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"*Songwriters are the lifeblood of American music. In order to have a great single or a great album, you first have to have a great song. You need the music. You need the lyrics and you need them to fit together in a way that makes you feel something, that tugs at your heart and your heartstrings, that makes you feel excited or peaceful or nostalgic. Songwriting is an art.*"[1]

Technology has dramatically influenced the manner in which music is enjoyed and consumed today. With music so readily available online via music streaming services, there is no longer a need for consumers to rush to the stores hoping to get their hands on the latest albums. In the digital age of music, when an artist releases new music, that music is made available online for streaming almost instantly. Music streaming services grant consumers access to music catalogues which contain numerous songs.

The consumers' listening experience is not bound to any particular musical category; such as genre, artist, album, release date, or publisher. Using the music streaming service's music catalogue, consumers are able to select songs to custom-build their own music library. This modern-day practice of streaming has allowed consumers to indulge themselves, creating a music experience unlike any other. With the realization of digital music and online streaming services the commercial music landscape has been transformed.[2]

In 2011, after having launched in Sweden just three years earlier, Spotify[3] entered the United States market as the first streaming service of its kind.[4] Several years later, services such as Apple Music, Amazon Music,[5] Pandora, and Google Play Music[6] began to launch in order to join Spotify in the race to dominate the online music streaming industry.[7] These streaming services were attempting to dominate the industry by procuring, for their consumers, the largest catalogue of music.[8] It was likely during this haze of urgency to dominate that these streaming services

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[1] Orrin Hatch (UT). *Congressional Record* 164 (2018) p. S6293 (Text from: *The Congressional Record Online through the Government Publishing Office*) (last visited Oct. 30, 2020).

[2] Daniel S. Hess, *The Waiting Is the Hardest Part: The Music Modernization Act's Attempt to Fix Music Licensing*, 2019 U. ILL. J.L. TECH. & POL'Y 187, 189 (2019).

[3] *See* Mark Milian, *Spotify music-streaming service launches in U.S.*, CNN, http://edition.cnn.com/2011/TECH/web/07/13/spotify.us/# (last visited Nov. 16, 2020); *see also* SPOTIFY – FOR THE RECORD, https://newsroom.spotify.com/company-info/ (last visited Feb. 21, 2020).

[4] Patrick H.J. Hughes, *Copyright Suit Against Spotify Has Merit, Attorneys Say*, 24 NO. 20 WINTHROP 2 (2018).

[5] Tiffany Hu, *Spotify, Apple Agree to Fund New Music Royalties Collective*, LAW360 (Nov. 15, 2019), https://advance.lexis.com/api/permalink/33135b4c-6ffc-40ab-91c9-d65fdc0a8543/?context=1000516.

[6] *See generally* Thomas Germain, *Google Play Music Is Shutting Down. Here's How to Save Your Tunes*, CONSUMER REPORTS, https://www.consumerreports.org/streaming-music-services/google-play-music-shutting-down-how-to-save-music/ (last visited Oct. 17, 2020) ("Google has announced that the app will be shut down and replaced by the YouTube Music app, which has been available for a few years.").

[7] Hess, *supra* note 2.

[8] *Id.*

began their struggle with obtaining and/or maintaining licensing for a substantial portion of their music catalogues.

The failure of the streaming services to properly obtain and/or maintain licenses for music within their catalogues resulted in substantial financial losses to all of the songwriters and publishers of the unlicensed music.[9] As a result, the streaming services have been defendants in countless copyright infringement lawsuits over the years.[10] The transition from purchasing physical albums to streaming was so rapid, it even appeared to have caught the music industry by surprise. Songwriters and publishers were still accustomed to producing physical albums, to facilitate the distribution of their music, when the streaming services appeared on the market causing its infrastructure to implode.[11]

