical creation would be an “insuperable management problem for individual copyright owners.”⁵⁷ In the United States, there are only a few collective rights organizations that administer licenses for the rights that interactive service providers implicate in the process of streaming music to users. With respect to performance rights, the primary organizations available to on-demand service providers are the American Society of Composers, Authors and Publishers (“ASCAP”) and Broadcast Music, Inc. (“BMI”).⁵⁸ There are

55. Press Release, European Commission, Directive on Collective Management of Copyright and Related Rights and Multi-Territorial Licensing – Frequently Asked Questions (Feb. 2, 2014), http://www.europa.eu/rapid/press-release_MEMO-14-79_en.pdf.

56. See U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE: A REPORT OF THE REGISTER OF COPYRIGHTS 32 (2015), <https://copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf> (explaining that the high frequency of public performances makes it nearly impossible for individual copyright owners to manage their music rights on their own).

57. CRAIG JOYCE ET AL., COPYRIGHT LAW 542 (10th ed. 2016).

58. See U.S. COPYRIGHT OFFICE, *supra* note 56, at 150.

also two smaller PROs that are becoming prevalent in the United States: Society of European Stage Authors and Composers (SESAC) and Global Music Rights (GMR).⁵⁹ ASCAP and BMI are the two largest PROs, and together they represent over 90 percent of the songs available for licensing in the United States.⁶⁰ ASCAP and BMI must distribute royalties according to governmentally imposed consent decrees.⁶¹ Contrastingly, SESAC and GMR are private and are not currently required to adhere to any consent decrees.⁶²

Each major PRO uses a separate process to track music use and calculate royalties.⁶³ This lack of consistency across organizations may decrease accuracy in reporting throughout the industry. Although SESAC uses a technological scanning device to track the digital fingerprint of a song,⁶⁴ a seemingly accurate measure, ASCAP and BMI use undisclosed equations based on arbitrary airtime samples to track the use of songs.⁶⁵ This is particularly concerning because, as mentioned previously, ASCAP and BMI currently manage rights for a significant portion of the music market in the United States.⁶⁶ Additionally, ASCAP and BMI established their standard operating procedures in the analog era,⁶⁷ when data was represented in a physical way, such as surface grooves on a vinyl record. Consequently, effectively functioning in the digital era will be difficult for collective rights organizations if they fail to modernize their operations to more efficiently and accurately manage digital rights.

Aside from performance rights, interactive services also require mechanical rights to legally operate in the digital realm. Similar to ASCAP and BMI, HFA is the primary collecting society that administers mechanical rights.⁶⁸ Again, there are other services emerging in this area, such as Loudr⁶⁹ and Music Reports, Inc.,⁷⁰ but

59. Lenard & White, *supra* note 26, at 8.

60. Sisario, *supra* note 27.

61. For ASCAP consent decree, see *United States v. ASCAP*, 41-1395, 2001 U.S. Dist. LEXIS 23707 (S.D.N.Y. June 11, 2001). For BMI consent decree, see *United States v. Broad. Music, Inc.*, 64 Civ. 3787, 1994 U.S. Dist. LEXIS 21476 (S.D.N.Y. Nov. 18, 1994).

62. Lenard & White, *supra* note 26, at 8.

63. Thomas Witt Godden, *US and European Music Copyright and Collections*, BERKLEE COLL. OF MUSIC: MUSIC BUS. JOURNAL (Dec. 2010), <http://www.thembj.org/2010/12/us-and-european-music-copyright-and-collections/>.

64. *Id.*

65. *Id.*

66. Sisario, *supra* note 27.

67. Lenard & White, *supra* note 26, at 5.

68. See PARK, LYNCH, & URBAN, *supra* note 31, at 8.

69. For more information about Loudr, see *FAQ*, LOUDR, <https://loudr.fm/faq>.

70. For more information about Music Reports Inc., see *Frequently Asked Questions*, MUSIC REPORTS (2018), <https://www.musicreports.com/musicreports/pages/faq.php>.

these new mechanical rights organizations have yet to adequately establish themselves in the market relative to HFA.⁷¹ Unlike ASCAP and BMI, which cover a majority of the music market, the operations of HFA are limited because HFA currently manages mechanical rights for roughly half of the music market.⁷²

