Imagine: Could Mediation Systems Fix Songwriter Split Disputes?

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ABSTRACT

Songwriters allocate compositional credit—and therefore songwriter earnings—for a given song through negotiated numerical percentages known as "splits" or "shares." Recently, as the number of writers per song has dramatically expanded, so too has the universe of possible split arrangements. They may be allocated evenly or unevenly; by type or extent of contribution, or without regard to either; in accordance with common customs or patterns, or in a manner that appears entirely nonsensical. Frequently, they are simply ordained by some party with superior bargaining power, such as a song's recording artist, who, as gatekeeper to the song's release, can often demand a higher split than their contributions may warrant. The entire endeavor is far more art than science—at best an approximation of contributions, and at worst a coercive crapshoot.

Perhaps unsurprisingly, given all this, split disputes *have become commonplace. And yet, the leading resolution mechanisms remain ill-equipped to justly and efficiently address this burgeoning class of conflict. As this Article argues, because the bonds between songwriters are at once financial, creative, interpersonal, and forged within a competitive field where success is an exercise in repeat partnership and word-of-mouth networking, split disputes implicate a unique combination of*

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creative, emotional, reputational, relational, and financial factors. Accordingly, they present a Petri dish of dispute forces that both befuddles traditional resolution mechanisms and remains relatively unexplored in dispute and entertainment literature alike.

This Article seeks to change that. It attempts to (1) distill the dynamics at work within split disputes and (2) demonstrate why mediation is ideally suited to accommodate these idiosyncrasies. It then (3) identifies performing rights organizations ("PROs") as the industry actors best equipped to implement a mediation systems design, and imagines what that system might look like in practice.

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INTRODUCTION

In 2017, after nearly fifty years of ubiquity, "Imagine" got a new songwriter. At an industry gala, it was announced that Yoko Ono would be officially recognized as a co-writer of the enduring work her late husband first recorded in 1971.[2] For 46 years, "Imagine" had

2. *See* Samantha Schmidt, *Yoko Ono Set to Receive Credit with John Lennon as Songwriter of 'Imagine'*, WASH. POST (June 15, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/06/15/yoko-ono-will-receive-credit-with-john-lennon-as-songwriter-of-imagine/ [https://perma.cc/S793-WM78].

been credited to John Lennon alone.[3] Lennon, who in 1971 had just emerged from another songwriting partnership of some renown,[4] recalled in 1980 that while "[a] lot of it—the lyric and the concept—came from Yoko," in 1971 he had been "a bit more selfish, a bit more macho, and I sort of omitted to mention her contribution."[5]

Decades later, the 84-year-old Ono was wheeled onstage by the couple's now-middle-aged son, Sean.[6] There, the woman long vilified for her perceived role in the demise of her husband's band[7] proudly accepted an award for her work on a song *Rolling Stone* once dubbed her husband's "greatest musical gift to the world."[8] It was a remarkable chapter in the annals of popular songwriting.

And yet, for all its distinction, its underlying dynamics actually fit snugly into modern trends in songwriting—and, as this Article will discuss, *disputes* surrounding songwriting credits. First, "Imagine" promptly joined the vast majority of its modern chart-topping progeny in the multi-songwriter realm. Today, it is quite rare for pop songs to credit just one writer.[9] The percentage of *Billboard* No. 1 hits penned by one writer has consistently fallen, from 44% in the

3. Ben Beaumont-Thomas, *Yoko Ono Could Get Songwriting Credit for Imagine*, GUARDIAN (June 15, 2017), https://www.theguardian.com/culture/2017/jun/15/yoko-ono-john-lennon-imagine-songwriting-credit [https://perma.cc/YKD9-NN29].

4. The "Lennon/McCartney" imprint had defined the Beatles catalog even as the two had increasingly written alone. *See* Mark Glickman, Jason Brown & Ryan Song, *(A) Data in the Life: Authorship Attribution in Lennon-McCartney Songs*, HARV. DATA SCI. REV., Summer 2019, at 2, https://doi.org/10.1162/99608f92.130f856e [https://perma.cc/68CK-374H]. The Lennon/Ono partnership would go the other directions: from Ono's "Imagine" snub to the two sharing equal billing on 1980's *Double Fantasy* album. *See* Geoff Edgers, *John Lennon's Most Revealing Album Was His Last*, WASH. POST (Nov. 12, 2020), https://www.washingtonpost.com/arts-entertainment/2020/11/12/john-lennon-death-double-fantasy-anniversary/?arc404=true [https://perma.cc/6BDF-5G3Z].

5. Beaumont-Thomas, *supra* note 3 (quoting an "embarrassed" Lennon: "If it had been a male, you know . . . [But] I just put 'Lennon' because, you know, she's just the wife and you don't put her name on, right?").

6. *See* Jem Aswad, *Yoko Ono to Receive Songwriting Credit on John Lennon's 'Imagine'*, VARIETY (June 14, 2017), https://variety.com/2017/biz/news/yoko-ono-to-receive-songwriting-credit-on-john-lennon-imagine-1202466645/ [https://perma.cc/7M9C-HKDK].

7. Delia Lloyd, *Paul McCartney: Yoko Didn't Break Us Up*, WASH. POST (Oct. 29, 2012), https://www.washingtonpost.com/blogs/she-the-people/wp/2012/10/29/paul-mccartney-yoko-didnt-break-us-up/ [https://perma.cc/EB5N-PE46].

8. *See* Schmidt, *supra* note 2.

9. The percentage of #1 hits with one writer has dropped from 44% in the 1970s to 4%. Paul Grein, *A No. 1 Song Written by a Solitary Songwriter Is Becoming a Thing of the Past*, BILLBOARD (Oct. 26, 2020), https://www.billboard.com/articles/business/chart-beat/9473248/hit-songs-written-by-one-songwriter-fleetwood-mac-dreams-stevie-nicks/ [https://perma.cc/8WTT-N5F2].

1970s to 4% in the 2010s.[10] The average number of songwriters per pop hit has roughly tripled since the 1980s;[11] it is now routine for writer credits to reach double figures.[12]

Second, the class of creative contributions to works of popular music that are now considered to be "compositional" in nature has significantly broadened since 1971. While songwriting was traditionally conceived as referring to a very narrow set of creative fruits—melody and lyrics—over time, it has become significantly more common for less traditionally-compositional creatives such as instrumentalists, producers, arrangers, background vocalists, and others to receive songwriting credit.[13] Thus, someone making a contribution similar to Ono's work on "Imagine" might understandably have a greater expectation of credit today than in 1971.[14] The upshot: since "Imagine," both the volume and breadth of creators who typically receive songwriting credit have increased.

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10. *See id.*

11. *See* Dan Kopf, *How Many People Take Credit for Writing a Hit Song?*, PRICEONOMICS (Oct. 30, 2015), https://priceonomics.com/how-many-people-take-credit-for-writing-a-hit-song/ [https://perma.cc/J5MA-25ZQ] (the average in the early 1980s was less than two songwriters per *Billboard 100* song); Dorian Lynskey, *How Many People Does It Take to Write a Hit Song in 2019?*, GQ (Nov. 2, 2019), https://www.gq-magazine.co.uk/culture/article/long-songwriting-credits [https://perma.cc/BR9D-RPVJ] ("[I]t took an average of 5.34 people to write the 100 biggest hits of 2018—a new record.").

12. *See* Lynskey, *supra* note 11.

13. This is a product of evolving creative practices. In the early half of the twentieth century, popular music was largely the product of siloed compositional, production, and performance processes. Under the "Tin Pan Alley" model, music publishers would employ writers, who would—typically in teams of one or two—create complete, self-contained compositions. Publishers would then pitch these compositions to recording artists, performers, or producers to be recorded and/or performed. In short, composition came first; production (i.e., recording the song) and/or performance (i.e., renditions of the song for live audiences) came later. Composition was the province of songwriters, while production and performance were the province of recording artists, performers, arrangers, and producers (who were usually different people than the songwriters). As a result, defining the scope of the composition was easy: it was simply what the songwriter(s) created prior to the work being tapped for production and performance. Naturally, songwriter credit was limited to the one or two people who had created that initial, complete, self-contained composition. *See* Daniel Abowd, Note, *FRE-Bird: An Evidentiary Tale of Two Colliding Copyrights*, 30 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1311, 1323–24 (2020). Today, Tin Pan Alley is largely a relic of the past. Modern pop music is primarily the product of composition and recording processes that overlap. In other words, where once it was typical for a song to be written and then recorded, today's songs are typically written *as* they are recorded. Further muddling matters: the same creators often wear multiple hats (e.g., songwriter, producer, artist, arranger, engineer, etc.). *See id.* at 1324–28.

14. *See* Beaumont-Thomas, *supra* note 3.

So has ambiguity surrounding those credits: the rise of digital tools has allowed for music creation to occur at different times, in different places, and with an increasing number of people.[15] It has also thoroughly muddled previously tidy borders between composition and production—between song and sound recording.[16] This has injected uncertainty into songwriter crediting: how can one determine who is a songwriter without first defining what the boundaries of the song are?[17] And if the song was once defined as the parcel of melodic and lyrical material that arrived at the studio ready to be recorded, what now defines the scope of a song that is born in the studio?[18] For that matter, w*ho* decides?[19] And how should writer

15. One common pattern: a producer will create a backing track and send it to other creators, who then submit melodic and lyrical ideas that the producer can stitch together into a complete song. *See* Helienne Lindvall*, Behind the Music: Why Topline Melody Writing Creates Disputes Between Artists and Songwriters*, GUARDIAN (Aug. 26, 2011) https://www.theguardian.com/music/musicblog/2011/aug/26/topline-melody-disputes-artists-songwriters [https://perma.cc/43N5-EXE6]. These participants may not, and often need not, know one another or have any clear sense of what or how each fellow participant contributed to the song. *See* Richard Osborne, *Doing the Splits: The Creative Accounting of Songwriting Shares*, IASPM UK & IRELAND CONFERENCE 2016: CREATIVITY, PRACTICE AND PRAXIS, BRIGHTON 9, (2016) (observing that quantifying relative contributions is harder when "divorced in space and time").

16. In an exact subversion of the traditional songwriting-then-production supply flow of yore, it is now common for production elements—beats, grooves, basslines, harmonic patterns—to be recorded first, and for "topliners" to layer melodic and lyrical ideas atop those pre-existing production elements. *See supra* note 13; JOHN SEABROOK, THE SONG MACHINE: INSIDE THE HIT FACTORY 200–04 (2015) (explaining how this "track-and-hook" model functions); *see also, e.g.*, Patrick Doyle, *Musicians on Musicians: Paul McCartney & Taylor Swift*, ROLLING STONE (Nov. 13, 2020), https://www.rollingstone.com/music/music-features/paul-mccartney-taylor-swift-musicians-on-musicians-1089058/ [https://perma.cc/FXB2-63NM] (Taylor Swift explaining to Paul McCartney that her newest album was written with her producer "send[ing] me this file of probably 30 instrumentals . . . He'd send me a track; he'd make new tracks, add to the folder; I would write the entire top line for a song, and he wouldn't know what the song would be about, what it was going to be called, where I was going to put the chorus."); Benjamin Samama, *What's the Difference Between a Songwriter and a Topline Writer?*, SONICBIDS (Mar. 2, 2016), https://blog.sonicbids.com/whats-the-difference-between-a-songwriter-and-a-topline-writer [https://perma.cc/DL2Y-7HFW] ("In commercial songwriting, the track virtually always comes first.").

17. *See, e.g.*, Helienne Lindvall, *Calculating the Credits Behind Songwriting*, GUARDIAN (June 24, 2008), https://www.theguardian.com/music/musicblog/2008/jun/24/calculatingthecreditsbehind [https://perma.cc/4KX3-3DYF] (cataloging a number of prominent instances in which the line between compositional and non-compositional contribution was contested).

18. *See id.*

19. *See id.*

"splits"—the numeric percentages reflecting each songwriter's financial interest in the song[20]—weigh the apples of Creator A's production work, against the oranges of Creator B's lyrical work, against the strawberries of Creator C's melodic work?[21]

Third, while posthumous crediting delays like the one in "Imagine" are certainly not the norm, it is now common for credits to be hashed out after the fact. Modern music creation tends to be a sprawling, informal beast, and so collaborators often do not settle on splits until after a record's release.[22] Crucially, by then a song's success (and therefore its value) may already be a known quantity, which can drastically affect negotiations—and, as with "Imagine," magnify the significance of the outcome.[23]

Finally, while the lore surrounding Ono and Lennon is of course not typical of most songwriting disputes, in *this* context it is but an extreme variation on an ordinary theme: the interplay between relationships and credit.[24] Songwriting is personal. Songwriting relationships are personal. The power dynamics inherent to other relationships (e.g., imbalances based on age, gender, longevity, success level, wealth, personality, etc.) are present in songwriting. Ono's acquiescence to Lennon's reductive crediting is entirely consistent with a tendency among less powerful co-writers to simply accept the splits declared by more powerful co-writers, particularly when that partner is a successful recording artist. In other words, if Lennon's

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20. *See infra* Part I.A.

