July 27, 2018

THE ASCAP AND BMI CONSENT DECREES REMAIN ESSENTIAL TO PROTECT CONSUMERS AND PROMOTE COMPETITION

EXECUTIVE SUMMARY

The U.S. Department of Justice ("DOJ") has announced that it may seek to terminate two antitrust consent decrees that have for decades been a cornerstone of the way that music is licensed in this country. The consent decrees combat anticompetitive practices by ASCAP and BMI—the dominant "performing rights organizations" ("PROs") in the United States. ASCAP and BMI each control the rights to "publicly perform" millions of copyrighted songs. By virtue of their vast holdings, ASCAP and BMI are able to demand and extract a license from virtually everyone who plays music to the public—from bars and restaurants, to TV and radio stations, to digital streaming platforms.

On July 13, 2018 four licensees that rely extensively on the protections of the ASCAP and BMI consent decrees to deliver music to consumers—Radio Music License Committee, Inc; Television Music License Committee, LLC; Pandora Media, Inc.; and Spotify USA Inc.—submitted to DOJ a detailed White Paper about potential termination of the decrees. Key points addressed in the White Paper include:

- Following an exhaustive investigation, DOJ concluded in August 2016 that the ASCAP and BMI consent decrees should *not* be terminated or modified, because "the current system has well served music creators and music users for decades and should remain intact."

- The ASCAP and BMI consent decrees act as a critical check on the unbridled exploitation of the PROs' monopoly power. Doing away with these longstanding pro-competitive market corrections would raise prices, reduce output, and harm consumers.

- The ASCAP and BMI consent decrees play a critical role in the highly complex and interrelated music licensing ecosystem. Congress itself has repeatedly passed legislation that assumes the continued existence of the ASCAP and BMI consent decrees. Complementary music licensing markets have come to depend on them in important respects.

- The ASCAP and BMI consent decrees are a perfectly appropriate—in fact, especially important—use of DOJ's statutory authority to enter and oversee antitrust consent decrees.

- Licensing of other music rights is subject to broadly similar legal regimes in which known competitive harms from collective licensing practices are mitigated through regulations and statutes that borrow heavily from the ASCAP and BMI consent decrees.

- For DOJ to terminate the ASCAP and BMI consent decrees would undermine any prospect of legislative reform in this area, by distorting the affected parties' incentives to discuss and embrace alternate approaches to combatting anticompetitive practices by PROs.

Any effort by DOJ to terminate the ASCAP and BMI consent decrees would be profoundly misguided: it would harm consumers, create chaos in commercial ecosystems that evolved around them for more than 75 years, and contravene DOJ's own assessment just two years ago that they remain critically important to the health of music licensing markets. The effects of DOJ's threatened action here would be felt in every Congressional district in the United States, raising local businesses' costs and ultimately reducing the use of music across the country, from hospitals to hotels and beyond.

THE ASCAP AND BMI CONSENT DECREES REMAIN ESSENTIAL TO PROTECT CONSUMERS AND PROMOTE COMPETITION

SUBMITTED TO

THE DEPARTMENT OF JUSTICE
ANTITRUST DIVISION

ON BEHALF OF

RADIO MUSIC LICENSE COMMITTEE, INC.

TELEVISION MUSIC LICENSE COMMITTEE, LLC

PANDORA MEDIA, INC.

SPOTIFY USA INC.

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I. INTRODUCTION

The United States Department of Justice ("DOJ") has indicated that it may seek to terminate the antitrust consent decrees that have shaped the way intellectual property ("IP") rights have been licensed in the U.S. music industry for more than 75 years. It should not do so. As DOJ itself concluded less than two years ago following an exhaustive investigation, "the current system has well served music creators and music users for decades and should remain intact."

The consent decrees combat anticompetitive practices by ASCAP and BMI—the two largest "performing rights organizations," or "PROs," in the country. ASCAP and BMI are private IP aggregators. They are in the business of pooling the copyrights in millions of songs, and extracting licensing fees from any company or establishment that lets people hear music—from bars and restaurants, to hospitals that have radios on in the background, to local television stations, to digital streaming platforms like Pandora and Spotify. Virtually no one who plays music to the public can avoid taking a license from ASCAP and BMI. As a result of the concerted action they have engineered among copyright owners to license their works jointly rather than individually, ASCAP and BMI both wield massive market power.

But their dominance has been restrained by antitrust consent decrees since 1941. Those consent decrees are as vital today as ever. They act as a critical check

on ASCAP and BMI's ability to exploit their monopoly positions and preserve them through exclusionary conduct. Courts have repeatedly recognized as much for decades. Doing away with these essential guardrails for protecting competition would directly harm consumers, and create chaos in markets and the courts alike.

We understand that DOJ's recent decision to reassess the need for the ASCAP and BMI consent decrees is part of a newly announced plan to reevaluate the 1,300 or so consent decrees that the Antitrust Division oversees. It may well be the case that many of those have outlived their usefulness—perhaps market conditions have changed to the point that a once-dominant player now faces legitimate competition; perhaps technology has rendered certain previously-sensible restrictions obsolete; perhaps the public interest would be served in some other way by relieving businesses of burdens they voluntarily shouldered in exchange for settling litigation in the distant past.

But none of that is true of the ASCAP and BMI consent decrees. Copyrighted music is still publicly performed; music users must still obtain licenses or face infringement actions; and ASCAP and BMI still control the vast majority of the underlying "public performance rights." The only relevant changes in music licensing practices—*i.e.*, the evolution of new digital streaming services—have made the decrees more important, not less. Countless channels of commerce have emerged in reliance on the protections these particular consent decrees afford.

Congress has repeatedly legislated on the express assumption that they would continue to exist. They are, in short, an essential part of the legal and commercial framework that supports the sound functioning of U.S. music licensing markets.

There is no valid basis as a matter of law or policy to harm consumers nationwide by doing away with the ASCAP and BMI consent decrees in direct contravention of DOJ's own assessment of the identical issue in 2016.

II. BACKGROUND

A. The Music Licensing Landscape

Playing music to the public requires "clearing" many different IP rights. A given recording generally contains two distinct copyrights: one in the song itself—*i.e.*, the notes and lyrics written by the composer—known as a "musical work" or "musical composition"; and a separate one in the recorded rendition of the song—*i.e.*, the performance rendered by the musicians and captured for posterity—known as a "sound recording." Bob Dylan (or his publisher) owns a "musical composition" copyright in "All Along the Watchtower," which he wrote; a band who records that song today (or its record label) owns another copyright in that sound recording. Musical compositions and sound recordings are imbued with similar but not identical sets of exclusive rights. The licenses required to use them vary, in turn, by precisely how they are transmitted to the listener.

