The Seesaw Effect: How Unregulated Negotiations Undermine Regulated Prices in the Market for Music Streaming

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ABSTRACT

Spotify, Pandora, and other firms that stream copyrighted music must acquire a variety of copyright permissions in order to legally stream even a single song. Federal law regulates the price charged for some of those necessary licenses, but other equally necessary licenses are sold in the unregulated market. This causes a seesaw effect where government efforts to raise or lower rates are blunted, or even fully reversed, by responsive private negotiations. In essence, in the hope of achieving one or another policy aim, the government dramatically orders a reduction in the price of right shoes, only to see the unregulated price of left shoes move correspondingly higher in return. In this Article, I consider the degree to which this largely ignored seesaw undermines the public policy stories that scholars, government officials, and industry stakeholders tell about the regulation of music streaming. Those stories turn out to be significantly incomplete, because the regulatory infrastructure is likewise significantly incomplete.

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INTRODUCTION

The Copyright Royalty Board is the administrative agency responsible for setting the fees and terms associated with certain compulsory licenses relevant to music streaming.[1] One license administered by the Board allows qualifying streamers to use the sounds captured in a prerecorded audio without directly acquiring permission from the rights-holding singers, musicians, and their representatives.[2] Because this license does not grant streamers any rights with respect to the song's words and notes, however, a streamer who invokes this license must in addition broker a deal with the lyricists, composers, and other songwriters who hold copyright with respect to the underlying composition. Indeed, if a streamer invokes the compulsory license with respect to a song's copyrighted sounds but fails to obtain consensual rights with respect to the song's underlying composition, the streamer cannot legally stream the song.

This connection between regulated rights and necessary, intertwined, unregulated rights sets the stage for a seesaw effect. Suppose, for instance, that the Board intentionally reduces the price of the above-referenced compulsory license, hoping to benefit streamers and in that way encourage additional long-term investment in streaming infrastructure. When a streamer approaches songwriters and their representatives to acquire the additional rights the streamer needs, those rights holders can plausibly raise their demand dollar for dollar. After all, if a streamer was willing to pay songwriters up to 20 cents back when the regulated price for use of the copyrighted sounds was 80 cents, that streamer will presumably be willing to pay up to 30 cents when the regulated price for use of the sounds drops to 70 cents. As a practical matter, the lower the regulated rate, the more money left on the unregulated negotiating table.

The Board has endeavored to grapple with this dynamic in the context of one specific rate-setting determination, struggling there with the question of how an increase in one particular regulated rate would impact a problematic unregulated one.[3] But regulatory seesaws raise an even more fundamental question than the narrow one the Board there pursued. After all, if parties engaged in unregulated interactions can compensate for and maybe even fully counteract regulatory decision-making, what purpose do the vulnerable regulations plausibly serve? Or, applied here, because some of the rights necessary for streaming are heavily regulated while other rights necessary for streaming are left to largely unregulated market forces, are the implicated regulatory interventions just so much black ink?

In this Article, I consider the degree to which the seesaw effect undermines the policy stories that academics, government officials, and industry stakeholders tell about

1. *See* 37 C.F.R. § 301.1 (establishing the entity); 17 U.S.C. § 801 (basic rules for its operation).

2. 17 U.S.C. § 114 (defining the compulsory license).

3. *See* Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), 84 Fed. Reg. 1918, 2026–28 (Feb. 5, 2019) [hereinafter Phonorecords III Order] (to be codified at 37 C.F.R. pt. 385) (highlighting the interaction between regulated and unregulated rates); Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), 88 Fed. Reg. 54406, 54409–54431 (Aug. 10, 2023) [hereinafter Phonorecords III Remand] (to be codified at 37 C.F.R. pt. 385) (revisiting the issue on remand).

the regulation of music streaming. I focus on music streaming for two reasons. First, from a copyright perspective, rights related to streaming are regulated to an unusually high degree.[4] Copyright licenses in general are negotiated in the unfettered market. Market forces determine whether Random House publishes an author's manuscript. Market forces again determine whether Paramount Pictures produces a movie based on that published book. For licenses relevant to music streaming, by contrast, market forces are subject to a thick web of idiosyncratic regulatory interventions, including, for example, explicit rules about how much money nonfeatured vocalists should be paid for their contributions to a streamed song,[5] and two government-negotiated consent decrees that today empower a group of federal judges to set rates for certain specific streaming rights.[6] The government, in short, is unusually active when it comes to the regulation of music streaming, frequently replacing market forces with intentional regulatory interventions.

Second, streamers cannot rely on these regulated offerings exclusively; streamers must in addition acquire, in unregulated transactions, other equally necessary copyright rights. That is, for a combination of legal and practical reasons, triggering every available federal intervention would still not suffice to allow a streamer to offer commercially viable service. Thus, every company that offers music streaming—Pandora, Spotify, Amazon, Apple, Google, iHeart, all of them—must at some point broker a consensual deal with at least one group of unregulated copyright holders. This is simply a consequence of how federal law defines and assigns the copyright rights relevant to streaming.

This confluence of factors—that copyright law protects music by way of an entangled web of complementary legal rights, and that the government regulates some of those necessary rights but does not regulate the others—makes possible a seesaw effect through which unregulated, intertwined, responsive private negotiations can in various ways undermine the government's regulatory decision-making. As I will explain in the sections that follow, that seesaw, in turn, significantly impacts the goals that government regulation can in this context realistically achieve.

My argument proceeds in four parts. In the first, I offer some necessary background on the law, vocabulary, and institutions relevant to music streaming. I explain how copyright law defines the rights to recorded music and how it distinguishes between different types of streamers, and I introduce the full cast of relevant characters, including record labels, music publishers, performing rights organizations, the Copyright Royalty Board, and the "rate courts" created under those two Justice Department consent decrees. In the second part, I examine the three justifications that

4. As the Copyright Office put the point in a 2015 report, "it is almost hard to believe" the degree to which the government intervenes in the market for music licensing. U.S. COPYRIGHT OFF., COPYRIGHT AND THE MUSIC MARKETPLACE: A REPORT OF THE REGISTER OF COPYRIGHTS 145–46 (2015) [hereinafter MUSIC MARKETPLACE].

5. 17 U.S.C. § 114.

6. These consent decrees were negotiated by the Justice Department and apply to two specific licensing intermediaries: the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI). *See infra* Part II.B.

scholars, government officials, and industry stakeholders typically voice in support of the government's idiosyncratic and heavy-handed approach to music streaming. Specifically, I consider the argument that compulsory licenses and antitrust oversight combine to reduce what would otherwise be cost-prohibitive transaction costs. I examine the degree to which compulsory licenses and antitrust oversight constrain market power. And I explore the possibility that government regulation in this space beneficially replaces market-mimicking outcomes with a *sui generis* balancing of the many competing interests. These traditional arguments are in my view compelling, but incomplete, in that they fail to account for the seesaw dynamic.

In the third part, I then take up that very challenge, integrating the seesaw effect into these conventional stories. With respect to the third justification—the idea that government intervention intentionally replaces market-mimicking outcomes with a *sui generis* approach—I argue that the seesaw effect significantly dampens the government's ability to reject market outcomes because unregulated, intertwined market interactions move much of the money back. As for market power, I argue that the government's ambitions with respect to market power are similarly undermined; this time because troublesome market power reasserts itself through those unregulated, intertwined deals. Lastly, for the transaction cost justification, I argue (first) that government interventions designed to reduce *existing* transaction costs motivate seesaw responses that ironically impose *new* ones, but (second) that those new transaction costs then support the government's overall ambitions, in that they slow private seesaw responses that would otherwise undo more of the government's regulatory achievements. Transaction costs, in essence, are transformed in this telling from villain to hero, because they make it harder for private parties to undo allocations that the government establishes as easy, initial, automatic defaults.

I briefly conclude in the fourth part, telling the story of that one time the Copyright Royalty Board itself did consider seesaw effects. Spoiler alert: The Board's initial analysis was reversed on appeal, and in the end the Board understandably punted, recognizing that stakeholders had not provided the Board with enough information to truly understand the phenomenon. In this fourth part I also sketch two reforms that could eliminate the regulatory seesaw and thereby preserve for the government fuller authority.

I. MUSIC RIGHTS AND MUSIC INSTITUTIONS

Music streaming implicates a jarringly complicated web of copyright rights, private licensing institutions, and governmental entities. In this section, I introduce the key vocabulary and the central players, but with a promise: As each rule or institution becomes relevant to my argument later in the Article, I will reintroduce the essential language, acronym, or entity, rather than expecting readers to memorize all the information and every acronym from the get-go. That said, the nuances of these rules and the identities of these private and governmental players do matter for understanding the seesaw effect. So, with apologies, I begin here with an abbreviated crash course on music rights and music institutions.

Recorded music is protected by two types of copyrights. One, the "sound recording" copyright, applies to the actual sounds made by the singer, musician, or other performing artist.[7] The other, the "musical work" copyright, applies to the underlying notes, lyrics, and other non-auditory details that might be reflected in the sound recording but can be fully captured on paper.[8] As the D.C. Circuit has explained, "[a]lthough almost always intermingled in a single song," these two rights "are legally distinct" and often will "be owned and licensed separately."[9] Typically, the rights to the musical work will initially vest in the songwriters, and the rights to the sound recording will initially vest in the performers.[10] Because copyrights can be divided and transferred,[11] however, those rights often end up being held by dozens of different entities, each of which might have authority to license some, but not all, of the necessary musical work and/or sound recording rights.[12]

A streaming service that allows listeners to choose specific songs is described in the law as an "interactive" service.[13] Familiar examples include certain offerings from Spotify, Apple, and Amazon. Copyright law requires interactive streamers to acquire five different permissions before streaming a copyrighted song: permission to make copies of the sound recording, permission to publicly perform the sound recording, permission to make copies of the musical work, permission to distribute copies of the musical work, and permission to publicly perform the musical work.[14] Radio-like

7. *See* 17 U.S.C. § 102(a) (defining "works of authorship" to include "sound recordings"); Music Choice v. Copyright Royalty Bd., 774 F.3d 1000, 1004 (D.C. Cir. 2014) (discussing this form of copyright protection).

8. *See* 17 U.S.C. § 102(a) (defining "works of authorship" to also include "musical works"); SoundExchange, Inc. v. Libr. of Cong., 571 F.3d 1220, 1222 (D.C. Cir. 2009) (discussing this form of copyright protection).

9. Recording Indus. Ass'n of Am., Inc. v. Libr. of Cong., 608 F.3d 861, 863 (D.C. Cir. 2010).

10. *See* 17 U.S.C. § 201 ("Copyright . . . vests initially in the author or authors of the work.").

11. *See* 17 U.S.C. § 201(d)(1) ("[C]opyright may be transferred in whole or in part by any means of conveyance or by operation of law.").

12. *See, e.g.*, DANA A. SCHERER, CONG. RSCH. SERV., R43984, MONEY FOR SOMETHING: MUSIC LICENSING IN THE 21ST CENTURY (2021) (explaining the typical business relationships and licensing patterns); U.S. COPYRIGHT OFF., HOW SONGWRITERS, COMPOSERS, AND PERFORMERS GET PAID (2020), https://www.copyright.gov/music-modernization/educational-materials/musicians-income.pdf [https://perma.cc/K6NR-4C3C] [https://web.archive.org/web/20240212133558/https://www.copyright.gov/music-modernization/educational-materials/musicians-income.pdf] (also explaining the typical relationships and patterns).

13. My definition in the text is a simplified one. A more formal version is codified at 17 U.S.C. § 114(j)(7), but even that definition is incomplete in that it fails to address countless critical details, including the proper characterization of a service that offers both interactive and noninteractive options, and the proper characterization of a service that does not allow user choice but does (say) announce its playlists in advance. Those details do not matter for my analysis, however, and so, for my purposes, I adopt the colloquial, accessible definition offered in the text.

14. These various rights are defined in 17 U.S.C. §§ 106, 114. Interestingly, I have not been able to find any published document that correctly lists the rights that interactive streamers need. For instance, a recent appellate opinion issued by the D.C. Circuit incorrectly states that interactive streamers must license six rights, wrongly listing the right to distribute copies of the sound recording alongside the five permissions that are actually necessary. *See* Johnson v. Copyright Royalty Bd., 969 F.3d 363, 367–68 (D.C. Cir. 2020). Similarly, an excellent law review article from 2021 lists four of the rights, inadvertently leaving out the

"noninteractive" services, by contrast, allow a listener to specify a song, an artist, a theme, or otherwise offer an indication as to their musical preferences, but then the technology picks which songs are actually played.[15] Pandora and iHeart each offer popular services in this category. Copyright law requires noninteractive streamers to acquire three different permissions before including a song in the mix: permission to publicly perform the musical work, permission to publicly perform the sound recording, and permission to make temporary "ephemeral" copies of the sound recording.[16] There are policy, historical, and political explanations for these distinctions, some of which are explored later in this Article. For now, however, what matters is that these are the rules under which Spotify, Pandora, Amazon, Apple, iHeart, Google, and other streamers today offer interactive and noninteractive services.

A complicated cast of characters is responsible for licensing streaming rights. Start with the private parties. A "record label" is a for-profit business that represents singers and other performers as they create, market, and license performances.[17] Record labels support their associated artists in a variety of ways, from overseeing the creation of initial recordings all the way through licensing those recordings, monitoring their use, and then collecting and distributing royalties. Record labels license streaming services directly, specifically licensing the public performance of sound recordings to both interactive and noninteractive streamers.[18] They also cut deals that allow their

necessary right to distribute musical work. *See* Daniel Abowd, *Something Old, Something New: Forecasting Willing Buyer/Willing Seller's Impact on Songwriter Royalties*, 31 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 574, 593 (2021). *But see* 17 U.S.C. § 115 (creating a compulsory license that covers the reproduction and distribution of a nondramatic musical work in the context of interactive streaming).

15. Again, my definition in the text here is a simplified version of the definition that actually applies when the Copyright Royalty Board is policing the relevant copyright rights. For the fuller articulation, see 17 U.S.C. § 114(d)(2)(C).

16. 17 U.S.C. § 106; *see* Joseph Dimont, *Royalty Inequity: Why Music Streaming Services Should Switch To a Per-Subscriber Model*, 69 HASTINGS L.J. 675, 682 (2018) (explaining the obligation to pay musical work copyright holders for public performance); Determination of Royalty Rates and Terms for Ephemeral Recording and Webcasting Digital Performance of Sound Recordings (Web IV), 81 Fed. Reg. 26316, 26316 (May 2, 2016) [hereinafter Web IV Order] (to be codified at 37 C.F.R. pt. 380) (noting noninteractive webcasters must pay for both the performance of the sound recordings and for the ephemeral copies needed to transmit them).

17. *See* U.S. COPYRIGHT OFF., *supra* note 12, at 8 (explaining the role of record labels); DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 69–84 (10th ed. 2019) (explaining the same).

