

Session 9B

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SESSION 9: COPYRIGHT LAW

9B. *Music Modernization Act*

Moderator:

Casey Chisick

Cassels Brock & Blackwell LLP, Toronto

Speakers:

Justin Hughes

Loyola Law School, Los Angeles

***The MMA – The Promise of a Better Deal for Creators and
the Challenge of an Authoritative Database***

Sean M. O’Connor

University of Washington School of Law, Seattle

***Can the Music Modernization Act’s Database Actually Solve
the Music Licensing Problem?***

Richard H. Reimer

ASCAP, New York

Performance Rights Licensing After the Music Modernization Act

Panelists:

Kenneth L. Steinthal

King & Spalding LLP, San Francisco

Frank P. Scibilia

Pryor Cashman LLP, New York

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MR. CHISICK: Welcome to the second-to-last copyright panel of the afternoon. My name is Casey Chisick. I'm a Partner at Cassels Brock in Toronto, and I'm honored, if a little confused, to have been asked to moderate this panel on the Music Modernization Act (MMA).¹

For those who are not music copyright nerds and may not have been paying attention, the MMA was signed into law last October after many years of negotiation, legislation, and debate. The MMA is the first major amendment to U.S. copyright law since the Digital Millennium Copyright Act (DMCA), so that's kind of cool. It's actually three statutes in one:

- The Musical Works Modernization Act revamps the music licensing process for digital services by creating a new, highly regulated mechanical license collective (MLC) as a sort of central clearinghouse, and also revamping the rate-setting process for digital music.

- The Compensating Legacy Artists for their Songs, Service, and Important Contributions to Society Act (CLASSICS) requires royalties to be paid for the performance of pre-1972 sound recordings used on digital radio.

- The Allocation for Music Producers Act (AMP) requires part of those royalties to be distributed to producers, mixers, and sound engineers who were involved in creating the sound recordings.

There was a fourth piece. To the surprise of no one, I think, the Fair Play Fair Pay Act,² which would have required terrestrial radio stations to pay royalties for public performance of sound recordings, didn't quite make the cut.

The legislation overall, despite its controversial nature, worked out pretty well in the end. It was passed unanimously by Congress and most of the stakeholders seemed to be pretty pleased with the outcome. The main constituencies — music publishers, songwriters, digital musical services, record labels — generally seemed pretty satisfied with the outcome as far as I can tell.

Of course, the devil is in the details, and implementation of course will be a challenge, and fissures have already started to emerge as the Copyright Office considers which of two competing groups to designate as the mechanical licensing collective.

Of course, there are those who doubt that it will ever be possible to achieve the key goals of the MMA, including, most importantly, the creation of a comprehensive, reliable database of musical works and information on the rightsholders who own them.

Complexity abounds. It will take the music industry some time to adjust, and we'll see how this all plays out. Fortunately, Fordham has assembled an all-star panel to explore those issues.

¹ Orrin G. Hatch–Bob Goodlatte Music Modernization Act, Pub. L. No. 115–264, 132 Stat. 3676 (2018).

² H.R. 1836, 115th Cong. (2017).

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I want to introduce them. Professor Justin Hughes from Loyola Law School is going to discuss, among other things, the opportunities and the challenges of the new database. Professor Sean O'Connor from the University of Washington School of Law will talk about another perspective on the implementation and governance of the new mechanical licensing system. Richard Reimer, in-house counsel at the American Society of Composers, Authors, and Publishers (ASCAP), is going to look at the other music-licensing provisions of the MMA that affect performing rights as well as mechanical rights.

We have our two panelists who will provide reaction no doubt, and further commentary: Frank Scibilia, a Partner at Pryor Cashman, and Ken Steinthal from King & Spalding, a Fordham University grad. They are both leading music industry lawyers who have been deeply involved both in the MMA itself and in the run-up to it.

Lots to discuss. Great people to discuss it.

Without further ado, I want to invite Professor Hughes to begin with his remarks.

PROF. HUGHES: Thank you, Casey.

If two or three or five years ago you had asked an average person in the copyright community if we would see a law like the Music Modernization Act, I think that member of the “copyrati” would have been very doubtful.

Indeed, many of you know that over the last few years of his tenure Chairman Goodlatte of the House Judiciary Committee held a wide variety of hearings on a substantial revision of copyright law. I can tell you that by 2016 the congressman’s staff was thinking about an exit strategy: *How do we extradite ourselves from this and not seem embarrassed? What can we get done? There doesn’t seem to be much we can get done. Well, we’ll say we got the Defend Trade Secrets Act³ done, so it won’t be a total wash on intellectual property.* So it was always a tremendous challenge, and for many people it’s just a wonderful surprise how the Music Modernization Act turned out.

The comprehensive database part, which I want to talk about most, is also a surprise because for many years this idea has been floated. It was floated many years ago at the WIPO, where the reaction of many of the rightsholders was, *That’s a really bad idea.* What might have been a really bad idea in Geneva now turns out to be a really good idea in Washington.

As Casey said, the Music Modernization Act has these three parts. In reverse order, they are:

- Title III, the Allocation for Music Producers, codifies a SoundExchange practice of distributing some of the royalties they collect to sound engineers, sound mixers, and producers. For people who haven’t followed that carefully, that was kind of a surprise. They were already distributing that money, so it really is just a codification of a practice.

- Title II, The CLASSICS Protection Act, which I hope we’ll talk more about.

- Title I, Music Licensing Modernization, replaces the old sound-recording-by-sound-recording compulsory licensing for digital streaming services with a new blanket license for digital music providers to make and distribute digital

³ Defend Trade Secrets Act of 2016, 34 U.S.C. 41310 (Supp. V 2018).

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phonorecord downloads, permanent downloads, limited downloads, and interactive streams.

As Casey said, this new system requires the creation of a new mechanical licensing collective that will (a) issue and administer the blanket licenses, (b) receive the proceeds of the blanket licenses, and (c) distribute the proceeds to composers and music publishers. To do (c), as Casey said, the music licensing collective will need to develop an authoritative database of musical composition ownership information in relation to sound recordings. I emphasize that because that makes it harder.

There is a huge amount of stuff in the MMA, and I don't claim to understand it all, but I want to focus on the promise of the blanket license and the challenge of the database project.

The promise of the blanket license. Generally speaking, at an event like this you learn from copyright owners that they don't like blanket licenses, and they aren't supposed to like compulsory licensing mechanisms. But, as academics said in a letter to Chairman Goodlatte many months ago, "At present, the lack of an authoritative resource for identifying copyright owners for musical compositions limits music licensing opportunities and impedes the prompt payment of songwriter royalties." Now, that was putting it very politely.