21. *See* Kim de Laat, *"Write a Word, Get a Third": Managing Conflict and Rewards in Professional Songwriting Teams*, 42(2) WORK & OCCUPATIONS 225, 240 (2015) ("Songwriting can be an ineffable process, and one's contribution may not be easily quantifiable."); Helienne Lindvall, *What Are Songwriting Splits and Why You Need to Agree on Them Now*, LANDR (May 4, 2019), https://blog.landr.com/songwriting-splits-explained/ [https://perma.cc/H6ZY-WXKB] (critiquing the fixation on melody and lyrics: "It may be something simple like changing the format of the song—like taking out the pre-chorus or adding an earworm hook—that's the difference between a hit and just an average track.").

22. *See generally* de Laat, *supra* note 21; Lindvall, *supra* note 21; *see also* Ana Ribeiro, *How to: Avoid Conflicting Claims and Credit Errors in Songwriting*, SONGTRUST (Jan. 27, 2021), https://blog.songtrust.com/counterclaims-what-to-do [https://perma.cc/7S6W-8HNV] (detailing how creative collaborative practices can spill over into "messy" split negotiations).

23. *See generally,* Kurt Mantheiy, *Splitting Up the Song*, MANTHEIY LAW, https://mantheiylaw.com/splitting-up-the-song/ [https://perma.cc/J6TW-QHCK] ("One of the most common, yet largely preventable, issues . . . [is] struggling to allocate songwriting credit after the song is written and released (and making money).").

24. *See infra* notes 78–83, 118–122 and accompanying text.

admission—that credits were affected by his relationship with Ono—was unusual, it was unusual only in its candor, not its content.[25]

There is, however, one key way in which the "Imagine" saga was *unlike* today's split disputes: it carried no significant financial implications.[26] That is abnormal. Modern split disputes are bitter battles implicating emotional, reputational, relational, and financial factors, among others. They present a Petri dish of dispute forces—one that remains relatively unexplored in academic dispute or entertainment literature.

This Article seeks to change that. It attempts to distill the forces at work within split disputes and to imagine a world where those disputes are more effectively resolved via mediation. It argues that mediation is better suited than current dispute mechanisms to absorb the collision of relational and financial interests, power imbalances, and other quirks inherent to songwriter disputes. It then identifies performing rights organizations ("PROs") as the industry actors best equipped to implement a mediation systems design, and examines what that system might look like in practice.

The Article proceeds in three parts. Part I introduces modern songwriter split disputes and explores the avenues through which these disputes are currently resolved (or abandoned). Part II then illustrates the ways in which mediation is remarkably well-matched to these disputes. Finally, Part III explores how a mediation system could be designed to best address stakeholder interests.

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25. *See supra* note 5. Ono herself illustrated the personal nature of credits not just in acknowledging the honor she felt in becoming a credited writer on "Imagine," but also in her decision to lambaste as "petty" (and pursue legal recourse against) Paul McCartney's attempt to nominally re-credit Beatles songs that he primarily wrote on his own as "McCartney/Lennon," rather than the traditional "Lennon/McCartney." *See* Mark Savage, *Yoko Ono Added to Imagine Writing Credits*, BBC (June 15, 2017), https://www.bbc.com/news/entertainment-arts-40286790 [https://perma.cc/Q928-BY7C]; Daniel Kreps, *Paul McCartney Talks Nixed 'McCartney/Lennon' Songwriting Credit*, ROLLING STONE (July 5, 2017), https://www.rollingstone.com/music/music-news/paul-mccartney-talks-nixed-mccartney-lennon-songwriting-credit-36633/ [https://perma.cc/RV8E-4938] (McCartney copping to "giv[ing] up on [flipping credit to "McCartney/Lennon"] . . . [i]n case it seems like I'm trying to do something to John.").

26. For one, Ono was already beneficiary to Lennon's estate, so she already stood to collect earnings earmarked for Lennon as the sole credited songwriter of "Imagine." Further, because "Imagine" was first published prior to the 1976 Copyright Act, crediting Ono as an author did not extend its life of U.S. copyright, which is still set to expire in 2066. Finally, Ono and her late husband's estate also shared a music publisher representing each of their musical compositions, so the move likely did not create any significant agency complications. *See* Aswad, *supra* note 6.

I. TODAY: SONGWRITER SPLIT DISPUTES

Part I of this Article charts out a cross-section of the status quo surrounding songwriter split disputes. Part A introduces songwriters' basic unit of creative currency: songwriter splits. Part B then illustrates the different kinds of split disputes that arise among co-writers of the same work. Finally, Part C explores the various resolution avenues currently available to songwriters.

A. *Songwriter Splits*

Writer credits take the form of songwriter "splits." These splits convey the extent of each writer's interest in a work.[27] A writer with a 100% split is due, naturally, 100% of the net income a song earns; similarly, the writers of a song with two credited songwriters who each have a 50% split are each due half of the net income a song generates. Unsurprisingly, while 100% and 50/50 splits may once have been the norm, as the number of writers per song has expanded, so too has the universe of possible split allocations.[28]

There are no rules that govern splits. They are entirely the product of negotiation, custom, relationships, and inertia.[29] They may be split evenly among writers or they may be split unevenly; they may be allocated by type of contribution (e.g., lyrics, melody, arrangement, production), or extent of contribution, or without regard to either; they may adhere to customs, or they may appear entirely random or nonsensical.[30] In the end, *any* allocation is possible so long as it sums to 100%.[31]

Songwriters differ on how and when to discuss splits. Some prefer to finalize everything prior to collaborating.[32] Some prepare and sign "split sheets," which stipulate, and allow for signatories to agree

27. *See generally* Osborne, *supra* note 15. The terms "splits" and "shares" are used interchangeably.

28. *See generally id.;* Lindvall, *supra* note 21.

29. *See generally* Osborne, *supra* note 15, at 2.

30. *See id.* at 2–12 (classifying common split conventions); SEABROOK, *supra* note 16, at 200–04 (contrasting the "track-and-hook" model with Nashville's Tin Pan Alley-esque culture).

31. *See* ASCAP, *Welcome to Splitsville, USA—Where Co-Writers Live Together in Harmony*, YOUTUBE (Aug. 29, 2018), https://www.youtube.com/watch?v=RAFZ_Q40qWk [https://perma.cc/E3UE-T5LX].

32. *See, e.g.*, Steve Knopper, *The Assembly Line*, VULTURE (Aug. 6, 2018) https://www.vulture.com/2018/08/the-songwriting-camps-where-pops-biggest-hits-get-crafted.html [https://perma.cc/5VKS-N3UU] (discussing split arrangements in the context of another common songwriting model: publishers, artists, PROs, or other entities hosting "writing camps," where a number of producers and writers come together and break into fluid groups to work on a number of songs simultaneously).

to, split arrangements.[33] This has obvious advantages, including clarity, formality, and administrative finality—allowing creatives to focus on creativity.[34] It also has drawbacks: many writers feel that interjecting what are effectively legal and monetary negotiations into the musicmaking process can be awkward and uncomfortable, chilling creativity.[35] An up-front approach can also yield a result where splits do not align with actual contributions, which may miff those who end up contributing more.[36] To that end, some prefer to work out splits after a song is complete, based on actual contributions.[37] But the exercise of clunkily attempting to quantify intangible inputs can breed its own awkwardness, which some believe can strain the ongoing relationships that all agree are vital to songwriting careers.[38]

In any event, signed split sheets are relatively rare. Songwriter and journalist Helienne Lindvall notes that "[u]sually the split is not even discussed as it's considered a gentleman's agreement . . . "[39] Often, shares remain unallocated until well after the writing process, at which point some person of relative authority—e.g., the song's producer, or artist—will simply declare them.[40] Splits may even remain unsettled until after a song has been released, leaving some writers taken aback when they end up with a smaller split than they had expected (or even none at all).[41]

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33. *See* Justin M. Jacobson, *Are You Co-Writing Songs? A "Split Sheet" Just Isn't Enough*, HYPEBOT (Nov. 25, 2015), https://www.hypebot.com/hypebot/2015/11/why-a-songwriter-split-sheet-just-isnt-enough-draft.html [https://perma.cc/7UBP-GN4K].

34. *See* Lindvall, *supra* note 21.

35. *See* de Laat, *supra* note 21, at 238–39 (stating that splits talk can "dampen the mood" and be a creative "buzz-kill").

36. *See* Hugh McIntyre, *How To Split Royalties Between Songwriters*, ROYALTY EXCHANGE (Apr. 20, 2018), https://www.royaltyexchange.com/blog/how-to-split-royalties-between-songwriters#sthash.RzaHZtvc.dpbs [https://perma.cc/JK9Z-3VUR] ("It's difficult to see so much money go to someone who wasn't really involved, and that can lead to sore feelings . . .").

37. *See* de Laat, *supra* note 21, at 238 (quoting a writer interviewee: "Actually, as a rule of thumb, divide it by whoever's creating the input . . . I'm a genuine believer that if you put in an amount of work you should be rewarded for that.").

38. *See id.* at 241–42 (noting there is a reputational risk associated with fighting over royalties that can be damaging to career and future collaboration prospects); Lindvall, *supra* note 17.

39. Lindvall, *supra* note 17.

40. *See e.g.*, *id.* (offering examples of more powerful creators, including recording artists and bandleaders, unilaterally determining split allocations).

41. *See, e.g.*, LEVON HELM & STEPHEN DAVIS, THIS WHEEL'S ON FIRE: LEVON HELM AND THE STORY OF THE BAND 209–10 (2000) ("So when the album came out, I discovered that I was credited for writing half of [one song] and that was it . . . Somebody had pencil whipped us."); *see also* Lindvall, *supra* note 17 ("In the end, to avoid any nasty surprises, my advice is to decide the splits before you even get to writing.").

The entire endeavor is far more art than science—at best an approximation, and at worst a coercive crapshoot. Although splits can, at times, reflect "earnest attempts to capture differing levels of creative input," in reality, "no division of shares offers a true account of popular music composition."[42] In the end, "[t]hey are all skewed by power and ideology."[43]

B. *Archetypical Songwriter Disputes*

Given all this, it is unsurprising that songwriter splits have become a "massive area of dispute."[44] While their many quirks can make it hard to generalize too freely, there are some common patterns, as described below.

Scenario A: Split Disputes. The first such pattern involves a writer who feels that they have been allocated too small a share, or unfairly cut out of a song in its entirety. One example:

> *"Bradley," a young writer and session guitar player created a guitar track that eventually formed part of the foundation of "Song X," which appeared on a successful album released by a top R&B artist, "Alex." Alex worked with a production team headed by producer "Shane," who sourced material from a number of other writers that Shane, his team, and Alex then built into completed songs. The parties did not prepare a formal split agreement, but Bradley fully expected to be credited on "Song X."*
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> *After the album's release, Bradley was upset to learn that he had been cut out of the shares for "Song X." His publisher attempted to reach out to Alex's management team to resolve the situation directly, but was ignored. Bradley also unsuccessfully tried to appeal to Shane through a mutual songwriting friend.*
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> *Bradley struggled with how to proceed. As a young, poor songwriter, he did not feel he could afford to simply write off the royalties that the song would likely earn, nor the reputational benefits from being credited on one of Alex's songs. But on the other hand, he feared burning bridges with Shane and especially with Alex, whom Bradley feared would not be keen to work with*

Post-release disputes can become complicated where the song has subsequently become successful and significant earnings are at stake. *See supra* note 23 and accompanying text; *see also infra* note 60–64 and accompanying text.

42. Osborne, *supra* note 15, at 12.

43. *Id.*

44. Mary Woodcock, *Artist Dispute Resolution: Mediators, What Are They? Will I Need One?*, MUSIC GATEWAY (Jan. 1, 2015), https://www.musicgateway.com/blog/artist-interviews/artist-dispute-resolution-mediators-what-are-they-will-i-need-one [https://perma.cc/A2BQ-CCSS] (artist dispute practitioner noting they are among "the most common disputes" she mediates).

> *him on future high-profile projects if he made a fuss. In the end, Bradley agreed to allow his publisher to issue a takedown notice for "Song X" on YouTube, which ended up creating a significant interpersonal rift between Bradley and the other collaborators, but also eventually led to Bradley receiving a five-figure settlement (in lieu of writer credit).*[45]

A related species of dispute can arise when songwriters collaborate on an early iteration of a song that is eventually abandoned and scrapped for parts, some of which are repurposed into an entirely new song that the original co-writers have no direct role in creating. In one recent example, two writers that the artist Lizzo had worked with on an unreleased track called "Healthy" asserted an interest in her #1 hit "Truth Hurts," after Lizzo reused a line from "Healthy" in "Truth Hurts."[46]

Scenario B: Disputed Participants. A second scenario arises when a passive or fringe participant asserts a songwriting claim that the other writers dispute.[47] One such example:

> *One story involved [a hit song written by a band]. As is typical, there were one or two girlfriends and other entourage members hanging out in the studio with the band when they wrote this particular hit. The band recorded and released the hit and significant money started rolling in. By this time, some of the girlfriends had become wives and some had become ex-girlfriends. One particular ex-girlfriend contacted the band and said that*

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45. This is a real-life dispute from the author's experience at an independent music publisher. Names and details have been changed to protect the composer's identity. Notes are on file with the author.