A bar or restaurant that plays music for its patrons needs a license to "publicly perform" any musical compositions it uses, as do hospitals, office buildings, and over-the-air radio stations.[1] A digital radio service (like Pandora, historically) needs the same license, plus permission to use the sound recording.[2] An on-demand service (like Spotify's music-streaming subscription service, or Pandora's recently-launched offering, each of which allows users to decide exactly what they hear) generally obtains three licenses: one to use the sound recording; one to publicly perform the underlying musical composition; plus what is called a "mechanical license" to make and distribute digital copies of the musical composition.[3] Broadcasting music on television requires navigating yet another rights-clearance regime, which includes the same "public performance" license for musical compositions that radio stations and others need.[4]

The net effect of this dizzying array of legal obligations is that, depending on how musical compositions and sound recordings are being used, many different

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[1] *See* 17 U.S.C. § 106(4) (granting musical composition copyright owners the exclusive right to publicly perform their works in any medium).

[2] *See* 17 U.S.C. § 106(6) (granting sound recordings copyright owners the exclusive right to publicly perform their works only via *digital* audio transmissions).

[3] *See* 17 U.S.C. § 106(1), (3) (granting both musical composition and sound recording copyright owners the exclusive right to reproduce and distribute copies of their works); *id*. § 115 (establishing a compulsory license regime for certain types of mechanical licenses).

[4] *See*, *e.g.*, *United States v. ASCAP*, 1993 WL 60687, at *22-24 (S.D.N.Y. Mar. 1, 1993) (describing the prevailing process), *aff'd in part, vacated in part*, 157 F.R.D. 173 (S.D.N.Y. 1994).

music users require many different licenses from many different copyright owners. The law has, in turn, developed a variety of distinct, complementary solutions to the challenges of mass-licensing in music markets. Most of them share one critical component in common: a centralized rate-setting body that is authorized to establish the terms of trade, *en masse*, for any music user willing to play by the rules.

There are three main types of these music rate-setting regimes in the United States. First, Congress has delegated to a federal administrative agency called the Copyright Royalty Board, or "CRB," the authority to set the price of the licenses that digital radio services need for *sound recordings*.[5] Second, Congress has deputized the CRB to set the default price of *mechanical licenses*.[6] Third, as a result of antitrust litigation, various judicial bodies have the power and responsibility to ensure competitive pricing for the principal licenses needed for the *public performance* of *musical compositions*.

That last category is where the ASCAP and BMI consent decrees come into play. They are the legal instruments that establish the federal court for the Southern District of New York as the arbiter of rate disputes for licenses to publicly perform large aggregations of musical compositions, which are required for essentially every

[5] *See* 17 U.S.C. §§ 112(e), 114(f) (establishing the operative compulsory license framework).

[6] *See* 17 U.S.C. § 115(c)(3)(C) (same).

different type of public-facing music user in the United States—including digital and over-the-air radio, TV, and all other media services.[7]

B. The ASCAP and BMI Consent Decrees

ASCAP was founded in the early 20th century, not long after Congress first granted songwriters the exclusive right to publicly perform their works. It has been the subject of successive, successful antitrust suits more or less since its inception.[8] The problem, in short, is that by agglomerating rights controlled by many individual owners, and setting a single price for a collective license to use all their works, ASCAP effectively eliminates incentives for songwriters to compete against each other to offer more attractive licensing terms to users. To the extent that rights holders each understand and intend that ASCAP will be setting the price of a blanket license to use both their own works and the works of their competitors, ASCAP is essentially the ringleader of a massive price-fixing scheme.[9]

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[7] SESAC (a third PRO) has privately agreed to binding arbitration with certain buyers to establish the price of its own license, in settlement of antitrust litigation several years ago. Global Music Rights (a fourth) is currently the subject of an antitrust suit intended to achieve the same result.

[8] *See, e.g.*, Michael Einhorn, *Intellectual Property and Antitrust: Music Performance Rights in Broadcasting*, 24 Colum.-VLA J.L. & Arts 349, 350-51 (2001) (reciting the history and explaining that ASCAP's licensing practices "have attracted Justice Department attention since 1934").

[9] *See Meredith Corp. v. SESAC LLC*, 1 F. Supp. 3d 180, 208 (S.D.N.Y. 2014) (holding that where a PRO's constitutive copyright owners have each "understood and expected that [the PRO] would collectively offer the rights to their works for sale in a blanket license," that fact alone suffices "to establish concerted action").

In 1940, ASCAP unilaterally sought to double the royalty fees it demanded from radio stations. In 1941, DOJ filed a lawsuit in the U.S. federal court for the Southern District of New York, alleging that ASCAP's licensing practices violated the Sherman Act. The same year, ASCAP agreed to settle the suit by entering a consent decree. BMI, another PRO, went through a similar process, and entered its own consent decree to resolve an antitrust suit by DOJ, in 1941 as well.

Through a series of agreements over the years, DOJ and the PROs have periodically modified the terms of their consent decrees. ASCAP's were last amended in 2001, BMI's in 1994—both times with DOJ's support and the court's sign-off. Today, the central features of the consent decrees are:

- ASCAP and BMI are subject to judicial oversight regarding the terms on which they license the songs in their "repertories" (*i.e.*, the collections of musical compositions whose rights they have aggregated);[10]

- ASCAP and BMI must issue licenses on request, even if final deal terms have not been hammered out, so that they cannot use the threat of imminent copyright infringement claims (with the attendant possibility of draconian statutory damages and attorneys' fees) to extract eleventh-hour concessions from licensees;[11]

- If the PRO and licensee cannot agree on a rate, the court overseeing the consent decree is available, at either party's request, to conduct a trial to determine the price that a willing buyer and willing seller would

[10] Second Am. Final J. ("AFJ2") § XIV, *United States v. ASCAP*, 2001 WL 1589999 (S.D.N.Y. June 11, 2001); Am. Final J. ("BMI Consent Decree") § XIII, *United States v. BMI*, 1966 U.S. Dist. LEXIS 10449 (S.D.N.Y. 1966), *modified by* 1994 WL 901652 (S.D.N.Y. 1994).