18. Although the details are not public, the Copyright Royalty Board has disclosed the existence of several negotiated deals involving noninteractive streamers and major record labels. *See* Web IV Order, *supra* note 16, at 26324 n.44, 26325. As for interactive streamers, Spotify has publicly announced licensing agreements with several record labels. *See, e.g.*, Dani Deahl, *Spotify and Warner Agree To an 'Expanded' Global Licensing Deal*, THE VERGE (Apr. 1, 2020), https://www.theverge.com/2020/4/1/21203324/spotify-warner-agree-expanded-global-licensing-deal [https://perma.cc/GZ7U-3BYD] [https://web.archive.org/web/20240301023444/https://www.theverge.com/2020/4/1/21203324/spotify-warner-agree-expanded-global-licensing-deal]. Amazon has announced record label deals as well. *See, e.g.*, Tim Ingham, *After 15 Months of Deadlock . . . Universal Licenses Amazon Prime*, MUSIC BUS. WORLDWIDE (Sept. 29, 2015), https://www.musicbusinessworldwide.com/after-15-months-of-deadlock-universal-licenses-amazon-prime/ [https://perma.cc/67TL-TRKN] [https://web.archive.org/web/20240216231858/https://www.musicbusinessworldwide.com/after-15-months-of-deadlock-universal-licenses-amazon-prime/].

associated sound recordings to be released as albums, sold as digital downloads, or used in television programs, movies, and video games. Many of these companies provide additional related services too, such as promoting their artists in the media and representing their artists in litigation. The details of any given artist's relationship with their record label are determined by contract and vary depending on the needs and leverage of both the label and the artist. Three firms dominate this segment of the industry, with Universal Music Group, Sony Music Entertainment, and Warner Music Group holding estimated 2022 market shares of 33%, 23%, and 17%, respectively, as measured by digital revenue.[19]

Much like the record labels that support singers and other performers, "music publishers" are for-profit businesses that work with composers, lyricists, and other songwriters as they endeavor to create, market, and license musical compositions.[20] Music publishers engage in a wide variety of activities in support of the artists with whom they are associated. Publishers arrange for a songwriter's musical work to be reproduced as sheet music, for instance, and publishers are sometimes instrumental in identifying and then authorizing particular singers to create recorded versions of their songwriters' songs. Publishers also help songwriters find opportunities to license their music for inclusion in television programs, movies, and video games. Sony Music Publishing, Universal Music Publishing Group, and Warner Chappell Music are currently the three largest music publishers in the United States, with 2022 statistics showing Sony with 25% of industry revenue, Universal with 23%, and Warner with 12%.[21]

When it comes to ensuring that songwriters are paid for the public performance of their songs on AM radio, FM radio, satellite radio, and, relevant here, streaming services, songwriters and music publishers partner with yet another type of intermediary: performing rights organizations, or "PROs."[22] These firms negotiate directly with radio stations, noninteractive streamers, interactive streamers, television stations, stadiums, restaurants, and bars, offering either tailored licenses that allow for particular songs to be played or blanket licenses that allow the licensee to play all of the music associated with that PRO. PROs typically conduct statistical analyses to determine how often each song is being broadcast or streamed in general by licensees, and they distribute royalties based on these statistical estimates of each song's relative

19. *Recorded-Music Market Share Gains for SME and the Indies, Publishing Share Growth for UMPG and WCM*, MUSIC & COPYRIGHT'S BLOG (Apr. 25, 2023) [hereinafter *Market Share Data*], https://musicandcopyright.wordpress.com/2023/04/25/recorded-music-market-share-gains-for-sme-and-the-indies-publishing-share-growth-for-umpg-and-wcm/ [https://perma.cc/G76Q-89HP] [https://web.archive.org/web/20240307225352/https://musicandcopyright.wordpress.com/2023/04/25/recorded-music-market-share-gains-for-sme-and-the-indies-publishing-share-growth-for-umpg-and-wcm/].

20. *See* U.S. COPYRIGHT OFF., *supra* note 12, at 4–5 (explaining the role of music publishers); STEVE WINOGRADSKY & DAVID LOWERY, MUSIC PUBLISHING: THE COMPLETE GUIDE 103–82 (2d ed. 2019) (explaining the same).

21. *Market Share Data*, *supra* note 19.

22. *See* U.S. COPYRIGHT OFF., *supra* note 12, at 6 (explaining the role of PROs); PASSMAN, *supra* note 17, at 226–31 (same); WINOGRADSKY & LOWERY, *supra* note 20, at 19–32 (explaining the same).

popularity. In the event of a conflict with a potential licensee, a PRO has standing to sue on behalf of its publisher and songwriter members.[23] Broadcast Music, Inc. (BMI) is today the largest domestic PRO, with approximately 22 million songs under management.[24] The American Society of Composers, Authors and Publishers (ASCAP) is next, with a catalog of over 19 million songs.[25] There are then two other major but much smaller PROs active in the domestic market: the Society of European Stage Authors and Composers (SESAC) and Global Music Rights, Inc. (GMR).[26]

ASCAP and BMI both operate under detailed consent decrees that were originally put in place by the Department of Justice back in 1941 and have been updated in the years since.[27] Under the resulting rules, ASCAP and BMI are not allowed to be the exclusive licensor for any of their associated songs;[28] are required to license all comers;[29] and operate under the jurisdiction of federal "rate courts" that, among other powers, set rates in the event of a disagreement between licensor and licensee.[30] Rate court proceedings are very much like traditional litigation events, with testimony, discovery, expert witnesses, and the like. Rate courts are not standing institutions, however.

23. For a collection of the relevant cases, and an interesting discussion of associational standing in this context, see Andreas M. Petasis, *Associational Standing Under the Copyright Act*, 84 U. CHI. L. REV. 1517 (2017).

24. *See About*, BMI, www.bmi.com/about [https://perma.cc/48WD-VYQA] [https://web.archive.org/web/20240303202407/https://www.bmi.com/about] (last visited Mar. 10, 2024) ("As a global leader in music rights management, BMI serves as an advocate for the value of music, representing over 22.4 million musical works created and owned by more than 1.4 million songwriters, composers and music publishers.").

25. *See About Us*, ASCAP, https://www.ascap.com/about-us [https://perma.cc/KHJ3-YAE3] [https://web.archive.org/web/20240308012623/https://www.ascap.com/about-us] (last visited Mar. 10, 2024) ("We license over 19 million ASCAP songs and scores to the businesses that play them publicly, then send the money to our members as royalties.").

26. U.S. COPYRIGHT OFF., *supra* note 12, at 6 (identifying BMI, ASCAP, SESAC, and GMR as the four "most-often used U.S. PROs"); *see also* Makan Delrahim, Assistant Att'y Gen., Statement of the Department of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees (Jan. 15, 2021) [hereinafter Delrahim Remarks] ("[T]he country's two largest performing rights organizations . . . together represent approximately 90 percent of the public performance licensing market.").

27. The currently operative versions of the consent decrees are the amended versions adopted in 2001 for ASCAP and 1994 for BMI. *See* Second Amended Final Judgment, United States v. Am. Soc'y of Composers, Authors and Publishers, 2001 WL 1589999 (S.D.N.Y. 2001) [hereinafter ASCAP AFJ2]; Final Judgment, United States v. Broad. Music, Inc., 1966 U.S. Dist. LEXIS 10449 (S.D.N.Y. 1966), *modified*, 1994 U.S. Dist. LEXIS 21476 (S.D.N.Y. 1994) [hereinafter collectively referred to as BMI AFJ]; MUSIC MARKETPLACE, *supra* note 4, at 36.

28. ASCAP AFJ2, *supra* note 27, § IV(B); BMI AFJ, *supra* note 27, § IV(A). As I discuss later in this Article, the idea is to leave open the possibility that songwriters will directly license their works to at least some licensees, in that way competing with ASCAP and BMI. *See infra* notes 99–100 and accompanying text.

29. ASCAP AFJ2, *supra* note 27, § VI; BMI AFJ, *supra* note 27, § XIV(A). The intuition this time: stop ASCAP and BMI from threatening to withhold music during the potentially long pendency of a rate negotiation. *See infra* notes 101–02 and accompanying text.

30. ASCAP AFJ2, *supra* note 27, § IX; BMI AFJ, *supra* note 27, § XIV. The explanation here: The threat of rate court intervention pressures ASCAP and BMI to offer reasonable rates, and actual rate courts are then available to set rates in the event negotiations break down. For discussion, *see infra* notes 103–06 and accompanying text.

Instead, whenever a qualifying dispute arises, a federal judge from the Southern District of New York is chosen at random and authorized to conduct the necessary proceeding.[31]

The Copyright Royalty Board (CRB or Board), by contrast, is a standing "institutional entity in the Library of Congress" that "house[s]" three appointed "Copyright Royalty Judges"[32] who serve for renewable six-year terms.[33] The CRB oversees three compulsory licenses directly relevant to music streaming: the § 112 compulsory license that allows qualifying *noninteractive* streamers to reproduce copyrighted sound recordings without direct permission from sound recording copyright holders;[34] the § 114 compulsory license that allows qualifying *noninteractive* streamers to perform copyrighted sound recordings without direct permission from sound recording copyright holders;[35] and the § 115 compulsory license that allows qualifying *interactive* streamers to reproduce and distribute copyrighted musical works without direct permission from musical work rights holders.[36] Rates are determined by way of "ratemaking proceedings" where interested parties present evidence and make arguments before the three Royalty Judges, after which the judges establish the relevant rate, applicable for a five-year term.[37] CRB decisions can then be appealed to the D.C. Circuit Court of Appeals.[38]

II. THE CONVENTIONAL JUSTIFICATIONS

Copyright licenses are traditionally negotiated in the unfettered market. A movie studio hoping to create a film based on a published book must negotiate for that right. A toy company looking to produce action figures based on the movie must likewise engage in an unregulated market negotiation. Licenses relevant to music, however,

31. Judges in the Southern District of New York exercise continuing jurisdiction over the ASCAP and BMI consent decrees. *See, e.g.*, United States v. Broad. Music. Inc., No. 64 Civ. 3787, 1994 U.S. Dist. LEXIS 214676 (S.D.N.Y. 1994) (amending the BMI decree). Under the Music Modernization Act, a rate dispute arising under either decree is assigned at random to a judge in that district. Orrin G. Hatch-Bob Goodlatte Music Modernization Act, 28 U.S.C. § 137 (2018).

32. 37 C.F.R. § 301.1 (2005) ("The Copyright Royalty Board is the institutional entity in the Library of Congress that will house the Copyright Royalty Judges, appointed pursuant to 17 U.S.C. 801(a), and their staff.").

33. 17 U.S.C. § 802(c) ("[T]he terms of succeeding Copyright Royalty Judges shall each be 6 years.").

34. *See* 17 U.S.C. § 112(e)(1) (defining the available statutory license); Digital Performance Right in Sound Recordings and Ephemeral Recordings, 76 Fed. Reg. 13026 (Mar. 9, 2011) (setting rates and terms for that license for the years 2011 through 2015).

35. *See* 17 U.S.C. § 114(d)(2) (defining the available statutory license); Digital Performance Right in Sound Recordings and Ephemeral Recordings, 76 Fed. Reg. 13026 (Mar. 9, 2011) (setting rates and terms for that license for the years 2011 through 2015).

36. *See* 17 U.S.C. § 115 (defining the available statutory license); Phonorecords III Remand, *supra* note 3 (setting rates and terms for that license for the years 2018 through 2022).

37. *See, e.g.*, 17 U.S.C. § 804(b)(3) (stating that petitions to adjust the § 114 and § 112 compulsory rates "shall next be commenced in January 2009" and "shall be repeated in each subsequent fifth calendar year"); 17 U.S.C. § 804(b)(4) (stating that petitions to adjust the § 115 compulsory rate "may be filed in the year 2006 and in each subsequent fifth calendar year").

38. 17 U.S.C. § 803(d) ("Any determination of the Copyright Royalty Judges . . . may . . . be appealed, to the United States Court of Appeals for the District of Columbia Circuit . . . .").

have long been an exception to this general rule. In fact, since 1909, federal law has required rights holders in the music industry to license at least some qualifying counterparties at government-set rates.[39] Many of those regulations sound quaint to modern ears. One of the early rules, for example, obligated songwriters to allow their copyrighted work to be distributed with and performed by self-playing player pianos.[40] But, today, governmental interventions regulate the industry's core, in that they apply to music streaming, a market segment that in 2022 generated over $13 billion in revenue and accounted for a whopping 84 percent of the total monies earned from the licensing of recorded music.[41]

What justifies this heavy-handed, market-rejecting music exceptionalism? Scholars, regulators, lawmakers, and industry stakeholders have advanced three main theories. One is that transaction costs are particularly problematic for streaming.[42] The typical book has an author or two, and maybe an illustrator. Major motion pictures rely on tens to hundreds of individual creative contributors but, once a film is made, the rights to distribute a film are typically consolidated under the control of some manageably small number of rights holders.[43] But Spotify today wields an on-demand library of over 100 million songs.[44] Pandora picks its radio-like streams from among a rumored 50 million individual options.[45] And the ability to serve this "long tail" might well be critical to each service's value and success.[46] The transaction costs associated with identifying, negotiating with, and ultimately compensating tens of millions of rights holders would obviously be significant. So, on this theory, the government's various

39. Examples include the licenses codified at 17 U.S.C. §§ 112, 114, 115, 118. For a general introduction to the system of compulsory licenses, emphasizing the degree to which this approach breaks from the conventional private-market default, see MUSIC MARKETPLACE, *supra* note 4, at 145–46. *See also* Delrahim Remarks, *supra* note 26, at 5 (detailing the same).

40. I discuss this compulsory license *infra* notes 120–24 and accompanying text.

41. *U.S. Music Revenue Database*, RECORDING INDUS. ASS'N OF AM., https://www.riaa.com/u-s-sales-database/ [https://perma.cc/PJ6K-3H5T] [https://web.archive.org/web/20240222143113/https://www.riaa.com/u-s-sales-database/] (last visited Mar. 10, 2024) (summarizing industry data from 1973 through 2022).

42. For my detailed discussion, see *infra* Part II.A.

43. Indeed, courts have gone to great lengths to ensure that movie rights are consolidated rather than shared among some large number of contributors. *See* Garcia v. Google, Inc., 786 F.3d 733, 742 (9th Cir. 2015) (en banc) (refusing to "make Swiss cheese of copyrights" by recognizing rights in large number of contributors); Aalmuhammed v. Lee, 202 F.3d 1227, 1235–36 (9th Cir. 2000) (finding no rights to major motion picture even though plaintiff did in fact make copyright-eligible contributions to the film).

44. *See About Spotify*, SPOTIFY, https://newsroom.spotify.com/company-info/ [https://perma.cc/GB8Z-GSY5] [https://web.archive.org/web/20240222143526/https://newsroom.spotify.com/company-info/] (last visited Mar. 10, 2024).

45. Pandora does not offer a public estimate as to the number of songs in its library. Discussion boards and industry blogs seem to consistently put the number at roughly the number in the text, but none of those sites publicly disclose supporting evidence.

46. Chris Anderson, *The Long Tail*, WIRED (Oct. 1, 2004), https://www.wired.com/2004/10/tail/ [https://perma.cc/M4TX-5SV6] [https://web.archive.org/web/20240222144124/https://www.wired.com/2004/10/tail/] (arguing that entertainment services can maximize profit by focusing on large amounts of niche fare, with each offering appealing to just a small number of viewers, listeners, and subscribers).

market-displacing interventions are attractive because they obviate wasteful expenses and, in that way, make possible at least some deals that would be cost-prohibitive but for the interventions.

A second justification often advanced in support of copyright's music exceptionalism is a justification focused on market power.[47] Recall that "record labels" are the companies that identify, invest in, and market specific performers, helping those artists first to create and later to monetize their audio performances. Concentration is so significant in this part of the industry that today just three firms—the "Big Three" or "Majors"[48]—together control roughly 70% of all licensed music.[49] Music publishers provide similar services for songwriters and are similarly concentrated, with the three largest publishers sweeping an estimated 60% of the available monies.[50] Performing rights organizations represent songwriters in certain licensing transactions with bars, restaurants, stadiums, radio stations, and streamers. Market share for the two largest here is estimated to be near 90 percent.[51] Concentration has benefits, of course. It can reduce transaction costs and in other ways tap into economies of scale and scope. However, concentration can also lead to market power, and thus government intervention on this story is desirable because it constrains the rates that these concentrated entities charge.

The third justification typically advanced in favor of the modern music regulatory regime is one founded on copyright law's fundamental policy goals.[52] As noted previously, copyright law in general relies on market forces to calibrate incentives. A higher market-clearing price means a greater incentive for authors to create but a correspondingly lower incentive for downstream partners to publish, sell, and distribute. A lower market-clearing price reduces author incentives but leaves more

47. This theory is my focus *infra* Part II.B.

48. Universal Music Group, Sony Music Entertainment, and Warner Music Group are often referred to colloquially as the "Big Three" labels. *See, e.g.*, Ben Sisario, *A New Spotify Initiative Makes the Big Record Labels Nervous*, N.Y. TIMES (Sept. 6, 2018), https://www.nytimes.com/2018/09/06/business/media/spotify-music-industry-record-labels.html?smid=url-share [https://web.archive.org/web/20240222145353/https://www.nytimes.com/2018/09/06/business/media/spotify-music-industry-record-labels.html?smid=url-share] (media analyst Amy Yong referring to "the Big Three"); Joe Coscarelli, *Beatles Catalog Goes on Streaming Services*, N.Y. TIMES (Dec. 23, 2015), https://www.nytimes.com/2015/12/23/arts/music/beatles-fans-start-your-streaming-playlists.html [https://web.archive.org/web/20240222145557/https://www.nytimes.com/2015/12/23/arts/music/beatles-fans-start-your-streaming-playlists.html] (referring to Warner Music Group as "one of the so-called big three"); Joe Coscarelli, *Taylor Swift Announces New Record Deal with Universal Music*, N.Y. TIMES (Nov. 19, 2018), https://www.nytimes.com/2018/11/19/arts/music/taylor-swift-record-deal-universal-republic.html [https://web.archive.org/web/20240222150220/https://www.nytimes.com/2018/11/19/arts/music/taylor-swift-record-deal-universal-republic.html] (referring to Sony Music as "one of the other big-three labels"). The CRB does not seem to use that moniker, referring to those companies as the "Majors" instead. *See, e.g.*, Web IV Order, *supra* note 16, at 26319 (distinguishing "Majors" from the other, smaller independent record labels).