46. *See* Jon Blistein, *Lizzo Sues Songwriters Claiming Stake in 'Truth Hurts'*, ROLLING STONE (Oct. 23, 2019), https://www.rollingstone.com/music/music-news/lizzo-lawsuit-truth-hurts-songwriting-902891/ [https://perma.cc/Q3M8-5VF4]. The line "I just took a DNA test, turns out I'm 100% that b*tch" was not just *any* line, either. It had become a meme—the centerpiece of a torrent of viral TikTok clips that propelled the song to ubiquity two years after its initial release. *See* Sarah Grant, *Songs That Defined the Decade: Lizzo's 'Truth Hurts'*, BILLBOARD (Nov. 21, 2019), https://www.billboard.com/articles/columns/hip-hop/8544114/lizzo-truth-hurts-songs-that-defined-the-decade [https://perma.cc/7J4S-RS7U]. Unable to resolve the matter directly, or through publishing administration tactics similar to those employed by Bradley's publisher, *supra* Scenario A, the two writers eventually brought an ill-fated claim against Lizzo. *See* Blistein, *supra*. Meanwhile, another claimant—an artist named Mina Lioness, who initially coined the "100% that b*tch" meme on Twitter—successfully lobbied to receive writer credit. *See* André Wheeler, *Lizzo Adds Songwriting Credit to Truth Hurts Amid Public Battle over Song*, GUARDIAN (Oct. 23, 2019), https://www.theguardian.com/music/2019/oct/23/lizzo-truth-hurts-plagiarism-mina-lioness [https://perma.cc/G4HA-WAL9]. *But see infra* note 57.

47. *See* de Laat, *supra* note 21, at 242 (quoting an interviewee: songwriters "get annoyed when someone is in the room on a consistent basis, like an artist or a writing partner of someone else, and they are just not contributing.").

> *she had contributed some lyrics while they were writing their hit song and therefore was entitled to a percentage of ownership (and therefore royalties). The band argued she did not contribute anything to the song. The ex-girlfriend had no proof she actually contributed, but the band also had no proof she* didn't *contribute. So what happened? The band was forced to give the ex-girlfriend the percentage of ownership she was demanding.*[48]

Importantly, in these scenarios, licensees and third-party licensing vendors will often withhold the song's earnings until the dispute is resolved—and beyond, as the administrative gears of resolving the conflict creak slowly from the songwriter, to the songwriter's management, to the songwriter's publisher, to the publisher's foreign subpublishers, to the individual licensing vendors who are freezing the disputed income, who must then confirm the split changes with the other claiming publisher, who must then check with their songwriter's management, who must then check with the songwriter, and so on.[49]

Scenario C: "Change a Word / Get a Third". The final scenario involves recording artists leveraging a larger than "deserved" split due to outsized bargaining power. For example:

> *[P]erforming artists are also demanding a share of royalties regardless of their actual contribution to the writing process . . . [Songwriter] Emma responds:*

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48. Erin Jacobson, *Don't Give Songwriting Credit to People That Didn't Earn It (Why You Need a Split Sheet)*, INDIE ARTIST RESOURCE (Mar. 2, 2015), http://indieartistresource.com/dont-give-songwriting-credit-to-people-that-didnt-earn-it-why-you-need-a-split-sheet/[https://perma.cc/XVU6-2RPN]; *see also* McIntyre, *supra* note 36.

49. *See, e.g.*, *Royalties and Payment: My Royalties*: *Disputes*, ASCAP, https://www.ascap.com/help/royalties-and-payment [https://perma.cc/BT75-C32E] (outlining the American Society of Composers, Authors and Publishers ("ASCAP")'s dispute policy: "If there is a dispute between two or more parties as to entitlement to [splits] and ASCAP concludes that there is a reasonable basis for the claim, ASCAP may hold royalties attributable to the disputed portion of such interests for as long as ASCAP deems appropriate."). For more on relevant publishing headaches that congest the flow of post-dispute income, *see, e.g.*, Richard Kirstein, *Sync License Requests: Approval Chains*, RESILIENT MUSIC (Jan. 16, 2017), https://resilientmusic.com/sync-licence-requests-approval-chains/ [https://perma.cc/Y9B8-74T4] (discussing approval complexities in a related context); Kevin Cornell, *A Look at Co-Publishing, Sub-Publishing, and Administration Agreements [Pt. 2]*, TUNECORE (Dec. 4, 2018), https://www.tunecore.com/blog/2018/12/a-look-at-co-publishing-sub-publishing-and-administration-agreements-pt-2.html [https://perma.cc/JWZ8-KB4Z] (explaining sub-publishers and multi-territorial hurdles); Eamonn Forde, *Writers' Bloc: Music Licensing in the Age of the Poly-Writer Hit*, SYNCHTANK (Sep. 28, 2020), https://www.synchtank.com/blog/writers-bloc-music-licensing-in-the-age-of-the-poly-writer-hit/ [https://perma.cc/WMJ3-ZSTW] (exploring other complexities stemming from the swell in credited songwriters per song).

> *A: A lot of artists want some of the publishing dollars and [ ] their name on the track.*
>
> *Q: How common is that—the artist not actually being in the room but still getting a credit?*
>
> *A: It's quite common. Songwriters rarely say it because they want the artist to take the song . . . There was another artist, I'm not going to give you a name, but she was quite big. On her second album she wanted seventy percent of the publishing. So what that means is if I've written a song with two other people, we all get ten percent each and she would get seventy percent.*
>
> *Q: Would you say this has been happening more and more, or has this always kind of happened?*
>
> *A: It's been happening a lot, particularly in the past ten years. Artists also think that people won't take them seriously if their names aren't on there. And a lot of media etc., that's what they say "Oh, she didn't write her music." Some of the best singers in the world didn't write their music but they were really good at interpreting, like Frank Sinatra or Whitney Houston. People like that.*[50]

This scenario is so ubiquitous that it has prompted a wry adage among writers: "Change a word, get a third." [51] Key to this dynamic is a disparity in bargaining power between writers and artists. Pop compositions are worthless widgets of intangible intellectual property unless and until they are recorded. Nobody derives any value from a piece of pop songwriting until it becomes embodied in a recording released to and consumed by the public—particularly if by a prominent artist. "[Songwriters know] what side their bread is buttered on. They are going to get a cut on that record. They have to give away 25% or 30% but it is a guaranteed cut."[52]

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50. de Laat, *supra* note 21, at 235.

51. Meaning, essentially, that it is possible for an artist to negotiate a split that far exceeds their contribution. *See* Nathaniel Rich, *Hit Charade*, ATLANTIC (Oct. 2015), https://www.theatlantic.com/magazine/archive/2015/10/hit-charade/403192/ [https://perma.cc/55G8-PFTE]. To be sure, a great many artists are writers who irrefutably earn their credits. For just a few of countless examples*, see, e.g.*, Ashley Iasimone, *Jack Antonoff Says Taylor Swift 'Wrote Every Stitch' of New Song 'Lover' Before He Joined Her in the Studio*, BILLBOARD (Aug. 17, 2019), https://www.billboard.com/articles/columns/pop/8527674/jack-antonoff-taylor-swift-lover-tweets [https://perma.cc/XFY9-TBRW]; *Episode 146: Janelle Monáe*, SONG EXPLODER (Oc. 15, 2018), https://songexploder.net/janelle-monae [https://perma.cc/YDK9-79CP]; Exhibit 9, Griffin v. Sheeran, No. 1:17–CV–05221 (S.D.N.Y. July 27, 2018), ECF No. 67–9 (Ed Sheeran deposition explaining the process he and co-writer Amy Wadge used to write "Thinking Out Loud"); Lucy Jones, *The Incredible Way Michael Jackson Wrote Music*, NME (Aug. 29, 2018), https://www.nme.com/blogs/nme-blogs/the-incredible-way-michael-jackson-wrote-music-16799 [https://perma.cc/2VYB-EQXC].

52. de Laat, *supra* note 21, at 245 (quoting a songwriter interviewee).

C. *Current Dispute Resolution Mechanisms*

While, again, the creative and interpersonal idiosyncrasies inherent to songwriter disputes make it difficult to generalize too broadly, songwriter disputes tend to travel three (non-mutually-exclusive) routes: litigation, publishing administration tactics, and acquiescence.

Litigation. The first dispute resolution avenue is formal litigation. Although there has been a recent glut in music litigation, that uptick has been more concentrated in the infringement space than in underlying authorship claims.[53] By contrast, while some split disputes manage to find their way into court,[54] these remain the exception, not the rule.

This is no accident: litigation is a profoundly imperfect vessel for resolving split disputes. This is true for several reasons. First, copyright litigation is onerous and expensive. While costs can be shifted under the Copyright Act, litigants must shoulder massive outcome and cost recovery uncertainty (particularly surrounding expensive and influential expert testimony) in pursuit of what are often underwhelming awards.[55] Music publishing is by no measure a small industry, but only a miniscule fraction of its assets—individual musical works—will ever earn enough justify the cost and uncertainty of litigation.[56]

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53. *See Music Copyright Infringement Resource,* GW LAW BLOGS, (Nov. 27, 2020), https://blogs.law.gwu.edu/mcir/cases-2/ [https://perma.cc/H6BF-7G7T]. Many infringement claims ultimately end with the claimant receiving a writer share of the allegedly infringing work. *See, e.g.*, Jess Denham, *Sam Smith credits Tom Petty and Jeff Lynne as Co-Writers on 'Stay With Me',* INDEPENDENT (Jan. 26, 2015), https://www.independent.co.uk/arts-entertainment/music/news/sam-smith-paying-tom-petty-royalties-stay-me-after-copyright-dispute-10003367.html [https://perma.cc/5E32-3RH7]. However, this Article focuses on split disputes among *contemporaneous* co-writers of the same work—rather than on infringement claims that may yield songwriter credit as either a judicial remedy or as part of a negotiated settlement.

54. *See, e.g.*, *supra* note 46 and accompanying text.

55. *See* Nicholas Vennekotter, Note, *Full Cost in Translation: Awarding Expert Witness Fees in Copyright Litigation*, 87 FORDHAM L. REV. 1721, 1737 (2019) (discussing questions surrounding copyright expert cost recovery).

56. Even the "Blurred Lines" infringement litigation—the most visible copyright infringement verdict in years, and involving once of the biggest hits of the decade—yielded a damages award of just over $5 million. *See* Daniel Kreps, *'Blurred Lines' Ruling Sliced to $5.3 Million, With a Catch*, ROLLING STONE (July 15, 2015), https://www.rollingstone.com/music/music-news/blurred-lines-ruling-sliced-to-5-3-million-with-a-catch-120273/ [https://perma.cc/LK6Y-CVMT]. That is no pittance, of course, but it is relatively small potatoes in the world of costly IP litigation—and the fact that it took a *massive* hit to achieve even this (relatively) modest sum illustrates that the ceiling for recovery leaves little room for parties to songwriter disputes surrounding moderate hits, or non-hits, to justify litigating them.

Furthermore, songwriter disputes are complicated. The surge in writers per work ensures that any prospective split dispute claimant has not just one potential defendant to tango with, but rather (on average) four or five other songwriter defendants, as well as each of their respective publishers.[57] Of course, it is not unusual for *infringement* claims to be brought against dozens of defendants—artists, labels, writers, publishers, etc.[58]—but unlike the binary, 'us vs. them' nature of an infringement dispute, where defendants' interests are relatively aligned, split disputes are multi-dimensional. Each writer has an interest in guarding their own piece, and no interest in the distribution of the rest of the pie. This dooms split dispute litigations to be complex, multilateral, expensive proceedings.[59]

Publishing Administration Tactics. A second adversarial mechanism is the use of publishing administration tactics. While sometimes a precursor to litigation, this alternative is less cost-prohibitive and therefore more commonly employed. Disputants can exert pressure on counterparts by leveraging royalty distribution systems to choke off publishing income for all parties.[60] For example, a publisher might assert a claim in YouTube's rights management system,[61] or at the PROs, sufficient to bump claims over 100% and freeze royalty payments.[62] Those royalties may then be held in escrow for significant periods of time—even indefinitely.[63] Thus, while such tactics do

57. *See supra* notes 9–12 and accompanying text. For example, "Truth Hurts," per BMI data, is credited to four songwriters, which does not include the failed "Healthy" claimants—nor, interestingly, does it include Lioness. *See supra* note 46 and accompanying text; *Truth Hurts*, BMI (Dec. 1, 2020), https://repertoire.bmi.com/Search/Search?Main_Search_Text=truth%20hurts&Sub_Search_Text=Lizzo&Main_Search=title&Sub_Search=performer&Search_Type=all&View_Count=0&Page_Number=0 [https://perma.cc/8SDD-Z274]. Meanwhile, BMI credits "Song X" to nine writers (not including Bradley, of course) and nine publishers. *See supra* note 45 and accompanying text.