Under the old system, when a digital music provider wanted to exercise the compulsory license, it sent a Notice of Intention to the copyright owner; and if they couldn't find the copyright owner or the owner was unknown or uncertain, they sent an "address unknown Notice of Intention" to the Copyright Office, which maintains a list of these online.⁴ Noticeably, the old statute didn't say whether in filing this address unknown Notice of Intention you had to do a reasonable or good-faith search for the prospective licensor copyright owner; all the prospective licensee needed to do was a Copyright Office public records search.

Even more importantly, many people interpreted the statutory royalties provision to mean that they accrued only after the copyright owner had been identified. Spotify was on record saying, "We hold on to the royalties and we pay them when the copyright owner is found." But many thought that was not required by the statute and that a prospective licensee that filed an address unknown Notice of Intention therefore arguably enjoyed a period of *gratis* use up until the point when a content owner came forward.

Our colleagues at the Copyright Office will know better than I, but beginning in April 2016 digital music services — e.g., Google, Pandora, Spotify — began serving an unprecedented number of address unknown Notices of Intention on the Copyright Office. Between April 2016 and January 2017 they filed 25 million address unknown Notices of Intention, meaning they claimed they could not find these copyright owners. There are scholars and commentators, like Professor Kristelia García at the University of Colorado, who believe that much of that was doubtful.

The MMA replaces that system of Notice of Intention and will in fact create a blanket license, and the blanket license will allow payment into this new collective. Of course, payment into the new collective is of no use unless there is a way to distribute the

⁴ See Section 115 NOIs Filed with the Copyright Office, U.S. Copyright Off., <https://www.copyright.gov/licensing/115/noi-submissions.php>.

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money, and distributing the money equitably and correctly requires an enormous amount of work gathering this information.

We have to be honest that the database politics are interesting. An incomplete database could work to the financial benefit of different parties, and that already is a contentious point.

The new Section 115(d)(3)(E) lays out the requirements of the database. The requirements of the database and assembling the database are daunting because:

(1) We have to assemble all the musical composition information, ownership information and composer information, that is in many different places, and some of it is arguably lost.

(2) We have to match up that information with the sound recordings in which the musical compositions are embodied.

(3) Even after all that information is collected from the music publishers — often who do not have complete information about composers that an individual music publisher doesn't represent — to do real due diligence for the database there will have to be a lot of cross-referencing with performance rights organizations (PROs) and, even if you talk to people at SoundExchange, cross-referencing with all kinds of publicly available information like MusicBrainz and Gracenote and All Access.

So the challenges of the database are enormous, but we want the database to be as complete and authoritative as possible.

Lastly — as the explosions and the cannonade or artillery continue — as we continue to refine the database and make it more authoritative and bring all the information together, we will find more and more conflicts. A lot of those conflicts will be false positives (e.g. territorial disputes) and we will be able to sort those out; but some will not, and that requires a dispute resolution mechanism.

MR. CHISICK: I just want to say that explosion is very un-Canadian.

PROF. HUGHES: It's America. What can you expect? [Laughter]

MR. CHISICK: We have five minutes for discussion of this topic.

I want to start off the discussion with a simple question that I'll throw out to everybody, not just Justin. Can this be done? I mean this is not a new problem. I was talking to somebody yesterday who said, "The MMA is really solving problems from the 1960s," and we've been talking about a comprehensive musical works database for as long as I've been practicing in the area, twenty years or more. Can this be done? What has changed that makes now the time for this project to be undertaken, and undertaken successfully?

PROF. HUGHES: In 2015 Spotify announced it was going to do this, and you can still read its press release online: "We are going to build a comprehensive database."

What has changed? First, the technology is much better. Second, we now have a statutory mandate and we have agreement of all the parties to engage in it. So now it will be harder for people who don't want an incomplete database to hide.

MR. STEINTHAL: If I can chime in on that — and, admittedly, I have the services' perspective, having represented many of the digital music services over the years — you referred to the political reasons why there hasn't been a public database or a comprehensive database. From my perspective, the reason is publishers have historically

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benefited from a lack of transparency with respect to ownership. Spotify could never do this without the statute by itself because there is no resource.

Just to give you examples, for the benefit of people who aren't as close to this as we are, when a sound recording hits the street, what we call the "street date," everybody knows the artist; everybody can know the record company. Probably nobody, unless they're a singer-songwriter, knows who wrote the underlying composition; and there are often multiple composition owners of the same composition.

So the song hits the street. You're Spotify, you're Pandora, you're whoever you are, broadcast radio, and the information is not available through any mechanism whatsoever to know who the owners of the composition are of the most popular music, the music that everybody wants on all these services. Therefore, the services cannot function without the risk of infringement absent this form of license.

It is a tradeoff. The publishers got a lot. The services have to fund the creation of this database and have to fund the costs of the music licensing collective going forward.

To your point about paying the money, the services, in my view, have always been willing to pay the money in as long as they can get immunity from copyright infringement in return. That's what the statute provides, the ability to have a single-notice blanket license. The services get their insurance against copyright infringement claims — and there were dozens of plaintiffs' class actions that were benefiting from the cracks in the system under the old Section 115 license.

That's the core tradeoff, and I think that's where everybody got what they really wanted. The publishers got a system that the services pay for. The services got immunity from all these class actions.

PROF. HUGHES: But not only is the information not available when the music hits the street, it may not be finalized. The ownership shares of compositions may not have been determined yet.

MR. STEINTHAL: That's why I used the new-release example. It's not known. The writers often don't agree on their splits until weeks or months later. You look at a song like "Uptown Funk," which had more than ten writers, and there's no way those writers had agreed on their splits when the song hit the street. So there are inherent problems with new releases.

And then there is the fact that composition ownership changes over the years. There is no resource where you can go to find out whether the original owner still owns the rights or has transferred them to someone else.

MR. CHISICK: I want to let Frank weigh in before we run out of time for this round.

MR. SCIBILIA: I'm coming from the copyright owner perspective. Just as a caveat, I do represent one of the two competing entities that are seeking to be designated as the collective.

MR. CHISICK: Oh, we'll get to that.

MR. SCIBILIA: My views are my own and not necessarily the views of this entity.

I think the database and the whole system will work. I'm very positive about it. The reason I'm positive about it is because I think the incentives are now in the right place.

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I believe that, to some degree, copyright law has been turned on its head. It used to be that if you wanted to exploit something, you had to go out and find the owner of it, license it, and then exploit it. Historically, in this digital-streaming environment that hasn't been the case because digital services, and record companies to some extent, want to get sound recordings on the digital streaming services as quickly as possible, and sometimes before clearing the publishing rights.