49. *See Market Share Data*, *supra* note 19 (reporting market share data for the largest record labels).

50. *See id.* (also reporting market share data for the largest music publishers).

51. *See* Delrahim Remarks, *supra* note 26 (explaining that the two largest PROs "represent approximately 90 percent of the public performance licensing market").

52. This theme is my focus *infra* Part II.C.

money on the table for those downstream partners and also for readers, listeners, and other potential consumers and licensees of the protected work. Government regulation displaces these market-based allocations, replacing them with government-influenced prices. This is attractive to scholars who are skeptical about how well market forces balance public policy tradeoffs in general, and it is also attractive to scholars who believe that, while market forces in most situations work well, there is something unique about the music industry, such as perhaps the particularly salient role played by technology companies in making music readily accessible. On this story, then, government intervention in music streaming is justified as a form of industry-specific optimization. The default market-based approach would result in one economic allocation as between singers, songwriters, musicians, record labels, music publishers, PROs, technology companies, and listeners; regulation empowers the government to establish another.

These three stories resonate. The regulatory regime applicable to music streaming can be justified as a response to transaction costs, it does to some degree cabin market power, and the system overall does rebalance copyright law's fundamental tradeoffs. Nevertheless, these compelling stories are problematically incomplete because the modern regulatory regime is itself problematically incomplete. Government regulations constrain the exercise of certain rights but do not constrain the exercise of other, equally necessary rights. In the next section, I will explain how these gaps make possible a seesaw effect that complicates and to some degree undermines the traditional stories. Here, I set the stage for that analysis by offering a fuller, industry-integrated telling of the three traditional explanatory tales.

A. THE TRANSACTION COST JUSTIFICATION

Many copyright markets are plagued with transaction costs. Warner Brothers, for instance, holds valuable copyrights related to popular fictional characters like Batman and Harry Potter. The company is open to certain types of technically infringing fan fiction because, even when infringing, fan stories and fan art increase awareness of and engagement with the company's movies and television programs. The administrative costs of individually evaluating and approving fan uses, however, would be enormous; thus, because of transaction costs, some win-win fan activities are chilled. That is, even if Warner would approve a given use because it might generate interest in the relevant Warner property while not meaningfully competing with any of Warner's own offerings, transaction costs mean that the studio cannot practically implement a program where individual, mutually beneficial uses are identified and authorized in a timely manner. So, Warner historically has had little choice but to leave the threat of legal action in place, discouraging at least some uses that Warner would embrace, if only practical constraints allowed.[53]

53. Two fun and thoughtful introductions to some of these issues are Yvette Joy Liebesman, *Redefining the Intended Copyright Infringer*, 50 AKRON L. REV. 765 (2016), and Tim Wu, *Tolerated Use*, 31 COLUM. J.L. & ARTS 617 (2008).

Private parties endeavor to mitigate transaction costs, of course. Consider the market for educational reprints. College professors often assign diverse readings to their students, pulling a chapter from one book, a few pages from another, and so on, sometimes drawing materials from dozens or even hundreds of different copyrighted sources. (Sorry.) Early on, academics, colleges, and universities took the position that federal law should excuse copying of this sort because the costs of identifying and negotiating with all the relevant copyright holders would, in at least some situations, be prohibitive.[54] Publishers, however, saw the problem, too, and they responded by pooling together to create clearinghouses (like the Copyright Clearance Center[55]) through which professors today can easily acquire the necessary permissions. Courts, in turn, have lauded this private approach, recognizing that it reduces transaction costs, facilitates the desirable downstream use of copyrighted materials, and at the same time ensures that publishers and authors are paid for their original work.[56]

Cleverly, Warner Brothers itself developed a private response to its transaction cost problem, specifically for its Harry Potter properties.[57] Warner's first Harry Potter film was released in 2001, but the last film in the original series was not released until ten years later, in 2011. Company executives thus had to worry that fans would lose interest in between film releases. Fan websites and fan stories obviously could help keep the momentum alive during those lulls, encouraging conversations about the Harry Potter franchise and even growing the fan base by introducing the characters and stories to new audiences. Moreover, for Warner's executives, fan content also offered some degree of genuine personal satisfaction; in addition to making money for the company, the movies in this way would inspire young people to write their own creative stories

54. For a good discussion and also helpful citations, see Kenneth D. Crews, *The Law of Fair Use and the Illusion of Fair-Use Guidelines*, 62 OHIO ST. L.J. 599, 615–21 (2001).

55. The Copyright Clearance Center (CCC) is a not-for-profit corporation established in 1977 by a consortium of publishers, authors, and copyright users to "act[] as a centralized clearinghouse for the granting of reproduction rights for books, journals, newspapers, and other works to corporate, academic, and other users." Brief *Amici Curiae* of Copyright Clearance Center, Inc. et al. in Support of Petitioners at 1, Author's Guild v. Google, Inc., 578 U.S. 941 (2016) (No. 15-849). The CCC obtains from rights holders a nonexclusive right to license; offers royalty-bearing licenses to would-be users; and pays the monies, net of expenses, back to rights holders. *Id.* Interestingly, it entered operation on January 1, 1978, the same day that the current Copyright Act took effect. *Id.*

56. *See* Am. Geophysical Union v. Texaco, Inc., 60 F.3d 913, 930–31 (2d Cir. 1995) (copying, although made by researchers in the course of their work, was not permissible fair use because the relevant copies could easily have been licensed). The allure of this approach turns at least in part on the assumption that consensual transactions will properly incentivize both the creation of this material and its use. That might not be a valid assumption. Research and education both generate significant positive externalities that are not fully captured in any would-be copyist's willingness to pay. Given that, it is not clear how well consensual transactions in these examples calibrate overall incentives, even after transaction costs are addressed. *See* William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659 (1988) (considering fair use through this broader, cost-benefit lens); Glynn S. Lunney, Jr., *Fair Use and Market Failure:* Sony *Revisited*, 82 B.U. L. REV. 975, 996 (2002) (discussing the same).

57. The information in this paragraph comes from an episode of my podcast, The Intellectual Property Colloquium, where I discussed these issues with then-Warner Brothers Senior Vice President Jeremy Williams. See Doug Lichtman, *Derivative Work*, INTELL. PROP. COLLOQUIUM (Sept. 8, 2009) (on file with author).

and generate their own creative art. So, Warner's legal team adopted a policy under which the company would not pursue legal action against any work that was "by fans, for fans, for fun," a simple guideline that could be easily communicated to the public, easily reinforced internally, and would not only avoid the transaction costs associated with item-specific review but also distinguish, with reasonable accuracy, harmful from helpful fan projects.

Copyright law does not rely exclusively on private efforts, however. Copyright law itself in various ways addresses these administrative challenges. Perhaps the most commonly referenced example here is one first identified by Wendy Gordon: the fair use doctrine, which, as a general matter, empowers courts to excuse what might otherwise be infringing activity in instances where public policy sufficiently favors an exception. Years ago, Gordon compellingly argued that many fair use findings are best explained as a means by which to avoid crippling transaction costs.[58] Certain types of fan fiction are fair use on this theory, given the transaction cost issues discussed above. Certain types of educational copying also qualify on this theory. For instance, if a professor has a legitimate educational reason to duplicate a news story that first became available just hours before class was set to begin, fair use would presumably excuse the copying because of the benefits to learning and the impracticality of timely seeking (let alone paying for) permission.[59]

Compulsory licenses are another mechanism by which copyright law addresses transaction costs, as Rob Merges long ago explained.[60] Under a compulsory license, a

58. Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the* "Betamax" *Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1601 (1982). A rich literature expands on and critiques Gordon's original insight. *See* Ben Depoorter & Francesco Parisi, *Fair Use and Copyright Protection: A Price Theory Explanation*, 21 INT'L. REV. L. & ECON. 453 (2002); Tom W. Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C. L. REV. 557 (1998); Wendy J. Gordon, *Excuse and Justification in the Law of Fair Use: Transaction Costs Have Always Been Only Part of the Story*, 50 J. COPYRIGHT SOC'Y U.S. 149 (2003).

59. *See* H.R. REP. NO. 94-1476, at 68–70 (1976) (explaining considerations relevant to classroom copying, including whether "it would be unreasonable to expect a timely reply to a request for permission").

60. Robert P. Merges, *Of Property Rules, Coase, and Intellectual Property*, 94 COLUM. L. REV. 2655, 2661–62 (1994) ("[A] common rationale for the several statutory compulsory licenses in copyright law is that they are needed in order for certain types of exchange to take place. Transaction costs preclude the formation of a market for certain types of rights; in the absence of statutorily mandated transactions, none would take place."); *see also* Stanley M. Besen et al., *Copyright Liability for Cable Television: Compulsory Licensing and the Coase Theorem*, 21 J.L. & ECON. 67 (1978) (explaining how compulsory licensing addresses various market failures); Ralph Oman, *The Compulsory License Redux: Will It Survive in a Changing Marketplace?*, 5 CARDOZO ARTS & ENT. L. REV. 37 (1986) (discussing the same); Mark A. Lemley & Philip J. Weiser, *Should Property or Liability Rules Govern Information?*, 85 TEX. L. REV. 783, 792 (2007) (noting that compulsory licenses provide compensation and "may be appropriate where the production of a particular type of work requires clearances of so many rights, or rights are so hard to find, that doing so would be uneconomic"); Yafit Lev-Aretz, *The Subtle Incentive Theory of Copyright Licensing*, 80 BROOK. L. REV. 1357, 1378 (2015) ("By removing the difficulties involved in identifying and locating rightsholders, bargaining over licensing fees, and transferring assets, compulsory licenses lessen transaction costs and allow many transfers that would not otherwise occur."); Pamela Samuelson, *Justifications for Copyright Limitations & Exceptions*, *in* COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS 12, 38 (Ruth L. Okediji ed., 2017) (writing that compulsory licenses can address "market failures" including the potentially prohibitive costs of "negotiating licenses on a work-by-work and rightsholder-by-rightsholder basis").

qualified party can pay a government-set rate and then use the licensed work without directly seeking permission from the implicated copyright holder. Licensor and licensee in this way avoid the costs they would have incurred in finding one another, and they also avoid the costs associated with negotiating, documenting, and ultimately enforcing a deal. An intuitive example is the compulsory license that allows cable television providers to retransmit copyrighted television programs as they are aired on qualifying local broadcast channels.[61] A cable provider could, in theory, scour each broadcaster's schedule in advance, identify every upcoming program, contact every relevant copyright holder, and then negotiate with each for permission to simulcast. But the costs of doing so would be high, maybe even prohibitively high, given the large number of programs, rights holders, and cable providers, let alone the tight time constraints.[62] Thus, in 1976, Congress put in place a statutory compulsory license under which a cable provider is automatically granted permission to retransmit these programs as long as the cable provider pays the applicable fee and otherwise complies with certain rules about the resulting transmissions.

Antitrust law is yet another tool in copyright law's cost-containing arsenal. Consider in this light the Department of Justice's antitrust enforcement efforts with respect to the "performing rights organizations" (PROs) that license, on behalf of songwriters and their representatives, the public performance of musical work. When live music is performed in a restaurant or bar, copyright law requires that either the performer or the venue license the underlying musical works.[63] A license is required even when a performance takes place in the background, and even if it is offered to patrons at no charge.[64] When an AM or FM radio station plays a recorded song, that station, too, must license their use of any copyrighted words and notes. Individual songwriters cannot plausibly enforce these legal rights, however, as there are simply too many bars, restaurants, radio stations, and, frankly, hours in the day. So, a handful of organizations—the aforementioned "performing rights organizations"—do this work on behalf of their music publisher and songwriter members.[65] These organizations send representatives to spot-check public venues. They use statistical sampling to determine how often each song is played in those venues, and also on the AM and FM dial. And they ultimately negotiate licenses with venues and stations, collecting

61. 17 U.S.C. § 111 (compulsory license for secondary transmissions of broadcast programming).

62. *See* H.R. REP. NO. 94-1476, at 89 (1976) (endorsing the compulsory approach because "it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner"); Distribution of 1998 and 1999 Cable Royalty Funds, 80 Fed. Reg. 13423, 13428 (Mar. 13, 2015) (justifying the compulsory license in light of the potentially "prohibitively high 'transaction costs'" that would otherwise be incurred); Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 130 (2004) ("[I]n the case of cable re-transmissions, the argument might be that transactions costs, the possibility of holdouts, and other strategic behavior by copyright owners might make it impossible for cable companies to effectively obtain licenses for all of the works that they wish to retransmit.").

63. *See* 17 U.S.C. § 106(5) (recognizing a public performance right in musical work).

64. Herbert v. Shanley Co., 242 U.S. 591, 594–95 (1917) (concluding that even background music, included at no explicit marginal cost, is "part of a total for which the public pays" in pursuit of an overall "pleasure not to be had from eating a silent meal").

65. *See generally supra* notes 22–31 and accompanying text.

royalties that are then distributed to songwriters and their various business partners. Two organizations have long dominated this clearance market: the American Society of Composers, Authors & Publishers (ASCAP), which today represents 960,000 songwriters, composers, and music publishers;[66] and Broadcast Music, Inc. (BMI), which enforces rights and collects monies on behalf of a staggering 1.4 million members.[67]

The Department of Justice filed its first antitrust action against ASCAP in 1934, and by 1941 the Department had filed a second action against ASCAP and also a first case against BMI.[68] As Lionel Sobel points out, however, the motivation here was not some fundamental hostility to the idea of collective enforcement. Quite the opposite, the Department "recognized that it would be impossible for individual composers and music publishers to police the public performance of their works"—transaction costs—and thus understood that collective action was to some extent justified.[69] The Department objected, however, to the fact that, rather than offering song-specific licenses, ASCAP and BMI sold "blanket licenses" under which a licensee had no choice but to purchase access to every song in the relevant entity's catalog.[70]

Transaction costs did offer a justification for this practice. Radio stations and restaurants do not necessarily know in advance which songs they will feature on any given day. And, while paying in arrears could work in theory, that approach would require costly record-keeping and detailed monitoring. Blanket licenses, by contrast, are agnostic as to these details. Prices can be a function of station revenues or, for restaurants and bars, based on the amount of money paid to the live performers,[71] and monies can then be distributed based not on venue-specific data but on more forgiving, market-wide averages. Blanket licenses offer another advantage, too: After acquiring a

66. *See* ASCAP, https://www.ascap.com/ [https://perma.cc/3NLT-RK42] [https://web.archive.org/web/20240216025239/https://www.ascap.com/] (last visited Mar. 10, 2024) ("ASCAP is a performing rights organization of 960,000 songwriters, composers and music publishers.").

67. *See* BMI, https://www.bmi.com [https://perma.cc/C9LC-NZNY] [http://web.archive.org/web/20240210061247/https://www.bmi.com/] (last visited Mar. 10, 2024) ("BMI represents more than 1.4 million songwriters, composers, and publishers with over 22.4 million musical works.").

68. The history of these two legal disputes is retold in countless court cases, government documents, and academic articles. *See also* United States v. Am. Soc'y of Composers, Authors and Publishers, 870 F. Supp 1211 (S.D.N.Y. 1995); United States v. Broad. Music, Inc., 64 Civ. 3787 (S.D.N.Y. 2001); Meredith Corp. v. SESAC LLC, 1 F. Supp. 3d 180 (S.D.N.Y. 2014); Lionel S. Sobel, *The Music Business and the Sherman Act: An Analysis of the Economic Realities of Blanket Licensing*, 3 LOY. L.A. ENT. L. REV. 1 (1983); MUSIC MARKETPLACE, *supra* note 4.

69. Sobel, *supra* note 68, at 3.

70. Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 10 (1979) (clarifying that the government's original focus was on the blanket licenses offered by ASCAP and BMI, including allegations that those blanket licenses were themselves an illegal restraint on trade and that they facilitated illegal price fixing).