In July 2015, HFA was acquired by SESAC.⁷³ Due to this acquisition, SESAC is now capable of licensing both the performance and mechanical rights of a musical composition. Although this may reflect a figurative step in the right direction, SESAC's acquisition of HFA is unlikely to make a noticeable impact in improving music licensing because SESAC and HFA have a somewhat trivial market share in the United States. If ASCAP and BMI identify a way to follow suit, more substantial advances could be made. Additionally, SESAC will likely need to address operational issues with HFA before it can effectively offer mechanical rights licenses in addition to performance rights licenses. As mentioned above, HFA has received complaints regarding its application process and database accuracy, and additional evidence suggests HFA is slothful in filing Section 115 notice of intentions,⁷⁴ which causes infringement liability risk to licensees.

B. The Role of Collective Rights Organizations in the European Union

Collective management organizations (CMOs) handle the collective management of rights in the European Union by primarily granting licenses on behalf of right holders, and collecting and distributing the corresponding royalties.⁷⁵ The practice of using CMOs to manage the rights of content owners in conjunction with the copyright laws of each respective country in the European Union emerged as early as 1926.⁷⁶ CMOs manage the rights of authors, performers, and other kinds of

71. See PARK, LYNCH, & URBAN, *supra* note 31, at 3 (noting that the HFA licenses mechanical rights for a large number of musical compositions and is the only centralized distributor of mechanical rights).

72. See *id.* (stating that HFA's catalog does not cover all nondramatic musical works).

73. *SESAC to Acquire the Harry Fox Agency*, SESAC (July 7, 2015) https://www.sesac.com/News/News_Details.aspx?id=2253.

74. See Mike Masnick, *Music Licensing Shop Harry Fox Agency Appears to Be Scrambling to Fix Its Failure to Properly License Songs*, TECHDIRT (Mar. 11, 2016, 2:07 PM), <https://www.techdirt.com/articles/20160310/23295633867/music-licensing-shop-harry-fox-agency-appears-to-be-scrambling-to-fix-failure-to-properly-license-songs.shtml>.

75. Press Release, *supra* note 55, at 2–3.

76. Kristen Greeley, Note, *Recommendations, Communications, and Directives, Oh My: How the European Union Isn't Solving its Licensing Problem*, 44 GEO. J. INT'L L. 1523, 1528 (2013).

right holders,⁷⁷ but CMOs are of particular importance in the licensing of rights of musical works.⁷⁸ More than 80 percent of the income CMOs collect each year is derived from musical creations.⁷⁹

Owners of music rights typically become members of CMOs to simplify the administrative process of distributing their work.⁸⁰ By becoming a member of a CMO, music rights owners authorize CMOs to act on their behalf in negotiations with potential users, such as online services, radios, and department stores.⁸¹ CMOs are also responsible for monitoring the use of licensed works and collecting and distributing royalties to each respective member.⁸² The repertoire of a CMO is usually limited to domestic works and comprises the rights of all of the members the CMO represents.⁸³ CMOs often provide users with blanket licenses, which may consist of numerous works from various content creators, thereby taking advantage of the economies of scale and allowing users to legally access the CMOs' entire music inventory.⁸⁴

There are twenty-five CMOs in Europe that manage musical performance and mechanical rights, and each organization is the sole representative of a country in the European Union.⁸⁵ Typically, a music rights CMO in Europe has exclusive administrative rights to distribute public performance licenses and mechanical licenses and collect the corresponding royalties.⁸⁶ Historically, and even more so under the 2014 European Union Directive, which is discussed below, the music rights CMOs in Europe are more highly regulated compared to similar organizations in the United States. The European Union regulates each CMO via a system called DJMonitor, which uses fingerprinting technology to track songs in a digital database.⁸⁷ Overall, European CMOs strive for transparency, and through increased regulation and the utilization of systems such as DJMonitor, Europe is becoming more adept at accurately tracking music use, tying that use to ownership, and properly compensating the corresponding content owners.

One complication that CMOs in Europe face, which is perhaps more applicable to the European Union than the United States, is licensing

77. Press Release, *supra* note 55, at 3.

78. *Id.*

79. *Id.*

80. See Greeley, *supra* note 76 (stating that "CMOs . . . relieve the burden on artists and composers to independently monitor all uses of their works").