[11] AFJ2 § VI; BMI Consent Decree § XIV(A).

agree to, absent the distorting effects of ASCAP and BMI's market power;[12]

- ASCAP and BMI must not be the exclusive channel through which a music user can seek a license to use the songs in their repertories, so that individual copyright holders can still, potentially, compete against each other on price and other terms;[13] and

- ASCAP and BMI must offer economically viable alternatives to a single, blanket license to use all the songs in their repertories for a set price, so that music users are not disincentivized from entering direct deals with individual copyright owners by paying twice for a license to use the same works (once through the PRO, and again from the rights owner).[14]

In practice, these protections have proven critical for music users. "Must-have" licenses are reliably available at rates lower than the full monopoly rents ASCAP and BMI would otherwise extract.[15] As a result, people tend to play more music. The proliferation of new entrants in digital streaming markets—from Pandora and Spotify to a slew of start-ups—is in no small part attributable to their ability to obtain licenses without being subjected to the unadulterated force of ASCAP and BMI's market power.

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[12] AFJ2 § IX; BMI Consent Decree § XIV.

[13] AFJ2 § IV(B); BMI Consent Decree § IV(A).

[14] AFJ2 §§ VII-VIII; BMI Consent Decree § VIII(B). The consent decrees also contain numerous other important provisions, of course. We summarize a select few here for convenience only—not by way of suggestion that other terms lack significance.

[15] The term "monopoly" rents or pricing is used throughout this White Paper to refer both to rates at the level a monopolist would charge, and to even *higher* rates, which can be produced under conditions in which "Cournot complements" exacerbate economic inefficiencies even beyond the degree a monopolist does. *See infra* n. 34 (discussing Cournot complements in further detail).

All told, by virtue of the concerted action they have engineered among music publishers and songwriters, ASCAP and BMI control the rights to roughly 90% of copyrighted songs in the United States (though, in economic terms, each is in fact a monopolist over its own "can't-avoid" catalogue).[16] They have repeatedly sought to exploit their monopolies in a variety of ways—and the courts overseeing the consent decrees have repeatedly reined them in. More or less as a matter of course, for example, both ASCAP and BMI have demanded exorbitant prices from licensees, which the rate courts have subsequently rejected on the basis that they reflect the PROs' exploitation of their dominant positions, rather than prices that would emerge in a competitive market.[17]

ASCAP and BMI have also resisted the consent decrees' requirement to offer economically viable alternatives to the all-or-nothing blanket license. These

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[16] Every court to have confronted the issue in recent memory has concluded that a given PRO's repertory effectively constitutes its own "product market" under the antitrust laws, in which the PRO is a monopolist. *See, e.g.*, *Meredith*, 1 F. Supp. 3d at 196 ("[T]he Court . . . holds that the relevant market is fairly defined as that for performance licenses of the music in SESAC's repertory[.]"); *Radio Music License Comm., Inc. v. SESAC*, 2013 WL 12114098, at *15 (E.D. Pa. Dec. 23, 2013) ("[T]his Court finds that RMLC has produced sufficient evidence to make a prima facie showing that the relevant product market is the market for SESAC's blanket license."); *Broadcast Music, Inc. v. Hearst/ABC Viacom Entm't Servs.*, 746 F. Supp. 320, 327 (S.D.N.Y. 1990) ("[T]he relevant product market is apparent: copyrighted musical compositions in BMI's repertoire.").

[17] This precise sequence of events has taken place, over and over, for decades. Examples from recent years include *BMI v. DMX Inc.*, 683 F.3d 32, 47-49 (2d Cir. 2012) (affirming lower court's rejection of the rates ASCAP and BMI demanded, because they reflected the PROs' "market power" rather than the price that would have been "competitively set"); *ASCAP v. MobiTV, Inc.*, 681 F.3d 76, 82 (2d Cir. 2012) ("[T]he rate-setting court must take into account the fact that ASCAP, as a monopolist, exercises market-distorting power in negotiations for the use of its music."); *In re Pandora Media, Inc.*, 6 F. Supp. 3d 317, 353 (S.D.N.Y. 2014) (same).

alternative license structures come in several different forms—one popularly known as the "per-program" license, another as the "adjustable fee blanket license." Both preserve a measure of competition for music rights by eliminating a significant obstacle to direct deals between individual rights holders and music users. They do so by providing that when a music user secures a license straight from the copyright owner (and various other conditions are satisfied), the PRO must in turn reduce its rates. Such reductions are important because they mitigate the problem of forced double-payments for two licenses to use the same exact songs—one to the copyright owner and another to the PRO—which would otherwise impede these competitive market transactions. As the Antitrust Division has explained, however, ASCAP and BMI have struggled with their consent decree obligations in this area:

> notwithstanding the AFJ's requirement that ASCAP offer broadcasters a genuine economic choice between the per-program and blanket license, ASCAP has resisted offering a reasonable per-program license, forcing users desiring such a license to engage in protracted litigation, and often successfully dissuading users from attempting to take advantage of competitive alternatives to the blanket license.[18]

[18] *See* Mem. of the United States in Supp. of the Joint Mot. to Enter Second Am. Final J. at 28, *United States v. ASCAP*, Civ. No. 41-1395 (WCC) (S.D.N.Y. Sept. 4, 2000) (*hereinafter* "DOJ Brief Supporting ASCAP Consent Decree Modification").

The history of ASCAP and BMI's compliance with their consent decree obligations to offer an adjustable fee blanket license has followed a similar course.[19]

In 2014, at ASCAP and BMI's request, the Department of Justice "opened an inquiry into the operation and effectiveness of the consent decrees."[20] After a two-year review, the Antitrust Division closed the inquiry and recommended that the consent decrees be left in place, unaltered. The resulting report, issued in August of 2016, explained: "the Division's investigation confirmed that the current system has well served music creators and music users for decades and should remain intact."[21]

Nothing of substance has changed since then.

III. REASONS THE DEPARTMENT OF JUSTICE SHOULD NOT SEEK TO TERMINATE THE ASCAP AND BMI CONSENT DECREES

A. Market Dynamics Have Not In Any Way Evolved to Obviate the Need for the ASCAP and BMI Consent Decrees

Today—no less than in 2016 when the Department of Justice last investigated this area—the ASCAP and BMI consent decrees serve a critical role in the music-

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[19] *See, e.g.*, *United States v. BMI (In re Application of AEI Music Network, Inc.)*, 275 F.3d 168, 177 (2d Cir. 2001) (holding, over BMI's objection, that the consent decree requires BMI to offer "a blanket license with a fee structure that reflects . . . alternative licensing" including direct deals with copyright holders); *WPIX, Inc. v. BMI*, 2011 WL 1630996, at *3-4 (S.D.N.Y. Apr. 28, 2011) (rejecting BMI's litigating position that the Second Circuit's *AEI* decision did not require BMI to offer an alternative fee blanket license option to television stations); *In re Application of THP Capstar Acquisition Corp.*, 756 F. Supp. 2d 516, 540-542 (S.D.N.Y. 2010) (rejecting ASCAP's substantially identical contention).