58. *See, e.g.*, Lastrada v. Ronson, No. 1:17–CV–06937 (S.D.N.Y. Sep. 12, 2017), ECF No. 1 (infringement complaint regarding "Uptown Funk," recorded by Bruno Mars and Mark Ronson, naming seventeen defendants).

59. *See infra* note 133 and accompanying text.

60. *See* Blistein *supra* note 46 ("According to the lawsuit, [claimants] previously tried to claim they each owned 10 percent of 'Truth Hurts,' and that the dispute was holding up Lizzo's ability to license the song to third parties.").

61. *See* Ed Christman, *'Uptown Funk!' Gains More Writers After Gap Band's Legal Claim*, BILLBOARD (May 1, 2015), https://www.billboard.com/articles/news/6553522/uptown-funk-gains-more-writers-after-gap-bands-legal-claim [https://perma.cc/7QWU-V4C7] (reporting that if claims exceed 100%, "YouTube stops paying publishers and moves the proceeds into an escrow account").

62. *See* ASCAP, *supra* note 49; Lindvall, *supra* note 21.

63. *See* Nicholas Thomas DeLisa, Note, *You(Tube), Me, and Content ID: Paving the Way for Compulsory Synchronization Licensing on User-Generated Content Platform*, 81 BROOK. L. REV. 2080–81 (2016) (detailing the mechanics of how such tactics

not resolve anything, the meaningful dent they may inflict upon publisher and songwriter earnings can infuse urgency into negotiations.

But of course, this underscores the problem with this "resolution" mechanism: it is not a resolution mechanism at all. It is a coercive tactic that harms some stakeholders in the interest of benefitting others. The collection of publishing revenue, which writers depend upon for their livelihoods, is already notoriously glacial, even at the best of times.[64] For one party to disrupt its flow is to seek justice by risking injustice to others. It is, therefore, neither a clean nor an efficient means of resolution.

Acquiescence. The final, most common, "resolution" path is songwriters simply accepting lower splits than they feel they deserve. While there are a number of reasons why a writer might do this, they tend to boil down to one theme: the benefit of protesting is not worth the cost—both the financial costs[65] and, especially, the relationship costs that jeopardize future opportunities.[66] For example, for young writers like Bradley in Scenario A, even a lump sum settlement may not be worth falling out of favor with a meal ticket like Alex.[67] And for the band in Scenario B confronting an ex-romantic-partner's purportedly frivolous authorship assertions, a small split concession—or, for that matter, a lump sum settlement—may ultimately be worth avoiding the hassle and cost of litigation, regardless of the actual merits of the ex's claims.[68]

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are employed); *see also Manage Your Music Rights*, YouTube, https://creatoracademy.youtube.com/page/lesson/music-partners-rights [https://perma.cc/CW7W-4YZ7].

64. For example, public performance royalties generated from a domestic performance of a song in January will likely not be paid out to songwriters until October. *See Performance Periods and Payment Methods*, ASCAP, https://www.ascap.com/help/royalties-and-payment/payment/payment [https://perma.cc/V56F-KCX8]. The turnaround for international earnings is even slower. *See* Seth Lorinczi, *Publishing Royalties: The Waiting Game*, Songtrust (Sep. 25, 2020), https://blog.songtrust.com/music-publishing-royalties-the-waiting-game [https://perma.cc/2R7R-RQEX].

65. *See infra* notes 136–156 and accompanying text.

66. *See* de Laat, *supra* note 21 at 241 ("[T]hose who fight over royalties or demand more than their fair share typically do not get invited to future collaborations."); *id.* at 244–45 ("[A]ccepting less than one's fair share requires striking a balance between not selling yourself short but, sometimes just taking some stuff on the chin to get to the next step and not get a bad reputation.") (quoting an interviewee); *id.* at 239, 44 (quoting interviewees: "I never feel like [splits] are worth fighting over . . . It's not going to be conducive to future collaborations I think.").

67. *See supra* note 45 and accompanying text.

68. *See supra* note 48 and accompanying text.

II. TOMORROW: WHY MEDIATE?

Thus, the status quo presents two related problems. First, there is no effective, accessible mechanism for resolving songwriter split disputes. Second, *because* there is no effective, accessible mechanism for resolving these disputes, a culture of tacit acquiescence has arisen.

Still, the observation that current dispute resolution mechanisms are insufficient raises an obvious follow-up: what would work better? Part II of this Article argues that widespread mediation would allow for more flexible, frictionless, and effective resolution of many songwriter split disputes. Part A dissects these disputes into their constituent elements and challenges, allowing Part B to explore the ways in which mediation is uniquely responsive to each.

A. *Dissecting the Dispute*

In order to derive the best mechanisms for resolving a dispute, it is naturally essential to understand the dispute itself. Typically, disputes can be broken down into five core elements: the (1) parties, and their (2) interests, (3) rights, (4) power, and (5) barriers to settlement.[69] This section discusses each in turn.

1. Parties: The immediate parties to a songwriter dispute are, of course, songwriters. But, as discussed in Part I, not all writers are created equal. There is a loose hierarchy, with producer-writers, more established writers, and—especially—artist-writers enjoying positions of relative power.[70] Furthermore, as Scenario A[71] illustrates, there is another prominent stakeholder: music publishers, who license, monetize, and enforce works on behalf of their songwriter clients.[72]

2. Interests: The interests at play in split disputes traverse the full spectrum of "economic, relational, political, and social values"

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69. *See* Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123, 126 (2009).

70. Producers often coordinate the recording/writing process and become centralized relationship hubs—either working with formal recording teams, or as informal organizers and connectors. *See* de Laat, *supra* note 21, at 235; *supra* note 45 and accompanying text. Recording artists provide the value of actually recording and releasing the song, a prerequisite to the song generating any value for anyone. *See supra* notes 50–52 and accompanying text.

71. *See supra* note 45 and accompanying text.

72. *See What Does a Music Publisher Do?*, BERKLEE, https://www.berklee.edu/careers/roles/music-publisher [https://perma.cc/356U-482X].

found in all sorts of disputes.[73] Songwriting relationships are "families, communities and commercial businesses all rolled into one,"[74] and as a result their disputes lump together an eclectic bundle of interests.

Songwriters. Songwriters typically share many economic interests. All co-writers to a work share an interest in that work being released and achieving financial success. For every writer, the fruits of the songwriting process represent their livelihoods, allowing the writers to support themselves and their families, and to stave off the dreaded "nine-to-fives."[75] To that end, writers have a strong interest in ensuring that they receive credit for their work—public credits are effectively their "business cards"—and in maximizing their share of any given work in order to maximize earnings from that work.[76] Writers also have an interest in avoiding disputes that further delay the receipt of publishing revenue that, even when all goes right, can take eons to trickle back to songwriters.[77]

Songwriters also share a number of relational and social interests. In the short-run, all have an interest in fostering a productive, cooperative space that facilitates the creation of quality work;[78] by consensus, interpersonal friction makes it hard to write songs.[79]

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73. *See* Smith, *supra* note 69, at 126; *see also* De Laat, *supra* note 21, at 22 (acknowledging the role of "financial and social capital" as well as "an appreciation for collegiality and friendship" in split arrangements).

74. *See* Woodcock, *supra* note 44; *see also supra* note 48 and accompanying text.

75. *See, e.g.*, Dave Roberts, *'When It Comes to Songwriting, I'm Like, You Don't Know My Pain, So Get the Hell Out of Here'*, MUSIC BUS. WORLDWIDE (July 9, 2020), https://www.musicbusinessworldwide.com/when-it-comes-to-songwriting-im-like-you-dont-know-my-pain-so-get-the-hell-out-of-here/ [https://perma.cc/GM8X-EV42] ("I do this so that I don't have to work nine to five."); *see also* Rachel Bresnahan, *How to Work That 9-to-5 and Still Be an Inspired Musician*, SONICBIDS (Aug. 9, 2016), https://blog.sonicbids.com/how-to-work-that-9-to-5-and-still-be-an-inspired-musician [https://perma.cc/9HVJ-H2QV] (describing the juggling act required of the expansive class of musicians who have yet to achieve financial success from music sufficient to quit their "day job[s]").

76. Nate Baker, *Metadata: What It Is and Why It Matters*, SPOTIFY FOR ARTISTS (Aug. 16, 2018), https://artists.spotify.com/blog/metadata-what-it-is-and-why-it-matters [https://perma.cc/Q9F2-YB5V].

77. *See* Lorinczi, *supra* note 64 and accompanying text; *supra* notes 60–62 and accompanying text.

78. *See* de Laat, *supra* note 21, at 227 ("Rather than exacerbate conflict by engaging in defensive tactics, songwriters pursue professional and economic interests by enhancing cooperation.").

79. *See id.* at 244–45.

Meanwhile, the long-run relational interests are a bit thornier. Songwriting is an increasingly competitive field[80] where success is an exercise in repeat partnerships and in building networks through fruitful co-writing experiences[81]—both of which rely upon interpersonal goodwill and positive collaborative reputations.[82] All of this is particularly important when relationships with powerful recording artists are at stake.[83]

Publishers. As songwriters' agents, publishers share many of their interests. However, there are impactful points of misalignment. Because writers tend to enter into relatively short-term deals with publishers—perhaps covering a term of years or a set number of compositions[84]—publishers' interests tend to be more skewed toward the short-run.[85] For instance, while a writer's immediate financial interest in maxing out their split on a given song might be somewhat offset by their interest in cultivating a long-term relationship with a collaborator, their publisher may have a stronger interest in the former than the latter.

On the flip side, publishers are also guided by one powerful, if thoroughly unsexy, economic interest: administrative simplicity. Music rights management is a terribly convoluted venture.[86] Rare is the song whose earnings will justify a publisher's labor costs associated

80. *See id.* at 234 (quoting a songwriter interviewee: "It's definitely more challenging, these days, as there are so many people writing songs for fewer opportunities out there."). Songwriters, as a class, have suffered economic challenges over the past two decades. *See* Peter Alhadeff, *Caz McChrystal, Inflation and US Music Mechanicals, 1976–2010*, 13 GLOBAL BUS. & ECON. REV. 1, 1 (2011) (tracking the 21st-century decline in songwriter compensation); Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), 84 Fed. Reg. 1918, 1957 (Copyright Royalty Bd. Feb. 5, 2019) (2018 Copyright Royalty Board decision—since vacated on unrelated procedural grounds—citing evidence of a 75% decrease in the Nashville songwriter labor force in its decision to raise statutory royalty rates payable by streaming services to songwriters).

81. *See* de Laat, *supra* note 21, at 229 ("One's next paycheck is never guaranteed, and so there is a constant need to pursue work opportunities . . . [and to] maintain relationships and ties that can lead to future job opportunities.").

82. *See id.* at 237–48.

83. *See id.*

84. *See* Henry Schoonmaker, *Administration, Co-Publishing Deal, or Work for Hire: Which is Right for You?*, SONGTRUST (May 6, 2020), https://blog.songtrust.com/music-publishing-deals [https://perma.cc/7DLH-SBVD].

85. *See, e.g.*, de Laat, *supra* note 21, at 243–44 (recounting one writer's experience juggling pressure from her publisher to push for a bigger split with a fear of "destroy[ing] [her] working relationship" with a valued co-writer).

86. *See supra* notes 49, 64 and accompanying text; Britnee Foreman, *Data Trends and the Songwriter*, SONGTRUST (July 17, 2020), https://blog.songtrust.com/data-trends-and-the-songwriter [https://perma.cc/S5VB-7M9Z]. This is true even under the best of circumstances, and is exacerbated by the injection of underlying

with brokering and administratively resolving a split dispute on behalf of its writer. Thus, in some cases, a writer with a strong reputational or emotional interest in receiving fair credit on a relatively low-earning, non-hit song (or, importantly, because much of this analysis is prospective, a song *predicted* to be low-earning) may find themselves represented by a publisher who would rather forgo a financial stake in a work altogether than bother with the hassle of fighting for it.

Artists. While recording artists who are also writers share many songwriter interests, they also have several divergent interests. Artists can derive value from songs in many more ways than songwriters can, such as through label royalties, concert revenue, and endorsements.[87] To power all of this, though, artists have an ongoing interest in ensuring they have access to first-rate songs and songwriters, allowing them to cultivate the quality of the repertoire that fuels their entire enterprise.