71. Sobel, *supra* note 68, at 6–7 (explaining some of the fee structures used for bars, restaurants, and broadcasters).

blanket license, licensees are free to pick songs based on their and their customers' in-the-moment preferences, no further negotiations or calculations required.[72]

The Justice Department was concerned, however, because blanket licenses reduce competition. Were songwriters forced to negotiate with bars and radio stations individually, they would compete head-to-head for business. A songwriter with rights to a popular song would endeavor to extract a higher royalty. A songwriter with less of a following might offer a discount in exchange for extra exposure. Blanket licenses eliminate this competitive interaction.[73] As the economist Adam Jaffe reminded the Department of Justice a few years back, copyright is by design an individual right. "For many individual composers to [then] put their works in the hands of a single agent and empower that agent to negotiate for the licensing of the overall repertoire is a form of collusion that greatly amplifies whatever market power each composer possesses acting on their own."[74]

Nevertheless—and this is the critical takeaway—antitrust law made room for collective and blanket licensing anyway because these mechanisms reduce transaction costs. Specifically, in 1941, the Department of Justice signed consent decrees with ASCAP and BMI.[75] Those decrees have been revised over time but are still in force today. They forbid ASCAP and BMI from becoming the exclusive licensor for any musical work.[76] They obligate ASCAP and BMI to immediately license any would-be licensee, even before rates are finalized.[77] They create judicial "rate courts" that have the power to set reasonable fees in the event licensees reject whatever ASCAP and BMI offer.[78] But they permit ASCAP to represent its nearly-one-million members, permit BMI to represent more-than-one-million members, and permit both to offer, among

72. As Kevin Murphy puts the point, "blanket license[s] allow[] the user to make unlimited performances of the licensed works at no marginal cost," thereby allowing them "to choose which works to perform and how much to perform each work in the way that creates the greatest possible value." Kevin M. Murphy, Economic Considerations for Modification and Termination of the ASCAP Consent Decree 8 n.12 (Aug. 9, 2019) (unpublished manuscript) (quoting Kevin M. Murphy, The Collective Licensing of Music Performance Rights: Market Power, Competition and Direct Licensing 8 (2012)), https://media.justice.gov/vod/atr/ascapbmi2019/pc-044a.pdf [https://perma.cc/Y2B7-L3TW] [https://web.archive.org/web/20240412183301/https://media.justice.gov/vod/atr/ascapbmi2019/pc-044a.pdf].

73. *Broad. Music, Inc.*, 441 U.S. at 32–33 (1979) (Stevens, J., dissenting) (writing that blanket licenses deprive new songwriters of the "opportunity to try to break into the market by offering his product for sale at an unusually low price"); Joint Public Comments of Radio Music License Committee and Digital Media Association on ASCAP/BMI Consent Decree Review, at 34 (Aug. 9, 2019) [hereinafter RMLC/DMA Comments] (writing that blanket licenses "eliminate any incentive for individual copyright owners to bargain or compete against each other").

74. ADAM B. JAFFE, ECONOMIC ANALYSIS OF THE ASCAP AND BMI CONSENT DECREES 8 (Aug. 9, 2019).

75. Although the ASCAP and BMI consent decrees are not identical, "they have generally been understood to call for the same set of restrictions on ASCAP and BMI." Comments of the Television Music License Committee, LLC in Connection with the Department of Justice Review of the ASCAP and BMI Consent Decrees, at 39 (Aug. 9, 2019) [hereinafter TMLC Comments]; *see also* MUSIC MARKETPLACE, *supra* note 4, at 36 (stating the same).

76. ASCAP AFJ2, *supra* note 27, at § IV(B); BMI AFJ, *supra* note 27, at § IV(A).

77. ASCAP AFJ2, *supra* note 27, at § VI; BMI AFJ, *supra* note 27, at § XIV(A).

78. ASCAP AFJ2, *supra* note 27, at § IX; BMI AFJ, *supra* note 27, at § XIV.

other options, catalog-wide blanket licenses. That is, the settlements allow for potentially problematic concentration of power because concentration also reduces transaction costs.

Against this backdrop, it is easy to voice the transaction cost explanation for the heavy role government plays in licensing music to streaming services. Start with the underlying problem. Pandora and iHeart do not publicly reveal the size of their respective song catalogs, but Spotify, Apple, and Amazon each boast on-demand libraries exceeding 100 million songs.[79] The costs of licensing all of that music—song by song, streamer by streamer, spin by spin—would be staggering. There would be challenges in identifying the relevant rights holders, difficulties in confirming compliance with whatever deals were actually struck, and a storm of song-specific payments that would constantly need to be made and audited. Money that could go toward incentivizing the creation of new music or rewarding the development of new distribution technologies would be lost to paperwork, lawyers, and bickering. Moreover, in some instances, administrative costs would be so significant that songs would be dropped from the various repertoires entirely, the benefits derived from inclusion being insufficient to offset the costs associated with cutting the requisite deals.

Private parties have been able to lighten these burdens in part. For instance, record labels are powerful cost-reducers, in that even a single label like Sony Music can, in one transaction, license various rights associated with literally millions of sound recordings.[80] The streamer iHeartMedia, in fact, cut a deal of that sort with Warner Music in 2021,[81] and Spotify has over the years cut separate deals like that with Sony, Warner Music, and Universal Music Group, indeed giving the labels partial ownership

79. *About Spotify*, *supra* note 44 ("Today, more listeners than ever can discover, manage, and enjoy over 100 million tracks, 5 million podcast titles, and 350,000 audiobooks . . . on Spotify."); Press Release, Apple, Celebrating 100 Million Songs (Oct. 3, 2022), https://www.apple.com/newsroom/2022/10/celebrating-100-million-songs/#:~:text=Apple%20Music's%20global%20head%20of,phenomenal%20growth%20by%20any%20metric [https://perma.cc/D9WV-6BQS] [https://web.archive.org/web/20231126032305/https://www.apple.com/newsroom/2022/10/celebrating-100-million-songs/]; *Apple Music*, APPLE, https://www.apple.com/apple-music/ [https://perma.cc/MGT9-KSCY] [https://web.archive.org/web/20240308060447/https://www.apple.com/apple-music/] (last visited Mar. 10, 2024) ("Over 100 million songs and 30,000 playlists, always ad-free."); Press Release, Amazon, Amazon Music Expands Its Prime Benefit, Now with a Full Catalog of Music and the Most Top Podcasts Ad-Free (Nov. 1, 2022), https://press.aboutamazon.com/2022/11/amazon-music-expands-its-prime-benefit-now-with-a-full-catalog-of-music-and-the-most-top-podcasts-ad-free [https://perma.cc/H9CH-BVRF] [https://web.archive.org/save/https://press.aboutamazon.com/2022/11/amazon-music-expands-its-prime-benefit-now-with-a-full-catalog-of-music-and-the-most-top-podcasts-ad-free].

80. *See Market Share Data*, *supra* note 19 (detailing market share data for Sony, Warner, and Universal); *cf.* SONY, SUPPLEMENTAL INFORMATION FOR THE CONSOLIDATED FINANCIAL RESULTS FOR THE FOURTH QUARTER ENDED MARCH 31, 2023, at 14 (Apr. 28, 2023) (reporting that Sony's music publishing arm owned and administered 5.46 million songs as of March 31, 2022).

81. *See* Testimony of Daniel R. Fischel and Douglas G. Lichtman, submitted in the matter of Determination of Royalty Rates and Terms for Ephemeral Recording and Webcasting Digital Performance of Sound Recordings (Web IV) at 8, CRB Docket No. 14-CRB-0001-WR (2016–2020) (Oct. 4, 2014) (Public Redacted Version) (evaluating a "license agreement that iHeartMedia signed with Warner Music").

of Spotify in exchange for millions of copyright permissions.[82] ASCAP and BMI reduce costs in this market as well; the same consent decrees that allow ASCAP and BMI to offer large-scale blanket licenses to bars and radio stations are today read to allow ASCAP and BMI to also license streamers, and again at a many-million-song scale. Smaller competitors offer blanket licenses covering their smaller catalogs, too, so far without any legal challenge from the Justice Department.

Compulsory licenses then round out the government's available cost-containing tools. Section 114 of the Copyright Act offers a compulsory license under which a noninteractive streamer can use copyrighted sound recordings in the context of their radio-like services. Specifically, the § 114 license allows eligible streamers "to perform sound recordings without an individual license from the copyright owner, provided they pay the statutory royalty rates for the performance of the sound recordings and for the ephemeral copy of the sound recording necessary to transmit it."[83] The § 112 license then covers the making of that ephemeral (temporary) copy.[84] Rates for both licenses are set by the Copyright Royalty Board, once every five years, under a standard where rates are to approximate the rates that "would have been negotiated in the marketplace between a willing buyer and a willing seller"[85] in a hypothetical market that is at least somewhat competitive.[86] Monies are collected by the rights management organization SoundExchange,[87] which in turn distributes the cash to copyright holders and also directly to contributing vocalists and musicians, again without the need for costly direct negotiations.

Under § 115 of the Copyright Act, meanwhile, interactive streamers are allowed to reproduce and distribute copyrighted musical works without direct permission from the implicated songwriters and their representatives.[88] Rates for this so-called "mechanical" license are also set once every five years by the Copyright Royalty Board, and under current law those rates also approximate the "rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller,"

82. *See* Ben Sisario, *As Spotify Goes Public, Sony Cashes in*, N.Y. TIMES (Apr. 4, 2018), https://www.nytimes.com/2018/04/04/business/media/as-spotify-goes-public-sony-cashes-in.html [https://web.archive.org/web/20240310173844/https://www.nytimes.com/2018/04/04/business/media/as-spotify-goes-public-sony-cashes-in.html] (reporting that Sony licensed Spotify in exchange for approximately 5.7 percent of the company, and estimating that Universal and Warner each owned approximately 4 percent by way of similar deals).

83. Determination of Rates and Terms for Digital Performance of Sound Recordings and Making of Ephemeral Copies To Facilitate Those Performances (Web V), 86 Fed. Reg. 59452, 59452 (Oct. 27, 2021) (to be codified at 37 C.F.R. pt. 380); *see also* 17 U.S.C. § 114(f).

84. 17 U.S.C. § 112(e).

85. 17 U.S.C. § 112(f)(1)(B).

86. *See, e.g.*, Determination of Rates and Terms for Digital Performance of Sound Recordings and Making of Ephemeral Copies To Facilitate Those Performances (Web V), 86 Fed. Reg. 59452, 59452 (Oct. 27, 2021) (to be codified at 37 C.F.R. pt. 380) (summarizing the standard applicable to both compulsory licenses); *Id.* at 59454–55 (discussing what it means for a hypothetical market to be "effectively competitive").

87. See U.S. COPYRIGHT OFF., supra note 12, at 10–11 (explaining the role played by SoundExchange); Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, § 3(b), 116 Stat. 2780, 2781 (2002) (codified as amended at 17 U.S.C. § 114) (establishing the rules under which SoundExchange receives these funds).

88. 17 U.S.C. § 115.

with special emphasis on (1) "whether use of the compulsory licensee's service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the musical work copyright owner's other streams of revenue from its musical works" and also (2) the "relative roles of the copyright owner and the compulsory licensee . . . with respect to relative creative contribution, technological contribution, capital investment, cost, and risk."[89] Monies paid under this compulsory license are efficiently collected and distributed by the Mechanical License Collective, an entity designated by the Copyright Office to serve this specific, transaction-cost-reducing purpose.[90]

Scholars, stakeholders, and regulators have long perceived all of this and understood the implication: In streaming markets, copyright law embraces compulsory licensing and relies on significant antitrust forbearance because, in doing so, the law at least partially addresses a plausible concern about the administrative costs of licensing. That is, Kristelia García is right when she asserts that, in this context, "individual negotiation with numerous, disparate rights holders would be both time and cost prohibitive," whereas compulsory licensing "allows for efficient en masse licensing of content and subsequent scalability of service where individual transactions are not practicable."[91] Jacob Victor is likewise correct when he describes as "the dominant explanation" the notion that copyright law "tolerates compulsory licensing" so that "a distributor like Pandora can forgo negotiations with a large number of individual music copyright holders" and in that way "bypass costly or unfeasible" negotiations.[92] Judge Ralph Winter compellingly captured this same intuition when he wrote, in an opinion related to the ASCAP and BMI consent decrees, that the ASCAP and BMI blanket licenses "eliminate costly, multiple negotiations," "reduce the costs of licensing copyrighted musical compositions," and thus are appropriately tolerated despite their potential anticompetitive impact.[93] Simply put, transaction costs are at least a partial explanation for the idiosyncratic rules that today govern music streaming.

B. THE MARKET POWER JUSTIFICATION

As explained in the prior subsection, the compulsory licenses and antitrust consent decrees that govern music streaming can be justified, at least in part, as a response to the high transaction costs that would otherwise hamper licensing in this market. As is also clear from that same discussion, however, interventions that reduce transaction costs often also lead to a new problem: private amalgamations of artists and/or rights

89. 17 U.S.C. § 115(c)(1)(F).

90. *See About Us*, THE MLC, https://www.themlc.com/our-story [https://perma.cc/HPQ5-G5L3] [https://web.archive.org/web/20240222171815/https:/www.themlc.com/our-story] (last visited Apr. 3, 2024) (explaining the MLC's status).

91. Kristelia A. García, *Penalty Default Licenses: A Case for Uncertainty*, 89 N.Y.U. L. REV. 1117, 1127 (2014).

92. Jacob Victor, *Reconceptualizing Compulsory Copyright Licenses*, 72 STAN. L. REV. 915, 919–20 (2020).

93. Buffalo Broad. Co. v. Am. Soc'y of Composers, Authors & Publishers, 744 F.2d 917, 934 (2d Cir. 1984) (Winter, J., concurring).

that raise serious concerns about possible anticompetitive effects.[94] Thus, a second conventional justification for the consent decrees and compulsory licenses applicable to music streaming is that these idiosyncratic interventions constrain the exercise of market power.

This is easy to see in the context of the ASCAP and BMI consent decrees. As Lionel Sobel emphasizes in his telling of the history, while the Justice Department knew that ASCAP and BMI facilitate beneficial licensing activities that would otherwise be cost-prohibitive for individual songwriters, [95] the Department also knew that these intermediaries could cause market distortions.[96] The ASCAP and BMI consent decrees were thus intended to cabin that risk. For instance, the consent decrees forbid ASCAP and BMI from taking exclusive rights to the musical works they license.[97] The idea is to leave open the possibility that, in at least some situations, individual rights holders can compete with ASCAP and BMI by offering deals directly to would-be licensees.[98] The decrees also require ASCAP and BMI to immediately grant licenses to "any music user making a written request therefor";[99] that restriction stops ASCAP and BMI from gaining leverage in a negotiation by even temporarily threatening to withhold one or the other catalog.[100]

94. Commentators regularly point out this link between transaction costs and market power. *See, e.g.*, Thomas M. Lenard & Lawrence J. White, *Moving Music Licensing into the Digital Era: More Competition and Less Regulation*, 23 UCLA ENT. L. REV. 133, 142 (2016) (collective licensing reduces transaction costs but "is highly likely to create market power issues"); Xiyin Tang, *Copyright's Techno-Pessimist Creep*, 90 FORDHAM L. REV. 1151, 1162 (2021) ("[F]or the same reasons that blanket licenses are efficient, the consolidation of so many musical works also presents serious anticompetitive concerns."); Statement of the Department of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees, at 2 (Aug. 4, 2016) (explaining that blanket licenses "enable music users to immediately obtain access to millions of songs without resorting to individualized licensing determinations or negotiations" but this mechanism "risks lessening competition" and thus has "long raised antitrust concerns").

95. Sobel, *supra* note 68, at 3.

96. *Id.* at 5–6.

97. ASCAP AFJ2, *supra* note 27, at § IV(B); BMI AFJ, *supra* note 27, at § IV(A).

98. *See* TMLC Comments, *supra* note 75, at 13 ("[T]he Consent Decrees serve to bar ASCAP and BMI from obtaining exclusive rights to license their affiliated copyright owners' works" and in that way preserve "the right of users such as local television stations to secure performance rights licenses directly from composers and music publishers."); RMLC/DMA Comments, *supra* note 73, at 29 ("ASCAP and BMI must not be the exclusive channel through which a music user can seek a license to use the songs in their repertories, so that individual copyright holders can still, potentially, compete against each other on price and other terms."); JAFFE, *supra* note 74, at 10 ("ASCAP and BMI are prohibited from restricting their affiliated rightsholders' ability to negotiate individually to license their works, in order to mitigate their collusive market power by allowing for the possibility of competition alongside the collective licensing.").