[20] *See* United States Dept. of Justice, *Statement of the Department of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees* (Aug. 4, 2016), at 2 (*hereinafter* "ASCAP/BMI Consent Decree Review Closing Statement").

[21] *Id*. at 3.

licensing ecosystem. They prevent the two largest PROs from: (1) exploiting their market power, which results from concerted action among horizontal competitors, by charging full monopoly rates; and (2) foreclosing competition by entering exclusive contracts with copyright owners and by eliminating alternatives to the blanket license. In so doing, the consent decrees afford a critical measure of predictability, preserve the realistic possibility of competitive market transactions, and guard against economic hold-up to the tens or hundreds of thousands of music licensees who rely on ASCAP and BMI—from gyms to restaurants to television stations to digital music streaming platforms. Circumstances have not changed in any respect that would obviate the need for these pro-competitive market corrections that enhance consumer welfare.

1. The Consent Decrees Address a Real and Ongoing Problem: ASCAP and BMI Have Assembled Must-Have Repertories By Eliminating Competition Between Individual Copyright Owners

a. Both of ASCAP and BMI's Repertories Are Must-Haves

There is no competition between PROs for licensees. The aggregated collections of rights that ASCAP and BMI sell are complements, not substitutes; music users need both, not one or the other. If ASCAP raised its prices (or really, *when* ASCAP raises its prices), licensees could not and cannot simply substitute away to BMI. And vice versa. As DOJ itself previously explained:

> BMI does not compete with ASCAP in the sense that users will purchase licenses from one or the other; since their repertories are different, most bulk users take licenses from both. Their relationship vis-a-vis users may be more accurately described as co-monopolists in the sale of blanket licenses.[22]

Virtually the entire music-using public thus must take a license from both ASCAP and BMI.[23] That is certainly true for each of the signatories to this White Paper.

RMLC: The Radio Music License Committee, Inc. ("RMLC") is a joint purchasing agent for public performance licenses for over-the-air radio stations that voluntarily elect to be represented by the RMLC in music licensing matters with PROs. Radio stations play music to the public, of course, in a variety of ways: some offer music programming, controlled by DJs they employ; some broadcast syndicated programs, whose content is supplied by a third party and may include songs; many play advertisements, which often include copyrighted musical works; and some broadcast non-musical content (*e.g.*, sporting events or on-scene news coverage) in which songs get performed incidentally to the primary subject matter.

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[22] Br. for the United States, *United States v. BMI (In Re Application of AEI Music Network, Inc.)*, Case No. 00-6123 (2d Cir. June 26, 2000), at 25 (internal citation omitted).

[23] On the rights holder side, by contrast, ASCAP and BMI do compete to administer a given copyright owner's public performance rights. That competition, however, redounds to the *detriment* of music users—because it effectively results in rich promises made to attract publisher "members" or "affiliates," which the PROs pass through to licensees in the form of higher and higher rates. If ASCAP and BMI *also* competed for licensee customers, then that competition would of course limit the consumer harm caused by competition for rights to administer. But they do not—so the competition on the rights owner side amounts to a one-way-ratchet on price.

The music rights holder community generally views each of these discrete types of use as a *prima facie* act of copyright infringement under U.S. law, which thus requires a license.[24] Radio stations, in turn, generally take licenses that grant permissions to broadcast virtually any copyrighted song that could appear on their stations—accounting for the fact that they do not and cannot know in advance what the complete set of such songs will be. In practice, they generally do so through PROs, and have no choice but to take a license from ASCAP and BMI.

TVMLC: The Television Music License Committee, LLC ("TVMLC"), an organization funded by voluntary contributions from the television broadcasting industry, represents the interests of some 1,200 local commercial television stations in the United States in connection with certain music performance-rights licensing matters. Like over-the-air radio stations, local TV stations play music to the public in a variety of ways: they broadcast programming that they produce themselves, which may include songs in one way or another; they run ads that have music in them; and typically as the dominant portion of their broadcast schedules, local TV

[24] ASCAP and other PROs have consistently taken the position that broadcasting "background music picked up at sports or news events" is actionable conduct, not fair use. *See, e.g.*, *United States v. ASCAP*, 1993 WL 60687, at *75 (S.D.N.Y. Mar. 1, 1993), *aff'd in part, vacated in part*, 157 F.R.D. 173 (S.D.N.Y. 1994); Answer, *ESPN, Inc. v. BMI.*, No. 16-CV-1067-LLS, Dkt. No. 10 at ¶ 16 (S.D.N.Y. March 8, 2016) (BMI rate-setting submission arguing that "ambient stadium music is a critical component of the broadcast that allows ESPN to attract viewers by making them feel like they are sitting in the stadium cheering for their favorite team"). And as rights holder communities are quick to remind broadcasters, remedies for copyright infringement can include up to $150,000 in statutory damages per *work* infringed, along with other substantial penalties. *See* 17 U.S.C. §§ 501 *et seq*.

stations feature syndicated programming produced by third parties that may contain music selected and incorporated by the producers. Although these third parties obtain licenses granting the necessary rights for use of every *other* copyrighted aspect of their productions—and convey those rights to television stations when they enter into broadcast distribution contracts—the content producers almost invariably do *not* obtain the public performance rights to the copyrighted musical compositions their programs include. The local stations, themselves, thus need to clear those rights in order to broadcast the programs they have already licensed and paid for.[25] As a result, deals with ASCAP and BMI are effectively unavoidable.

Pandora: Pandora Media, Inc. ("Pandora") historically offered an internet radio service (known in copyright jargon as a "non-interactive service"), in which users could provide feedback regarding the type of music they wished to hear, but not select the particular songs to be streamed. Today, it continues to offer that popular product, and also has an on-demand service (known in copyright jargon as an "interactive" streaming service). Whenever Pandora streams a song to a listener—whether via its internet radio product or its interactive service—that conduct constitutes a public performance of the musical composition embodied in the sound recording, which thus requires a license. Pandora generally obtains those

[25] Local TV stations are contractually prohibited from altering the music contained in third-party produced programming and commercials. Even when they purchase programs before the time they have been created, they have no ability to dictate the music that will later be inserted.

licenses from PROs, and has no choice but to deal with both ASCAP and BMI. As noted above, Pandora also takes licenses from the owners of the copyrights in the sound recordings it streams, as well as "mechanical licenses" to use the underlying musical compositions via its on-demand, interactive product.