Spotify debuted in the U.S. in 2011,[12] and Apple Music followed in 2015,[13] however it was in 2014 that the music industry began to see a significant decline in purchases of physical albums.[14] Music streaming quickly created a new standard for music consumers, making physical albums seem archaic. This rapid change caused some songwriters and publishers to feel as though they had lost their place in the music industry, especially since it had become increasingly difficult for them to turn a profit off of their works.[15] As the subsequent issues arose regarding the streaming services' failure to obtain adequate licensing for their works, and as a result cost them the potential royalty earnings, songwriters and publishers appeared unafraid of pursuing a lawsuit against any and all of the infringing music streaming services. There are plenty of benefits to streaming services, which songwriters and publishers have undeniably recognized, but the manner in which the transition into a digital music age unraveled ultimately left both parties vexed.[16]

On April 10, 2018, in response to the years of expensive litigation and settlement agreements, and outward cries for help from both sides of the conflict, the U.S. Congress introduced a bipartisan bill.[17] On October 11, 2018, the Orrin G. Hatch–Bob Goodlatte Music Modernization Act ("MMA") was signed into law.[18] The MMA's primary function was to bring music copyright protections in line with the digital music age of online music streaming.[19]

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[9] Nikki R. Breeland, *Bad Blood: Reconciling the Recording Industry and Copyright Protections on the Internet*, 19 FLA. COASTAL L. REV. 169, 176 (2019).

[10] *See* Hughes, *supra* note 4; *see also* Wixen Music Publishing, Inc. v. Spotify USA Inc., 2017 WL 6663826 (C.D. Cal.).

[11] Breeland, *supra* note 9.

[12] *See* Mark Milian, *Spotify music-streaming service launches in U.S.*, CNN, http://edition.cnn.com/2011/TECH/web/07/13/spotify.us/# (last visited Nov. 16, 2020); *see also* SPOTIFY – FOR THE RECORD, https://newsroom.spotify.com/company-info/ (last visited Feb. 21, 2020).

[13] APPLE, *Introducing Apple Music — All The Ways You Love Music. All in One Place*, https://www.apple.com/newsroom/2015/06/08Introducing-Apple-Music-All-The-Ways-You-Love-Music-All-in-One-Place-/ (last visited Feb. 21, 2020).

[14] James Vincent, *Digital music revenue overtakes CD sales for the first time globally*, THE VERGE (Feb. 21, 2020), https://www.theverge.com/2015/4/15/8419567/digital-physical-music-sales-overtake-globally.

[15] Steven Tyler & David Israelite, *Congress, Fix How Songwriters Are Paid & Pass the Music Modernization Act* (Guest Column), BILLBOARD (Feb. 15, 2018), https://www.billboard.com/articles/business/8100002/steven-tyler-david-israelite-music-modernization-act-guest-column.

[16] *Id.*

[17] Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. 115-264, 132 Stat. 3676 (2018).

[18] *Id.*

[19] Hu, *supra* note 5.

Spotify, Apple Music, Amazon Music, Pandora, and Google Play Music[20] "are the principal corporate entities that will operate under these new rules."[21] The MMA calls for the creation of a new licensing collective in order to facilitate the collection and distribution of mechanical royalties.[22] The new royalty system will be funded by the major music streaming services, and per the MMA, the system must be in effect by January of 2021.[23]

Despite the MMA providing solutions to issues and concerns raised by both sides, the MMA does not appear to be the antidote needed to avoid future litigation between the streaming services and music publishers. Part I of this article discusses the history of the music industry with respect to copyright law prior to the development of the digital music age. Part II of this article discusses the major changes to the Copyright Act presented in the language of the MMA. Part III of this article discusses copyright law following the technological advancement of the internet and the rise of the music streaming industry. Part IV of this article discusses the present implementation of the MMA and whether, as implemented and interpreted, the MMA presents any constitutional concerns.