This really wasn't a big problem for the services for a long period of time because they were content, when they didn't know who to pay, to just hold the money. That was until they started getting sued in class action lawsuits, and then they all of a sudden started thinking, *Gee, this might be a problem. Let's try to see how we can solve this.*

One method the services used to try to avoid legal exposure was to serve bulk NOIs on the Copyright Office. The bulk NOIs may or may not have given the services legal coverage — one can ask whether the statutory requirement to make a good-faith effort to identify the rights owner was complied with — but that still did not get the royalties into the hands of the correct musical works rights owners.

Now, with the MMA, the tasks of matching and identification rest with the collective, which has the most incentive to do it correctly. The collective has to be established by copyright owners, it has to be managed and run by copyright owners, and the copyright owners have the incentive to make sure that the correct copyright owners are paid.

I know that at least the MLC, which is one of the two entities seeking designation as the collective, has the incentive and wants to do all it can to make as many matches as possible, have as thorough and complete a database as possible, to pay the correct rights owners and to reduce the amount of unclaimed or unallocated royalties to as close to zero as possible.

But, of course, the only way the collective can fulfill this mission is if it is adequately staffed and funded, which is an issue that I know Kenny has flagged for discussion.

MR. CHISICK: We'll pick that up after Sean's presentation. Sean is going to talk more about the implementation and governance of the collective, so it's a good segue.

PROF. O'CONNOR: Absolutely. Good.

I'm going to be coming at it from a perspective of somebody who does a lot of company formation. I'm a professor, but I have also practiced for a long time. I do a lot with startup companies, with governance of large nonprofits, and things as well. My comments may seem very small and pedantic, but this is the kind of stuff I worry about when I'm wearing my lawyer hat. I also had zero role in anything going on with MMA, so there might be really easy obvious answers to the things I'm going to point out.

When the statute was finalized and came out and I read through the gory details about the entity and the database, I was really shocked at how much detail about the governance was baked into the statute. I think that's normally not a great idea because, in other words, whatever entity wants to be designated, if it is a preexisting entity, it's going to already have to comply with it. For example, weird stuff, like saying what has to be in the bylaws, a lot of the stuff that's required to be in the bylaws about a staggered board is

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pretty standard, and the entities that are jockeying for position in this probably have that anyway; but, if they don't, they are going to have to revise their bylaws.

The bylaws have to be made public. But who cares about that because if you are setting up an entity, you could put all the stuff in the charter instead? Maybe you say, "Well, the charter under state law has to be nominally public."

It seems weird to me. Again, maybe somebody — maybe Justin — has a really easy explanation for this. But I found it very odd that so many details for governance were baked into the statute.

Then, at the same time while we're looking at that, there are other things that look odd to somebody who sets up entities.

It's really odd that a lot of the boards, the voting members themselves on all these different boards, are even numbers. Anyone who sets up companies knows that's a terrible idea because you get deadlocks. You always set it up as an odd number — three, five, whatever. In the case of the overall governance with the fourteen voting members, don't be fooled. It says fourteen voting members and three nonvoting members, so you get seventeen. But the nonvoting members are nonvoting, so that doesn't matter, and you still could have a deadlock with fourteen. If the voting members are ten publishers and four professional songwriters, there's probably not going to be a problem there.

But then, if you go down further, the Unclaimed Royalties Oversight Committee will have five copyright owners and five songwriters. As a total outsider, I think that's a little weird. If those two groups get adversarial with each other, you are completely relying on being able to peel off somebody from the opposing camp. That can happen; but, as somebody who is also involved in dispute resolution knows, when governance goes bad it can be hard to do that.

So, there are a lot of problems with the governance requirements.

Another one is the Mechanical Licensing Operations Advisory Committee, which has no fewer than six and it's equal between copyright owners and digital music providers. It seems like that's a tension right there as well.

While I love the idea of this, I think there are a lot of problems that are going to emerge as this gets implemented.

Looking at the database itself, I think one of the problems is that we want to set up all this information that will then be tagged saying, "Here are some sound recordings and here's the information behind them," but with no real sense behind all of this that digital sound recordings have to have metadata incorporated into them. That makes it even harder.

One thing that I have been trying to promote — I know it may be an unpopular idea with some — is that it may be time to suggest or try to mandate that the digital music service providers only do trade in downloads and streaming of files that actually have uncorrupted metadata that contains all this database information. If you are saying all this information is what will identify it in the database, it should be in the files themselves.

My other concern then is that, as we've just heard, the onus is on the copyright owners to identify the sound recordings that their songs have been mechanically reproduced in. Some of the stuff you will be able to find through Harry Fox because if somebody used the Harry Fox system to do the mechanical reproduction that information

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is there. But there's a lot of stuff on the street that is just dubious; it didn't necessarily go through Harry Fox; it's just somebody made a sound recording and there is no metadata in it at all.

I was one of the people who used Apple iTunes a number of years ago when they did that weird "swap in the iCloud" thing. I had recordings that I had bought and ripped — I guess that was legal — and they replaced it, but it wasn't even with the original artist. So now I have a sound recording that I don't even know who the artist was but I know who the composer was supposed to be.

I used to be a professional songwriter myself. Even some of my stuff got lost, like my own recordings that I had put into iTunes myself, meaning stuff I owned, recorded in a studio on my own, and that went into the ether in a weird way.

The onus really has to be, on not just the copyright owners and songwriters trying to identify their stuff, but also on the other side, meaning that we can't be trafficking in digital downloads or streaming in stuff that has no metadata. Maybe that goes off the grid — well, not literally off the grid — to pirate sites and things where you know you are getting essentially counterfeit stuff.

I am going to end a little early because I just wanted to set this up and get the debate going.

MR. CHISICK: I think you succeeded in doing that.

I want to pick up on that suggestion. I heard Kenny huffing and puffing the whole time.

MR. STEINTHAL: The notion that the services can solve that problem is absurd. The services get the data from the record companies. The record companies give them a feed and that has whatever metadata the labels have.

If you are talking about pirate websites, fine. That's not who I represent and that's not what the MMA is all about. The MMA is trying to solve a problem for the companies that are generating dozens of millions of dollars in royalties. It is meant to encourage them to keep paying and to get the money to the writers and the publishers.

So I don't think it's fair to say that the services should somehow come up with a mechanism to get metadata when they are reliant on the labels in the first instance for the very metadata they have to get.

PROF. O'CONNOR: I'm not saying they have to get it, because I agree that's hard. I'm saying that they shouldn't stream it. If something's on YouTube — and I've heard some recordings — you get on the list if you look for a certain song, and, as somebody who's a musician, I'm thinking, *I don't know who the heck is performing that song. That's just a weird recording.*

MR. STEINTHAL: We can go back to DMCA panel on that. If people don't like the fact that there's a safe harbor for user-generated content, that's a different issue than this issue, which is just coming up with a better system for the main players of audio streaming to pay money in and get the money back out.