Spotify: Spotify USA Inc. ("Spotify") offers an interactive streaming service, which also requires obtaining licenses from a wide variety of music rights owners. With over 35 million tracks available on its service, Spotify clears the rights to the sound recordings on its service as well as innumerable musical compositions those recordings embody, including both the rights to reproduce and distribute the compositions, and the right to publicly perform them. Spotify obtains licenses for musical composition public performance rights from PROs, and in order to clear those rights *en masse*, it must negotiate with ASCAP and BMI.

b. The Consent Decrees Mitigate the Problem that ASCAP and BMI Eliminate Competition Between Individual Copyright Owners

While licensing copyrighted works *en masse* undoubtedly offers certain efficiencies for both rights owners and music users, ASCAP and BMI—by virtue of their very business models—commit one long-recognized harm to competition: their fixed-fee, all-or-nothing blanket licenses eliminate any incentive for individual

copyright owners to bargain or compete against each other.[26] Though large aggregations of public performance rights are complements, individual songs remain actual or potential substitutes for each other in a variety of critical respects. Agglomerating the separate licenses for those individual songs together into a single product at a fixed price destroys that competition—or rather it would, absent the consent decrees' requirements that ASCAP and BMI licenses be the *non-exclusive* means to obtain permission to broadcast any given song, and that they offer alternatives to the standard blanket license that make direct deals with rights owners economically viable.[27]

Music licensing by local television stations under the consent decrees illustrates the critical role they play in protecting and promoting competition. Today,

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[26] *See* DOJ Brief Supporting ASCAP Consent Decree Modification at 15 ("Blanket licenses reduce music users' ability and incentive to take advantage of competition among rights holders[.]"). We do not suggest, of course, that any collective transaction in any context that has the effect of reducing incentives for would-be competitors to bargain against each other necessarily violates the antitrust laws. The Federal Reports are, of course, replete with cases in which courts have determined that a given venture may be pro-competitive on balance notwithstanding a reduction in head-to-head bargaining by members of the venture. That said, there is no question that in the context of ASCAP and BMI, in particular, the pooled rights they sell *en masse* harm competition within the meaning of the Sherman Act by vitiating incentives for individual rights owners to compete against each other—which is among the primary problems that the consent decrees seek to remedy. *See generally BMI v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 11 (1979) ("Under the amended decree, which still substantially controls the activities of ASCAP, members may grant ASCAP only nonexclusive rights to license their works for public performance. Members, therefore, retain the rights individually to license public performances[.]").

[27] The "rate court" backstop provided by the consent decrees is, in substance, another way of attacking the same problem: it is a bulwark against the distorting effects of market power resulting from concerted action among rights owners to set a single fixed price for their aggregated works.

over 450 stations (more than a third of the total) choose a per-program license from ASCAP and BMI, and as a result obtain at least some of their performance rights directly from copyright owners. These free-market transactions would be effectively impossible absent the consent decrees, because it is often in the PROs' interest *not* to offer license structures that allow for competition between composers and publishers to have their works performed (as history demonstrates).[28] The consent decrees' provisions for non-exclusive terms with copyright owners and economically viable alternative license structures for music users thus "promote competition" that benefits the TVMLC's members and many other music users.[29]

RMLC's members similarly rely on the pro-competitive features of the ASCAP and BMI consent decrees. More than twenty percent of its member stations use a form of the per-program license (formally known as a "program period" license). The *lack* of a viable alternative to the blanket license, in fact, was a primary driver of RMLC's successful antitrust suit against another PRO, SESAC.[30] As the

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[28] *See supra* pp. 9-10; DOJ Brief Supporting ASCAP Consent Decree Modification at 15 ("ASCAP historically refused to offer users anything other than a blanket license."). It was a suit by the local television industry, pursuant to the consent decrees, that effectively forced ASCAP and BMI to offer an economically viable per-program license in the first place. *See In Re Application of Buffalo Broad. Co.*, 1993 WL 60687, at *32, 86 (S.D.N.Y. Mar. 1, 1993) (holding that the value of a PRO license was not accurately measured as a percentage of a television station's revenue, and embracing a meaningful per-program license alternative).

[29] *See* DOJ Brief Supporting ASCAP Consent Decree Modification at 15.

[30] *See Radio Music License Comm., Inc. v. SESAC Inc.*, 29 F. Supp. 3d 487, 502 (E.D. Pa. 2014) ("SESAC's anticompetitive conduct has driven up the price of copyright licenses and

court in that case held, "selling . . . exclusively in the blanket license format" and "discouraging direct licensing by refusing to offer carve-out rights . . . constitute exclusionary conduct when practiced by a monopolist."[31] This is precisely the conduct that the ASCAP and BMI consent decrees restrain and that ASCAP and BMI have historically chafed against.[32]

Pandora's business depends on the consent decrees in a variety of respects. In commercial terms, a blanket license to publicly perform large aggregations of musical compositions is a practical necessity. The rate-setting mechanism in the consent decrees, and other pro-competitive protections they afford, are thus critical to Pandora's ability to clear the rights for the songs that are the lifeblood of its platform—and to the sound functioning of the music licensing ecosystem more broadly. Without the consent decrees, if ASCAP and BMI rates were to go materially up, Pandora's output, measured on a variety of metrics (from users to usage and beyond), would go materially down. The result would be a decline in consumer welfare.

Spotify is similarly subject to potential anticompetitive hold-up by ASCAP and BMI absent the consent decrees. Having sunk massive costs into licensing other

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deteriorated the quality of service insofar as customers only have the option of purchasing a blanket license.").

[31] *Id*. at 501.

[32] *See supra* pp. 9-10.

slices of copyright in sound recordings and musical compositions, Spotify is particularly prone to the exploitation of PROs' market power. The consent decrees are thus a critical component of the interlocking web of copyright licenses that Spotify obtains: without their protections against monopoly pricing and other consumer harms, Spotify would be unable to license the public performance rights for its customer-facing product at anything resembling competitively reasonable rates.

