

Operational Considerations for Collective Licensing Frameworks in the Music Publishing Industry

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When I think about music, I often end up thinking about how music is being used in the technological sense, and then I think about what all needs to happen for the underlying rightsholders to get paid. For example, when I watch a film or some other audiovisual work that incorporates music, I think about how that music audio was added to enhance the mood by timing it perfectly with a portion of the video footage, thus requiring a synchronization license. These types of licenses are handled individually and typically by the licensing representatives who manage the sound recording rights (e.g., a record label) and the underlying composition rights (e.g., a music publisher).¹ It can be a high-volume operation, but what is clear is what music is used and how music is used, and therefore who to seek a license from and how to compensate for the use.

A large part of my work is to negotiate and issue blanket music publishing licenses that cover the availability for use of full catalogs of music on behalf of the songwriters and rightsholders my company represents. It should not come as a surprise if I were to say that licensing negotiations often center around what is the appropriate value for the use of music (i.e., ample consideration for the rights granted under contract), and that the economics of a deal take the spotlight. After all, the goal is to get music professionals paid for their work.

However, equally important to the success of a deal, and therefore a key component of negotiating a blanket license, is operational—how is the use of music managed, and what are the responsibilities of each of the contracting parties to administer the license and pay the underlying rightsholders. Administering an individual synch license is straightforward—the licensee knows what music will be

* Any views or opinions expressed in this article are my own and do not necessarily represent the views, opinions, or strategies of the Author's employer.

1. How Songwriters, Composers, and Performers Get Paid, U.S. COPYRIGHT OFF. (Jul. 2022), <https://www.copyright.gov/music-modernization/educational-materials/musicians-income.pdf> [<https://perma.cc/VZY8-L4LT>] [<https://web.archive.org/web/20250417180217/https://www.copyright.gov/music-modernization/educational-materials/musicians-income.pdf>]

used and how and relays that to licensor, licensor issues the license, collects payment, and administers the royalties. The thought exercise becomes more complicated with digital service providers (DSPs) whose services and platforms host and make available seemingly limitless quantities of music,² where the volume of usage is high³ or the extent of usage unknowable (or both). To provide a straightforward example here, when I listen to music using a music streaming service application on my phone (e.g., to name a few popular ones in alphabetical order, Amazon Music, Apple Music, Pandora, Spotify, YouTube Music, etc.), I think about how the audio gets delivered from various record labels and distributors through a delivery feed to the DSPs, how music is listened to perhaps through curated playlists or through user selection, how users may pay a subscription to listen to music or they may opt to include advertisements in their music listening experience, or how users might be part of “family” accounts for the discount whether or not related, and how the music plays get matched to the applicable revenue stream, then calculated and paid to songwriters. Digital music consumption is not limited to music streaming services—social media platforms have made it possible for the everyday user to easily create content (with or without music) for sharing. How much content? YouTube is estimated to host 14 billion videos on its site,⁴ some of which contains music, and some of which does not.

Thankfully, over time, we have overcome major hurdles in the music business such that most digital service providers (DSPs) using music on their platforms know to and will seek licenses, mainly by entering blanket licenses either directly with music companies or through collective licensing mechanisms. There was a time when DSPs were not so cooperative or willing to collaborate to create a sustainable environment where music may enhance the service user’s experience for compensation.⁵

So, now, when I think about music, I think about blanket licenses, and in addition to thinking about the appropriate value for the use of music, I consider the following questions: (1) how does the DSP monitor music usage on their platform (i.e., what data is collected on usage and made available to rightsholders); (2) how does the music get matched to the metadata; (3) what portion (if any) is not being matched and why; and (4) what operational tools and resources do we have readily available or do we need to verify the money collected, determine what’s potentially missing, and close the gap (if any) between the two—i.e., how does the money flow from the DSPs to the songwriter’s royalty statements? Who bears the responsibility to monitor the use of music, identify the appropriate music stakeholders, and calculate and pay royalties?

2. On average, that daily number in 2024 was 99K. See LUMINATE, *Year End Music Industry Report 2024*.

3. 1.3 trillion streams of on-demand streaming audio in Y2023; 1.4 trillion in Y2024. *Id.*

4. Ryan McGrady, *There Are 14 Billion Videos on YouTube*, THE ATLANTIC (Jan. 26, 2024).

5. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1017 (9th Cir. 2001); Neal Pollack, *Spotify Is the Coolest Music Service You Can’t Use*, WIRED, (Dec. 27, 2010), <https://www.wired.com/2010/12/mf-spotify/> [https://perma.cc/NVD3-VN4R] [https://web.archive.org/web/20250223084944/https://www.wired.com/2010/12/mf-spotify/].