MR. SCIBILIA: But we are not talking about user-generated content. We are talking about a service like Spotify; and we are not talking about major record labels that are presumably providing their metadata.

MR. STEINTHAL: First time ever we agree.

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MR. SCIBILIA: We're talking about Spotify rushing to put stuff up on Spotify, something that Spotify doesn't know but perhaps should know is really not authorized or not really licensed and doesn't have metadata.

MR. CHISICK: Is this really about the professionalization of metadata and the professionalization of the services, saying that the services should traffic only in content that rises to a certain standard of metadata?

PROF. O'CONNOR: Yes. Think about if you are a coffee company and you are selling coffee that is "fair trade certified." There are ways that we do that.

PROF. HUGHES: But it's also about making sure the independent artistic community eventually gets tools to put the metadata into their digital files.

MR. CHISICK: But those tools exist, don't they?

PROF. HUGHES: I wanted to talk about something else, Sean.

Sean was talking about the structure of the boards. What he didn't say is everyone should know there has been a little bit of a ruckus in Washington that the two boards proposed by the two contenders are all white, and it has been certainly observed by the artistic community, which is not all white, that the boards are totally lacking in diversity at this point. That raises big issues because a lot of African American artists and a lot of Latino artists feel they have been especially screwed by the music industry. All artists feel screwed, but the minority artists feel especially screwed. To have the really bad appearance that the boards of these proposed contenders for the MLC totally lack diversity was just politically tone-deaf.

MR. SCIBILIA: I will just say that there has been some misinformation about that. The MLC's board members were selected in an open and competitive process by panels of well-respected songwriters and independent music publishers. My understanding is that in selecting the MLC board these panels did consider diversity, among many other criteria, including relevant experience and diversity of music genre, and that the MLC board as constituted is somewhat diverse. It's not, as you stated, an "all-white" board.

PROF. HUGHES: Do you want to tell us about the details of "somewhat" diversity?

MR. SCIBILIA: The MLC's submission to the Copyright Office, which is publicly available, identifies all of the board members and provides biographical information for each.⁵ The MLC board represents a wide diversity of musical styles and creators of all backgrounds and it includes racially, ethnically, and gender diverse members.

PROF. HUGHES: Out of how many?

MR. SCIBILIA: As per the statute, there are fourteen voting and three non-voting board members.

PROF. HUGHES: Okay.

MR. SCIBILIA: Of course diversity should always be a consideration.

MR. CHISICK: There are a lot of questions about the composition of the boards. The ruckus is not just about diversity. There are all sorts of ruckus about conflicts of

⁵ See Frank P. Scibilia & Benjamin K. Semel, *MLC Comments in Reply to the Designation Proposal of the American Music Licensing Collective, Inc.*, <https://www.regulations.gov/document?D=COLC-2018-0011-0031>.

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interest or the appearance of conflicts of interest, and I want to get into that and have a conversation about it.

Justin, do you have a view on the composition of the board apart from the diversity issue?

PROF. HUGHES: Not on the composition of the board. And I acknowledge that once a contender is chosen to be the MLC — and I keep saying MLC because I don't know why we keep saying “mechanical licensing collective” for a world of digital downloads and digital streaming. I think that is really bizarre. So, “the collective.” The board of the collective will be reconstituted, as I understand it, once a contender is chosen to be the collective.

MR. SCIBILIA: It may or may not be.

PROF. HUGHES: Hopefully, it would reflect some of these concerns. But again, that's one issue where completeness of data in the database and the overarching goal of the database and its success — the more it is complete, the more it is authoritative, the more the controversies are worked out.

This goes to an issue of what are called “black box” royalties.

MR. CHISICK: We'll come to the black box royalties “after this,” as they say on TV.

We are going to shift gears for a moment. Richard, coming from ASCAP, gives us a good opportunity to highlight that the MMA may be substantially about mechanical licensing, but it's not only about mechanical licensing. I want to shift gears a little bit and talk about the performing rights aspects of the MMA.

MR. REIMER: Thanks, Casey.

I think everybody knows that ASCAP and Broadcast Music, Inc. (BMI) are two performing rights organizations, two of the four in the United States today, but the only two that are governed by consent decrees.⁶ The consent decrees have been in place for seventy-plus years.

The MMA achieves some modification of the consent decree process. I want to give a very brief recitation of the history that got us to the MMA.

From 2000–2010 ASCAP principally, but BMI as well, were involved in a large number of Rate Court proceedings with digital music services and others in the digital space. There was a great deal of dissatisfaction among our members and BMI affiliates with the outcomes of those litigations, to the point where the major music publishers asked the performing rights organizations to change their rules to permit so-called “digital rights withdrawals” so that they could license directly in this space.

That led to ASCAP and BMI ultimately going to the Department of Justice in 2014, following decisions that effectively prevented those digital withdrawals. In 2014 we asked for modification of the decrees. That led to the so-called “fractional licensing debate.”

Ultimately, in August 2016 the Department of Justice issued a closing letter saying that they would not agree to modify the decrees and they thought that there should

⁶ United States vs. ASCAP, No. 41-1395 (WCC), 2001 WL 1589999 (S.D.N.Y. Jun. 11, 2001); United States v. BMI, No. 64 CIV. 3787, 1994 WL 901652 (S.D.N.Y. Nov. 18, 1994).

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be 100 percent licensing; that is to say, ASCAP and BMI would have to license the entire work even if they didn't control all of the interests in the work.⁷

That was really the run-up to the MMA. What we see in the MMA — and I think Casey alluded to this earlier — are three provisions that deal with performing rights licensing.

One deals with reform of the consent decrees themselves. The only way that consent decrees can be modified is by agreement with the Department of Justice approved by the courts that administer the consent decrees, currently Judge Cote for ASCAP and Judge Stanton for BMI, both sitting in the Southern District of New York.

The MMA provides that if the government and the parties agree on changes, before those changes can be implemented Congress must be involved. The Department of Justice must notify the chairs and ranking members of the Judiciary Committees in the House and the Senate, and presumably Congress would have an opportunity to have hearings on any proposed revisions in the consent decrees.

The other two provisions in MMA deal with the Rate Court process itself.

There was a perception, I think on both sides, users and the PROs, that there was the ability to game the system, in the sense that one could select which judge they thought would be more suitable to the goals of a particular user or one of the societies in a Rate Court proceeding. As a result, the MMA has a provision that requires any Rate Court proceeding to be conducted by a judge chosen at random in the Southern District of New York. It cannot be the consent decree judge for either ASCAP or BMI.