I. History of Music Copyright Law

The U.S. Constitution Article I, Section 8, grants Congress the authority to "promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[24] Thus, the legislature was free to enact copyright terms, since copyright regulation fell squarely under the control of the federal government.[25] Throughout the years Congress has tackled the realm of music copyright with legislation, each time addressing a new area of concern or updating the law to better suit societal advancements.[26] Congress, with the Copyright Act of 1909, expanded copyright protection by vesting music owners with an exclusive right to create mechanical reproductions of musical works in "phonorecords."[27]

[20] Germain, *supra* note 6.
[21] Dave Davis, *Music Modernization Act of 2018 Becomes Law*, COPYRIGHT CLEARANCE CENTER (Oct 11, 2018), http://www.copyright.com/blog/music-modernization-act-introduced-house-senate/.
[22] Hu, *supra* note 5.
[23] *Id.*
[24] U.S. CONST. art. I, § 8, cl. 8.
[25] 17 U.S.C. § 101 (2010).
[26] *See* Kal Raustiala and Christopher Jon Sprigman, *Scales of Justice: White-Smith Music case: A terrible 1908 Supreme Court decision on player pianos*, SLATE https://slate.com/technology/2014/05/white-smith-music-case-a-terrible-1908-supreme-court-decision-on-player-pianos.html (explaining that around the 1890s, player pianos had become very popular because it was one of the few ways in which people could enjoy music at home).
[27] *See* U.S. Copyright Office, *Copyright and the Music Marketplace Executive Summary*, COPYRIGHT (Feb. 2015), https://www.copyright.gov/policy/musiclicensingstudy/executive-summary.pdf; *see also* U.S. Copyright Office, *U.S. Copyright Office Definitions*, COPYRIGHT, https://www.copyright.gov/help/faq/definitions.html#:~:text=Phonorecord%3A,other%20means%20of%20fixing%20sounds (In 1909 "[t]he songs were recorded in "Phonorecords": A material object in which sounds are fixed and from which the sounds can be perceived, reproduced, or otherwise communicated either directly or with the aid of a machine or device. A phonorecord may include a cassette tape, an LP vinyl disc, a compact disc, or other means of fixing sounds. A phonorecord does not include those sounds accompanying a motion picture or other audiovisual work.").

The Sound Recordings Amendment of 1971, amended the Copyright Act of 1909 to include "sound recordings" to the works of authorship entitled to copyright protection.[28] In 1976, revisions were made to the Copyright Act of 1909 in an effort to expand the protections for creative works within the recording industry. [29] Congress revised the act in order to address technological developments and redefine copyright infringement under the modern technology.[30] Nineteen years later, Congress enacted the Digital Performance Right in Sound Recordings Act of 1995 ("DPRA").[31] The DPRA granted copyright owners the exclusive right "in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission."[32]

As technology continued to advance, creating new ways for consumers to access and enjoy music, copyright law fell further and further behind the times. In an effort to fill the gaps in the law, Congress enacted the Digital Millennium Copyright Act of 1998 ("DMCA").[33] DMCA's main focus was to extend the reach of copyright law by explicitly recognizing online streaming technology.[34] Previous efforts by Congress, such as the DPRA, did not leave room for the expansion of copyright protections to digital sound recording accessed via online streaming.[35] Essentially, the DMCA amended the DPRA by expanding the statutory license for subscription transmissions to also include webcasting as a new category of "eligible non-subscription transmissions."[36]

Congress' most recent effort to revamp music copyright law, so that it takes into consideration current music streaming technology, is the Music Modernization Act of 2018 ("MMA").[37] The MMA established an administrative organization, the Mechanical Licensing Collective (MLC), to administer blanket licenses.[38] The new blanket licenses would eliminate the old process of requesting a license for each individual song that the streaming services wished to make available to their customers. By requesting a blanket license from the publishing company, the stream service obtains one license which grants them legal rights to multiple songs, songs which are sometimes by different artists, but all of which are owned by the same publishing company.[39]

II. The Music Modernization Act

On September 25, 2018, Senator Orrin Hatch ("Sen. Hatch") submitted a concurrent resolution directing the Clerk of the House of Representatives to make corrections in the