99. ASCAP AFJ2, *supra* note 27, § IX. The BMI consent decree uses different language, to the same effect. BMI AFJ, *supra* note 27, § I (stating that applicants "shall have the right to use any, some or all of the compositions in defendant's repertory" even before the terms of that license have been finalized).

100. *See* TMLC Comments, *supra* note 75, at 11 ("[T]he Consent Decrees bar 'gun to the head' licensing tactics by requiring ASCAP and BMI to issue licenses on request, thereby preventing ASCAP and BMI from using the threat of crippling copyright infringement litigation if the licensee does not agree to whatever license fees and terms the PRO demands."); RMLC/DMA Comments, *supra* note 73, at 29 ("ASCAP and BMI must issue licenses on request, even if final deal terms have not been hammered out, so that they cannot use the threat of imminent copyright infringement claims . . . to extract eleventh-hour concessions from licensees."); JAFFE, *supra* note 74, at 10 ("ASCAP and BMI must grant a license to anyone who requests one,

Most significantly along these lines, under both consent decrees, if there is a dispute about the appropriate fee to be charged for a given license, would-be licensees can petition judges in the Southern District of New York to set a "reasonable" rate.[101] The decrees do not provide specific guidance for making that determination, but over the years courts have established that the rate must reflect "the fair market value for a particular license," where "fair market value" in this context means "the price that a willing buyer and a willing seller would agree to in an arm's length transaction."[102] As one rate court decision summarized the point, a "rate court must concern itself principally with 'defin[ing] a rate . . . that approximates the rates that would be set in a competitive market.'"[103] Or, as the Second Circuit warned when reviewing a rate court decision, "rate-setting courts must take seriously the fact that they exist as a result of monopolists exercising disproportionate power over the market for music rights."[104]

Without these protections, licensees would be vulnerable to a wide range of potential abuse. For example, in order to negotiate effectively about rates and terms, would-be licensees need to know which rights are controlled by which entity. As radio stations, television stations, and countless other licensees have long complained, however, this information is often unavailable as a practical matter. In 2019, for instance, a trade group representing Amazon, Apple, Google, Pandora, Spotify, and YouTube joined with a coalition of radio stations to file comments in response to a Justice Department inquiry about the ASCAP and BMI consent decrees. Among other issues, the group complained that "neither ASCAP nor BMI provide potential licensees with bulk, machine-readable access to their repertory databases, and both disclaim the reliability of what limited information they do provide on their websites."[105] As a result,

because restricting access to the collective product is the mechanism by which a cartel (i.e., the PRO) elevates the price.").

101. ASCAP AFJ2, *supra* note 27, § IX; BMI AFJ, *supra* note 27, § XIV. Rate court review obviously protects against the exercise of market power. *See, e.g.*, Memorandum of the United States in Response To Motion of Broadcast Music, Inc. To Modify the 1966 Final Judgment Entered in This Matter at 9, United States v. Broad. Music, Inc., 1994 WL 16189511 (S.D.N.Y. June 20, 1994) (No. 64 Civ. 3787) ("[E]mpowering the Court to resolve licensing disputes when negotiations between BMI and music users break down is sound enforcement policy" and "an effective restraint on potential abuse of market power."); Brief for the United States at 24, United States v. Broad. Music, Inc., 275 F.3d 168 (2d Cir. 2001) (No.00-6123(LEAD)) ("BMI and the government agreed at the time the rate court provision was entered that it was to be a constraint on BMI's market power."); Memorandum of Defendant Broadcast Music, Inc. in Support of Motion To Modify Consent Decree at 30, United States v. Broad. Music, Inc., 1994 WL 16189513 (S.D.N.Y. June 27, 1994) (No. 64 Civ. 3787) ("The proposed modification [to add a Rate Court] substitutes a rate court mechanism for BMI's right to withhold access to its repertoire, thus further limiting any possible market power BMI might derive as a result of its accumulation of performing rights to over 2 million compositions.").

102. United States v. Broad. Music, Inc., No. 64 Civ. 3787 (LLS), 2001 WL 829874, at *4 (S.D.N.Y. July 20, 2001); *see also* Am. Soc'y of Composers, Authors & Publishers v. Showtime/The Movie Channel, Inc., 912 F.2d 563, 569 (2d Cir. 1990).

103. United States v. Am. Soc'y of Composers, Authors and Publishers, No. Civ. 13-95 (WCC), 1993 WL 60687, at *16 (S.D.N.Y. Mar. 1, 1993).

104. United States v. Broad. Music, Inc., 426 F.3d 91, 96 (2d Cir. 2005). Just the threat of rate court intervention should typically suffice to pressure ASCAP and BMI to offer reasonable rates because all parties know that unreasonable offers can be brought up for review.

105. RMLC/DMA Comments, *supra* note 73, at 7.

"radio and digital music services are regularly forced to enter into license negotiations where the [licensors] claim to collectively control well over 100% of performances on the relevant service" and where licensees "are simply unable to ascertain what they are, and are not, licensing."[106] These challenges seemingly persist. A telling sign: ASCAP still today publicly disclaims the accuracy of its own data, noting on its website that "ASCAP makes no guarantees, warranties or representations of any kind with regard to . . . the accuracy, completeness, timeliness, quality or reliability of any information made available on and through"—wait for it—the very search tool that ASCAP itself provides to potential licensees.[107]

The issue here is likely in part strategic, with intermediaries hoping to gain leverage by intentionally obfuscating the details of what they can and cannot license.[108] But it is also likely more than that. For example, successful songs are often written by teams of writers. The ten most-streamed songs in 2018, for instance, each credited an average of 9.1 individuals.[109] Those writers and their copyrights from time to time move from one music publisher to another, and those publishers from time to time move from ASCAP to BMI, BMI to ASCAP, or from ASCAP and BMI to other licensing entities like SESAC and GMR. Multiply that commotion by (say) the 100 million songs currently included in Spotify's library and adjust for practical challenges like the fact that ASCAP at one point represented "nine different composers named 'Brian Smith'" and two additional composers listed as "Brian David Smith"[110] . . . and the result, as lawyers for both Netflix and the National Cable & Telecommunications Association explained in a recent submission to the Justice Department, is an understandable information quagmire.[111] No wonder licensees claim to have little choice but to take blanket licenses

106. *Id.*

107. *ASCAP Repertory Search—Terms of Use Agreement*, ASCAP, https://www.ascap.com/help/legal/ace-terms-of-use [https://perma.cc/8CD9-UQLL] [https://web.archive.org/web/20240218200917/https://www.ascap.com/help/legal/ace-terms-of-use] (last visited Mar. 10, 2024).

108. Ample evidence suggests that at least some of the obfuscation is intentional. For example, when a coalition of radio stations sued SESAC in 2013, the magistrate judge conducted an early evidentiary hearing on the coalition's then-pending motion for a preliminary injunction. After the hearing, the magistrate issued written findings, including a finding that SESAC "engaged in exclusionary conduct by failing to disclose its repertory and [thereby] ensuring that users have no alternatives but to purchase [SESAC's] licenses." Radio Music License Comm., Inc. v. SESAC Inc., No. 12-CV-5807, 2013 WL 12114098, at *20 (E.D. Pa. Dec. 23, 2013). A judge in the Southern District of New York found that Sony used a similar tactic in its negotiations with Pandora. In that instance, Sony had refused to share a list of the songs in its repertory even though it "had a list readily at hand" because "Sony understood that it would lose an advantage in its negotiations with Pandora if [Sony] provided the list of works" and thus Sony "deliberately chose not to do so." In re Petition of Pandora Media, Inc., 6 F. Supp. 3d 317, 344 (S.D.N.Y. 2014). That said, ASCAP and BMI have in recent years promised to be more transparent. *See* Delrahim Remarks, *supra* note 26, at 4.

109. Tim Ingham, *How To Have a Streaming Hit in the USA: Hire 9.1 Songwriters (and a Rap Artist)*, MUSIC BUS. WORLDWIDE (Jan. 6, 2019), https://www.musicbusinessworldwide.com/how-to-have-a-streaming-hit-in-the-us-hire-9-1-songwriters-and-a-rap-artist/ [https://perma.cc/5Q5W-HS3C] [https://web.archive.org/web/20240218203432/https://www.musicbusinessworldwide.com/how-to-have-a-streaming-hit-in-the-us-hire-9-1-songwriters-and-a-rap-artist/].

110. JAFFE, *supra* note 74, at 5.

111. KENNETH STEINTHAL ET AL., SUBMISSION OF AUDIOVISUAL MEDIA LICENSES REGARDING REVIEW OF ASCAP AND BMI CONSENT DECREES 9–10, 22 (2019) (explaining various information challenges and

from both ASCAP and BMI. To do otherwise would be to accept a very high risk that some necessary right was accidentally left uncleared.

Like the consent decrees, the compulsory licenses applicable to music streaming serve to constrain market power.[112] Start with the rights governed by § 112 and § 114. As explained in the previous subsection, noninteractive streamers need permission to publicly perform the copyrighted sound recordings they include in their streams, and they also need permission to make temporary copies of those sound recordings in order to facilitate the streamed performances.[113] Transaction costs make it hard to license those rights directly from the relevant artists, so record labels like Sony Music, Warner Music Group, and Universal Music offer bigger, many-song licenses. Those amalgamations reduce transaction costs, true; but, if not for the § 112 and § 114 compulsory licenses, those licenses would likely be priced at levels far above the competitive level.

The issue this time is not merely that these three firms are large.[114] They are; indeed, as noted previously, concentration in this part of the market is so significant that industry insiders call Sony, Warner, and Universal "the Big Three," and even the Copyright Royalty Board refers to them as "the Majors" when issuing rate-setting determinations.[115] The problem is that these three catalogs have achieved "must have" status: The only way for a noninteractive streamer to offer a commercially viable radio-like service is to take licenses from all three record labels.[116]

Pandora ran experiments to show this empirically.[117] In 2014, for certain subsets of its customers, Pandora intentionally increased its use of music controlled by one of the Majors and correspondingly decreased its use of music from the other two. The relevant listeners were not informed of the change. For all they knew, they were receiving normal radio-like streams created by the normal preference-driven Pandora algorithm. What Pandora found was that, while the company could increase or decrease a label's percentage of plays by 15% without causing a noticeable negative

asking that ASCAP and BMI be required to make available accessible, comprehensive, reliable information). Tellingly, even ASCAP and BMI have trouble keeping track of the necessary information. *See* U.S. DEP'T OF JUSTICE, STATEMENT OF THE DEPARTMENT OF JUSTICE ON THE CLOSING OF THE ANTITRUST DIVISION'S REVIEW OF THE ASCAP AND BMI CONSENT DECREES 13–16 (2016) (Despite "their years of experience" and "their established relationships with music creators, [ASCAP and BMI] often do not make distributions until weeks or months *after* a song is played, and even then do so imperfectly.").

112. *See* Daniel A. Crane, *Intellectual Liability*, 88 TEX. L. REV. 253, 270 (2009) ("Copyright compulsory licenses are justified as a means of preventing the exercise of market power in copyright licensing or its creation in downstream markets."); Michael J. Meurer, *Vertical Restraints and Intellectual Property Law: Beyond Antitrust*, 87 MINN. L. REV. 1871, 1906 (2003) ("Copyright law has enacted compulsory licenses to moderate the danger that exclusive licenses can be used to create market power in downstream markets.").

113. *See supra* note 16 and accompanying text.

114. *See* Web IV Order, *supra* note 16, at 26374 ("[T]he Judges do not find that the mere size of the Majors or their share of the noninteractive market is in itself anticompetitive.").

115. *Id.*

116. *See* Web IV Order, *supra* note 16, at 26373 ("There appears to be a consensus that the repertoire of each of the three Majors is a 'must have' in order for a noninteractive service to be viable.").

117. The details discussed in the text were all reported in the public Web IV final determination. *See id.* at 26357–58.

response, a change of 30% caused the average listener to significantly reduce the number of hours spent listening to Pandora.[118] Pandora has not publicly reported any experiments where it completely eliminated all music associated with one of the Majors, but the Copyright Royalty Board deemed these "steering" experiments sufficient to establish the basic point: "[S]teering away from [the Majors'] repertoires cannot be pursued beyond a certain level," and "the Majors' repertoires [are] 'must haves' even though noninteractive services [can] steer away from them to an extent."[119]

If there were no compulsory license, each of the Big Three would be able to use this "must have" status to extract a significant price premium above and beyond the market-clearing prices they would earn were each song licensed individually. Sony would literally threaten to put a specific streamer out of business by withdrawing all of its associated songs. So would Warner. So would Universal. Thanks to the compulsory license, however, none of the Big Three can fully wield this market power. In the face of any such threat, a noninteractive streamer would simply invoke the government license and pay the regulated rate. The existence of the compulsory license thus neutralizes this type of market power. Streamers can negotiate with the Big Three record labels, knowing all the while that full catalog withdrawal is not a credible threat.

A similar analysis applies to the compulsory license codified in § 115, which is the license that today allows interactive streamers to pay a government-set rate for permission to reproduce and distribute musical work. Section 115 was first introduced in 1909 and was what Howard Abrams endearingly describes as "copyright's first compulsory license."[120] As Abrams tells the story,[121] the cutting-edge technology for music distribution back then was a device called the player piano, which was a self-playing piano that, in those days, would receive music on rolls of paper, with the relevant notes and patterns encoded as tiny perforations.[122] The Aeolian Corporation was the dominant distributor of player pianos, but its dominance was based at least in part on copyright: A large number of music publishers had agreed to give Aeolian exclusive rights to hundreds of thousands of copyrighted compositions, thereby denying to Aeolian's rivals what might well have been commercially necessary music.[123] Worried that a "cartel of music publishers" would in this way use concentrated copyright rights to distort competition, Congress created the § 115 compulsory license, requiring copyright holders to license all manufacturers at the same government-set

118. From the public record, it is unclear whether this result held for all three of the Majors, or just for Universal and Sony. *Id.* at 26358 (summarizing that "Pandora was unable to steer -30% or +30% for Universal or Sony without creating a statistically significant change in listening behavior" but not mentioning Warner).

119. *Id.* at 26373 n.155.

120. Howard B. Abrams, *Copyright's First Compulsory License*, 26 SANTA CLARA HIGH TECH. L.J. 215 (2010). For another excellent introduction to this history, see Lydia Pallas Loren, *The Dual Narratives in the Landscape of Music Copyright*, 52 HOUSTON L. REV. 537, 545–49 (2014).

121. Abrams, *supra* note 120, at 217–21.

122. The technology is explained in White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 9–10 (1908), *aff'g* 147 F. 226 (2d Cir. 1906), *aff'g* 139 F. 427 (C.C.S.D.N.Y. 1905).

123. Abrams, *supra* note 120, at 219.

rate, with no possibility of exclusive deals.[124] Musical work copyright holders would be paid, but they were not allowed to pick winners by licensing one firm while denying access to another.