2. The Complexity of the Music Licensing Ecosystem Only Augments the Need for the Consent Decrees

The complexity of contemporary music-rights licensing markets only *augments* the importance of the ASCAP and BMI consent decrees. The sheer number of different rights that music users must secure means that absent rate oversight, they would be subject to anticompetitive extortion at multiple points in the IP licensing process. Without the consent decrees, ASCAP and BMI could essentially wait until licensees had sunk massive costs into obtaining all the other rights they need, and then threaten hold-out to extract supracompetitive rates.[33] In other words, even if a music user spent millions of dollars developing its service or

[33] A variant of this problem plagues many other music users as well. Many ASCAP and BMI licensees—from radio stations to local television networks to hospitals to local B&Bs—do not have any knowledge of or ability to control what will be performed on their "platforms." As a result, ASCAP and BMI could, absent the consent decrees' protections, effectively hold up those buyers, who have no real alternative to taking a license—or even hold out from issuing a license altogether, opting for copyright infringement actions with the threat of statutory damages over commercially reasonable business transactions.

product and acquiring nearly all necessary licenses, the last rights holder in line could always leverage its potential ability to bring the business to a screeching halt—after the time for substituting away to other alternatives had long since passed—and thereby extract an exorbitant fee.[34]

It is precisely in recognition of this danger and others mitigated by the consent decrees that Congress has established rate-setting processes for other critical music rights—modeled in no small part on the ASCAP and BMI judicial rate-setting processes that preceded them.[35] In the course of designing the compulsory license for digital radio stations to stream sound recordings, for example, Congress acceded to guidance from DOJ against allowing the formation of PROs for *sound recording* performance rights that could exploit "combined market power associated with the pooling of intellectual property rights" by being the "exclusive negotiating

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[34] This hold-up power leads to what the economics literature refers to as a classic "Cournot complements" problem: by virtue of being split among separate sellers, the aggregate price of must-have assets (here, music IP rights) is artificially elevated above even the price that a single monopolist would charge. *See, e.g.*, Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEX. L. REV. 1991, 2013 (2007) ("The Cournot-complements effect arises when multiple input owners each charge more than marginal cost for their input, thereby raising the price of the downstream product and reducing sales of that product. . . . As a result, if multiple input owners each control an essential input and separately set their input prices, output is depressed even below the level that would be set by a vertically integrated monopolist.").

[35] *See, e.g.*, H.R. Conf. Rep. No. 105-796, at 79-80 (1998) (revising the statutory compulsory license to stream sound recordings on internet radio, to ensure "fair and efficient licensing mechanisms"); *Columbia Broad. Sys.*, 441 U.S. at 15 ("Congress itself, in the new Copyright Act, has chosen to employ the blanket license and similar practices.").

agency."[36] The CRB, in turn, understands the resulting legislative rate-setting regime to require its judges "to make certain that the statutory rates they set are those that would be set in a hypothetical 'effectively competitive' market," borrowing an essential element of the inquiry that S.D.N.Y. conducts pursuant to the consent decrees.[37]

Beyond effectively replicating key aspects of their operation in other music licensing domains, Congress has ensconced the ASCAP and BMI consent decrees in surrounding legislation expressly addressing them. Section 513 of the Copyright Act, for example, prescribes an intricate set of rules for "any performing rights society subject to a consent decree which provides for the determination of reasonable license rates or fees to be charged by the performing rights society."[38] The pending legislative overhaul of large swaths of the music copyright regime, the Music Modernization Act, similarly engages directly with various provisions of the

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[36] *See* Letter from Acting Assistant Attorney General Markus to Senator Leahy (June 20, 1995), 141 Cong. Rec. S11945-04, S11962.

[37] *See* United States Copyright Royalty Board, *In Re Determination of Royalty Rates and Terms for Ephemeral Recording and Webcasting Digital Performance of Sound Recordings (Web IV)*, Dkt. No. 14-CRB-0001-WR (2016-2020), at 40 (C.R.B. Dec. 16, 2015) (appeal pending, *SoundExchange, Inc. v. Copyright Royalty Board*, D.C. Cir. No. 16-1159); *see also* United States Copyright Royalty Board, *Determination of Royalty Rates for Digital Performance Right in Sound Recordings and Ephemeral Recordings (Web III)*, 79 Fed. Reg. 23102, 23114 n. 37 (Apr. 25, 2014) (explaining that "the 'willing seller/willing buyer' standard calls for rates that would have been set in a '*competitive* marketplace'") (emphasis in original). In other music rate-setting contexts, Congress has instead prescribed a standard intended "[t]o minimize any disruptive impact on the structure of the industries involved" and reflect a range of additional considerations as well. *See* 17 U.S.C. § 801(b)(1).

[38] *See* 17 U.S.C. § 513.

U.S. Code that specifically concern how the ASCAP and BMI consent decrees are to operate.[39] For DOJ to seek to rescind those very consent decrees *now* would contravene the legislative intent to work within the framework they establish—as the Chairs and ranking members of the key Congressional committees with relevant oversight responsibilities have recently explained.[40]

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Less than two years ago, DOJ announced: "After carefully considering the information obtained during its [two-year] investigation, the [Antitrust] Division has concluded that the industry has developed in the context of, and in reliance on, these consent decrees and that they therefore should remain in place."[41] The need for non-exclusivity and other protections that mitigate the anticompetitive effects of ASCAP

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[39] *See* Letter from Senators Klobuchar, Leahy, Blumenthal, and Booker, Members of the Subcommittee on Antitrust, Competition Policy, and Consumer Rights, to Assistant Attorney General Delrahim (June 7, 2018) (*hereinafter* "Senate Antitrust Subcommittee Letter"), at 1-2 (explaining that "music licensing legislation before Congress assumes the continued existence of the framework established under the consent decrees").

[40] *See* Letter from Senators Grassley and Feinstein, and Representatives Goodlatte, and Jerrold Nadler, to Assistant Attorney General Delrahim (June 8, 2018), at 2 ("Enacting the Music Modernization Act only to see the Antitrust Division move forward with termination of the decrees . . . could displace the legislation's improvements to the marketplace with new questions and uncertainties for songwriters, copyright owners, licensees and consumers."). Other critical pillars of the music copyright ecosystem would similarly have the rug pulled out from under them. For example, several rates set by the CRB for mechanical rights rest on the longstanding assumption that the federal court for the Southern District of New York will be overseeing terms of trade for the separate rights that ASCAP and BMI administer. *See, e.g.*, United States Copyright Royalty Board, *Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III)*, Dkt. No. 16-CRB-0003-PR (2018-2022) (C.R.B. Jan. 26, 2018) (Initial Determination).

[41] *See* ASCAP/BMI Consent Decree Review Closing Statement at 22.

and BMI's market power certainly has not changed. The need for reasonable rates from ASCAP and BMI and a check on the anticompetitive effects of blanket licenses has not magically disappeared. DOJ's 2016 conclusion remains as correct today as it was then.

B. Overseeing the ASCAP and BMI Consent Decrees Is a Proper Function of the Department of Justice

Although DOJ's instinct to scrutinize the vast stable of consent decrees it currently oversees is laudable, it should not throw out the wheat with the chaff: administering the ASCAP and BMI consent decrees is a perfectly appropriate—in fact, especially valuable—use of its authority and resources. It would not be in the public interest, as the law requires, for a court to terminate these particular consent decrees.