81. *Id.*

82. *Id.*

83. Press Release, *supra* note 55, at 3.

84. Greeley, *supra* note 76.

85. Godden, *supra* note 63.

86. *Id.*

87. *Id.*

music across territories. Given Europe's territorial approach to rights management,⁸⁸ a prospective on-demand music service provider has to negotiate licenses with twenty-five different CMOs to distribute music throughout the European Union. The challenge of negotiating licenses with numerous territories is under continuous scrutiny. Traditionally, European CMOs circumvented this difficulty by using reciprocal representation agreements to grant each other the right to license repertoires in each other's territory.⁸⁹ As discussed below, the Directive considered the difficulty of multi-territorial licensing and implemented changes to address this issue in the future.⁹⁰

CMOs are vital entities in the process of obtaining and managing the rights that are necessary for interactive music service providers to provide music to their users. On-demand music service providers seek to cover many territories and offer a large portfolio of music.⁹¹ In their original operation, CMOs lacked the capacity to process or match data in a way that was beneficial, and to a certain extent necessary, for existing and prospective interactive music service providers to be successful.⁹² The inefficiencies historically associated with CMOs made digital rights licensing challenging in the European Union. In response to vast concerns regarding the operations of CMOs, the European Union adopted a directive on collective rights management that, of particular importance for this Note, aimed to improve multi-territorial licensing by CMOs of authors' rights in musical works for online use.⁹³

III. OVERVIEW OF THE 2014 EUROPEAN UNION DIRECTIVE AND THE IMPLICATIONS FOR CMOs THAT MANAGE MUSIC RIGHTS

The purpose of the 2014 European Union Directive on collective rights management and multi-territorial licensing of rights in musical works for online uses is three-fold. First, it aims to establish standards for governance, transparency, and financial management to improve how CMOs are managed.⁹⁴ Second, it lays out common standards to streamline multi-territorial licensing for CMOs that manage rights in

88. See Press Release, *supra* note 55, at 3 (explaining that CMOs in the EU are historically established on a national basis and license rights for their own territory).

89. *Id.* at 11.

90. See Directive 2014/26, of the European Parliament and of the Council of 26 February 2014 on Collective Management of Copyright and Related Rights and Multi-Territorial Licensing of Rights in Musical Works for Online Use in the Internal Market, 2014 O.J. (L 84) 72, 90–93.

91. Press Release, *supra* note 55, at 4.

92. *Id.*

93. See Directive 2014/26, *supra* note 90.

94. Press Release, *supra* note 55, at 5.

musical works for online use.⁹⁵ Finally, it aims to provide additional changes that will increase legal access to online music.⁹⁶

The Directive will greatly benefit right holders, service providers, and consumers.⁹⁷ Service providers will face lower transaction costs because the changes required under the Directive will allow service providers to tie use to ownership more efficiently. One hope of the European Union is that this reduction in transaction costs will invite the creation of new online services and increase the availability of creative content to European consumers.⁹⁸ Additionally, the standards enshrined by the Directive will presumably lead to more accurate and transparent management of CMOs, which will improve revenue appropriation for content owners.

The parts of the Directive that are of particular importance to this Note are the governance and transparency standards the Directive imposes and the additional requirements it establishes for CMOs that manage authors' rights in musical works. Right holders are only able to exercise their rights if they have comprehensible information from the CMOs. To address this point, not only does the Directive require CMOs to include right holders in the decision-making process, it also requires that CMOs increase the availability of useful information to right holders, other CMOs, service providers, and the general public.⁹⁹ Additionally, CMOs must ensure that they are appropriately collecting revenues on behalf of the right holders they represent.¹⁰⁰

The Directive also notes that CMOs, considering their role in collecting and managing revenue that ultimately belongs to right holders, must improve their financial management practices.¹⁰¹ Under the Directive, CMOs must manage royalty revenue separate from their own assets and should ensure sufficient transparency on any deduction they make.¹⁰² The Directive also requires CMOs to distribute royalties no later than nine months from the end of the financial year during which the amounts were collected.¹⁰³ Finally, CMOs are required to publish information about their structure and financial management on their website, including an annual report that lists detailed accounts and financial information.¹⁰⁴

95. *Id.*

96. *Id.*

97. *Id.*

98. Press Release, *supra* note 55, at 7.

99. *Id.* at 8.