Finally, there is a provision that deals with the standards by which the rates can be determined. The MMA permits the use of results in proceedings involving sound recording performance rights but only for digital service providers.

As to where we wind up with the MMA, some of you may know that last year Makan Delrahim became the Head of the Department of Justice Antitrust Division. He announced that he was intent on reviewing all consent decrees, not obviously just the ASCAP and BMI decrees. This has provided an incentive, I think, for not only ASCAP and BMI but also the user community to advocate for further changes in the consent decrees.

Congress has already jumped in. There have been meetings with staff of the Judiciary Committee on the Senate side, and the users and the PROs have made suggestions.

ASCAP and BMI issued a joint open letter on February 28⁸ announcing that their goals in terms of reform of the consent decrees include:

- First, sunset of the decrees. We recognize that this reform is going to take place over a period of time. As a transition to the elimination of the decrees ultimately, we have proposed that the automatic license granted by the consent decrees — anyone who writes and applies for a license is entitled to a license immediately — would continue.

⁷ United States Department of Justice, *Statement of the Department of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees* (Aug. 4, 2016), <https://www.justice.gov/atr/file/882101/download>.

⁸ BMI President & CEO Mike O'Neill and ASCAP CEO Elizabeth Matthews Issue Open Letter to the Industry on Consent Decree Reform, ASCAP (Feb. 28, 2019), <https://www.ascap.com/press/2019/02/02-28-ascap-bmi-announcement>.

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- There ought to be a mechanism for immediate payment of interim license fees.
- The Rate Court process would continue over the period before the termination of the decrees.
 - ASCAP and BMI would continue to obtain only nonexclusive rights so that members and users can enter into direct licenses.
 - Any reform of the decrees would continue the current forms of license that are currently available — the blanket license, the program license, and adjustable-fee licenses.

That's where we are at this point.

MR. CHISICK: There are two competing presumptions here. The MMA relies on the presumption that regulation is necessary. Both on the mechanical side and the performing rights side it is still necessary to regulate the royalties paid to songwriters.

I couldn't help but notice, Richard, that you very casually referred to the transition "to the termination of the decrees," as though that's a foregone conclusion, or at least a foregone conclusion in the PROs' minds.

The question is, is there or isn't there a need for regulation of songwriter royalties in 2019?

MR. STEINTHAL: The answer is absolutely yes. The reason why the provision was put in the MMA that requires the Justice Department to report to Congress if the Justice Department takes steps to sunset the decrees is because they had spent more than a year developing a solution that would allow a smooth-functioning licensing marketplace for digital music services in a fashion where the publishers and the composers would get all the money upfront and build a database to distribute it.

Of course, digital streaming services are engaged in distributions of music that implicate both the public performance right and the mechanical right. So Congress, having fixed the problem on the mechanical right component, did so assuming that the public performance rights licensing marketplace would remain largely efficient and functioning.

The underlying problem is still there. If you take away the ASCAP and BMI consent decrees and you take away the effective compulsory licensing thereunder, then you are back where you were before, with no smoothly functioning mechanism for the rights to be cleared.

MR. CHISICK: But what's curious is that the United States is somewhat unique in the fact that there is still a compulsory licensing system in the first place. That's hardly in vogue.

MR. STEINTHAL: We are also unique in we're the only civilized country with statutory damages of up to \$150,000 per work infringed.

MR. CHISICK: Okay. Fair point.

MR. STEINTHAL: It's the elephant in the closet. In every other country, if you infringe, especially if you are doing your best to get licenses and you don't get some because it's hard to do it, your damages are going to be essentially what the licensing fee would have been and perhaps the costs of the suit.

MR. CHISICK: No, no, no, no, no.

MR. STEINTHAL: Canada has some degree of a statutory license. Other than the United States and Canada, nowhere else. That's the bludgeoning that the publishers and

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the record companies have used over the years, the club of potential damages of \$150,000 per work. I bet you a lot of the services would trade off no compulsory licensing for no statutory damages in a heartbeat.

MR. CHISICK: Frank, I saw you moving around back there.

MR. SCIBILIA: Do you ever wonder why songwriters are the most regulated profession in the United States? Why do we need to regulate the income of songwriters?

MR. STEINTHAL: We need to find them. We need to have a mechanism for the information to be available.

MR. SCIBILIA: We are now talking about paying them. In terms of paying them, we are talking about statutory provisions enacted back in the days when there was the Aeolian manufacturer of piano rolls and the government was concerned that it was going to corner the market on music by getting exclusive licenses to use the music in piano rolls.

MR. CHISICK: I was concerned no one was going to mention piano rolls in this panel.

MR. SCIBILIA: It's a hundred years later, and the beneficiaries of the compulsory license and the consent decrees are Google and Apple and Amazon. They don't need protection in negotiating with songwriters.

In terms of antitrust issues, as I think Mr. Delrahim has said, if there are antitrust concerns, if somebody is acting as an antitrust violator — as Ken knows because he'll go out and sue them as he sued the Society of European Stage Authors and Composers (SESAC) — you could bring a private right of action and you can get the Department of Justice to get involved.

But why do we need to have the rates regulated? Today, in the year 2019, I think that is an anomaly.

MR. CHISICK: Sean?

PROF. O'CONNOR: We have small independent photographers; why is that not the same situation? We have lots of areas in copyright where the creators are smaller, independent "indie" players, and we don't have them regulated under consent decrees.

MR. STEINTHAL: Bars and nightclubs absolutely benefit from the ASCAP and BMI compulsory licenses.

PROF. O'CONNOR: But they could still get blanket licenses.

MR. STEINTHAL: Wait a minute, wait a minute. There's no way in the world that general licensees could effectively get licenses for all the music that plays in their establishments absent an effective compulsory license. There's just no way.

PROF. O'CONNOR: What about SESAC and the others who are not part of the consent decree?

MR. STEINTHAL: Well, SESAC was sued under the antitrust laws and agreed to thirty years of arbitration and an effective compulsory license under that settlement agreement.

MR. REIMER: Not for bars and restaurants.

MR. STEINTHAL: No, not for bars and restaurants.

PROF. O'CONNOR: I have actually represented bars and restaurants who were being approached by SESAC. Now there are other PROs out there. When I talk to the

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local bar owners in Seattle, they ask me, “What the heck do we do? Now we’ve got a bunch of them.”

MR. STEINTHAL: They need it.

PROF. O’CONNOR: But they are not doing it in the same way. BMI and ASCAP are under the consent decrees but the other PROs are not. We’ve got to open up the market.