1. The Circumstances Where Terminating a Consent Decree Is Justified Look Nothing Like This

Congress explicitly authorized DOJ to enter into and oversee antitrust consent decrees. The Tunney Act establishes a detailed framework under which the Antitrust Division is to do so.[42] Antitrust consent decrees are not some rogue form of regulation without legislative imprimatur. To the contrary, ongoing legal commitments, overseen by a court, in settlement of antitrust actions brought by the federal government, are one of the tools that DOJ is *supposed* to wield.

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[42] *See* 15 U.S.C. § 16.

That said, there is no denying that not all antitrust consent decrees on the books today remain necessary. Markets and technology sometimes evolve to the point that competitive restrictions imposed decades earlier may outlive their usefulness. In 1921, for example, the Antitrust Division entered a consent decree with the Eastman Kodak Company to resolve litigation started in 1915. At the time, Kodak sold fully 90% percent of the color film in the United States. By the 1990s, when the parties jointly sought to dissolve the consent decree (which prohibited Kodak from requiring that people who bought film also use Kodak's photo processing services), it turned out that "[t]he marketplace for film ha[d] changed considerably in the last 80 years."[43] Specifically, as the decades rolled by, the color film market had become vastly more competitive: Kodak's global share had shrunk to 36%, and it faced competition from four "well-financed, billion-dollar, multinational corporations selling film all over the world" that was effectively interchangeable with the product Kodak offered.[44]

That is when a consent decree should be ended—when the conditions that justified its creation have simply ceased to hold over time, because competition has deprived the dominant party of any appreciable market power.

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[43] *See United States v. Eastman Kodak Co.*, 63 F.3d 95, 98 (2d Cir. 1995).

[44] *Id*.

But nothing remotely like that has happened to ASCAP and BMI. When DOJ sought to revise and restate the ASCAP consent decree in 2000, it filed a lengthy brief explaining why retaining the core protections it affords are manifestly in the public interest.[45] Since then, court after court after court has explained that ASCAP and BMI still, to this day, wield significant market power that distorts the rates they demand far above the price that a willing buyer and willing seller would agree to in a competitive market.[46]

In these circumstances, "empowering the Court to resolve licensing disputes when negotiations between BMI [and ASCAP] and music users break down is sound enforcement policy." That is not some radical perspective voiced by self-interested licensees seeking to save a buck. Those words are from the Department of Justice

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[45] *See* DOJ Brief Supporting ASCAP Consent Decree Modification at 15-16 (explaining that the ASCAP consent decree "contains a number of provisions intended to provide music users with some protection from ASCAP's market power").

[46] *See supra* n. 19; *see also* Br. for the United States as Amicus Curiae, *In Re Application of THP Capstar Acquisition Corp.*, Case No. 11-127 (2d Cir. May 6, 2011), at 1-2 (explaining that PROs wield "significant market power"); Br. for the United States, *United States v. BMI (In re Application of AEI Music Network, Inc.)*, No. 00-6123 (2d Cir. June 26, 2000), at 24 ("That BMI has market power, the ability to exercise some control over price, is plain."). The PROs' revenues have, accordingly, been soaring, because the consent decrees only partially constrain the power conferred by collective bargaining. *See, e.g.*, BMI Press Release, *BMI Announces $1.060 Billion in Revenue, the Highest in the Company's History* (Sept. 8, 2016); ASCAP Press Release, *ASCAP Delivers for the First Time More Than $1 Billion to Songwriter, Composer and Music Publisher Members* (Apr. 19, 2018).

itself.[47] The ASCAP and BMI consent decrees are among the leading examples of an ongoing antitrust remedy overseen by a court that is manifestly *appropriate*.[48]

2. DOJ Could Not Satisfy the Legal Standard to Terminate the ASCAP or BMI Consent Decrees

"Although the Tunney Act, by its terms, applies only to the *approval* of consent decrees, [the Second Circuit has] held that termination also requires supervision—and consideration of the public interest—as a corollary to the Tunney Act."[49] "In most cases, [the party seeking termination] should be prepared to demonstrate that the basic purposes of the consent decrees—the elimination of monopoly and unduly restrictive practices—have been achieved."[50] In practice, courts have translated that high-level principle into a requirement for the moving defendant "to prove that: (1) it no longer possesses market power . . . and (2) termination of the consent decrees would benefit consumers."[51]

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[47] *See* Mem. of the United States in Response to Motion of Broadcast Music, Inc. to Modify the 1966 Final Judgment Entered in this Matter at 9, *United States v. BMI*, 64-cv-3787 (S.D.N.Y. June 20, 1994).

[48] Even leading critics of the use of consent decrees to resolve antitrust cases do not contend "that consent decrees should *never* be used by agencies in antitrust cases. They should be." *See* Joshua D. Wright & Douglas H. Ginsburg, *The Economic Analysis of Antitrust Consents*, EUR. J. L. & ECON. (online ed.), at 21 (emphasis added). They are plainly preferable, in circumstances like those presented here, to a break-up remedy, which would only exacerbate some of the principal competition problems that plague PRO licensing practices. *See supra* n. 34.

[49] *United States v. Int'l Bus. Machs. Corp.*, 163 F.3d 737, 740 (2d Cir. 1998) (internal quotation marks omitted).

[50] *Kodak*, 63 F.3d at 101.

[51] *Id*. at 102.

DOJ cannot meet these standards for termination. Neither the consent decrees nor changing market conditions have in any sense eliminated ASCAP or BMI's monopolies and concomitant ability to engage in restrictive practices. To the contrary, DOJ itself has recognized over and over again that they continue to enjoy meaningful market power, which they do not hesitate to exercise to the detriment of their customers—and, ultimately, listeners and viewers.[52] As noted above, Congress has effectively built its reliance on the consent decrees (as a bulwark against that problem) into the U.S. Code, which expressly reflects in numerous respects the fact that leading PROs' rates are to be set in judicial proceedings.[53] The Antitrust Division's own operating procedures strongly counsel against terminating consent decrees in circumstances like these.[54]

Doing so would not remotely benefit consumers. To the contrary, it would have the predictable effect of *increasing* prices and *decreasing* the output of music. That is textbook economics: allow a party with market power to raise customers' costs in order to arrogate consumer surplus to itself, and it will. And it is exactly what the history shows as well: ASCAP and BMI routinely seek to extract supracompetitive prices, and the primary constraint that stops them from fully

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[52] *See supra* n. 46.