Section 115 has obviously expanded significantly over the years, but the underlying economic issues are largely unchanged. Sony Music Publishing, Universal Music Publishing Group, and Warner Chappell are today the three largest music publishers.[125] Their catalogs might well be large enough to constitute "must have" assets akin to the sound recording catalogs licensed by the Big Three. Even if they are not so categorized, however, were even one of these publishers to deny access to a given streamer while licensing that streamer's rivals, the denied streamer would certainly find itself at a significant competitive disadvantage. Section 115 therefore precludes this potential exercise of market power. If a record label takes an aggressive position, the implicated streamer can license the necessary rights directly from the government by way of the compulsory license or, more commonly, license those rights through the Harry Fox Agency, which is an intermediary that offers a license modeled after the compulsory one but with slightly less onerous reporting requirements.[126] Either way, and indeed across all of these examples, market power is checked because, at worst, the government—through consent decrees and compulsory licenses—guarantees access and caps prices.[127]

C. THE PUBLIC POLICY JUSTIFICATION

The previous two subsections considered two of the three justifications typically offered to explain why the government might rightly take a heavy-handed approach when it comes to music streaming: Government intervention might be a justified response to transaction costs, and government intervention might be a justified response to market power. This subsection considers a third and slightly more nuanced explanation: Even in the absence of transaction costs and market power, the government might still rightly intervene in order to tailor the flow of monies in this

124. *Id.*; Loren, *supra* note 120, at 548. The Copyright Royalty Board tells a similar story about the origins of the § 115 compulsory license, acknowledging Congress's concerns with respect to monopolization but also emphasizing Congress's interest in balancing "the exclusive rights of owners of copyrighted musical works" with "the public's interest in access" to those works. *See* Phonorecords III Order, *supra* note 3, at 1918. Jacob Victor takes the position that, while the "monopolization explanation makes sense to a point," the compulsory license is better understood as an attempt to allow an "access-expanding" technology to "flourish, while still ensuring that copyright owners received some compensation." *See* Victor, *supra* note 92, at 922, 940; *see also* Jane C. Ginsburg, *Copyright and Control over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613, 1626–27 (2001) (considering monopolization, compensation, and access rationales); Peter DiCola & Matthew Sag, *An Information-Gathering Approach To Copyright Policy*, 34 CARDOZO L. REV. 173, 202 (2012) (describing the license as a compromise between copyright holders' interest in compensation and piano roll manufacturers' interest in developing that nascent industry).

125. *See supra* note 21 and accompanying text.

126. *See* Loren, *supra* note 120, at 549 n.54 (explaining the Harry Fox license).

127. *See* Phonorecords III Order, *supra* note 3, at 1933 (explaining that one reason to have a compulsory license "is to prevent the licensor from utilizing or monetizing the ability to 'walk away' as a cudgel to obtain a better bargain").

market so as to address public policy challenges that are applicable to music streaming and arguably not well handled by copyright law's market-deferring defaults.

Consider first those market defaults. Copyright law is an incentive system. In the words of the Supreme Court, it is designed to "motivate the creative activity of authors"[128] while at the same time "promoting innovation in new communication technologies"[129] and supporting "broad public availability of literature, music, and the other arts."[130] Balancing all of this is an enormous challenge, and copyright law for the most part relies on market forces to fill in the details. That is, questions about how much money should go to a given author, or how expensive a given book or video should be, are typically resolved not by government fiat but by the give-and-take interactions of buyers and sellers. The hope is that, through self-interested market transactions, authors, licensors, distributors, and audiences will together end up participating in a set of transactions, interactions, and payments that achieve all of copyright law's various policy purposes,[131] or at least achieve them more effectively than could any other plausible regime.[132]

Transaction costs and market power interfere with this process. Transaction costs make it difficult for market participants to cut deals. Market power distorts deals that are nevertheless struck. As a result, one way to conceptualize the consent decrees and compulsory licenses applicable to music streaming is to think of them as recreating through regulation the market outcomes that transaction costs and market power would otherwise spoil. Thus, for example, the ASCAP and BMI rate courts define as "reasonable" the rate that a "willing buyer" would pay a "willing seller" in a hypothetical market subject to effective competition. That standard on this view is just a formal way

128. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

129. Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 1008 (2005).

130. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (footnotes omitted).

131. As the Justice Department reiterated in its most recent review of the ASCAP and BMI consent decrees, the "very foundation" of copyright law is that "the best, most efficient way to allocate resources—and the most effective way to maximize consumer welfare—is through allowing parties to negotiate, to set prices based on supply, demand, and available information." Delrahim Remarks, *supra* note 26, at 5; *see also* Mazer v. Stein, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'"); Victor, *supra* note 92, at 927 ("[C]opyright entitlements are expected, according to some, to optimally embody a tradeoff between incentives and access, allowing authors to profit off their works through the market while still ensuring that the public and other creators are not unduly restricted from accessing them.").

132. The government does motivate some creative and innovative activity by offering direct cash grants, including from the National Endowment for the Arts, the Defense Advanced Research Projects Agency, and the National Institutes of Health. An expanded system along these lines could in theory accomplish many of copyright law's goals but without the use of market mechanisms. That said, such a system would be hopelessly impractical, in that it would be vulnerable to abuse (the relevant political leaders favoring their preferred authors and projects) and also to well-meaning error (paying too much for one creative work, too little for another). For discussion, see Doug Lichtman, *The Economics of Innovation: Protecting Unpatentable Goods*, 81 MINN. L. REV. 693, 704 n.36 (1997); Doug Lichtman, *Pricing Prozac: Why the Government Should Subsidize the Purchase of Patented Pharmaceuticals*, 11 HARV. J.L & TECH. 123 (1997); Michael Abramowicz, *Perfecting Patent Prizes*, 56 VAND. L. REV. 115 (2003); Benjamin N. Roin, *Intellectual Property Versus Prizes: Reframing the Debate*, 81 U. CHI. L. REV. 999 (2014).

of articulating the underlying goal: emulate standard market outcomes by way of various regulatory interventions. The Copyright Royalty Board uses a similar market-mimicking standard for at least some of its rate determinations.

That said, commentators and lawmakers sometimes imagine for the government a more ambitious role. This time, compulsory licenses and consent decrees are not designed to emulate the market outcomes that would be achieved were costs low and the market reasonably competitive. Compulsory licenses and consent decrees instead intentionally deviate from those idealized market results and in that way even more effectively balance copyright law's complicated and interrelated purposes.

There are hints along these lines throughout the Copyright Act. For instance, before it was amended in 2018, § 801(b) required that the CRB price the § 115 compulsory license such that the resulting rate was "reasonable" in light of four statutory objectives: "maximize the availability of creative works to the public"; "afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions"; "reflect the relative roles of the copyright owner and the copyright user in the product made available to the public"; and "minimize any disruptive impact on the structure of the industries involved."[133] Those words might simply have been Congress's way of articulating what a well-functioning market would naturally achieve. Market forces, for instance, should naturally "afford the copyright owner a fair return" and "reflect the relative roles of the copyright owner and the copyright user in the product made available to the public." But it is possible that Congress in addition meant to introduce policy considerations beyond those that would be addressed by conventional market forces, rejecting the conventional approach of using market forces to calibrate copyright incentives and replacing it with a streaming-specific variant focused on these particular factors.

Similarly, while § 114 requires that the CRB set certain compulsory rates such that the rates represent what a "willing buyer" and "willing seller" would negotiate in the marketplace,[134] that statutory provision goes on to require that the CRB consider "whether use of the [compulsory licensee's] service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner's other streams of revenue from the copyright owner's sound recordings" and "the relative roles of the copyright owner and the [compulsory licensee] in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk."[135] Again, Congress here might simply be explaining what market forces would inevitably achieve were transaction costs eliminated and market power constrained. But it is also possible that Congress meant to suggest something more: a streaming-specific tradeoff between competing copyright interests that differs from the conventional, market-mediated outcome.

133. *See* 17 U.S.C. § 801(b)(1) (2011) (amended 2018).
134. 17 U.S.C. § 114(f)(1)(B).
135. 17 U.S.C. § 114(f)(1)(B)(i).

Some decisions issued by the Copyright Royalty Board likewise seem to pursue outcomes that are not market-mimicking. In 2019, for instance, the CRB announced new rates and terms for the § 115 license. The decision was based in part on market evidence, and the rates were explicitly adjusted to account for the "oligopoly power" and "bargaining constraints" that otherwise taint private market negotiations.[136] But the decision went on to explicitly rely on a game-theoretic algorithm that purportedly establishes a "fair" division of surplus as between record labels, music publishers, and streamers.[137] That allocation had been described by some testifying economists as if it reflects market outcomes,[138] but a more plausible interpretation of both the algorithm and the CRB's implementation is that "fairness" in this instance was an entirely distinct conclusion about the degree to which singers, songwriters, and technology companies should each benefit from streaming revenues.[139] The CRB, in essence, was directly implementing public policy—"fairness"—rather than mimicking some idealized market structure.

Another example along these lines is an allocation rule buried deep in the weeds of the § 114 compulsory license. Specifically, under § 114(g)(2), monies collected under that license must be distributed such that "50 percent of the receipts [are] paid to the copyright owner of the exclusive right . . . to publicly perform [the] sound recording"; "45 percent of the receipts [are] paid, on a per sound recording basis, to the recording

136. *See*, *e.g.*, Phonorecords III Order, *supra* note 3, at 1933.

137. *See*, *e.g.*, Phonorecords III Order, *supra* note 3, at 1947–52 (introducing Shapley analysis); *id.* at 1948 (explaining that Shapley analysis is a "game theory model that is ultimately designed to model the outcome in a hypothetical 'fair' market environment"); *id.* at 1958–59 (further discussing Shapley analysis).

138. Professor Joshua Gans asserted in a 2016 CRB filing that Shapley's "fairness" analysis can be used to estimate the royalties "that would prevail in an unconstrained market." Expert Report of Joshua Gans, submitted in the Matter of Determination of Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), No. 16-CRB-003-PR (2018–2022) (on behalf of Copyright Owners) (Oct. 31, 2016) at 31. Professor Richard Watt wrote in a 2017 filing that Shapley analysis "mimics what a free and unrestricted market negotiation would yield." Written Rebuttal Testimony of Richard Watt (PhD), submitted in the Matter of Determination of Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), CRB Docket No. 16-CRB-003-PR (2018–2022) (on behalf of the National Music Publishers' Association and the Nashville Songwriters Association International) (Feb. 13, 2017) at 15. Professor Watt followed up in 2021 with the assertion that that the Shapley methodology "reflects effective competition." Written Direct Testimony of Richard Watt (PhD), submitted in the Matter of Determination of Rates and Terms for Making and Distributing Phonorecords (Phonorecords IV), CRB Docket No. 21-CRB-0001-PR (2023–2027) (on behalf of Copyright Owners) (Oct. 13, 2021) at 9. Professor Robert Willig testified in 2019 that "Shapley Values are an appropriate approach for assessing rates that would be negotiated in the hypothetical marketplace . . . ." Written Direct Testimony of Robert Willig, submitted in the Matter of Determination of Rates and Terms for Digital Performance of Sound Recordings and Making of Ephemeral Copies To Facilitate Those Performances (Web V), CRB Docket No. 19-CRB-005-WR (2021–2025) (on behalf of SoundExchange) (Sept. 26, 2019) at 12. These interpretations are in my view indefensible, in that Shapley analysis was neither designed to simulate market interactions nor is it so capable. *See* Doug Lichtman, *Shapley Analysis: A Cautionary Tale,* HARV. J. SPORTS & ENT. L. (forthcoming 2024).

139. *See* Phonorecords III Order, *supra* note 3, at 1948 (evaluating various rate proposals in terms of whether they reflect a "fair division" of the available surplus, embody a "fair rate" for the license, and align with "public utility-style" intuitions about cost recovery); *id.* at 1959 (interpreting the relevant legal standard as one designed "to move [the Judges'] determination of new rates for existing licenses beyond a strictly market-based analysis"); *id.* at 1959 n.156 (acknowledging that, in general, "microeconomic principles . . . do not provide insights as to what constitutes 'fairness'").

artist or artists featured on such sound recordings"; and five percent is split evenly between "nonfeatured musicians" and "nonfeatured vocalists" who perform on the sound recordings.[140] This allocation is flatly inconsistent with traditional copyright allocations. Under traditional rules, after all, royalties paid for a *copyright* license go to the *copyright* holder, full stop. And Congress knew it. The House Judiciary Committee acknowledged in a written report recommending the change that, under conventional rules, "record companies [would typically be the] authors of both the performance and the sound engineering portions of the sound recordings, and thus the sole rightsholders"; and, as a result, performers would be paid only according to the terms of their contracts. [141] Then-Register of Copyrights Marybeth Peters likewise acknowledged in prepared written testimony that copyright law by default would distribute these monies differently.[142] The Judiciary Committee, however, was acting intentionally, very explicitly trying "to ensure that a fair share of the digital sound recording performance royalties goes to performers . . . ."[143]

Some commentators take the position that the government's idiosyncratic approach to music streaming is best explained by this theory. That is, these commentators argue that the regulatory regime is best understood as the implementation of a set of intentional, market-rejecting policy choices. Jacob Victor, for instance, recently argued that the "primary function" of various interventions in music licensing "has been to recalibrate the balance between creators' financial incentives and public access to expressive works in situations where free market licensing would yield problematic outcomes."[144] Tim Wu argued back in 2004 that compulsory licenses and various "technologically specific immunities" combine to create a "de facto communications policy" that endeavors to facilitate competition between, and promote innovation by, firms that disseminate copyrighted information.[145] Jessica Litman frames many of these same interventions more cynically, seeing them as a mix of rent-seeking and self-interested advocacy by various stakeholders in the creative and technology fields, each trying to replace copyright law's default rules with tailored alternatives that favor their own economic and artistic interests.[146] Differences aside, these commentators are correct in their high-level message: In addition to the transaction cost and market power justifications, a third plausible justification for the government's heavy-handed interventions with respect to music streaming is a justification tied to copyright law's fundamental policy tradeoffs. That is, through these interventions, the government

140. 17 U.S.C. § 114(g)(2).

141. Report of the Committee on the Judiciary, Digital Performance Right in Sound Recordings Act of 1995, H.R. REP. NO. 104-274, at 23–24 (1995).

142. *Statement Before the S. Comm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 104th Cong. 183 (1995) (statement of Marybeth Peters, Register of Copyrights).

143. Report of the Committee on the Judiciary, Digital Performance Right in Sound Recordings Act of 1995, H.R. REP. NO. 104-274, at 24 (1995).

144. Victor, *supra* note 92, at 915.

145. Timothy Wu, *Copyright's Communication Policy*, 103 MICH. L. REV. 278, 279–80 (2004).

146. *See generally* JESSICA LITMAN, DIGITAL COPYRIGHT (2d ed. 2006). *See also* Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 862 (1987).

might be doing more than simply enshrining previously unattainable market outcomes; the government might instead be tailoring copyright law for this specific application.

III. SEESAW IMPLICATIONS

In the prior section, I examined the three primary justifications that scholars, stakeholders, and regulators have put forward in support of copyright law's idiosyncratic approach to music streaming: that these interventions reduce transactions costs, constrain market power, and implement situation-specific public policy tradeoffs rather than merely imposing the rates and terms that would be obtained in a friction-free competitive market. In this section, I revisit these theories in light of an important wrinkle: Government regulation in this space is remarkably incomplete, such that interrelated but unregulated interactions can compensate for, and maybe even fully counteract, regulated and regulatory decision-making. As I explain here, these gaps in the regulatory regime undermine all three of the standard justifications. Market power reemerges by way of unregulated rights and unregulated interactions. Public policy allocations are vulnerable because unregulated interactions move that same money around but are subject to market forces. And, through all of that, transaction costs not only return, but ironically are transformed from villain to hero, as various new costs and frictions slow these seesaw responses and thus preserve at least some influence for the government's original, intended rules.

A. SEESAWS LIMIT MARKET-REJECTING INTERVENTIONS

Long before a song is available to be licensed, songwriters and their representatives negotiate with singers and their representatives to decide whether any given song will be recorded in the first place, by whom, and how any resulting royalties and rights will be shared.[147] This is perhaps the most competitive and vibrant slice of the music ecosystem. After all, if a given singer demands too much money or too much control, the songwriter will bring the song at issue to some other singer. Likewise, if the songwriter demands too much money or too much control, the singer can opt to record another song or even write a song of their own.

Musicians, producers, lyricists, composers, backup singers, and other creative contributors likewise participate in this dynamic push and pull. Whether a specific percussionist performs on a given track will depend on that musician's skills, financial requirements, and interpersonal demands. Whether a saxophone will sound in the background will similarly depend on whether an appropriately skilled player is available and under what terms. Important here, all of these negotiations are completely unregulated except for standard constraints that apply to the formation of any employee/employer/independent contractor relationship. The government does not

147. *See* JASON BLUME, SIX STEPS TO SONGWRITING SUCCESS: THE COMPREHENSIVE GUIDE TO WRITING AND MARKETING HIT SONGS (revised ed., 2008); JASON BLUME, THIS BUSINESS OF SONGWRITING (2d ed. 2013).

decide how royalties are divided between singers and songwriters in their direct private deals. The government has no say over whether a singer's record label or a songwriter's music publisher will, for instance, pay a significant advance, or how that advance will be recouped over time.