[28] Sound Recording Act of 1971 § 1, Pub. L. No. 92-140, 85 Stat. 391 (1971) (enacting the Sound Recording Act of 1971 to address the issue of piracy); *see generally* 1909 Copyright Act, Pub. L. No. 60-349, 35 Stat. 1075 (Mar. 4, 1909).
[29] U.S. CONST. art. I, § 8, cl. 8 (vesting Congress with the authority to revise existing copyright laws).
[30] Kenneth J. Abdo & Jacob M. Abdo, *What You Need to Know about the Music Modernization Act*, 35 ENT. & SPORTS LAW 5 (2019).
[31] 17 U.S.C. § 106(6) (2020).
[32] *Id.*
[33] Digital Millennium Copyright Act, PL 105–304, October 28, 1998.
[34] *Id.*
[35] 17 U.S.C. § 106(6), *supra* note 31.
[36] Digital Millennium Copyright Act, *supra* note 33.
[37] Kaitlin Chandler, *The Times They Are a Changin': The Music Modernization Act and the Future of Music Copyright Law*, 21 TUL. J. TECH. & INTELL. PROP. 53 (2019).
[38] U.S. Copyright Office, *Music Modernization*, COPYRIGHT, https://www.copyright.gov/music-modernization/115/ (last visited Feb. 21, 2020); *see also* Orrin G. Hatch-Bob Goodlatte Music Modernization Act, *supra* note 17.
[39] Monique Brown, *The Music Modernization Act*, 55 TENN. B.J. 22, at 23 (2019).

enrollment of the MMA.[40] Standing before the Senate, Sen. Hatch began his motion by introducing the then bill as being "the most important copyright reform in decades."[41] Sen. Hatch expressed that the need for the copyright reform was to protect the rights and interest of artists and songwriters, since they are the ones who lost out on their royalties due to the previous, poor licensing system.[42] Additionally, Sen. Hatch called the bipartisan passage of the bill an "enormous victory for songwriters, for the first time in history songwriters and their representatives will be in charge of making sure that they get paid."[43] Then, on October 11, 2018, the MMA was enacted into law.[44]

The MMA created a new section of the Copyright Act which allows for the creation of a blanket compulsory license and largely benefits the publishing section and digital service providers.[45] The MMA also established the need for a Mechanical Licensing Collective ("MLC").[46] The MLC will be governed by a board of directors, made up of music publishers and professional songwriters.[47] The MLC's board of directors are responsible for creating and organizing the new royalties system.[48] The royalties system needs to be fully operational by January of 2021, pursuant to the language of the MMA.[49]

Additionally, the board of directors will be responsible for establishing and appointing an unclaimed royalties oversight committee as well as a dispute resolution committee.[50] The MMA includes a clause which limits the liability of digital service providers for prior uses of unlicensed musical works. [51] More specifically the MMA established that for any copyright infringement lawsuit that is filed on or after January 1, 2018, the copyright owner's remedy have been limited to only the recovery of the royalties that are due provided that: (1) the digital service provider has made an ongoing good faith effort to identify the copyright owner and pay for all works used on its service; and (2) has collected payments for the unidentified works.[52]

However, is the enactment of the MMA really an "enormous victory for songwriters" if they have been stripped of their ability to recover against a streaming service that fails to obtain proper licensing and/or issue royalties for the use of their musical works?

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[40] *U.S. Senate: Senate Floor Activity*, UNITED STATES SENATE (Sept. 25, 2018), https://www.senate.gov/legislative/LIS/floor_activity/2018/09_25_2018_Senate_Floor.htm (summarizing the Senate floor activity for Tuesday, September 25, 2018).
[41] *U.S. Senate Session, Part 2*, C-SPAN (Sept. 25, 2018*)* https://www.c-span.org/video/?451994-2/us-senate-considers-nominations.
[42] *Id.*
[43] *Id.*
[44] Orrin G. Hatch-Bob Goodlatte Music Modernization Act, *supra* note 17.
[45] 17 U.S.C. § 115 (2018).
[46] *Id.*
[47] Chandler, *supra* note 37.
[48] *Id.*
[49] Orrin G. Hatch-Bob Goodlatte Music Modernization Act, *supra* note 17.
[50] *U.S. Senate Session, Part 2*, *supra* note 41.
[51] 17 U.S.C. § 115(d)(1)(D) (2018).
[52] Todd Larson, et al., *Music Licensing Overhaul Signed into Law*, WOLTERS KLUWER (2018).