One of the major hurdles for a DSP to use or enable others to use music is to get the appropriate licenses from the various rightsholders. The creation of the first sound recording of a composition requires permission from the composition rightsholder(s), but, pursuant to Section 115 of the Copyright Act, any subsequent (i.e., cover) recording can be created without permission, and can be reproduced in audio-only format through the compulsory mechanical licensing mechanism, subject to the terms of license and royalty payments as set forth in the applicable regulations.⁶ Prior to digital streaming, for physical product (e.g., vinyls, CDs, etc.) or even for downloadable music (e.g., MP3s), the label or record producer would notify its intent to enter a compulsory mechanical license directly from the rightsholder or via a mechanical rights organization (e.g., Harry Fox Agency).⁷

With digital streaming, the existing construct became untenable from an operational perspective. For one, every use of the recording requires a license for the use of the sound recording and a license for the underlying composition. Additionally, it is common business practice for multiple copyright holders to own a fractional interest in a musical composition, as it is common for there to be multiple songwriters contributing to the composition of the song.⁸ Regulations were adapted to include a royalty calculation that recognized a mechanical reproduction right in streaming, such right being codified into law formally under the Music Modernization Act in 2019 (MMA), which amended Section 115 of the Copyright Act to include a compulsory blanket licensing mechanism for mechanical reproductions of digital phonorecords.⁹ In addition, the Mechanical Licensing Collective (The MLC) was designated as the statutory mechanical licensing collective established by the MMA to administer blanket compulsory digital audio mechanical licenses and royalties in accordance with the relevant regulations.¹⁰ As part of its mandate, the MLC has established and maintains a publicly available musical works database. This provides constructive notice to music users in the United States of the identity of songwriters and publishers associated with a song.

The 2019 Amendment of Section 115 of the Act included a framework that addresses operational concerns arising from the use of music in a digital context, and by law, the DSPs are required to fund the operations of the mechanical licensing collective that administers the blanket licenses under their purview.¹¹ Looking at the MLC's operating expenditures, the technology services comprised nearly 50% of the

6. Compulsory License for Making and Distributing Physical and Digital Phonorecords of Nondramatic Musical Works, 37 C.F.R. pt. 210 (2014).

7. 17 U.S.C. §115 (as amended in 1996); *History of HFA*, THE HARRY FOX AGENCY, <https://www.harryfox.com/history> [https://perma.cc/5SGG-YBAH] [https://web.archive.org/web/20250426183524/https://www.harryfox.com/history].

8. 17 U.S.C. §101.

9. Orrin G. Hatch–Bob Goodlatte Music Modernization Act, Pub. L. No. 115–264, 17 U.S.C. § 115.

10. *Digital Royalties & The Digital Music Landscape*, Mechanical Licensing Collective, <https://www.themlc.com/digital-music-royalties-landscape> [https://perma.cc/VLA6-9KQR] [https://web.archive.org/web/20250426012653/https://www.themlc.com/digital-music-royalties-landscape]

11. 17 U.S.C. § 115(d)(4).

total Start-up Expenditures,¹² and as of the end of 2023, remain approximately 30% of operational expenses.¹³ The MLC also reports on an administrative fee ratio “to both allow the public to track its efficiency over time and to allow for easier benchmarking and comparison”, which fee ratio is less than 5%.¹⁴ This seems to indicate that there is a benefit in investing in the appropriate technology to operate and administer blanket licenses efficiently. This structure creates consistency across the DSPs in the manner that they monitor and report music usage timely and accurately and encourages the DSPs to collaborate with the music industry to ensure that the licenses are administrable.¹⁵

In many cases, we cannot rely on modifying the law to cover the operational challenges in music licensing that come with technological advances, and the governing laws were enacted before current technology (and before the DMCA, the Internet) existed. Instead, music rightsholders rely on the DMCA copyright notice and takedown rules and regulations to enforce their rights on digital service providers who may seek protection from liability through the “safe harbor” defense from the same. In those cases, a DSP may be held liable for copyright infringing activities on the service through litigation if the DSPs are not compliant with the DMCA rules.¹⁶

12. THE MECHANICAL LICENSING COLLECTIVE, 2021 Annual Report, <https://www.themlc.com/hubfs/Marketing/23856%20The%20MLC%20AR2021%206-30%20REFRESH%20COMBINED.pdf> [https://perma.cc/8MVQ-F9DU]

[https://web.archive.org/web/20250426013355/https://www.themlc.com/hubfs/Marketing/23856%20The%20MLC%20AR2021%206-30%20REFRESH%20COMBINED.pdf]

13. THE MECHANICAL LICENSING COLLECTIVE, 2023 Annual Report <https://www.themlc.com/hubfs/2023%20MLC%20Annual%20Report.pdf> [https://perma.cc/2GNR-6R3G]

[https://web.archive.org/web/20250426014628/https://www.themlc.com/hubfs/2023%20MLC%20Annual%20Report.pdf].

14. In comparison, US performing rights societies ASCAP and BMI report that their operating expenses are 12% and 15% of revenue respectively. *Follow the Dollar*, ASCAP, <https://www.ascap.com/music-users/follow-the-dollar> [https://perma.cc/4FKH-NGD6]

[https://web.archive.org/web/20250426015300/https://www.ascap.com/music-users/follow-the-dollar];

Michael O'Neill, *BMI Annual Report 2023*, BMI (Oct. 12, 2023), <https://www.bmi.com/pdfs/publications/2023/bmi-annual-report-2023.pdf> [https://perma.cc/5A4X-VU67]

[https://web.archive.org/web/20250426015704/https://www.bmi.com/pdfs/publications/2023/bmi-annual-report-2023.pdf].