100. *Id.*

101. See Directive 2014/26, *supra* note 90, at 90.

102. Press Release, *supra* note 55, at 8.

103. *Id.*

104. *Id.* at 9.

The aforementioned standards apply to all CMOs, but the Directive also implemented specific requirements for CMOs that manage authors' rights in musical works. To adapt to the digital era, the Directive requires CMOs to enhance their capabilities to process large amounts of data and accurately identify the works used by service providers.¹⁰⁵ Additionally, CMOs must improve their operations to be able to quickly invoice service providers and distribute accurate royalties to right holders.¹⁰⁶ Overall, the standards imposed by the Directive aim to streamline the licensing process in the European Union. Once the changes discussed in the Directive are implemented, CMOs will operate more efficiently and it will be more practical for digital service providers to create and manage new music platforms for European consumers.

IV. REFINING COLLECTIVE MUSIC RIGHTS MANAGEMENT IN THE UNITED STATES

Proposed solutions for simplifying digital rights licensing range from moving to a free market negotiation structure for all rights in music¹⁰⁷ to establishing a new protocol for distributing music that uses technical tools currently available on the internet.¹⁰⁸ This section suggests that the most plausible first step for modernizing music licensing for interactive services is implementing a transparency and governance framework for the collective rights organizations in the United States that license rights to on-demand service providers. Additionally, this section proposes the creation of additional collective rights organizations to administer mechanical rights to interactive services. The section closes by suggesting that the creation of a global rights database is necessary to modernize music licensing.

A. Establishing a Governance and Transparency Framework for PROs

Current negotiations between streaming services, such as Spotify, and collective rights organizations (referred to as CMOs in the EU) or independent right holders have proven to be costly and time-consuming.¹⁰⁹ These negotiations also take place privately via a nondisclosure agreement, which prevents transparency and may cause artists to feel skeptical about the underlying license or per-stream

105. *Id.* at 10.

106. *Id.*

107. Karen (Kai-Wen) Hsieh, Note, *Unlock the Music: Replacing Compulsory Music Licenses with Free Market Negotiation*, 17 CARDOZO J. CONFLICT RESOL. 595, 597 (2016).

108. Duncan, *supra* note 29, at 164.

109. PARK, LYNCH, & URBAN, *supra* note 31, at 4.

rates.¹¹⁰ Consequently, prominent artists, such as Taylor Swift, have pulled their music from certain streaming services,¹¹¹ which could impede progress and innovation in the music industry. It is long overdue that collective rights organizations in the United States that manage music rights increase their tracking and transparency capabilities. This will allow content owners to feel confident that their payments are fair and justified,¹¹² and will further allow current and prospective service providers to efficiently obtain the music rights necessary for their platforms.

The United States Copyright Office should implement a governance and transparency framework that regulates the operations of collective rights organizations in the United States, with a specific focus on music rights. In doing so, the Copyright Office should adopt some of the measures implemented in the 2014 European Union Directive on collective rights management. Specifically, to increase efficiency and accuracy, the respective collective rights organizations should be required to enhance their technological capabilities to a standard level that allows the respective organizations to accurately process large amounts of streaming data, quickly identify right holders, and convey this information to on-demand service providers.

Standards should also be created to make the operations of collective rights organizations in the United States more transparent. This can be accomplished by requiring the collective rights organizations to involve content owners and service providers in certain decision-making processes that ultimately affect both parties. Furthermore, standard financial management practices can be established that require collective rights organizations to provide comprehensible royalty information to content owners and prohibit collective rights organizations from collecting royalties that will ultimately end up in a “black box.”

The lack of transparency in the current system in place in the United States irrefutably benefits the “middlemen.”¹¹³ Currently, it is the intermediaries, such as PROs and the HFA, that benefit from the complex and inaccurate licensing system, and none of these collective rights organizations have any incentive to invest in better tracking, reporting, or accounting systems. Thus, a governance and transparency framework should be imposed on these intermediaries to encourage modernization of the music licensing process and create a system where everyone in the music industry values chain benefits equally.

110. RETHINK MUSIC, *supra* note 1, at 16.

111. *Id.*

112. *Id.* at 18.