III. Copyright Law and The Music Streaming Industry

In 2011, when Spotify launched its business in the United States,[53] the Copyright Act of 1976 was the governing law.[54] The copyright laws and procedures which were in effect imploded under the demands and fast pace of the streaming business. The Copyright Act was ill-suited for the streaming economy. The mechanical licensing system in place at the time required streaming services, like Spotify, to issue a Notice of Intent in order to begin the licensing process.[55]

It was noted that, "[t]he system required individual song-by-song notices to be served on the copyright owners, or, if the owner could not be found, the Copyright Office."[56] Additionally, producers and engineers, who are creative contributors to sound recordings along with the musical performers, did not enjoy a statutory right to royalties on streaming revenues.[57] This all gave rise to the growing trend of courtroom battles and steep settlement payments between songwriters and streaming services.

After nearly seven years of seemingly constant litigation between the streaming services and songwriters and their publishing companies, the MMA was in the works. The MMA was drafted and enacted with the intent to address the root of the allegations made against the streaming services in each of these lawsuits: errors in licensing music.[58] This being the expectation from the MMA, the MMA included language effectively limiting the streaming services of liability;[59] the MMA drew a line in the sand.

The MMA states that statutory damages would not be available for any claim of unpaid royalties filed against a streaming service after January 1, 2018.[60] This was just one side of the deal. In exchange for this language limiting its liability, the streaming services had committed themselves to funding the establishment of the new royalty system for issuing the blanket licenses.[61]

Essentially, by paying for the new system, the music streaming services would in return receive an end to all of the litigation. Did the MMA basically guarantee a serial defendant a pass to never be hauled into court again? Why did the MMA, advertised as reform to copyright law that was favorable to songwriters, strip songwriters and their publishing companies of their opportunity to receive statutory damages from streaming services who failed to pay them royalties that they were entitled to? It was not long after the MMA's cutoff date that another lawsuit seeking statutory damages was filed against Spotify for unpaid royalties.[62] But this time, the songwriters and publishing companies' complaint included a constitutional challenge.[63]

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[53] SPOTIFY – FOR THE RECORD, https://newsroom.spotify.com/company-info/ (last visited Feb. 21, 2020).
[54] Kevin Chung, *Music Matters: A Discussion of Current Legal Issues in the Music Industry*, 35 ENT. & SPORTS LAW. 78 (2019).
[55] *Id.*
[56] *Id.*
[57] Abdo & Abdo., *supra* note 30.
[58] Bill Rosenblatt, *Here are the Loopholes Closed By the Music Modernization Act*, FORBES, https://www.forbes.com/sites/billrosenblatt/2018/10/11/music-modernization-act-now-law-leaves-one-copyright-loophole-unclosed/#17d5e34e7272 (Oct 11, 2018).
[59] Hu, *supra* note 5.
[60] Larson, et al., *supra* note 52.
[61] Hu, *supra* note 5.
[62] Althea Legaspi, *Eminem Publisher Sues Spotify for Copyright Infringement*, ROLLING STONE, (Aug. 21, 2019), https://www.rollingstone.com/music/music-news/eminem-publisher-spotify-copyright-infringement-lawsuit-874956/ (last visited Feb. 21, 2020).
[63] *Id.*

IV. The MMA and Constitutional Concerns

On August 21, 2019, Eight Mile Style ("Eight Mile"), rapper Eminem's publishing company who holds administration rights to his early catalog, filed suit against Spotify for copyright infringement.[64] Eight Mile alleges that Spotify had streamed two hundred and fifty (250) of Eminem's songs without proper licensing.[65] In their complaint, Eight Mile alleges that MMA's limitation on liability for digital service providers was unconstitutional.[66]