These unregulated agreements counterbalance the government's attempts to determine the allocation of licensing monies. On one side of the seesaw, for example, is the Copyright Royalty Board's 2023 rate determination for the § 115 license. That is the determination where the CRB announced its intention to direct a certain percentage of the available monies to the music publishers that represent songwriters and a certain percentage to the record labels that represent singers and other performers. The Board did implement its policy preference to at least some degree: When the Board's rates formally took effect, streamers who invoked the license were obligated to pay music publishers exactly the amounts the Board calculated. But from there the money could move again, and those next transfers were determined by the various private agreements between and among the singers, musicians, songwriters, composers, record labels, and music publishers. The government's policy-focused rule directed the initial cash transfer, sure, but market-mediated contracts then determine where those dollars ultimately ended up.[148]

This same seesaw interaction blunts Congress's allocation of revenue through § 114(g)(2). That provision is the one where Congress stipulated that royalties paid under the § 114 compulsory license must be distributed such that 50% goes to the rights holder, 45% goes to the featured artists, and 5% is split evenly between the nonfeatured musicians and nonfeatured vocalists. Again here, the government does get its way in a sense: SoundExchange, which is the nonprofit intermediary in charge of receiving and distributing these monies, dutifully writes checks and sends wires to the intended parties in the intended proportions. From there, however, privately negotiated, completely unregulated contracts take over. If the rights holder or featured artist lured some nonfeatured vocalist to sing on the track by promising more than just a 2.5 percent royalty, that contract is valid, and the cash will move accordingly. If the rights holder gave the featured artist an advance and the artist in return promised to reimburse that advance by sharing future royalties, again that contract binds regardless of how SoundExchange fashions the initial checks.

A different set of contracts creates yet another policy-resisting, market-returning seesaw: direct licensing agreements that displace potential compulsory ones. Consider again § 114. Although this provision creates the possibility of a compulsory license, the law explicitly allows and indeed even seems to encourage rights holders and streamers to instead directly negotiate. Section 114(e)(1), for instance, states that

148. Another example of a contractual allocation that seems to override a government-set rate: The CRB recently took note of "controlled compensation clauses," which are negotiated arrangements under which music publishers agree to cap their royalties on certain songs at a level below the relevant statutory rate, again functionally shifting royalties from the relevant songwriter to the relevant singer as a condition of creating the implicated music in the first place. Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords IV), 87 Fed. Reg. 18342, at 18344 (Mar. 30, 2022) (to be codified at 37 C.F.R. 385) (summarizing record evidence as to the use of controlled composition clauses).

"notwithstanding any provision of the antitrust laws," rights holders and streamers are permitted to "negotiate and agree upon the royalty rates and license terms and conditions for the performance of such sound recordings and the proportionate division of fees paid among copyright owners, and may designate common agents on a nonexclusive basis to negotiate, agree to, pay, or receive payments."[149] Suppose a rights holder and streamer were to take the government up on this invitation. Obviously, the § 114(g)(2) allocation of funds would not apply to the resulting private deal. Nonfeatured artists would still be paid, but the amounts would be determined by contract, not Congress. Kristelia García uses the word "circumvention" to describe this strategic decision to engage in private licensing despite the availability of, and possibly in order to avoid the restrictions imposed by, compulsory licenses.[150] But, for my purposes, this practice represents yet another seesaw through which unregulated transactions can functionally undermine government-favored royalty allocations.

In short, while Congress can, in theory, move the § 112 and § 114 royalty numbers in whichever directions it believes best, and the CRB in theory can similarly allocate the § 115 royalties in ways that correspond to yet other policy intuitions, all of those allocations are subject to a seesaw effect powered by the countless unregulated interactions that involve the same parties, free of direct government supervision, and subject to the very market forces that government regulations are, on this theory, designed to overrule. The seesaw in this way undermines market-rejecting justifications for music streaming regulation.

B. SEESAWS ALLOW MARKET POWER TO REEMERGE

The ASCAP and BMI consent decrees obviously constrain ASCAP and BMI in their ability to exercise market power. Those decrees do not apply, however, to other firms that offer similar licenses. Two such entities are of particular consequence: the Society of European Stage Authors and Composers (SESAC), which was launched back in 1930 and today manages a catalog of approximately 1 million musical works;[151] and Global Music Rights, Inc. (GMR), which launched in 2013 and manages, among its roughly 90,000 compositions, works authored by Bad Bunny, Billie Eilish, Billy Idol, Pharrell Williams, Drake, Bruce Springsteen, and Bruno Mars.[152] Neither of these entities is restricted in their negotiations with music streamers. Both are free to refuse any specific streamer, and both are likewise free to set prices without rate court oversight.

149. 17 U.S.C. § 114(e)(1).

150. Kristelia A. García, *Private Copyright Reform*, 20 MICH. TELECOMM. & TECH. L. REV. 1 (2013) (exploring the implications and applications of this practice with a particular focus on the distributional consequences for artists and authors).

151. *See About Us*, SESAC, https://www.sesac.com/about/ [https://perma.cc/4PAA-TL6C] [https://web.archive.org/web/20240222204739/https://www.sesac.com/about/] (last visited Mar. 10, 2023). Importantly, among the represented songwriters is my Mom's favorite, Neil Diamond.

152. To its credit, GMR makes available, for free, upon request, an electronic copy of its full song catalog. Requests can be submitted at https://globalmusicrights.com/about#why-gmr [https://perma.cc/FYN4-ZABL] [https://web.archive.org/web/20240323000343/https://globalmusicrights.com/about#why-gmr].

This creates a potential seesaw effect through which SESAC and GMR can arrogate to themselves at least some of the leverage that the government intentionally constrains with respect to ASCAP and BMI. Indeed, to at least some degree, SESAC and GMR exist *because* ASCAP and BMI are constrained. That is, as the economist Kevin Murphy argued on behalf of ASCAP in a filing with the Justice Department, one reason that membership in SESAC and GMR is attractive to songwriters and their representatives is that SESAC and GMR enjoy "operating flexibility" that ASCAP and BMI are denied.[153] Even GMR publicly nods to the fact that existing outside the scope of the consent decrees is a competitive advantage. As their lawyers spun the point in a regulatory filing, the absence of rate regulation is an opportunity to "better align the royalties paid to songwriters with [the] value songwriters create for others."[154]

That SESAC and GMR are small as compared to ASCAP and BMI does not necessarily eliminate these risks. True, ASCAP and BMI are the "behemoths" in this market, together enjoying ballpark 90 percent market share.[155] And, in a conventional market, it would not be unreasonable to conceptualize a 90/10 fight as a David-versus-Goliath struggle, with the smaller firms endeavoring to offer better prices and service than their larger rivals, and the larger firms either losing business or being forced to match. But, in this context, any narrative about comparative size and lopsided competition is, at best, more complicated. After all, what matters to a would-be licensee is the degree to which any license is essential to commercial viability. For streaming, the evidence suggests that a streamer probably needs licenses from all four of these entities in order to offer a competitive music service.

One reason that streamers likely need all four licenses is that, while SESAC and GMR are small as compared to ASCAP and BMI, they are still large in the absolute sense.[156] As a coalition of television station owners complained in a private antitrust filing, "in practice, [all television stations] must obtain licenses" from SESAC because its repertory is "large and includes works so ubiquitous that some are inevitably embedded" in every stations' programs.[157] Strategy likely plays a role here as well. In a filing with the Justice Department, for example, one music streamer complained that SESAC intentionally "recruit[s] high-profile members" away from ASCAP and BMI.[158] As a result, "[e]ven though its total number of represented songs is small relative to the

153. Murphy, *supra* note 72, at 2.

154. Response to the Request for Comments from the Antitrust Division of the United States Department of Justice Regarding the ASCAP and BMI Consent Decrees, Global Music Rights, LLC, at 1 (Aug. 9, 2019) ("By remaining small and nimble, we are able to better align the royalties paid to songwriters with value songwriters create for others.").

155. *Id.*

156. As one commenter put the point in a submission to the Justice Department, "a PRO need not have a repertory the size of either ASCAP or BMI for it to have monopoly power. Any PRO that secures a repertory that is sufficiently large such that a license from it becomes 'must have' to a music user has monopoly power." TMLC Comments, *supra* note 75, at 40.

157. Meredith Corp. v. SESAC LLC, 1 F. Supp. 3d 180, 186 (S.D.N.Y. 2014) (summarizing plaintiffs' allegations).

158. Music Choice, Comments in Connection with the Department of Justice's Review of the ASCAP and BMI Consent Decrees, at 32 (Aug. 9, 2019) [hereinafter Music Choice Comments].

total size of the respective repertories of ASCAP and BMI . . . SESAC controls the rights to a significant number of popular songs that are necessary to have a viable music distribution service."[159] A coalition of radio stations made the point even more sharply as applied to GMR, accusing GMR of "poaching" from ASCAP and BMI "a strategic group of songwriters" in order to "create a repertory that no radio station could succeed without access to."[160]

ASCAP, BMI, SESAC, and GMR are also significantly intertwined. As I noted earlier, songs are often written by multiple songwriters. One recent study found that the average mainstream song has at least four writers,[161] and top songs can easily have more than eight.[162] This pressures licensees to take licenses from all four entities. For instance, if BMI represents only one of a given song's writers and hence holds only that one fractional interest in the coauthored song, BMI is allowed under the BMI consent decree to offer a license that covers just that one fractional share.[163] A licensee interested in actually playing the song would need to license the other fractional shares from, as relevant, ASCAP, SESAC, and/or GMR. In theory, a streamer can do this, of course, tracking all of this information song by song and updating that data as songs and songwriters move from one licensing intermediary to another.[164] But information in this market is notoriously hard to come by. Remember, ASCAP still today refuses to guarantee the accuracy of its own song database, and music licensees regularly accuse music licensors of intentional obfuscation.[165] Besides, even if all the necessary information were available as a practical matter, partial rights would still allow SESAC and GMR to arrogate to themselves considerable market power. After all, if SESAC or GMR own a fraction of a given song, they can hold that song hostage even if the other

159. *Id.*

160. Radio Music License Comm., Inc. v. Global Music Rights, LLC, No. 16-6076, 2019 WL 1437981, at *1 (E.D. Pa. Mar. 29, 2019).

161. Daniel Sanchez, *The Average Hit Song Has 4+ Writers and 6 Different Publishers*, DIGIT. MUSIC NEWS (Aug. 2, 2017), https://www.digitalmusicnews.com/2017/08/02/songwriters-hit-song/ [https://perma.cc/G59E-TRJS]; *see also Music Reports' Songdex Analysis Shows Trend Toward More Songwriters and Publishers for Top Hits Since 1960's*, BUS. WIRE (Aug. 4, 2017), https://www.businesswire.com/news/home/20170804005339/en/ [https://perma.cc/28UM-XDQF] [https://web.archive.org/web/20240308200632/https://www.businesswire.com/news/home/20170804005339/en/] (reporting that the average number of songwriters for a Billboard Top 10 song jumped from 1.87 in the 1960s to 4.07 in the 2010s).

162. Mark Sutherland, *Songwriting: Why It Takes More than Two To Make a Hit Nowadays*, MUSIC WEEK (May 16, 2017), https://www.musicweek.com/publishing/read/songwriting-why-it-takes-more-than-two-to-make-a-hit-nowadays/068478 [https://perma.cc/E7WJ-8GMR] [https://web.archive.org/web/20240215203410/https://www.musicweek.com/publishing/read/songwriting-why-it-takes-more-than-two-to-make-a-hit-nowadays/068478].

163. United States v. Broad. Music, Inc., 720 F. App'x 14, 16–17 (2d Cir. 2017); BMI, Response To the Department of Justice's June 5, 2019 Request for Public Comments Concerning the BMI and ASCAP Consent Decrees, at 42 (Aug. 9, 2019) [hereinafter BMI Response]; *see also* Delrahim Remarks, *supra* note 26, at 2–3 (summarizing the issues).

164. This is one reason the Justice Department has objected to fractional licensing. *See* U.S. Department of Justice, Statement on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees, at 13–14 (Aug. 4, 2016) (stating that fractional licensing means that "music users seeking to avoid potential infringement liability would need to meticulously track song ownership before playing music").

165. See *supra* notes 107–110 and accompanying text.

fractions have already been licensed from ASCAP and BMI at regulated rates.[166] Fractional shares functionally tie ASCAP, BMI, SESAC, and GMR together.[167]

Private antitrust settlements do constrain some of this potential bad behavior. In 2014, for example, SESAC settled a private class action lawsuit that had been brought by a coalition of television stations. Under the terms of the deal, SESAC agreed to "abide by core conduct restrictions" that the parties describe as "similar" to those that apply to ASCAP and BMI,[168] and SESAC agreed to participate in "binding arbitration for the setting of license fees and terms" in the event of any disagreement.[169] SESAC later signed a similar settlement with a coalition of terrestrial radio stations, again committing to restrictions comparable to those that constrain ASCAP and BMI, and again specifically agreeing to restrictions on, and arbitration over, licensing rates.[170] In 2022, GMR settled a case brought by the same radio station coalition. That final agreement is not public,[171] but public documents confirm that it, too, is modeled after the ASCAP and BMI consent decrees and it, too, establishes meaningful constraints on pricing.[172]

166. Insiders have repeatedly raised this concern, warning that SESAC and GMR can in essence hold licensed songs hostage. *See, e.g.*, TMLC Comments, *supra* note 75, at 31 ("Requiring a licensee to secure not only a license from each of ASCAP and BMI, but also a license from each copyright owner of a split work that is unaffiliated with ASCAP and BMI, just to perform works that are in the ASCAP and BMI repertories, diminishes this protection, as it gives each such non-ASCAP and BMI affiliate 'hold-up' power over the performance of the work."); U.S. Department of Justice, Statement on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees, at 15 (Aug. 4, 2016) ("Finally, allowing fractional licensing might also impede the licensed performance of many songs by incentivizing owners of fractional interests in songs to withhold their partial interests from the PROs. A user with a license from ASCAP or BMI would then be unable to play that song unless it acceded to the hold-out owner's demands, providing the hold-out owner substantial bargaining leverage to extract significant returns.").

167. TMLC Comments, *supra* note 75, at 29 ("Fractional licensing undermines the efficiencies created through collective licensing by requiring music users to secure, before the time of performance, all of the fractional interests to works in the ASCAP and BMI repertories, including those that can be licensed through ASCAP and BMI and those that cannot."); RMLC/DMA Comments, *supra* note 73, at 6 (complaining that the various PRO catalogs "are no longer substitutes for each other, if they ever were" in part because "the exponential growth in the number of co-writers of popular songs" means that "a radio station or digital music service now typically needs licenses . . . from every PRO").

168. Settlement Class Notice, Meredith v. SESAC, No. 09 Civ. 9177 (PAE) (S.D.N.Y 2014), https://tvmlc.com/wp-content/uploads/2014/10/Meredith-v-SESAC-Settlement-Class-Notice-ECF-175-1-Declaration-Ex.-1.pdf [https://perma.cc/T54A-25P3] [https://web.archive.org/web/20231128232706/https://tvmlc.com/wp-content/uploads/2014/10/Meredith-v-SESAC-Settlement-Class-Notice-ECF-175-1-Declaration-Ex.-1.pdf]; *see also* BMI Response, *supra* note 163, at 11 (noting that SESAC "agreed to an arbitration process that would . . . mirror the consent decree process" used with BMI and ASCAP (internal quotation omitted)).

169. TMLC Comments, *supra* note 75, at 25–26.

170. For a summary, see TMLC Comments, *supra* note 75, at 25–27.

171. *See* Gene Maddaus, *Irving Azoff's Music Rights Firm Ends Legal Battle with Radio Stations*, VARIETY (Feb. 7, 2022), https://variety.com/2022/music/news/irving-azoff-global-music-rights-rmlc-settlement-1235174154/ [https://perma.cc/QME2-PZWL] [https://web.archive.org/web/20240216202817/https://variety.com/2022/music/news/irving-azoff-global-music-rights-rmlc-settlement-1235174154/] (reporting settlement but noting that the terms are confidential).