MR. REIMER: Your clients are going to get licenses, right? They are not going to risk being sued by anybody. Then it just becomes a matter of negotiating the rates. You can negotiate in other industries. Why can’t you negotiate in this one?

MR. STEINTHAL: I think, especially when you get to the general licensees, they are absolutely without a mechanism to fairly assess whose music they are using and how much to pay for it. Whatever the PRO says they want to get, what are they going to do? They just have to pay whatever it is the PRO says they should pay.

MR. REIMER: There is something called the NRA — not the National Rifle Association but the National Restaurant Association — and they refuse to come to the table to negotiate.

MR. SCIBILIA: I would also draw a distinction between general licenses and digital streaming services, as we tried to do when the publishers wanted to withdraw digital rights from ASCAP and BMI. Even if the consent decrees are sunset, the PROs do serve a very valuable purpose, including the general licensing of bars and clubs, because they are dispersed throughout the country and it’s hard to license them all.

But Google and Apple already enter into direct licenses. They need all sorts of rights, so they enter into direct licenses with those same companies that they can get all the rights from, including mechanical rights and including performance rights, and they can negotiate those in the free market. I don’t see why we have to separate out certain rights that are negotiated freely and other rights that are not negotiated freely.

MR. STEINTHAL: I will go back to the easy example of the new releases, which is the lifeblood of the services that are distributing music, like Spotify, like Amazon, like Google Play. You cannot get licenses for information that is not available in the market. Therefore, they would be at risk for every new release that they played if they didn’t have a license for it. And how do you get a license for something that doesn’t yet exist — i.e., a copyright owner who steps forward and says, “I own the rights to this composition?”

MR. SCIBILIA: Where does the recording come from? Does somebody give it to you? Does somebody say, “Hey, here’s my sound recording; put it on Spotify?” Shouldn’t I ask, “Who are you? Do I have the right to license that from you?” That’s the way it has traditionally been done.

MR. STEINTHAL: I wish the sound recording companies would convey the rights. In a normal marketplace — and this is the way mechanical rights were cleared before — in the old physical day, the sound recording companies cleared all the rights, and they repped and warranted to Sam Goody or whoever was the distributor, “Don’t worry about it; I’ve cleared all the rights.” They wouldn’t do that for digital distribution. That’s why my clients are stuck having to clear the publishing rights and have no idea who owns the publishing rights, especially for the new releases.

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MR. CHISICK: Before we shift gears in a few minutes to the black box, is there anybody in the audience who wants to get in on this fun? Now is the time. Put up your hands and we'll call on you.

QUESTION [Lauri Rechart, IFPI, London]: A question for Ken. You said that it is impossible for the services to get licenses. But the services get the licenses outside the United States. As someone said, the United States is the outlier. So can you elaborate about the impossibility?

MR. STEINTHAL: If you are talking about the label licenses, yes, we get label licenses.

QUESTIONER [Mr. Rechart]: No, publishing. Of course with respect to labels, as you know, everything works on the basis of direct licensing.

MR. STEINTHAL: On the publishing side, yes, the major services will go and seek direct licenses from the largest music publishers, but they absolutely rely on the effective compulsory licensing under Section 115 for mechanicals, under the ASCAP/BMI consent decrees and licenses. They rely on those for the long tail. The "long tail" is the term for the 90 percent of the music out there that constitutes 10 percent of the plays.

PROF. HUGHES: Ken may be being asked — and he may not want to answer — why in other countries without statutory damages Spotify will do a deal with the big music publishers but doesn't worry about it if deals aren't done everywhere.

MR. STEINTHAL: I can't answer that. I just don't know.

QUESTIONER [Mr. Rechart]: The point, Ken, is that outside the United States these compulsory licenses do not exist and yet all the music is available and the deals are being done.

PROF. HUGHES: But all the music is available because there aren't statutory damages. If you don't have statutory damages, it's a lot easier to put up stuff that maybe you're not 100 percent sure you've got the rights to.

QUESTIONER [Mr. Rechart]: It's all seems a little bit speculative to me.

MR. STEINTHAL: The statutory damages issue is a pervasive issue, and it's the answer to a lot of the questions as to why we need compulsory licensing.

MR. CHISICK: I want to shift gears and talk about the black box, but before I do Richard just wants to let you know that there are copies — well, go ahead.

MR. REIMER: There are copies of the ASCAP/BMI open letter, in case anyone's interested in reading it.

MR. CHISICK: Justin, you mentioned the black box issue, so why don't you introduce the issue again and let's talk about that?

PROF. HUGHES: The black box issue is simply about the royalties that are sitting there where you might have a name but you can't identify sufficiently who to pay. The question is: what do you do with them, and when do you do what you do with them, and how long do you let them sit? For example, Spotify in one of its class actions — I think it was a class action over \$200 million — agreed to a settlement of \$43 million,⁹ but

⁹ See *Ferrick v. Spotify USA Inc.*, No. 16-CV-8412 (AJN), 2018 WL 2324076, at *6 (S.D.N.Y. May 22, 2018), appeal dismissed sub nom. *Ferrick v. Diable*, No. 18-1702, 2018 WL 6431410 (2d Cir. Oct. 9, 2018).

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the truth of that settlement is the \$43 million sits with Spotify until people come and collect it.

So the black box issue is one that divides, as I understand it, the contenders to be the MLC. There are accusations that the contender that is backed by SoundExchange and the National Music Publishers Association (NMPA) would adopt a mechanism which, while following the statute, might quickly lead to the uncommitted and unidentified and uncollected proceeds and royalties going to the big majors, going to the major publishers. The American Mechanical Licensing Collective (AMLC) proposal would have greater efforts to figure out who gets the proceeds of the black box.

But remember, too, that the size of the black box, the size of the undistributed royalties, depends on how good your database is. If your database is better and better and better, the size of the undistributed royalties shrinks; and if your database isn't so hot, the size of the undistributed royalties grows. So the problem has different dimensions.

MR. SCIBILIA: Yes, sure.

First of all, I'd like to correct the notion that SoundExchange is somehow involved with the MLC. It's not. The MLC, as I said, was founded by copyright owners. The Nashville Songwriters Association International (NSAI), Songwriters of North America (SONA), and NMPA have assisted in that process. SoundExchange is a potential vendor, as are several other potential vendors, including HFA and Music Reports. There's a request-for-proposal process going on for that.

In terms of the so-called "black box," I think there has again been a lot of misinformation that has been spread.

First of all, as you said, the statute already has certain governance requirements. The statute requires the board of the MLC to contain both publisher members and songwriter members. Every publisher member that is on the board of any entity that is seeking designation as the collective is going to arguably have an interest in the black box royalties to the extent that any ultimately exist.