Furthermore, the Complaint states the MMA's retroactive elimination of the right of a successful plaintiff to receive profits and damages "attributable to the infringement is an unconstitutional denial of substantive and procedural due process and an unconstitutional taking of a vested property right."[67] The Eight Mile complaint argues that, "[g]iven the penny rate for streaming paid to songwriters, the elimination of the combination of profits attributable to infringement, statutory damages, and attorneys' fees would essentially eliminate any copyright infringement case as it would make the filing of any such action cost prohibitive."[68]

On October 16, 2019, the Assistant United States Attorney filed an "Acknowledgment by The United States of America of Plaintiffs' Constitutional Challenge."[69] In the filing, the Attorneys for the United States stated that, despite having an interest in Eight Mile's constitutional challenge, it could not outright address Eight Mile's constitutional challenge.[70] This is because Eight Mile and Spotify were still in the early stages of litigation and had not filed responses further detailing the extent of and basis for the constitutional claim.[71] Without this argument and detail, the Attorneys for the United States could not and would not address Eight Mile's constitutional challenge.[72] To date, the Court nor the Attorneys for the United States have addressed the merits of Eight Mile's constitutional challenge.[73]

There may, however, be some merit to Eight Mile's constitutional challenge. Should the owner of a musical work be able to recover more than just unpaid royalties for a digital streaming service? Does it matter that the music streaming services could have or should have known that the musical works belonged to a particular artist? In the case of Eight Mile's lawsuit, "Lose Yourself," despite being one of "the most famous and popular songs in the world," Spotify has allegedly not been paying royalties for the song.[74] Eight Mile states that despite the songs well-

[64] *Eight Mile Style, LLC; Martin Affiliated, LLC v. Spotify USA Inc*., U.S.D.C. Mid. Dist. Tenn. (2019); *see also* Jem Aswad, *Eminem Publisher Sues Spotify, Claiming Massive Copyright Infringement*, VARIETY, https://variety.com/2019/biz/news/eminems-publisher-sues-spotify-claiming-massive-copyright-infringement-1203310370/ (last visited Feb. 21, 2020).

[65] Nick Statt, *Eminem's Publisher Sues Spotify for Copyright Infringement Over 'Lose Yourself' and Other Tracks*, THE VERGE, https://www.theverge.com/2019/8/21/20827358/eminem-eight-mile-style-suing-spotify-lawsut-copyright-infringement-lose-yourself/ (last visited Feb. 21, 2020).

[66] Complaint for Copyright Infringement, Eight Mile Style, LLC, et al. v. Spotify USA Inc., No. 3:19-cv-00736 (U.S.D.C. Mid. Dist. Tenn. Aug. 21, 2019).

[67] *Id.*

[68] *Id*.

[69] Acknowledgment by The United States of America of Plaintiffs' Constitutional Challenge, Eight Mile Style, LLC, et al. v. Spotify USA Inc., No. 3:19-cv-00736 (U.S.D.C. Mid. Dist. Tenn. Apr. 4, 2020).

[70] Complaint for Copyright Infringement, *supra* note 66.

[71] *Id.*

[72] *Id*.

[73] *See* Court Docket Sheet, Eight Mile Style, LLC, et al. v. Spotify USA Inc., No. 3:19-cv-00736 (U.S.D.C. Mid. Dist. Tenn.) (last updated on Nov, 11, 2020).

[74] Complaint for Copyright Infringement, *supra* note 66.

known success and world-wide popularity, Spotify and its agent placed the song into its "copyright control" category.[75] Spotify places songs in this category when the copyright owner is unknown and, as a result, the song cannot be licensed.[76]

In its complaint, Eight Mile asserts that Spotify "does not meet the requirements for MMA damage limitations."[77] Eight Mile argues that Spotify failed to meet certain obligations which would have triggered the applicability of the limitation on the copyright owner's ability to sue.[78] This is essentially the first time that the language and application of the MMA are being called into question and reinterpreted before a court. Additionally, Eight Mile asserted that, even if the court did not agree with the prior argument, the court should still disregard the MMA's limitations on Eight Mile's right to sue because it is an unconstitutional taking.[79]