Because artists are far more visible to the public than songwriters, they also have certain publicity interests.[88] Unlike songwriters, who operate in the business-to-business space, recording artists are consumer "brands." It matters what the public thinks of them[89]—whether they write their own music, whether their songs' lyrics are authentic to their lived experiences, whether they make a habit of stealing from other creatives, and so on.[90]

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split disputes between songwriters. Such disputes create more direct work for publishers, who must navigate the disputes on behalf of their clients, *and* more indirect work: all of the administrative toil that must be done in order to chase down income that may be tied up in disputes for years. *See, e.g.*, Music Modernization Act, 84 Fed. Reg. 185, 49967 n. 12 (setting forth regulatory guidance for the dispute resolution arm of a rights management statutory body).

87. *See* Amy X. Wang, *How Musicians Make Money—Or Don't at All—in 2018*, Rolling Stone (Aug. 8, 2018), https://www.rollingstone.com/pro/features/how-musicians-make-money-or-dont-at-all-in-2018-706745/ [https://perma.cc/VA48-6V6S].

88. These are analogous to the "political" interests contemplated by Smith et al. *See* Smith, *supra* note 69, at 126.

89. *Compare* Nicholas Voorhees, *5 Tips for Branding Yourself in the Music Biz*, Hypebot (Sep. 27, 2019), https://www.hypebot.com/hypebot/2019/09/5-tips-for-branding-yourself-in-the-music-biz.html [https://perma.cc/R895-7LV2] (discussing the importance of branding for recording artists) *with* Rich, *supra* note 51 (commenting on the relative anonymity of even top songwriters).

90. *See* Tim Ingham, *Hardly Anyone on the Pop Charts Writes Their Own Music (Alone) Anymore*, Rolling Stone (Apr. 1, 2019), https://www.rollingstone.com/music/music-features/hardly-anyone-in-the-pop-charts-writes-their-own-music-alone-anymore-815333/ [https://perma.cc/5V28-QJGW] (quoting a music executive's views on artists who write their own songs: "Fans adore . . . their authenticity, and it can make a real difference in the connection they feel to the act.").

All parties. There are also several interests that all parties share. All parties share an interest in minimizing dispute resolution transaction costs, though the extent of this interest varies: parties with greater resources can afford to be more intransigent in their positions, and can even use this fact to their bargaining advantage.[91] Similarly, all share an interest in speedy resolutions. Publishing income is notoriously latent, and disputes extend the time it takes to collect and pass that income through to songwriters.[92] Again, however, this matters less to better-resourced parties.

3. Rights: There are a number of formal and informal rights that bear on split disputes. Formally, the shadows of both copyright and contract law loom large. For example, while, by statutory default, co-authors of a joint work receive equal ownership interests, parties are at liberty to contract around that default.[93] Songwriters routinely do so; while equal splits is one convention, it is by no means a universal (or even the predominant) approach.[94] Additionally, songwriters formally grant to publishers the right to exploit and enforce their ownership interest in their copyrights.[95] In exchange, publishers often require writers to create a set number of works before their deals are fulfilled.[96]

A number of informal rights also impact split disputes. For example, songwriters typically have the right to collaborate with anyone they wish.[97] Recording artists have not only this right, but also the ability to choose which songs to ultimately record (i.e., to allow to earn revenue).[98] This final point is critical: because recording artists

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91. *See* Lindvall, *supra* note 21 ("Beyoncé's album[ ] was still under dispute 18 months after release. No doubt, Beyoncé still had the money to pay her bills, but the same might not have been true for some of the co-writers.").

92. *See supra* note 64 and accompanying text; *supra* note 49 and accompanying text.

93. *See* Jacobson, *supra* note 33.

94. *See supra* Part I.A. Co-author-owners of a joint work typically each have the right to license the whole of the work, which can add additional fuel to split disputes where co-writers have differing views on how the work should be exploited. *See* Jacobson, *supra* note 48. Songwriters only have a very limited ability to regulate who records and releases their songs: once a song has been distributed once, anyone can unilaterally obtain a compulsory, statutory license to record and release the song. *See* 17 U.S.C. § 115(a)(1)(A).

95. *See* Schoonmaker, *supra* note 84.

96. *See id.*

97. *See, e.g.*, Judy Stakee, *A Survival Guide to Cowriting Songs*, ASCAP (Aug. 31, 2015), https://www.ascap.com/help/career-development/wcm-judy-stakee-cowriting [https://perma.cc/CK2N-KGXB].

98. *See* de Laat, *supra* note 21, at 21.

have the power to select which songs they record, artists are effectively the gatekeepers to the livelihoods of everyone involved in the creation process.

4. Power: Power imbalances greatly affect songwriting disputes. Junior, less established songwriters wield less power than senior, more established songwriters.[99] Songwriters who are not producers tend to wield less power than producers.[100] Everyone has less power than the recording artist, who holds the keys to the ultimate prize: getting the song recorded and released.[101]

Ultimately, this superior bargaining power derives from the traditional source of bargaining power in any dispute: a better BATNA ("best alternative to a negotiated agreement"). Artists' BATNAs are typically superior to their counterparts' BATNAs.[102] Successful artists are scarcer than songs. Unless the song is one-in-a-million, it is easier for the artist to find another comparable song to record than for the songwriters to find another comparable artist to record their song.[103] Furthermore, while pop artists may derive their musical livelihoods from a number of revenue sources, "songwriters' livelihood[s] [are] almost entirely dependent on the percentages, or 'splits,' that they get from contributing to hit songs."[104] Simply put: the songwriters need it more, and everyone knows it.[105]

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99. *See* Jim Ottewill, *How to Calculate Your Songwriting Splits*, PRS (Jan. 23, 2014), https://www.prsformusic.com/m-magazine/business-and-money/calculate-songwriting-splits/ [https://perma.cc/9AWX-6HN7] ("[W]ell-known writers may insist on a larger split, especially if that writer increases the chances of the song being successful."); Jenny Valentish, *Move Over Sia: How Young Australian Songwriters Are Making It Big in LA*, GUARDIAN (May 14, 2018), https://www.theguardian.com/music/2018/may/15/move-over-sia-how-young-australian-songwriters-are-making-it-big-in-la [https://perma.cc/8BBS-W29A] ("[Y]oung songwriters can be easily convinced that they should count themselves lucky simply to be involved. This results in them not getting a fair slice of the royalty pie . . . ").

100. *See supra* note 70 and accompanying text; SEABROOK, *supra* note 16, at 32, 200.

101. *See supra* notes 50–52 and accompanying text.

102. *See* Paul F. Kirgis, *Bargaining with Consequences: Leverage and Coercion in Negotiation*, 19 HARV. NEGOT. L. REV. 69, 91 (2014) ("Which party has greater positive leverage is determined primarily by BATNAs.").

103. *See supra* notes 50–52 and accompanying text; Lindvall, *supra* note 21 ("If the artist is big enough, it could be worth giving up a bigger share. After all, having 15% of a Drake track could be worth more than having 50% of the same track released by an unknown artist."). Only a very small few non-artist songwriters every achieve the stature to reverse this dynamic. *See* SEABROOK, *supra* note 16, at 8–9.

104. Ben Sisario, *Lizzo Sued Back by Songwriters Over 'Truth Hurts'*, N.Y. TIMES (Feb. 28, 2020), https://www.nytimes.com/2020/02/28/arts/music/lizzo-truth-hurts-lawsuit.html [https://perma.cc/VGV5-CWBC].

105. That all parties share this understanding matters. *See* Avnita Lakhani, *David Versus Goliath and Multilateral Diplomatic Negotiations in the 21st Century:*

Separately, publishers have power over their writer clients. Publishers commonly pay out advances—large lump sums which must be recouped before the writer can earn additional income or, in some cases, enter into a new publishing deal.[106] Furthermore, they boast organizational power as entities with greater capital and technical industry expertise[107] than their creator clients.[108]

These power dynamics affect songwriter split disputes through the leverage they bestow upon the more powerful parties. Typically, leverage derives from the degree to which parties depend on one another: if Party A depends more on Party B than Party B depends on Party A, then Party B has greater leverage than Party A.[109] The more powerful party can apply *positive* leverage by "offering to satisfy [the] counterparty's interests, or by withholding satisfaction of [their] interests to extract concessions."[110] Alternatively, it can apply *negative* leverage, which stems from its ability to "inflict damage" on the other or "reduce [their] alternatives."[111]

Both forms of leverage exist in split disputes. Artists apply positive leverage when they mobilize their gatekeeper role to extract a greater split than their contributions would otherwise seem to warrant.[112] Publishers apply positive leverage when they encourage their clients to push for a larger share on a work than the writer—who may have a more vested interest in a long-term relationship with a co-writer—might otherwise be inclined to push for.[113] All powerful

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How the Greek Debt Crisis Negotiations Marked the Revenge of Goliath, 24 CARDOZO J. INT'L & COMP. L. 97, 125 (2015) ("Power can be effective or ineffective depending on the *perception* one party has about another party's power. If a party can genuinely convince the opposing party that they have the power to do something and will use that power, that party reinforces the perception that he/she has effective power, rather than an ineffective bluff.") (emphasis added).

106. *See* Peter K. Yu, *How Copyright Law May Affect Pop Music Without Our Knowing It*, 83 UMKC L. REV. 363, 377–78 (2014); Donald S. Passman, *Songwriter Deals: Part III*, BMI (Dec. 16, 2004), https://www.bmi.com/news/entry/SONGWRITER_DEALS_Part_III_By_Donald_S._Passman [https://perma.cc/C7Z6-ND5J].

107. *See* Robert S. Adler & Elliot M. Silverstein, *When David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 HARV. NEGOT. L. REV. 1, 26–27 (2000) (arguing that information power "so often tips the scales in favor of one party").

108. *See id.* at 24–25 (discussing how organizational might comes from "resources that vastly exceed those [of] isolated individuals").

109. *See id.* at 19.

110. Kirgis, *supra* note 102, at 91.

111. *Lakhani*, *supra* note 105, at 142.

112. *See supra* notes 50–52 and accompanying text.

113. *See supra* notes 45, 85 and accompanying text

parties exert negative leverage when they perpetuate, or at least passively benefit from, the culture of acquiescence—that anyone who makes a fuss about splits will not be invited to the next session.[114]

5. Barriers: These intersecting variables erect a number of barriers to resolving disputes in a manner that is satisfactory to all. Split disputes present a blend of interpersonal and economic dynamics, which in turn yield an eclectic mix of emotional and structural barriers to settlement.

Emotional. Songwriting is an emotional and vulnerable process.[115] Writers draw on lived experiences and invest intimate creative energy in order to summon a song into existence. It is also a collaborative process—by design, all of one writer's vulnerability and emotional investment collides with every other writer's vulnerability and emotional investment.[116] And unlike most vulnerable, intimate, introspective exercises, the fruits of songwriting do not remain private. Instead, songwriters get to watch these deeply personal, collaborative masses of emotional handiwork (at least the successful ones) be trotted out to be judged by a merciless public.[117]

Songwriting is also a relational enterprise. Songwriting relationships are personal relationships, which means they contain all of the usual baggage associated with personal relationships, multiplied against the complexities of professional relationships.[118] And because songwriting involves the sharing, developing, and whittling of ideas, it inevitably gives rise to moments when contributors must choose between (and reject) ideas offered by different writers.[119] Thus, individual egos, and the emotions associated with those hurt egos, are often a factor.[120]

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114. *See supra* note 66 and accompanying text; *see also* Kirgis, *supra* note 102, at 94 ("Negative leverage arises out of the ability to impose retributive costs on a counterparty if the counterparty pursues its BATNA.").

115. *See* de Laat, *supra* note 21, at 239.

116. *See id.* ("Often times, writers may not know one another too well, and yet they are expected to engage in an artistic endeavor together that can come from an intimate and emotional place.").

117. *See, e.g.*, Allegra Frank, *Why Everyone Loves Lizzo—Well, Almost Everyone*, Vox (Jan. 23, 2020), https://www.vox.com/culture/2020/1/23/20976665/lizzo-grammys-2020-fans-critics-body [https://perma.cc/VHD5-HEPD].

118. *See supra* notes 78–83 and accompanying text.

119. *See* de Laat, *supra* note 21, at 240–45.

120. *See id.*

But songwriter relationships are not *only* personal. They are also professional relationships impacting writers' livelihoods: every contact is an opportunity, a future gig, a writing camp invite, a connection to an important artist, etc.[121] Naturally, these relationships also embed the professional fears, financial insecurities, and other emotional baggage that professionals in any competitive field experience.[122]

All of this emotion spills into split disputes. Dispute scholars generally emphasize the role that emotions play in impeding negotiations, even to the point of "routinely tak[ing] precedence over material interests."[123] These emotional barriers can take the form of bruised egos[124] (as may occur when one writer receives a smaller split than they feel they deserve);[125] or anger[126] (as may occur when a writer receives a *larger* split than *others* feel they deserve);[127] or fear, particularly among parties with inferior bargaining power[128] (as may occur when less established writers fret over whether to speak out for a larger share on a song, which may help them financially in the short run, but imperil long-run opportunities).[129] The presence of this sort of emotion can have a dramatic negative effect on negotiating outcomes.[130]

Structural. These emotional barriers are compounded by a number of structural barriers.[131] First, as discussed in Part II.A.4, there are significant power imbalances that bear on settlement outcomes, either by introducing friction into negotiations or by unjustly biasing

121. *See supra* notes 80–83 and accompanying text.