Second, in terms of this particular MLC that my firm has represented, there was a process where a songwriter panel vetted and selected songwriters for MLC board seats. Songwriters were voted on; songwriters were selected by songwriters. Publishers were selected by publishers. Most of the publishers on the board are actually independent publishers; in fact, the Unclaimed Royalties Oversight Committee that will be involved in these unclaimed royalty issues is made up exclusively of small independent publishers. So things are being done to ensure that everything is transparent and everything is done aboveboard.

That said, also as I said before, I think the incentives are there for the collective, whoever is chosen, to really work hard to match as many songs as possible, to find as many copyright owners as possible. That's the goal; the MLC wants to have everybody who is supposed to get paid be paid, and be paid correctly.

As MLC said in its submission to the Copyright Office, in its view the statute does not even permit the collective to make a distribution of unclaimed royalties until 2023, and the MLC doesn't even necessarily intend to do so then. It will try to match as many works as possible, find as many copyright owners as possible, before making a distribution. That's its goal.

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Of course, the ability to do that will depend to some extent on the funding, so we've got to make sure the MLC is funded so that it can do the important tasks that it is designated to do under the statute.

MR. CHISICK: What is the matching process supposed to look like? Is it all an internal process? Is there some interface with the public outside the confines of the collective? How is that supposed to work under the MLC process?

MR. SCIBILIA: There is supposed to be a public database.

PROF. HUGHES: The statute is very elaborate in all the ways the database is supposed to be public. Presumably, it will be publicly searchable by individual songwriters. Because it is searchable by individual songwriters, whoever the MLC is, all kinds of songwriter organizations should do massive outreach to say, "Once it's up and running, get on there and find out if your stuff is there; and, if your stuff isn't there, pursue the mechanism to get it corrected."

PROF. O'CONNOR: But just remember you still would have to find all the sound recordings. So, you can put yourself in the database as a composer, but then it sounds like the onus is still on you to figure out all the sound recordings. That can be tough with people around the world making random recordings all the time.

MR. SCIBILIA: Actually, the intention is to have, in addition to a database that people can populate with their rights ownership for the works they own, a claiming portal. There will be a claiming portal for the sound recordings where the musical works rights owners are unknown and for which the royalties are unallocated and not yet paid because nobody has claimed them. Those will be sound recording-specific. If you are somebody who thinks you might have a claim to royalties, you could go to that portal and make a claim.

PROF. O'CONNOR: I don't disagree with that.

MR. CHISICK: And the database is supposed to have a matching mechanism from the sound recording to the composition owners; is that right?

PROF. O'CONNOR: Yes. I like that idea, but it's a "wait and see" to see if it actually works.

PROF. HUGHES: When I said SoundExchange, I was actually being complimentary because I think they've done a better job than most of the database developers I have seen. Since the trick is not just to have an authoritative database of musical compositions but to actually connect it to an authoritative database of sound recordings, I think that if they weren't in the puzzle, I would wonder why.

MR. SCIBILIA: The reason I balked is because certain publications, to be unnamed, appear to have made the assumption that this is a predetermined process, that SoundExchange has been preselected, when it in fact has not.

MR. CHISICK: I think the way the black box money is dealt with is the source of a lot of the controversy. One of the criticisms that I have read said that distributing black box money according to market share to music publishers is precisely the inverse situation to what it ought to be, because then the royalties that are least likely to be claimed are the royalties that are attributable to long-tail compositions that will not necessarily belong to music publishers.

PROF. HUGHES: The Sean O'Connor works, for example.

MR. CHISICK: To Sean O'Connor.

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PROF. HUGHES: I think he's doing well.

MR. CHISICK: Is that a fair criticism; and, if so, how can it be dealt with differently?

PROF. O'CONNOR: In a way, isn't that what happens with radio now?

MR. CHISICK: Yes.

PROF. HUGHES: Yes. That's a good idea then.

PROF. O'CONNOR: No, no, no. I'm trying to be fair. Look, I'm trying to be objective here. I agree, but I'm saying that is the same criticism we had with radio for a long time, too.

MR. SCIBILIA: First of all, the statute is set up that way. But what's the alternative, to let Spotify keep it?

MR. CHISICK: I don't know.

PROF. HUGHES: Actually, I can give you an alternative. One alternative would be, instead of it getting distributed to the music publishers, the money should be sent to music education programs in magnet schools around the country.

I don't say that flippantly. There was a very early moment in 1998, when the copyright extension was being discussed — it was not very public, and it won't be; none of you will tell, right? — when the White House seriously considered that some of the proceeds would have to go to the National Endowment for the Arts.

PROF. O'CONNOR: I think that's a good idea.

But I want to go back to my thing about "fair trade certified" again. Let me give another perspective as somebody who does still record — not well. If you are working in Pro Tools — and any musician in the room will know this — when you are doing the final bounce-down (after you have recorded a bunch of tracks, you mix it down, you bounce it down) you put metadata in that file you generate. Everyone who is recording in a digital native medium is putting in metadata. The question is, what happens to that stuff; where does it go?

Again, I think that we really should be focusing on, whether it's mandated through statute or somehow regulatory or a private ordering, is to come together and figure this out and negotiate it. A lot of the major digital music service providers should think about adopting this. It's kind of a win-win all around.

PROF. HUGHES: But, Sean, let me ask you a question. First of all, does the designation of the metadata really guide you on the type of metadata? Second, you just moved across the country, didn't you?

PROF. O'CONNOR: I did.

PROF. HUGHES: So is the metadata accurate on all those?

PROF. O'CONNOR: Location you don't really worry about. I don't worry about that. Location is not one of the normal categories. The normal categories are genre, artist, composer.

PROF. HUGHES: Right. But the problem is we might know the names of a lot of artists but we simply just don't know how to find them. We know the names of a lot of songwriters but we can't find them.

PROF. O'CONNOR: But if the database is successful, someone like me, a very small-time songwriter, could go and put my name in there. What I'm saying then is if there are any recordings out there that list me as the songwriter, now I can match it up.

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I'm not disagreeing that the songwriters have some work to do, but I'm saying that we all have to meet each other halfway on this and make it possible.

MR. SCIBILIA: To some degree, the recordings that are in the unallocated or unmatched royalty database may not be completely divorced in terms of copyright ownership from the people or the entities who are going to be sharing in the unallocated royalties. Like Kenny said, sometimes things get thrown up there on the Internet — maybe it's a cover of a Billy Joel song — that doesn't mean that Universal doesn't own that recording, but it just hasn't been cleared to the point that it has been designated as a Billy Joel song.

PROF. O'CONNOR: Yes.