15. Pursuant to the MMA, the MLC is governed by a Board of Directors and three Advisory Committees as set forth in the MMA, including the Operations Advisory Committee (OAC), a committee that includes both DSP and music publisher representatives. The OAC provides a means for collaboration between DSPs and rightsholders to discuss and, where practicable, improve on processes and best practices for identifying and matching music usage to the appropriate music rightsholders. *See Governance*, THE MECHANICAL LICENSING COLLECTIVE, <https://www.themlc.com/governance> [https://perma.cc/69ND-B43X] [https://web.archive.org/web/20250426020342/https://www.themlc.com/governance] (Note that Author is Chair of OAC).

16. *See* Viacom Intern., Inc. v. YouTube, Inc., 676 F.3d 19, 27–28 (2d Cir. 2012); *NMPA Reaches Resolution of Copyright Infringement Lawsuit Against YouTube Agreement Results in New Licensing Opportunity for Music Publishers*, NAT'L MUSIC PUBLISHERS' ASS'N (Aug. 17, 2011), <https://www.nmpa.org/nmpa-reaches-resolution-of-copyright-infringement-lawsuit-against-youtube-agreement-results-in-new-licensing-opportunity-for-music-publishers/> [https://perma.cc/C3HW-QQF5]

Or, if DMCA compliance results in a disruption to service for a large number of users, this may compel the DSPs to cooperate with music rightsholders to come to an agreement to cover the use of music by service users.¹⁷ Social media platforms now offer content creator tools with music libraries which can enhance the user's experience in creating and sharing content for social purposes, but it is also an important tool in rights management—music used from the service's library will contain the appropriate metadata necessary to track and report usage to rightsholders.¹⁸ Music usage not tied to an audio library relies on the technological capability of audio identification tools like Audible Magic or YouTube's proprietary Content ID for content moderation.¹⁹ The extent to which DSPs invest in content moderation technology robust enough to comprehensively monitor the widespread use of music in user-generated content seems to depend on the service offering and the recognition of the value in using music to enhance the user experience and drive consumption on the platform. Unfortunately, without the cooperation from the DSPs, there is no way for music creators and rightsholders to ensure that music is being used with proper authorization, compensation and attribution.

When I think about music, I think about the way in which a stream of music generates revenue and gets paid. I think about how licensing frameworks are most successful when the burden of responsibility of music rights management is shared between those who create music and those who commercially benefit from it. There is no settled licensing framework for the use of music in the machine learning context in the creative industry. It seems unlikely that such a framework can be modeled for industry-wide implementation without settled law (i.e., a legal determination on what will require a license and/or whether any such use is “fair use”), especially as it pertains to developing and training machine learning models (MLMs) using publicly available data, including copyright-protected music and the use of copies of such

[<https://web.archive.org/web/20250426021128/https://www.nmpa.org/nmpa-reaches-resolution-of-copyright-infringement-lawsuit-against-youtube-agreement-results-in-new-licensing-opportunity-for-music-publishers/>].

17. Jay Peters, *Twitch warns streamers another wave of copyright strikes is coming*, THE VERGE (May 28, 2021), <https://www.theverge.com/2021/5/28/22458481/twitch-streamers-dmca-takedown-wave-warning-notice> [https://perma.cc/M47C-M5QM]

[<https://web.archive.org/web/20250426164451/https://www.theverge.com/2021/5/28/22458481/twitch-streamers-dmca-takedown-wave-warning-notice>]; *NMPA and Twitch Announce Agreement*, NAT'L MUSIC PUBLISHERS' ASS'N (Sept. 21, 2021), <https://www.nmpa.org/nmpa-and-twitch-announce-agreement/> [https://perma.cc/DB62-NFXH]

[<https://web.archive.org/web/20250426165146/https://www.nmpa.org/nmpa-and-twitch-announce-agreement/>].

18. See, e.g., *Company*, AUDIBLE MAGIC, <https://www.audiblemagic.com/company/> [https://perma.cc/7H3E-NBDU]

[<https://web.archive.org/web/20250426165747/https://www.audiblemagic.com/company/>].

19. AUDIBLE MAGIC, <https://www.audiblemagic.com/> [https://perma.cc/DB46-K8ML] [<https://web.archive.org/web/20250426170135/https://www.audiblemagic.com/>]; *Overview of YouTube rights management*, YOUTUBE, <https://support.google.com/youtube/answer/4597810?hl=en> [https://perma.cc/Y328-8JMV]

[<https://web.archive.org/web/20250426170730/https://support.google.com/youtube/answer/4597810?hl=en>].

music to generate output via machine learning models (MLMs). Rightsholders and technology services are collaborating for a solution to the attribution problem. To what extent MLMs will take technological responsibility for music rights management is yet to be determined.