122. *See supra* note 80 and accompanying text.

123. Kirgis, *supra* note 102, at 97.

124. *See* Robert S. Adler et al., *Emotions in Negotiation: How to Manage Fear and Anger*, 14 NEGOT. J. 161, 168–69 (1998) ("If our egos are bruised in a manner that makes us feel small, we react defensively, and often in anger.").

125. *See supra* notes 45, 78–79 and accompanying text.

126. *See* Adler, *supra* note 124, at 168–69 ("Anger . . . carries a high potential for disrupting negotiations.").

127. *See supra* notes 48–49 and accompanying text.

128. *See* Adler, *supra* note 124, at 174 (arguing that fear, which arises "if we sense that our opponent has superior bargaining power," is "particularly debilitating" in negotiations).

129. *See supra* notes 80–83 and accompanying text; *supra* note 45 and accompanying text.

130. *See* Clark Freshman, Adele Hayes, & Greg Feldman, *The Lawyer-Negotiator As Mood Scientist: What We Know and Don't Know About How Mood Relates to Successful Negotiation*, 2002 J. DISP. RESOL. 1, 15 (2002).

131. Structural barriers refer to the "way the [organization of the] negotiation and dispute resolution environment" may impede settlement. Maurits Barendrecht & Berend R. de Vries, *Fitting the Forum to the Fuss with Sticky Defaults: Failure in the Market for Dispute Resolution Services?*, 7 CARDOZO J. CONFLICT RESOL. 83, 95 (2005).

outcomes in favor of more powerful parties.[132] Second, as discussed in Part I.C, split disputes are often messy and multilateral, not bilateral, and therefore involve a mishmash of disputants, each of whom might have differing roles and relationships to one another.[133] Third, as discussed in Part II.A.2, divergent interests between songwriters and their agents (publishers) may pose an additional structural barrier for split negotiations.[134] Finally, and perhaps most importantly, there is a culture of acquiescence among songwriters—of 'don't make a fuss'—that discourages songwriters from speaking up to advocate for themselves.[135]

B. *Benefits to Mediation in Intellectual Property Contexts*

Mediation has been widely recognized as presenting many advantages over other dispute mechanisms. These benefits have remarkable overlap with the dynamics at work in split disputes. Part II.B explores three such benefits in depth: (1) speed and cost-effectiveness; (2) elevating parties' interests over power imbalances; and (3) greater finesse and sensitivity as to ongoing relationship interests.

1. Speed, Expense, Complexity. First, mediation is significantly cheaper, faster, and less cumbersome than litigation. By most estimates, mediation costs represent a tiny fraction of litigation costs.[136] This holds true even for cases that do not proceed to trial.[137] It is especially true for intellectual property ("IP") disputes, which tend to be fact-intensive, complicated, and reliant on costly expert testimony[138] to "teach[ ] the relevant technology to a lay judge or jury."[139]

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132. *See supra* notes 109–114 and accompanying text.

133. *See* Barendrecht, *supra* note 131, at 107 (noting that a greater number of interested parties "complicate[s]" resolution).

134. *See id.* at 106 (cataloging ways in which misaligned agent/principal interests may complicate negotiations).

135. *See* de Laat, *supra* note 66 and accompanying text. This reinforces the "stick[iness]" of status quo defaults already unjustly warped by bargaining power, making it harder to arrive at settlements that depart from those skewed defaults. *See* Barendrecht, *supra* note 131, at 93–94 (parties tend to be "bias[ed]" towards pre-existing defaults).

136. Kevin M. Lemley, *I'll Make Him an Offer He Can't Refuse: A Proposed Model for Alternative Dispute Resolution in Intellectual Property Disputes*, 37 AKRON L. REV. 287, 312–13 (2004).

137. *Id.*

138. *See* Thomas D. Barton & James M. Cooper, *Symposium Introduction: Advancing Intellectual Property Goals Through Prevention and Alternative Dispute Resolution*, 43 CAL. W. INT'L L.J. 5, 10 (2012).

139. Scott H. Blackman & Rebecca M. McNeill, *Alternative Dispute Resolution in Commercial Intellectual Property Disputes*, 47 AM. U. L. REV. 1709, 1716–17 (1998).

IP disputes also routinely touch multiple jurisdictions, "mak[ing] . . . lawsuits far less efficient."[140]

These IP-specific realities "present a substantial economic incentive" for alternative dispute resolution ("ADR").[141] Interest-based processes like mediation, in addition to offering greater "potential [for] mutual benefits" to the parties, are also "cheaper and faster" than litigation.[142] Mediation therefore allows IP disputants to "efficient[ly]" resolve disputes "without significantly depleting their budgets."[143]

This efficiency is a product of both financial savings *and* time. While litigation—especially federal IP litigation—"can consume years, mediation often provides a resolution within a few hours or days."[144] Even relative to other ADR proceedings, wherever a "quick resolution" would benefit parties, mediation poses significant advantages.[145] This is particularly true in IP disputes, where speedy resolution allows the parties to "focus their energies back on making money rather than financing litigation."[146] For songwriters, that

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While Blackman and McNeill argue that copyright disputes are less technical than other IP disputes, they do not address music copyright cases specifically; music cases are notorious for their reliance upon complicated expert testimony. *See* Kristelia A. García, I*mproving the Quality and Consistency of Copyright Infringement Analysis in Music,* BERKELEY TECH L.J. at 2 (Jan. 24, 2018), https://scholar.law.colorado.edu/articles/954/ [https://perma.cc/EHC6-BEDS] (observing that music litigation often "devolves into a battle of the experts"). "The expense and difficulty of suing in federal court mean individual creators are unable to enforce their intellectual property rights," concerns which have prompted recent legislation that will allow certain copyright claims to be heard by a new, optional small claims tribunal thought to be more accessible to litigants. S*ee* Kathleen K. Olson, *The Copyright Claims Board and the Individual Creator: Is Real Reform Possible?,* 25 COMM. L. & POL'Y 1, 4 (2020); Sandra M. Aistars, *Ensuring Only Good Claims Come in Small Packages: A Response to Scholarly Concerns About A Proposed Small Copyright Claims Tribunal,* 26 GEO. MASON L. REV. 65, 67 (2018) (exploring criticisms of this bill); Terrica Carrington & Keith Kupferschmid, *CASE Act Signed Into Law: What This Means,* COPYRIGHT ALLIANCE (Jan. 7, 2021), https://copyrightalliance.org/ca_post/case-act-signed-into-law/ [https://perma.cc/UC2U-CVNP].

140. Barton, *supra* note 138, at 15. Scholars often discuss this in the patent context, but it also applies to songwriters, who collaborate across borders and whose rights are administered on a territorial basis. *See* Cornell, *supra* note 49.

141. Blackman, *supra* note 139, at 1716–17.

142. Frank E. A. Sander & Lukasz Rozdeiczer, *Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to A Mediation-Centered Approach*, 11 HARV. NEGOT. L. REV. 1, 29–30 (2006).

143. Blackman, *supra* note 139, at 1725.

144. Lemley, *supra* note 136, at 313; *see also* Blackman, *supra* note 139, at 1722 (highlighting the "relatively quick procedure[s]" available through ADR processes like mediation).

145. Barton, *supra* note 138, at 36.

146. Lemley, *supra* note 136, at 313–14.

might mean getting back into the studio and/or, more immediately, allowing disputed publishing income to be released.[147]

These monetary and time costs are exacerbated by the uncertainty inherent to litigation. To choose to litigate in just about any context is to shoulder significant risk.[148] This is doubly true of IP litigation.[149] And of course, as a reward for absorbing this cost, delay, and uncertainty, disputants are treated to the "mental anguish and suffering of an arduous litigation process."[150]

All of this is relevant to songwriter disputes.[151] Many individual creators lack the resources to spearhead complex litigation.[152] Even for those who can afford it, the rewards are rarely worth the transaction costs.[153] That would be true even if the outcome were guaranteed, which of course it is not. This outcome uncertainty, stacked atop the costs, ensure that it is almost never a rational economic choice for a songwriter to litigate a split dispute—even before factoring in the lost income from a song remaining in dispute for the years it takes a case to filter through the courts.[154]

This underscores a crucial point: the disadvantages of litigation relative to mediation cannot be calculated in terms of actual disputes alone. The cost to disputants is not merely the difference between the cost, time, and uncertainty of litigation versus the cost, time, and uncertainty of mediation. There is also the incalculable cost of acquiescence born by would-be disputants who choose not to pursue the dispute in the first place because they cannot afford current dispute

147. *See supra* notes 49, 60–64 and accompanying text.

148. *See* Lemley, *supra* note 136 at, 312.

149. *See id.* at 304.

150. *Id.* at 313.

151. *See* Matthew H. Ormsbee, Note, *Music to Everyone's Ears: Binding Mediation in Music Rights Disputes*, 13 CARDOZO J. CONFLICT RESOL. 225, 228 (2011) (underscoring the benefits of "speed, confidentiality, and affordability" in music disputes) (internal citations omitted). This is not lost on practitioners in the field. *See, e.g.*, Woodcock, *supra* note 44 ("What's the main difference between using a mediator [and litigation]? Cost, time and aggravation.").

152. Per some estimates, "the median cost for a copyright infringement lawsuit with less than $1 million at stake [is] $350,000, including appeals. These costs make it impossible for plaintiffs without financial means to get a day in court." Olson, *supra* note 139, at 6–7 (citing AIPLA, 2011 Report of the Economic Survey 35 (2011)); *see also* Ayelet Sela, *Streamlining Justice: How Online Courts Can Resolve the Challenges of Pro Se Litigation*, 26 CORNELL J.L. & PUB. POL'Y 331, 355 (2016) (arguing "overly complex" civil procedure rules exacerbate this issue).

153. *See* Olson, *supra* note 139, at 6.

154. *Cf.* Lemley, *supra* note 136, at 313 (discussing the years that it takes for a lawsuit to work itself through courts).

mechanisms.[155] It is not merely an efficiency discussion, but an *access to justice* discussion.[156]

2. Interests over power. Second, mediation is particularly helpful in scenarios where other mechanisms risk allowing power dynamics to trump parties' interests. Interest-driven processes like mediation yield both the "highest satisfaction with outcomes"[157] and better substantive results for all parties.[158] They also construct a "more level playing field between the small-time [party], with perhaps few resources and experience, and [larger parties with] access to legal advice."[159] Power-driven processes, by contrast, "may be costly in terms of relationships . . . or [the] failure to vindicate rights"[160]—especially where, as in many split disputes, there are power and resource disparities.[161]

Interest-driven processes like mediation are particularly fruitful where interests are as eclectic as those of split disputants. In those cases, the "limited remedies" litigation affords "may not address the full range of interests . . . important to the parties."[162] In IP disputes in particular, scholars question litigation's ability to address all interests, and "to do so without introducing significant adverse side-effects."[163] This is because most IP disputes "do[ ] not require an 'either/or' result . . . [P]arties often consider some form of shared rights to be an acceptable, or even preferred, result."[164] Mediation addresses this need; "[r]ather than one party receiving a judgment and the other party losing all music rights," parties can forge flexible

155. *See supra* notes 65–66 and accompanying text; Lemley, *supra* note 136, at 311 ("One of the major issues facing intellectual property owners is the cost of enforcing their intellectual property rights.").

156. Mediation has been widely heralded as responsive to "access to justice" concerns in many contexts. *See, e.g.*, Heather Scheiwe Kulp, *Increasing Referrals to Small Claims Mediation Programs: Models to Improve Access to Justice*, 14 CARDOZO J. CONFLICT RESOL. 361, 373–385 (2013) (discussing the role of mediation programs in state and municipal courts); Jacqueline Nolan-Haley, *Mediation and Access to Justice in Africa: Perspectives from Ghana*, 21 Harv. Negot. L. Rev. 59, 66–69 (2015) (chronicling the history of mediation in global access to justice movements).

157. Smith, *supra* note 69, at 126; *see also* Blackman, *supra* note 139, at 1710 (suggesting that, in litigation, "parties may miss an opportunity to craft their own outcome, control the process, and preserve valuable resources").

158. *See* Sander, *supra* note 142, at 2 ("The highest payoff for both parties is a Pareto efficient outcome, which can often be achieved by a problem-solving process like mediation.").

159. Ormsbee, *supra* note 151, at 246–47 (internal citations omitted).

160. Smith, *supra* note 69, at 127.

161. *See supra* notes 99–114 and accompanying text.