MR. CHISICK: The concern that Kenny was expressing earlier — and it's a concern you hear a lot — is that these songs are released at a time when the ownership splits haven't been determined. It's easy if you are writing and recording your own music and there's one songwriter. It's not so easy if you have ten or fourteen co-writers on an urban music composition, for example, which is common.

MR. STEINTHAL: It's often not even agreed. In other words, the writers have disputes among themselves over who is going to get what split, and it takes a while to sort itself out.

PROF. O'CONNOR: I agree.

One question I have is, who is the onus on to update the database when there is either outright litigation, and then we realize we have to add somebody else, or it gets settled before finalized and we add another songwriter?

MR. STEINTHAL: The beauty of the statute is that it creates the flow of money into the collective while those disputes are being resolved.

PROF. HUGHES: Yes, and that is different from the old system statutorily.

MR. STEINTHAL: Correct.

PROF. HUGHES: I have a question for Richard. I know from talking to you guys that you will frequently have the band come and say, "We're going to list all of us as on the composition, and Bob gets 20 percent and Jessica gets 40 percent." How long does it take between the release of a record with new musical compositions and when you actually have that at the PRO?

MR. REIMER: It could take weeks; it could take months. But in the PRO world we are distributing current moneys based on performances that occurred six months prior.

PROF. HUGHES: Right, right, right.

MR. REIMER: So we have the time to sort it all out.

PROF. HUGHES: You have the time lag.

MR. REIMER: Yes.

MR. CHISICK: I come from a jurisdiction where a lot of what is in the MMA has been tried as part of a private settlement of a different problem, which was the pending and unmatched royalties in the physical world, with a public claims process, with the reproduction right collectives — Canadian Musical Reproduction Rights Agency (CMRRA) and Society for Reproduction Rights of Authors, Composers, and Publishers in Canada (SODRAC) — jointly administering a claims process and finally a market share distribution.

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It's interesting that you hear all of these accusations that the publishers are somehow self-interested — and you can understand why the criticism is there — but in practice an enormous amount of the money that had not been distributed was distributed to the rightholders because there was suddenly an incentive to do that. The collecting societies, which are controlled by songwriters and publishers, have managed to do a pretty good job of doing that before the market share distribution occurred. So part of me wonders why there is the concern that this model cannot be replicated in the United States.

MR. STEINTHAL: I think the goal is to replicate that model.

MR. CHISICK: I understand. But we're hearing all of this ruckus about the publishers conspiring to keep the money out of the hands of the people who deserve it. That is inconsistent with what I've seen.

MR. STEINTHAL: From the services' perspective it's the publishers' and the songwriters' problem. We want to put the money in and let them figure out how to distribute it.

One of the other things we haven't talked about that is a huge problem is, what is the cost of this collective going to be? How is the money going to be raised to fund this very, very expensive undertaking? The MLC and AMLC had fundamentally different cost propositions advanced as to what this database was going to cost. The services are not going write a blank check, although they are going to have to write a big check. That is a big issue that is going to be litigated probably over the course of the next year.

MR. CHISICK: Does anybody want to address the question of cost?

PROF. HUGHES: I think it should be low. That's one reason why I spoke highly of SoundExchange. If you start with that, you have half the data already pretty authoritatively, and I think the cost should be fairly low.

MR. STEINTHAL: There are vendors out there — Harry Fox and MRI have been mentioned in this panel — the Society of Composers, Authors, and Music Publishers of Canada (SOCAN); and I think SESAC is now affiliated with Harry Fox — and there have been investments made by these companies that manage the lion's share of this data. The question is how to aggregate it all into one place and then sort through the data, to have a common way of processing it. It shouldn't be as expensive as one of the collectives said it would likely be.

PROF. HUGHES: Right. My last thing is that some of the cost might actually just be the cost of political compromise, not the cost of a real market. I am very concerned that the database we should go for is the most authoritative and the best, not the political compromise database.

MR. STEINTHAL: Hear, hear!

MR. SCIBILIA: Yes.

We talked today a lot about a lot of the things that the collective has to do, especially if they want to do it well, including finding the songwriters and matching the data to make sure the right people are getting paid.

The collective is a brand-new entity with a host of statutory responsibilities, which are set out in the Act at Section 115(d)(3)(C)(i). The collective's responsibilities include:

- Offering and administering blanket licenses;

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- Collecting and distributing royalties;
- Matching and identifying musical works in sound recordings (including manual efforts) and locating copyright owners;
- Maintaining and updating the rights database, including the transfer of rights;
- Administering the ownership claiming process and managing the claiming portal;
- Administering the collections of the administrative assessment and participating in assessment proceedings;
- Engaging in and responding to audits and filing bankruptcy claims;
- Reporting to stakeholders, including in annual and other reports;
- Managing disputes, including split disputes, for millions of works; and
- Monitoring and enforcing compliance with the terms of the license and the statute and its implementing regulations, including accurate calculation of royalty pools and rates and defaults in licensee reporting.

You cannot compare the collective's costs to what one service might pay to one vendor today because the collective will be engaging in nationwide activities on behalf of all blanket licenses and significant non-blanket licenses, and not just for streaming but also downloading. The scale is exponentially larger.

If you look at what the Congressional Budget Office budgeted for this — and they had experts look at this — they said it was going to cost roughly \$30 million per year.¹⁰

I think it's natural for the services to want to pay less because they are going to be funding it. But, at the same time, they have to make sure that the collective is not underfunded, because if it's underfunded, it can't perform its duties; where, on the other hand, if it's overfunded, it's not really a problem because the collective can just apply any excess to the next period.

Also, given that one of the collective's duties is enforcement with respect to accounting and payment by the services, one has to ask whether the services might benefit from underfunding because if the collective is underfunded, it would be less able to engage in these statutorily required enforcement efforts.

I also think any discussion of the costs of the collective to the services should also be tied to a discussion of the benefits of the collective to the services, in particular, the ability to obtain a blanket license and the limitation on liability from hundreds of millions of dollars in statutory damages provided they follow statutory procedure.

The MMA struck a bargain. The services wanted the limitation on liability and they wanted the ease and the protection of the blanket license. To obtain those benefits they agreed to fund the collective. Now they seem to want the benefits but without the burden.

MR. CHISICK: So you see, as I said at the beginning, consensus, everybody's happy, it's working out great, and we are all looking forward to seeing how it pans out. [Laughter]

¹⁰ See, e.g., Cong. Budget Office, S. 2823 Music Modernization Act Cost Estimate 3 (2018), <https://www.cbo.gov/system/files/2018-09/s2823.pdf>.

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Thank you to the panelists for a fantastic discussion. Thank you to Fordham for hosting us.