The Takings Clause of the Fifth Amendment provides that, "[P]rivate property [shall not] be taken for public use, without just compensation."[80] However, the Takings Clause's application to copyright reform is viewed as "largely unexplored" territory.[81] Nevertheless, there is still support for such an application. It has been argued that, "[t]he basic fairness orientation of the Takings Clause suggests that, if the government takes away those entitlements after the investment has been made, the taking should receive at least some constitutional scrutiny."[82]

Music publishing companies and songwriters, like Eight Mile, had solidified their entitlement to their musical works with Congress' implementation of the Sound Recording Act of 1971.[83] If their works were used without proper licensing, they would be entitled to statutory damages against the individual who infringed on their copyright. This is a right that individuals in the music industry have held for years. Thus, it does appear as though the MMA's language, which prevents a copyright owner from seeking statutory damages against a music streaming service, results in an unconstitutional taking.

V. Conclusion

Despite the MMA supplying solutions to issues and concerns raised by both sides to this conflict, the MMA does not appear to be the antidote needed to avoid future litigation between the streaming services and music publishers. The MMA was proposed and portrayed as a body of law that was going to support and protect songwriters and publishing companies. However, in practice, it appears that the MMA has left songwriters and publishing companies at a disadvantage; it is as though they cannot compete with the streaming services.

Without the songwriters and the publishing companies, there would be no music for the services to stream. It is the property of the songwriters and publishing companies that makes this whole music business what it is. Their work product is the item that the streaming services'

[75] *Id.*
[76] *Id.*; s*ee also* Eriq Gardner, *Eminem Publisher Sues Spotify Claiming Massive Copyright Breach, "Unconstitutional" Law*, THE HOLLYWOOD REPORTER, https://www.hollywoodreporter.com/thr-esq/eminem-publisher-sues-spotify-claiming-massive-copyright-breach-unconstitutional-law-1233362.
[77] Complaint for Copyright Infringement, *supra* note 66.
[78] *Id.*
[79] *Id.*
[80] U.S. CONST. amend. V.
[81] *Copyright Reform and the Takings Clause*, 128 HARV. L. REV. 973 at 974.
[82] *Id.*
[83] *See generally* Sound Recording Act of 1971 § 1, Pub. L. No. 92-140, 85 Stat. 391 (1971).

customers are in search of. Yet again, copyright law is not prepared, nor designed, to protect or support them when their works are used without proper licensing.

The MMA's limitation on the songwriters and the publishing companies' ability to recover statutory damages needs to be removed from the MMA. The fact that songwriters and the publishing companies will have no true recourse against these streaming services is unconstitutional. Artists have no other choice but to allow their music to be available on streaming services because this is now the leading method of accessing and consuming music and the streaming services are very aware of this. Therefore, it would not be right to allow streaming services to continue to hold all the power in this business endeavor.

Even worse, under the current application and interpretation of the MMA, these services not only hold all the power but there is also no method or recourse for the songwriters and the publishing companies to implement against them. This was by the streaming services' design, when it agreed to fund the new royalty system, in exchange for the limitation of statutory damages.

The alternative to the MMA's damages limitation would be to implement a cap. Instead of drawing the line in the sand as it had done with the January 1, 2018 cut-off date for plaintiffs to sue for statutory damages, Congress could have instead implemented a recovery cap. This would not prevent parties from suing one another, as the MMA had hoped it would. It would, however, at least allow for a check and balance between the songwriters and the publishing companies against the music streaming services.

This would act as a deterrent for both parties; the songwriters and the publishing companies will be prevented from filing lawsuits for exceptionally high amounts, as they have done in the past. However, they would not be deprived of their right to bring a claim against an infringer of their copyright because suing had not been made unconscionable.

For the music streaming services, because they are still faced with the potential threat of suit for infringing on copyright, they will be more likely to ensure that they obtain proper licenses. Under the present system of the MMA, the music streaming services have been put in a position where their actions cannot be addressed in a manner that would allow them to suffer the consequences of their wrongdoings.