172. *See GMR Settlement: FAQ for Broadcasters*, MICH. ASS'N OF BROADS. (Jan. 21, 2022), https://www.michiganmedia.com/2022/01/21/gmr-settlement-faq-for-broadcasters/

But these settlements do not apply to streaming.[173] Thus, while Spotify, Pandora, iHeart, and Amazon can trigger the protections of the ASCAP and BMI consent decrees in the event that their negotiations with ASCAP or BMI falter, no streamer can invoke any of the several SESAC and GMR settlements because those settlements apply only to the licensees who litigated them.[174] At best, streamers can threaten to file their own lawsuits, a path that is costly and slow,[175] and one that would leave the litigating streamer vulnerable to retaliation in the meantime.[176]

The extent to which all of this allows market power to reemerge is contested. Copyright holders regularly point out that technology companies arguably have market power of their own, power that potentially offsets at least some of the leverage SESAC and GMR bring to the table.[177] Moreover, the existence of ASCAP and BMI at a minimum complicates the use of any plausible leverage. If GMR and SESAC were to withdraw their music from Spotify, for instance, songwriter members might hold the line, but some might instead jump to ASCAP and BMI, reluctant to lose the income that would otherwise come from Spotify spins.

All that said, available evidence does suggest that market power persists. For instance, one streamer reports that, when songs move from ASCAP and BMI to SESAC

[https://perma.cc/9AFY-G22X]
[https://web.archive.org/web/20240308204514/https://www.michiganmedia.com/2022/01/21/gmr-settlement-faq-for-broadcasters/].

173. TMLC Comments, *supra* note 75, at 43 (settlement between SESAC and a coalition of local television stations "only provides protection to local television stations"); JAFFE, *supra* note 74, at 19 (explaining that, while local television and radio stations have settled their antitrust cases against SESAC, "no other SESAC licensees" can formally invoke those settlements).

174. Streamers complain about this patchwork approach. *See, e.g.*, Music Choice Comments, *supra* note 158, at 34–35 (noting that coalitions of radio and television stations have "won significant early rulings of likelihood of success on antitrust claims against SESAC" but the "only benefit [streamers see] is SESAC's curbed appetite to threaten litigation"). Other music licensees complain about this as well. *See, e.g.*, TMLC Comments, *supra* note 75, at 43 (noting that, even after a coalition of radio stations sued and negotiated a settlement with SESAC on antitrust grounds, "all other SESAC licensees, including music streaming services, restaurants, bars, concert venues, and many others" remained unprotected "from the abuse of market power by SESAC").

175. For example, that case involving SESAC and the coalition of television stations settled before trial, but even that truncated process took more than five years, and cost the coalition more than 16 million dollars. TMLC Comments, *supra* note 75, at 3.

176. As streamer Music Choice emphasized in a recent filing with the Justice Department, the "requirement that ASCAP and BMI issue a license upon request . . . eliminates the risk that ASCAP and BMI might refuse to . . . license and use the threat of massive infringement liability as additional leverage." Music Choice Comments, *supra* note 158, at 6. SESAC and GMR are not subject to that requirement and hence could wield that very leverage. *See id.*

177. One commenter put the point this way: "Amazon, Apple, Google and Microsoft . . . are four of the largest corporations in the United States . . . . It's absurd to suggest that ASCAP and BMI need to be constrained against these titans of industry." The Recording Academy, Comments Regarding the Review of ASCAP and BMI Antitrust Consent Decrees, at 3–4 (Aug. 9, 2019) [hereinafter Academy Comments]; *see also* National Music Publishers' Association, "Selective Withdrawal" of New Media Rights from ASCAP and BMI, at 4 (Aug. 9, 2019) (stating that Google, Amazon, and Apple are "exponentially larger than the music publishing industry as a whole").

and GMR, licensing costs go up in the aggregate.[178] That is, as the rights to perform musical works move from a large regulated intermediary to a smaller unregulated one, increases in the prices charged by the smaller one are not offset dollar-for-dollar by reductions to the prices charged by the bigger one. Presumably, this imperfect seesaw is part of the reason why songwriters are willing to move. Even if SESAC and GMR offer no other advantages, they at least have some freedom to charge higher prices, because the consent decrees do not bind them, and private antitrust enforcement is inevitably an imperfect check.[179]

C. TRANSACTION COSTS BENEFICIALLY LIMIT THE SEESAW EFFECT

In the conventional framing, transaction costs are a problem that government regulation helps to solve. Introduce the possibility of a seesaw, and transactions costs begin to play an ironic role. One irony is that the very government interventions meant to reduce transaction costs at the same time incentivize the creation of new ones. By regulating ASCAP and BMI, for instance, the government drives at least some rights holders to SESAC and GMR. That, in turn, increases transaction costs. Streamers as a practical matter have no choice but to interact with these additional intermediaries,[180] and at least some of the monitoring, enforcement, advertising, and auditing infrastructure already available from ASCAP and BMI is as a result wastefully replicated at SESAC and GMR. Similarly, § 112, § 114, and § 115 compulsory licenses reduce transaction costs by obviating the need for a large number of direct deals. But, because Congress and the Copyright Royalty Board allocate the resulting monies by way of market-rejecting rules, private parties have an incentive to respond by writing, implementing, and, as need be, enforcing more contracts, including contracts between streamers and rights holders, and contracts between and among singers, songwriters, musicians, record labels, and music publishers, all designed at least in part to reallocate available monies in light of the underlying market realities.

The second irony is yet more rich. As private parties endeavor to undo various government interventions by way of unregulated rights and unregulated interactions, their efforts are slowed by various costs, frictions, and delays. That is, transaction costs

178. Music Choice Comments, *supra* note 158, at 33 (accusing SESAC of increasing its fees by "more than any demonstrated increase in the fair market value" of its repertory, "and with no equivalent decrease" in the rates owed to ASCAP and BMI "even though SESAC's repertory [increases] at the expense of" the ASCAP and BMI catalogs).

179. *See* TMLC Comments, *supra* note 75, at 40–41 (stating that unregulated PROs "can offer to pay their affiliated composers and publishers at higher levels, not because their music has somehow become more valuable as a result of switching their PRO affiliation, but because the unregulated PRO is able to secure monopoly rents from music users, and pass at least some of those rents on to their affiliates"); Murphy, *supra* note 72, at 4–5 (complaining that "the highest valued [copyrights] will flow to the unregulated PROs even if unregulated PROs are less efficient than the regulated PROs" because "an unregulated profit-maximizing firm will make optimal choices across all the dimensions on which it can compete . . . but a regulated company is constrained on one or more of the dimensions on which competition occurs").

180. *See, e.g.*, TMLC Comments, *supra* note 75, at 41–42 ("[H]aving multiple unregulated PROs in the market" causes "distorting inefficiencies" because "music users need to secure licenses from every PRO that has become sufficiently large such that using its music is unavoidable.").

limit the degree to which the seesaw can readily swing, thereby maintaining at least some influence for the original governmental interventions. For instance, while private contracts can and do dampen the government's ability to allocate monies in market-defying patterns, this private response is muted by the challenge of consummating, documenting, updating, and enforcing all of the contracts necessary to fully reallocate monies among and between every featured singer, nonfeatured singer, featured musician, nonfeatured musician, record label, music publisher, and the like. Similarly, were the Copyright Royalty Board to lower the rate for the § 115 compulsory license, record labels in theory could respond by raising the sound recording public performance royalty dollar for dollar, but not immediately, as there would presumably be at least some contracts already in place between labels and streamers, and streamers would not be anxious to renegotiate those rates prematurely if they knew that any new rate would be higher, not lower.

All this leads to imperfect middle-ground interactions where the government's influence is preserved, at least in part. A striking example: In 2021, *Rolling Stone* reported on a dispute where a particular "high-powered singer" demanded to be listed as a songwriter "in exchange for recording" a specific songwriter's song "even though that artist had not contributed to the writing process in any way."[181] Yes, the singer might have been suffering from delusions of songwriting grandeur. But more plausibly, the singer was trying to tap into the monies that existing law allocates to songwriters, rather than having to incur the costs of writing, auditing, and enforcing a contract under which the songwriter would first receive that money and then transfer the appropriate share to the singer. In response to the incident, a group of prominent songwriters published and publicized an "open letter" decrying the fact that a "growing number of artists" are similarly "demanding publishing"—that is, demanding to be listed as songwriters—"on songs they did not write."[182] Again, maybe these interactions are delusional. Or maybe the motivation is purely reputational. But maybe singers are asking to be listed as songwriters because transaction costs are making it difficult for them to fully defeat the government's default allocations by contract, so they are

181. Elias Leight, *Songwriters Are Tired of Having Their Money Taken – by Artists*, ROLLING STONE (Mar. 31, 2021), https://www.rollingstone.com/pro/news/songwriters-the-pact-1149427/ [https://perma.cc/3Z4U-69DB] [https://web.archive.org/web/20240210151857/https://www.rollingstone.com/pro/news/songwriters-the-pact-1149427/].

182. Jem Aswad, *Justin Tranter, Emily Warren, More Songwriters Sign Letter Calling for Artists To Stop Demanding Credit for Songs They Didn't Write*, VARIETY (Mar. 30, 2021), https://variety.com/2021/music/news/pact-justin-tranter-emily-warren-songwriters-letter-1234940341/ [https://perma.cc/4RW3-3LZX] [https://web.archive.org/web/20240210152226/https://variety.com/2021/music/news/pact-justin-tranter-emily-warren-songwriters-letter-1234940341/]; Lindsey Havens, *Top Songwriters Ask Artists & Execs To Stop Taking Credit for Songs They Didn't Write in Open Letter*, BILLBOARD (Mar. 30, 2021), https://www.billboard.com/pro/songwriters-the-pact-rights-open-letter/ [https://perma.cc/B82A-PM8F] [https://web.archive.org/web/20240210152541/https://www.billboard.com/pro/songwriters-the-pact-rights-open-letter/]. A copy of the letter was initially posted online at https://www.the-pact.org/ but was at some point removed; the letter can still be viewed through the Wayback Machine at https://web.archive.org/web/20210331143939/https://www.the-pact.org/.

attempting a second-best solution: harnessing the government's own rules to functionally transfer money from songwriters to singers.[183]

IV. CONCLUSION

The Copyright Royalty Board has thus far explicitly grappled with the seesaw effect only once, specifically in the context of a rate determination related to the § 115 license. There, University of Canterbury Professor Richard Watt testified as an economic expert on behalf of a coalition of songwriters, presenting an economic model through which he argued that streaming revenue should be distributed to copyright holders according to a specific, calculated ratio.[184] To achieve that ratio, Professor Watt needed the Board to increase the government-set rate for the § 115 license, but he also needed sound recording copyright holders to voluntarily lower the rate that they were at the time charging for rights they controlled. That is, Professor Watt not only needed the Board to rule in a way consistent with his analysis, but he also needed private parties, operating outside the scope of the compulsory license, to renegotiate completely unregulated, related rates.[185]

Professor Watt recognized that the Board could not force record companies and other sound recording copyright holders to make the latter change, but he argued that the necessary reduction would happen as the inevitable result of a seesaw. Specifically, he argued that, if the government rate were increased, less money would be available to divide between streamers and sound recording copyright holders, and so sound recording copyright holders would have no choice but to reduce their royalty demand. As he put the point in live testimony, "the reason why the sound recording rate is so very high [today] is because the statutory rate is very low. And if you increase the statutory rate, the bargained sound recording rate will go down."[186]

Professor Watt's testimony received decidedly mixed reviews. Writing in dissent, one of the three CRB judges jeeringly described it as "the Heroic Assumption that the Major Record Companies will Docilely Accept Millions of Dollars in Lost Revenue, by Agreeing to Accept Lower Sound Recording Royalties."[187] But the other two judges found the testimony credible. They agreed that the then-existing sound recording

183. This is apparently an issue of concern abroad as well. Indeed, a report from the U.K. House of Commons recently described this practice as an "industry norm" in which "song writing revenues have become fair game" for artists who are "demanding publishing on songs they did not write." DIGITAL, CULTURE, MEDIA & SPORT COMMITTEE, ECONOMICS OF MUSIC STREAMING, SECOND REPORT OF SESSION, 2021–22, HC 50, ¶ 83 (UK) (quoting the open letter discussed *supra* note 182).

184. Written Rebuttal Testimony of Richard Watt (PhD), submitted in the Matter of Determination of Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), No. 16-CRB-003-PR (2018–2022) (on behalf of the National Music Publishers' Association and the Nashville Songwriters Association International) (Feb. 13, 2017).

185. *See* Phonorecords III Order, *supra* note 3, at 2027 (Strickler, J., dissenting) ("Professor Watt's model indicates that this ratio reduction should occur via a significant increase in musical works royalties and an even greater precipitous decline in the sound recording royalties set in an unregulated market."); Written Rebuttal Testimony of Richard Watt (PhD), *supra* note 184.

186. *See* Phonorecords III Order, *supra* note 3, at 1953 (quoting Professor Watt).

187. *Id.* at 1966 (Strickler, J., dissenting).

royalty rate was "artificially high as a result of musical works rates being held artificially low through regulation," and they concluded that the "sound recording royalty rates in the unregulated market will decline in response to an increase in the compulsory license rate for musical works."[188]

Appeals followed, and years later the issue was remanded to the Board with instructions to, among other things, reconsider whether a seesaw really would "lead to a decrease in sound recording royalties."[189] On remand, with a new judge replacing one of the judges in the original majority, the Board backed away from its prior view, explaining this time that seesaws are considerably more complicated than their earlier summary had let on.[190] The Board in the end withdrew its prior rate determination and adopted an alternative structure—one that might have raised its own seesaw complexities save for one critical fact: The appeal and remand had taken so long that the new rate was destined to be applied retroactively. That is, because of the appeal, the final rate order did not issue until 2023, even though it governed payments for the years 2018 through 2022.[191] Absent a time machine, private parties had no ability to react to the new rates, and hence there was no seesaw for the Board to further analyze.

Of course, regulators and lawmakers will not always be so lucky. The consent decrees and compulsory licenses relevant to music streaming typically apply on a forward-looking basis, designed as they are to influence *future* prices and alter *future* behavior. Thus, the law at some point will have to grapple with the seesaw phenomenon. How?

One possibility is to simplify the relevant legal rights and, in that way, facilitate more cohesive and comprehensive interventions. Interactive streamers today are required to separately license five rights: public performance rights for sound recordings, reproduction rights for sound recordings, performance rights for the underlying musical works, and both reproduction and distribution rights for musical works. Noninteractive streamers must license three: public performance rights for musical works, public performance rights for sound recordings, and reproduction rights for sound recordings. From the perspective of a streamer, this is all unnecessary complexity. Streamers are simply looking to purchase the integrated right to stream each implicated song. Were copyright law redefined such that an entire song could be licensed through a single transaction, government intervention could more reliably influence that transaction and achieve the standard transaction cost, market power, and public policy goals.

188. *Id.* at 1953 (majority opinion).

189. Johnson v. Copyright Royalty Bd., 969 F.3d 363, 383 (D.C. Cir. 2020); Phonorecords III Remand, *supra* note 3, at 54409 ("The D.C. Circuit concluded that, on remand . . . [the Judges] shall address all substantive challenges . . . raised by the Services, including the issue of whether 'an increase in mechanical license royalties would lead to a decrease in sound recording royalties.'" (citation omitted)).

190. *See* Phonorecords III Remand, *supra* note 3, at 54424 n.78 (discussing economic testimony and conceding that the seesaw effect, as originally conceived, was "rife with assumptions").

191. *Id.* at 54406 (being effective August 10, 2023, but establishing rates that "apply to the license period beginning January 1, 2018, and ending December 31, 2022").

Another possibility is to take the opposite tack and expand the regulatory regime such that it is more commensurate with the existing complexity and diversity of copyright law's rights and players. The ASCAP and BMI rate court provisions could be expanded to govern SESAC and GMR. The compulsory licenses under § 112, § 114, and § 115 could be augmented to include not just the narrow permissions codified today, but also the various related, necessary, unregulated rights. Private contracts that work around the government's various preferred allocations could be forbidden by law. This approach, too, would position the government to more fully tame transaction costs, more completely constrain market power, and also actually enforce its idiosyncratic market-rejecting policy judgments, albeit with obvious costs, as the government would at best struggle to set all those prices, structure all of those deals, and police the many plausible private responses.

For now, my goal is not to champion either these or other reforms, but instead to highlight what has to date been an unappreciated factor in the analysis. The seesaw effect undermines the stories by which academics, government officials, and industry stakeholders justify the government's surprisingly heavy-handed regulation of music streaming. Taking it into account is not easy, but doing so is the only way to capture a realistic assessment of what current regulations accomplish, and also what changes would be required were the government truly committed to the transaction cost, market power, and market-rejecting interventions that commentators have long identified as the regulatory regime's underlying purposes.