113. *See id.* at 9–10.

B. Creating Additional Collective Rights Organizations to Manage Mechanical Rights

An ongoing recommendation among many primary stakeholders in the music industry is the creation of organizations that manage all of the rights associated with on-demand streaming services.¹¹⁴ Although this sounds feasible, it is unlikely that the current organizations that administer portions of the digital transmission rights, primarily ASCAP and BMI, will be willing to allow new organizations to undercut their respective market share.¹¹⁵ A more practical solution is for ASCAP and BMI to take a similar approach as SESAC, and either acquire one of the emerging mechanical rights organizations or create an in-house department or subsidiary to administer licenses for mechanical rights. If ASCAP and BMI transition into “one-stop shop” organizations for musical composition rights, much of the complexities and efficiency issues that currently exist in licensing rights for musical works may be remediated.

Once ASCAP and BMI have the capability to license all the required rights of musical compositions, an additional recommendation is to amend Section 115 to establish a blanket mechanical license for digital uses, which will allow an interactive music service provider to obtain a repertoire-wide mechanical license.¹¹⁶ Perhaps ASCAP, BMI, and SESAC can be charged with acting as collection agents for the mechanical rights compulsory blanket licensing scheme, and the scheme can provide fixed royalty rates for music that is digitally streamed. The recommended transition of ASCAP and BMI into organizations that can manage all rights for purposes of digital transmissions, in connection with offering blanket licensing for mechanical rights, would be a significant step toward simplifying music licensing, and thereby increasing content distribution and digital service innovation in the United States.

C. Creating a Global Authoritative Rights Database

Currently, it can take months or even years to identify rights holders and negotiate the appropriate licenses,¹¹⁷ and this seems to act as a barrier of entry to new services that are interested in getting involved in the on-demand music service space. The success of interactive services like Apple Music and Spotify will likely increase

114. Marshall, *supra* note 28, at 49.

115. *Id.*

116. Koransky, *supra* note 8, at 5–6.

117. RETHINK MUSIC, *supra* note 1, at 21.

with easier rights identification mechanisms. The easier it is for services to identify and obtain rights to music, the more music they will be able to offer and the more users they are likely to attract.

The modern music business generates millions of micro-transactions throughout the world each day involving the buying and selling of songs and albums,¹¹⁸ and the music licensing system needs to evolve to support future opportunities of growth and innovation. Jim Lucchese, the CEO of The Echo Nest, a music intelligence and data platform for developers and media companies, stated that “[a]pplication developers are the future of the music business.”¹¹⁹ After surveying 10,000 application developers, Lucchese learned that the number one problem developers faced in building commercial music applications was music licensing difficulties.¹²⁰

From a technical perspective, music licensing can be made more efficient through the creation of a global authoritative rights database (GARD) that accurately details and tracks global ownership and control of music rights. Although current technology is able to track every song streamed in real-time around the world,¹²¹ an effective way to share information downstream is lacking. This could be accomplished by creating a global rights database. The necessary components of such a database include the owners of each digital transmission right, contact information for the rights holders, and the rates the respective rights owners accept.¹²²

For a global rights database to be successful, a standardized system of unique identifiers must also be created for all past, present, and future musical creations. The identifier should correspond to all types of copyright for a single work, including the digital transmission rights. None of the systems of identifiers currently in practice provide an exhaustive, reliable way to identify which licenses are needed to avoid copyright infringement.¹²³

Given the magnitude of the task and the corresponding difficulty, establishing a single, authoritative database has proven to be only a dream of the future. For instance, fourteen key figures in the global music industry, including Universal Music Publishing, Warner/Chappell

118. *Id.* at 5.

119. GLOB. ENTMT & MUSIC BUS. PROGRAM, BERKLEE COLL. OF MUSIC, NEW BUSINESS MODELS IN THE MUSIC INDUSTRY 19 (2013), <https://static1.squarespace.com/static/552c0535e4b0afcbcd88dc53/t/553021e3e4b012ff28709a3f/1429217763895/rethink-music-2013-framing-paper.pdf>.

120. *Id.*

121. RETHINK MUSIC, *supra* note 1, at 10.

122. Marshall, *supra* note 28, at 51.

123. *See id.* (highlighting the shortcomings of HFA’s “song code” system in its Songfile database).