162. Smith, *supra* note 69, at 127.

163. Barton, *supra* note 138, at 15.

164. Blackman, *supra* note 139, at 1716 (internal citations omitted).

solutions tailored to their specific interests.[165] Likewise, rather than defaulting to a zero-sum dispensation of splits for one song,[166] mediation can "direct the solution away from the past and toward some future-oriented resolutions."[167]

3. Ongoing Relationships. These future-oriented solutions are especially useful to disputes where the parties have significant ongoing relationship interests. In such disputes, the ongoing relationship interests "may completely change the goals of the part[ies]."[168] Nonetheless, an adversarial context such as litigation or arbitration can often "escalat[e] the dispute into a purely aggressive 'seek and destroy' approach, which easily could destroy any potential for future collaboration"—a result that may be directly contrary to the parties' actual interests.[169]

By contrast, mediation "can encourage parties to settle their disputes earlier, saving time, money, and valuable business relationships."[170] This is acutely relevant in the IP context, where ongoing relationships are of heightened import,[171] and even more so where those relationships are both "personal and commercial" in nature[172]—and especially where emotions run high.[173]

Mediation is, in other words, tailor-made for split disputes. Split disputes occur between people whose ongoing bonds are at once financial, creative, and personal.[174] Mediation is uniquely equipped to

165. Ormsbee, *supra* note 151, at 257 (citing Michael Roberts, *Why Mediation Works*, MEDIATE (Aug 14, 2000), https://www.mediate.com/articles/roberts.cfm [https://perma.cc/2XSH-V6XM]).

166. For more on the structural barrier of "zero-sum," *see* James H. Stark & Douglas N. Frenkel, *Changing Minds: The Work of Mediators and Empirical Studies of Persuasion*, 28 OHIO ST. J. ON DISP. RESOL. 263, 340–42, 349–50 (2013).

167. Sander, *supra* note 142, at 31–32.

168. *Id.* at 16.

169. Blackman, *supra* note 139, at 1726 ("In such situations, there is a substantial benefit to avoiding outright litigation not only in terms of time and expense saved, but also in being able to formulate the solution that best meets the needs of the parties and the situation.").

170. *Id.* at 1725.

171. *See generally* Carmen Collar Fernandez & Jerry Spolter, *International Intellectual Property Dispute Resolution: Is Mediation the Sleeping Giant*, 1 J. WORLD INTELL. PROP. 555 (1998).

172. Barton, *supra* note 138, at 18 ("Less tangible but often no less real are the costs to business and personal relationships that often accompany litigation, and that are softened by using ADR methods."); *see id.* at 15–18.

173. *See* Freshman, *supra* note 130.

174. *See supra* notes 75–83, 115–130 and accompanying text.

referee this melee of emotion, commercial creativity, and ego.[175] Unlike litigation, it can "facilitate better communication" between parties who may otherwise have difficulty resolving an immediate dispute without marring their ongoing relationship.[176] Similarly, an adept mediator "aware that reputations and relationships are important in the relatively small community of performers and composers," can act to protect these interests in ways that a judge managing and evaluating a zero-sum legal dispute from afar simply cannot.[177]

III. HOW TO GET THERE: SYSTEMS DESIGN

While mediation is remarkably well-equipped to accommodate the unique interests and barriers that entangle split disputes,[178] it also introduces one massive new structural barrier: itself. Scholars have long noted that despite mediation's theoretical usefulness to IP disputes, it remains underutilized.[179] Split disputes are no exception.[180] As a result, even if someone were to embrace the notion of a songwriter mediation system, they would still have to figure out how to implement one.

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175. *See id.*

176. Barton, *supra* note 138, at 24.

177. *See* Ormsbee, *supra* note 151, at 230.

178. In addition to the discussion in Part II, analytical studies comparing dispute resolution mechanisms reinforce this point. *See, e.g.*, Sander, *supra* note 142, at 12–13 (devising a rating system from 0—"unlikely to satisfy goal"—to 3—"satisfies goal very substantially"—and awarding mediation a top rating, relative to other processes, for a suite of interests central to songwriter disputes, including: "Speed," "Privacy," "Minimize costs," "Maintain/Improve Relationship," "Create New Solutions," "Party Control of Process," "Party Control of Outcome, "Provide Satisfying Process," and "Improve Understanding of the Dispute"); Lemley, *supra* note 136, at 315–16 (listing the following songwriter-relevant advantages of mediation: "Have a voice in the final solution," . . . "Cost beneficial," "Work with the opposing party . . . ," "Minimize intangible losses," . . . "Minimize mental anguish/suffering," . . . "Time sensitive," . . . "Promote future relationships (if desired)"); Barton, *supra* note 138, at 24 (listing the following songwriter-relevant advantages of mediation: "party control, flexibility of remedy, speed of resolution, confidentiality, low cost, and the possibility of maintaining or improving the parties' relationship").

179. *See* Barton, *supra* note 138, at 24 ("Mediation is generally recognized as offering the advantages of retaining party control, flexibility of remedy, speed of resolution, confidentiality, low cost, and the possibility of maintaining or improving the parties' relationship. Despite these advantages, IP disputants have been somewhat slow to accept mediation."); Ormsbee, *supra* note 151, at 231 ("Despite its growing popularity, ADR generally remains overlooked as an alternative to litigation, especially for music rights disputes.").

180. While there may be the occasional practitioner who mediates music disputes, *see, e.g.*, Woodcock, supra note 44, the overwhelming majority of split disputes continue to travel the roads discussed in Part I.C.

In their foundational article on the topic, Professors Smith and Martinez argue that dispute systems design ("DSD") involves five analytical steps: (1) the goals motivating the system; (2) its structure and processes; (3) its stakeholders; (4) the resources powering the system; and (5) success and accountability.[181] Part III of this Article addresses each, albeit in a slightly varied configuration.

A. *Goals, Success, and Accountability*

Professors Smith and Martinez, with Professor Amsler, suggest that the "overarching" goal of DSD is to "achieve some measure of justice."[182] But within that broad mandate, a system must aim to solve specific problems—e.g., employee disputes, customer disputes, etc.[183] Then, within that scope, a system can be calibrated to achieve targeted objectives, such as conflict resolution; efficiency of time or resources; minimizing costs; relational goals; enhancing access; substantive and/or procedural justice or fairness; deterrence; creating precedent; etc.[184]

For a DSD centering around songwriter split disputes, the scope would be self-evident: songwriter split disputes. Its goals would then cater specifically to the interests identified in Part II.A.2: an accessible, efficient, and stigma-free mediation system for songwriters. In striving for *accessibility* and *efficiency*, the system would aim to improve upon current dispute mechanisms,[185] while also opening a pathway for disputes currently shackled by the acquiescence of writers who feel they have no choice but to accept any split allocation, even if they believe it to be unjust.[186] In that sense, it would not seek to prevent conflicts, but actually, in a way, to create *more* conflicts—or rather to enfranchise the conflicts that already exist but have no

181. Smith, *supra* note 69, at 69. For discussion on why a planned system is preferable to "problematic" "ad hoc" dispute resolution methods, *see* John Lande, Peter W. Benner, *Why and How Businesses Use Planned Early Dispute Resolution*, 13 U. ST. THOMAS L.J. 248, 254 (2017).

182. LISA BLOMGREN AMSLER, JANET MARTINEZ & STEPHANIE E. SMITH, DISPUTE SYSTEM DESIGN: PREVENTING, MANAGING, AND RESOLVING CONFLICT 14 (2020). Beneath that overarching banner, the authors identify five "families" of justice: "outcomes (e.g., substantive, distributive, utilitarian, and social justice); process (e.g., voice and procedural justice); organizations (e.g., organizational, interactional, informational, and interpersonal justice); community (e.g., corrective, retributive, deterrent, restorative, transitional, communitarian, and communicative justice); and formal justice, personal justice, and injustice." *Id.* at 15.

183. *Id.* at 26.

184. Smith, *supra* note 69, at 130.

185. *See supra* Part I.C.

186. *See id.*

practical access to justice.[187] *Accessibility* and *efficiency* would also seek to correct for the power imbalance disfavoring parties without the means to leverage current dispute mechanisms.[188]

By striving to be *stigma-free*, the system would be pursuing a relational goal—protecting songwriters' potent ongoing relationship interests with each other and with artists.[189] That goal: to normalize mediation (admittedly a tall order given the status quo),[190] quelling the backlash that writers like Bradley[191] fear will occur if they dare to stick up for themselves. This would also animate artists' interest in avoiding the stigma of being publicly accused of creative chicanery (e.g., Lizzo).[192]

The system's success would be determined by its ability to meet these objectives. Smith *et al* define success via functional metrics—participation, user satisfaction, meeting efficiency goals (e.g., cost and time)—as well as procedural supports, such as enacting transparency and monitoring measures to reliably evaluate whether the system is hitting those benchmarks.[193] For split disputes, *efficiency* would be easy enough to measure: have costs and delays remained low? *Accessibility* and stakeholder *buy-in* would be tougher to measure, but would presumably involve weighing system participation against the number of disputes that either (a) use other dispute mechanisms or (b) are abandoned (an elusive measurement, to be sure). *Stigma*, *normalization* and *user satisfaction* would be the trickiest to measure, likely requiring "applied field research and quasi-experiment[al]"[194] studies such as surveys,[195] interviews,[196] and other qualitative means assessing to what extent writers believe the system can serve immediate justice without risking their careers.

187. *See supra* notes 151–156 and accompanying text.

188. *See id.*

189. *See supra* notes 78–83 and accompanying text.

190. *See supra* notes 179–180 and accompanying text.

191. *See supra* note 45 and accompanying text.

192. *See supra* note 46 and accompanying text.

193. Smith, *supra* note 69, at 132.

194. Amsler, Martinez & Smith, *supra* note 182, at 80.

195. *See, e.g.*, Kathryn E. Newcomer, Timothy Triplett, *Using Surveys in* The Handbook of Practical Program Evaluation 344 (Kathryn E. Newcomer, Harry P. Hatry & and Joseph S. Wholey eds., 5th ed. 2015).

196. *See, e.g.*, William C. Adams, *Conducting Semi-Structured Interviews in* The Handbook of Practical Program Evaluation 492 (Kathryn E. Newcomer, Harry P. Hatry & and Joseph S. Wholey eds., 5th ed. 2015).

B. *Stakeholders, Resources, and Culture*

Of course, discussion of a system's goals, and of the means through which it can measure its attempts to meet those goals, raises an obvious question: what exactly *is* the system? Whom does it serve? Who gets to design it? Who pays for it? To start, Smith et al. argue that any successful DSD requires "identification of various stakeholders and their relative power"[197] in order to fashion a system that weighs "all significant interests, has legitimacy, and is therefore more likely to garner credibility and produce durable outcomes."[198] Naturally, the parties discussed in Part II.A.1—songwriters, artists, and publishers—would be the system's primary stakeholders. But who among that group is equipped to *enact* the switch to mediation?

Here, the realities of the music industry pose a challenge. Per Smith et al., systems must not only be "designed in alignment with available resources—human, organizational, and financial," but they must also enjoy both "*top-down*" (i.e., from the institutional level) and "*bottom-up*" (i.e., from the participant level) support.[199] Furthermore, the pre-existing context (the "situation in which a system is . . . designed") and culture ("patterns of being, perceiving, believing, behaving," including "conflict management approaches") within an environment wield immense influence over any DSD attempt.[200] Right away, this illuminates a few key obstacles. First, again, there is no prior tradition of songwriter mediation.[201] Second, there is no single actor that could even attempt to impose a universal, *top-down* mediation mandate upon the entire US songwriting/publishing sector.[202] Finally, a power paradox would seem to deter a *bottom-up*

197. Smith, *supra* note 69, at 131.

198. *Id.*

199. AMSLER, MARTINEZ & SMITH, *supra* note 182, at 36.

200. *Id*. at 30; *see also* Lande, *supra* note 181, at 270 (stressing the impact of culture in DSD).

201. *See supra* notes 179–180 and accompanying text.