Music, GEMA, SACEM, Apple, and Google, initiated an effort in 2009 to develop a Global Repertoire Database (GRD).¹²⁴ The GRD was considered the “most ambitious, complex endeavor the music industry has ever set out to achieve,”¹²⁵ and although it had the support of many prominent entities within the music industry, efforts backing the creation of the GRD came to a halt in July 2014.¹²⁶ Similarly, the World Intellectual Property Organization (WIPO) has proposed the International Music Registry (IMR), which seeks to centralize the different rights management systems used throughout the world,¹²⁷ but the success of the IMR remains unseen. Numerous parties appear to be working in silos to create a global system of rights ownership, which prolongs the unsolved problem of needing a uniform system to connect music use and streams to ownership.¹²⁸ Instead, prominent stakeholders in the global music industry need to combine efforts and work together to determine the best means of creating a uniform global rights database.

Aside from the unconsolidated efforts to create a uniform rights system, there are additional difficulties impeding the development of a GARD, such as the need for an easily adaptable database and the challenge of obtaining the support of collective rights organizations and music right holders throughout the world. Ownership data is subject to updates and changes. For example, there are situations in which artists and songwriters renegotiate the terms of certain licenses.¹²⁹ Thus, a global rights system must have the capacity to efficiently adapt to ownership updates. Collective rights organizations, artists, labels, and individual music creators may require incentives to contribute their repertoires to the database and financially support the creation of the database.¹³⁰ Perhaps a system of incentives should be established up front to increase cooperation, but at the very least, all of the stakeholders previously mentioned should be incentivized by the fact that a GARD will accelerate rights identification, lower transaction

124. GLOB. ENTMT & MUSIC BUS. PROGRAM, *supra* note 119, at 16–17.

125. *Id.* at 17.

126. Klementina Milosic, *GRD's Failure*, BERKLEE COLL. OF MUSIC: MUSIC BUS. JOURNAL (Aug. 2015), <http://www.thembj.org/2015/08/grds-failure/>.

127. U.S. COPYRIGHT OFFICE, *supra* note 56, at 67.

128. *See id.* (discussing efforts to establish the GRD); GLOB. ENTMT & MUSIC BUS. PROGRAM, *supra* note 119, at 16–17 (discussing efforts to establish the IMR); Marshall, *supra* note 28, at 51 (discussing efforts to establish Songfile).

129. Greeley, *supra* note 76, at 1550.

130. *See* Lenard & White, *supra* note 26, at 25 (arguing that certain protections against potential infringement cases by distributors will incentivize music rights owners to contribute music and financially support the database).

costs, reduce liability for infringement, and expedite royalty determinations in the long run.

CONCLUSION

The time is now for the United States Copyright Office and Congress to take a fresh look at interactive music services much like it has done for other innovations in the past. The current music licensing system is stuck in the analog era, and serious changes to music licensing are necessary to allow all key stakeholders in the music industry, especially interactive service providers, to prosper in the digital era. Perhaps music licensing will always be complex due to the rapid technological advancement associated with the music industry. A prime illustration of this accelerated development is the fact that digital media and streaming were unknown concepts when the laws governing music rights were established. Nevertheless, through operational, structural, and technological improvements, transparency and efficiency in music licensing are achievable.

Collective rights organizations in the United States allow on-demand services to streamline music licensing to a certain extent, but there is substantial room for improvement considering the many inefficiencies related to collective rights organizations listed throughout this Note. The 2014 European Union Directive implemented key changes for CMOs that manage music rights to increase transparency and accuracy. The United States should consider adopting similar governance and transparency standards, and should also consider establishing “one-stop shops” for digital music licensing where possible to simplify music licensing.

A consolidated, authoritative rights database that utilizes a system of unique identifiers would make the proposed changes to collective rights organizations much easier to achieve. Creating and implementing a GARD that ties usage to ownership would not only accelerate royalty payment determinations and increase accuracy in invoicing, but it would also create a less complex, more transparent licensing system. Overall, a more transparent and efficient music licensing system could reduce the administrative difficulties interactive service providers currently experience in obtaining the required digital transmission rights to music, and effectively move music licensing into the digital age.