202. There is no organization with whom all U.S. songwriters are directly affiliated. While there are several PROs that, together, affiliate nearly all U.S. songwriters (and many international writers) and publishers, no *single* US PRO reaches the entire community. *See* Henry Schoonmaker, *ASCAP, BMI, SESAC, SOCAN, and GMR: The Guide to USA & Canada PROs*, SONGTRUST (July 17, 2020), https://blog.songtrust.com/guide-to-usa-and-canada-pros. [https://perma.cc/XUC7-E8ZW]. Likewise, while there are a number of songwriter associations, membership is far from comprehensive, and in any event, publishers cannot affiliate. *See, e.g., About NSAI,* NSAI, https://www.nashvillesongwriters.com/about-nsai [https://perma.cc/YYT4-PM9G]. Meanwhile, the opposite is true of publishing-only trade associations like the NMPA. *See, e.g., Mission Statement*, NMPA, https://www.nmpa.org/mission/ [https://perma.cc/QCR8-L6BJ]. While someday, the newly formed statutory Mechanical Licensing Collective ("MLC") may be able to boast comprehensive U.S. publisher

impetus: individuals with the power to effect change are likely the parties with sufficient bargaining power to benefit from the status quo. Further, even if a purely *bottom-up* solution were plausible, it would probably have to be done contractually. Here, the scarcity of formal split agreements once again rears its head; how can one draft a mediation clause into a contract that is never discussed, let alone formalized?[203]

However, even if a *single*-entity solution is impractical, there are two institutions who might be able to make real headway: the American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI"), the two dominant US PROs.[204] While ASCAP and BMI are not the only entities with songwriter or publisher membership, they are well-situated in several respects.[205] First, they have direct and intimate ties to *both* writers and publishers; if anyone has sufficient writer and publisher goodwill to pull this off (admittedly an open question), it is the PROs.[206] Second, they are already in the business of tracking splits; until recently,[207] they were *the* authorities on songwriter split data.[208] Indeed, they already informally referee split disputes—not as conflict managers, but as

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and songwriter membership, it is still in its infancy; it currently caters only to publishers and *self-administered* songwriters, and, in any event, its narrow statutory purview does not lend itself to the same intimate bond with writers that the PROs enjoy as a result of significant investment in songwriter career development. *Compare The MLC Process*, MLC, https://www.themlc.com/how-it-works [https://perma.cc/49P2-N2A6] *with Talent Development*, ASCAP FOUNDATION, https://www.ascapfoundation.org/programs/talent [https://perma.cc/4E6K-BAHZ].

203. *See supra* notes 32–41 and accompanying text. *Cf.* Lande, *supra* note 181, at 274–75 (discussing how contractual clauses serve as an "important form of planning for" organized dispute resolution).

204. PROs are entities who, on behalf of writers and publishers, grant licenses to businesses (e.g., broadcasters, bars, stadiums), collect revenue from those businesses, and distribute it to their members. Schoonmaker, *supra* note 202.

205. *See supra* note 202.

206. *See supra* note 202. Perhaps helpfully, ASCAP is governed by a board comprised solely of songwriters and publishers. *Governance*, ASCAP, https://www.ascap.com/about-us/governance [https://perma.cc/J6UP-BA6X].

207. While the MLC will now house the first public database, the PROs remain split authorities. *See supra* note 202.

208. *See ASCAP & BMI Announce Creation Of A New Comprehensive Musical Works Database To Increase Ownership Transparency In Performing Rights Licensing*, ASCAP (July 26, 2017), https://www.ascap.com/press/2017/07-26-ascap-bmi-database [https://perma.cc/S93J-MBX4].

database owners and intermediaries who need to know whom to pay.[209]

Third, they occupy a key position as brokers of the most lucrative songwriter income type: performance revenue.[210] This would summarily arm them with leverage in any DSD attempt; no stakeholder could afford to simply ignore them. Together, ASCAP and BMI collect over $2 billion in annual revenue, and, crucially, decide how to distribute that revenue.[211] And while they openly compete as to who can boast the lower operational overhead,[212] the mere fact that both fund themselves through licensing revenue—and not by directly charging members—means that they could conceivably fund a "free to the user" system.[213] This would do much to address another of Smith et al.'s core DSD concerns: the source, method, and sufficiency of system funding.[214]

One drawback of centering this effort around PROs is that unlike other territories, the US has multiple PROs, so no *one* entity can singlehandedly reach every songwriter or dispute.[215] Still, ASCAP and

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209. *See Compendium of ASCAP Rules and Regulations*, ASCAP (Sep. 23, 2020), https://www.ascap.com/~/media/files/pdf/members/governing-documents/compendium-of-ascap-rules-regulations.pdf/about-us/governingDocuments [https://perma.cc/4K3G-4X53] (Section 2.8: Claims Against ASCAP Members' Works).

210. *See* Tim Ingham, *US Publishers Pulled in $3.7BN during 2019—Just Over Half What Record Labels Made*, MUSIC BUS. WORLDWIDE (June 11, 2020), https://www.musicbusinessworldwide.com/us-publishers-pulled-in-3-7bn-during-2019-just-over-half-what-record-labels-made/ [https://perma.cc/VU2G-CCWY] (reporting that even as mechanical income—i.e., from sales and streaming—has recently begun to increase, performance income still comprised 52.3% of 2019 US publishing revenue); Alhadeff, *supra* note 80, at 2 (noting the stark early-2000s decline in the share of songwriter earnings attributable to mechanical income).

211. *See* Ed Christman, *ASCAP Revenue and Payouts Both Top $1 Billion (Again) as Focus Turns to Navigating Pandemic*, BILLBOARD (May 1, 2020), https://www.billboard.com/articles/business/9369810/ascap-2019-finances-payouts-revenue-1-billion-total-collections [https://perma.cc/77W8-386J].

212. *See, e.g., "Follow the Dollar": Where ASCAP Music Licensing Fees Go*, ASCAP, https://www.ascap.com/~/media/files/pdf/licensing/brochures/ascap-licensing-follow-the-dollar-update.pdf [https://perma.cc/SV2D-8UX7] ("[O]ne of the most cost-efficient performance rights organization in the world!").

213. This ability to eliminate or mitigate dispute resolution transaction costs presents significant access-to-justice benefits. *See, e.g.,* AMSLER, MARTINEZ & SMITH, *supra* note 182, at 114 (quoting a chief US district judge: "[F]ree or low cost ADR programs represent one of the very few means through which courts can provide any meaningful service to many litigants.").

214. *See* Smith, *supra* note 69, at 131–32 (discussing the perils of party-funded systems).

215. *See supra* note 202. Not even the newly-formed MLC can accomplish this. *See id.*

BMI together control over 90% of the US market.[216] And while vigilant antitrust oversight constrains the steps they can take in tandem,[217] the two PROs do have some history of limited administrative joint ventures.[218] The bottom line: either in concert, or individually, ASCAP and BMI are the entities best positioned for to make a meaningful DSD impact.

C. *Processes and Structures*

Were the PROs to embrace mediation DSD, they would still need to figure out how it would actually function. The next step, per Smith et al.: "Which processes are used to prevent, manage, and resolve disputes? How are those processes defined, and how do they relate to each other . . . ?"[219] In practical terms, these broad queries would prompt a suite of narrower ones: Is the system mandatory? Who mediates? Which disputes are eligible for mediation? If the system is "free" at the point of service, how to avoid abuse? Are lawyers allowed? What about publishers? For songs with double-figure songwriters—and as many publishers—do all appear at once? Virtually, or in the same place?[220]

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216. *See* Adam Candeub, *Keep the BMI-ASCAP Consent Decrees: Despite New Technology, Their Licensing Duopoly Endures*, FORBES (Jan. 13, 2020), https://www.forbes.com/sites/washingtonbytes/2020/01/13/keep-the-bmi-ascap-consent-decrees-despite-new-technology-their-licensing-duopoly-endures/?sh=1225dec516a6 [https://perma.cc/MB2C-JKMN]. The vast majority of US songwriters are affiliated with ASCAP or BMI and most ex-US PROs have relationships with them. *See* Schoonmaker, *supra* note 202. While writers typically can only affiliate with one, publishers typically affiliate with all PROs. *See* Ryan Faughnder, *Sony/ATV threatens to withdraw from ASCAP and BMI*, LA TIMES (July 11, 2014), https://www.latimes.com/entertainment/envelope/cotown/la-sony-atv-ascap-bmi-20140711-story.html [https://perma.cc/P5TA-PZT2].

217. *See generally* Brontë Lawson Turk, Note, *"It's Been A Hard Day's Night" for Songwriters: Why the ASCAP and BMI Consent Decrees Must Undergo Reform*, 26 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 493 (2016).

218. *See, e.g.,* ASCAP, *supra* note 208; *ASCAP, BMI and SOCAN Collaborate on MusicMark*, BMI (Apr. 2., 2014), https://www.bmi.com/news/entry/ascap_bmi_and_socan_collaborate_on_musicmark [https://perma.cc/4KPL-UXUQ]; Ed Christman, *Who Owns That Song? ASCAP & BMI's New Joint Data Platform Will Tell You,* BILLBOARD (Dec. 21, 2020), https://www.billboard.com/articles/business/9503351/ascap-bmi-joint-database-songview/ [https://perma.cc/WN8E-EWJV].

219. Smith, *supra* note 69, at 130.

220. *See, e.g.*, AMSLER, MARTINEZ & SMITH, *supra* note 182, at 215–16 (listing the kinds of granular design choices that DSD must address: who presides, who pays, how proceedings are structured, etc.).

While some suggestions may come to mind,[221] it is both difficult and, in fact, self-defeating to blindly prescribe these details. A successful DSD *for* songwriters will be one constructed in consultation *with* songwriters (and other stakeholders). Smith et al. tout the import of stakeholder engagement for several reasons.[222] For one, "[p]eople who do not trust systems that others design may choose not to use them."[223] A system without *bottom-up* buy-in will fail. Parties may revert to prior dispute paths, or halfheartedly participate—bearing the costs of the system without reaping its benefits.[224] Nor is this merely a symbolic matter. Systems built without stakeholder input are *worse* than those that incorporate the perspectives of those they serve.[225] Ultimately, it will be essential for the PROs to involve songwriters and publishers in decisions pertaining to, for example, what mediators to use, which disputes get to be mediated, who gets to be there—and all the other granular DSD choices.

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221. For example, it may be problematic for an industry to go from zero to sixty overnight by jumping from, essentially, no mediation whatsoever to *mandatory* mediation. *See, e.g.*, Jacqueline M. Nolan-Haley, *Is Europe Headed Down the Primrose Path with Mandatory Mediation?,* 37 N.C. J. INT'L L. & COM. REG. 981, 1008–11 (2012) (documenting the proliferation of mandatory mediation schemes while highlighting practical and ethical concerns thereof). Furthermore, one could expect the PROs—who, as collectors of performance income and song-level performance data, are in a very good position to judge the value of a given song—to consider imposing earnings threshold for a song to reach before becoming mediation-eligible. *See supra* notes 207–210 and accompanying text. Then, in considering mediators, one can imagine the PROs prioritizing subject matter expertise—e.g., songwriters and other creatives—or trained dispute resolution expertise, or some combination. *See, e.g.*, Art Hinshaw & Timothy Burr, *Foreclosure Mediation in Arizona*, 45 ARIZ. ST. L.J. 749, 766 (2013) ("Whether mediators need to be subject matter experts is a question that has been making the rounds in the mediation community for years.").

222. *See* Smith, *supra* note 69, at 144 (it is a "wise[ ]" means to "better [meet] the needs of . . . stakeholders"). DSD will require educating stakeholders, who may not "have the time or inclination to be educated about dispute resolution because they are preoccupied with other things" like writing songs. *See* Lande, *supra* note 181, at 259–61.

223. AMSLER, MARTINEZ & SMITH, *supra* note 182, at 21.

224. *See, e.g.*, Stephanie E. Smith, *Comment: Trends and Challenges in Bringing Together ADR and the Rule of Law*, J. DISP. RESOL. 189, 190–91 (2011) (stating that lack of "bottom-up" support can yield "less than robust outcomes").

225. *See* Smith, *supra* note 69, at 144 ("stakeholder engagement resulted . . . in an improved . . . system"). "It may be particularly helpful to ask stakeholders what they find most troublesome about the [current system]." Lande, *supra* note 181, at 291 (adding that DSD can then "focus on the particular problems that . . . stakeholders are most concerned about").

CONCLUSION

There is remarkable overlap between the dynamics at work in split disputes and those that mediation handles best. There are obstacles embedded within current dispute mechanisms for songwriter split disputes that encourage—and often assure—inefficient, unjust outcomes. And there is a recipe for influential organizations to effectively design a mediation system for these disputes. This really *could* work.

But . . . when? What exactly could trigger such a shift? According to Smith et al., there are five common DSD catalysts, which they dub the "Five Cs": compliance, cost, crisis, competition, and cultural. As this Article has detailed, some of these DSD triggers—particularly litigation costs and competition—are present in today's songwriting industry. Nonetheless, the ongoing dispute-mechanism-inertia suggests that the current watered-down "two or three Cs" cocktail is too weak to spur the sort of systemic change that this Article envisions. Another shoe is going to have to drop. Perhaps as the number of writers per song continues to grow,[226] and as writer income continues to rebound from its early-2000s decline,[227] stakes will grow consistently high enough, and disputes common enough, that the current system's failings will become harder for writers and publishers to swallow. Or perhaps artists like Lizzo, tired of earmarking royalties for their litigators, will lead the charge. Either way, one can only hope that reform arrives swiftly enough to prevent the next Yoko Ono from waiting a half-century before getting the credit she deserves.

226. *See supra* notes 9–12 and accompanying text.
227. *See supra* note 210 and accompanying text.