[53] *See supra* n. 38 and accompanying text; *cf.* 17 U.S.C. § 114(i).

[54] United States Dept. of Justice, *Antitrust Division Manual*, at § III-146 (5th ed. 2017).

exploiting their market power is the rate court process established by the consent decrees.[55]

Terminating the consent decrees would thus have the effect of freeing ASCAP and BMI to commit antitrust violations on a massive scale. The supracompetitive prices they would charge, which plainly result from concerted action among rights owners, would amount to the very paradigm of an anticompetitive effect without a legitimate business justification, in violation of Section 1 of the Sherman Act.[56] The express or *de facto* exclusive licensing they would resort to, along with other standard PRO practices that effectively exclude competition, would constitute Section 2 violations under established, unbroken judicial doctrine.[57]

DOJ already decided where the "public interest" lies here, and it is in *preserving* the ASCAP and BMI consent decrees.[58] For the agency to suddenly do a 180 now would not just be bizarre policy; it would have significant legal

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[55] *See supra* n. 19.

[56] *See Columbia Broad. Sys.*, 441 U.S. at 10 ("Both organizations [ASCAP and BMI] plainly involve concerted action[.]"); *Am. Ad. Mgmt., Inc. v. GTE Corp.*, 92 F.3d 781, 791 (9th Cir. 1996) ("[I]t is difficult to imag[ine] a more typical example of anti-competitive effect [under Section 1] than higher prices[.]"); *Gordon v. Lewistown Hosp.*, 423 F.3d 184, 210 (3d Cir. 2005) ("[S]howing that the alleged contract produced an adverse, anticompetitive effect within the relevant geographic market . . . . can be achieved by demonstrating that the restraint . . . reduced output, raised prices or reduced quality").

[57] *See, e.g.*, *Radio Music License Comm.*, 2013 WL 12114098, at *13-20 (finding RMLC likely to succeed on Section 2 claim against SESAC); *Radio Music License Comm., Inc.*, 29 F. Supp. 3d at 501 (denying SESAC's motion to dismiss).

[58] *See* ASCAP/BMI Consent Decree Review Closing Statement at 2.

consequences in any ensuing proceeding. "[T]he case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views."[59] There would be no basis for a court, today, to simply assume that an assessment by DOJ opposite the one it made less than two years ago—that the public interest would somehow now be served by *termination*—is correct. To the contrary, such a position "which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view."[60]

Ending the ASCAP and BMI consent decrees despite the overwhelming evidence *that they are working* would, to quote Justice Ginsburg, be like "throwing away your umbrella in a rainstorm because you are not getting wet."[61] The legal standard for terminating them could not be satisfied under these circumstances.

C. DOJ Should Not Seek Termination In Order to Generate a Legislative Solution

Out of an abundance of caution, we note that if DOJ's goal is to pressure Congress to enact legislation to move PRO ratemaking from S.D.N.Y. over to the CRB, terminating the ASCAP and BMI consent decrees would be an ineffective—in fact counterproductive—means of achieving it.

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[59] *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 698 (1991).

[60] *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 447 n.30 (1987) (internal quotation marks omitted).

[61] *Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 590 (2013) (Ginsburg, J., dissenting).

Without the ASCAP and BMI consent decrees, licensing negotiations with a wide range of music users would go off the rails. Freed from oversight, ASCAP and BMI would dramatically increase license fees, threaten crippling copyright infringement lawsuits against users that did not immediately accede to their demands, eliminate meaningful alternatives to their preferred fixed fee all-or-nothing blanket license, and discriminate between similarly situated licensees. Music users would find themselves in the untenable position of choosing among paying monopoly rates, embarking on costly litigation, or dramatically altering their basic operations to restrict their use of copyrighted music. Chaos is not a word to be tossed around lightly, but it accurately describes what would likely envelop music licensing markets—and the popular consumer-facing products that depend on them—if the ASCAP and BMI consent decrees were here today, gone tomorrow.

We do not understand DOJ to take the view that there is no need for an open, universally accessible rate-setting process for ASCAP and BMI licenses at all.[62] Rather, DOJ's interest in considering consent decree termination may result primarily from a perceived need to get the Antitrust Division out of the business of overseeing the prevailing regime. For the reasons discussed above, we believe that

[62] The BMI consent decree contains one because *BMI itself requested it* back in the 1990s. *See* Public Comments of Broadcast Music, Inc. Regarding Review of Consent Decree in United States v. Broadcast Music, Inc. (Aug. 6, 2014), at 5.

calculus reflects an unduly narrow view of the appropriate scope of DOJ's responsibility in this area, as Congress has defined it.

But perhaps more importantly, if DOJ seeks to have Congress transfer PRO rate-setting authority to the CRB or another administrative entity, then terminating the ASCAP and BMI consent decrees would be counterproductive. It would make a legislative solution effectively impossible in the near-term, by altering the *status quo* in a way that distorts incentives for the relevant stakeholders to reach a compromise—which would be effectively required for Congressional action.[63] If the alternative to legislation is *no oversight at all*, the rights owner community may not perceive it to be in their interests to accede to an agency-based solution that is fair and reasonable. Instead, they may choose to test licensees' will and resources through waves of antitrust suits in the courts, with the attendant possibility of inconsistent results.

It would be misguided for DOJ to try to encourage Congress to act by terminating the consent decrees, with all the collateral damage that would result.[64] Doubly so where the political economy cannot actually be reliably predicted to yield

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[63] The pending Music Modernization Act reflected years of negotiations, and ultimately won significant political support only by virtue of near-consensus among affected businesses, on all sides, that its revisions to the Copyright Act would be preferable to the *status quo*.

[64] *Cf.* Senate Antitrust Subcommittee Letter at 2 ("When considering your approach to judgments that still have a pervasive influence on current markets, we respectfully request that the Division take appropriate action to allow relevant parties to negotiate an alternative regime before taking unilateral action by terminating or weakening these judgments.").

a new legislative regime. All of the relevant stakeholders represented here on the music-user side of these issues are open to a reasoned, timely discussion about whether, all things considered, the prevailing approach to addressing the PROs' market power is or is not preferable to various potential alternatives. A healthy airing of competing perspectives would be a productive step forward. But it is impossible to conduct that policy debate in the face of an impending crisis which distorts the leverage of all of the affected constituencies and is guaranteed to produce unintended consequences.

IV. CONCLUSION

We thank DOJ for its attention to this submission, and would be pleased to continue our ongoing dialogue at the Antitrust Division's convenience. We hope and trust that it will accede to the repeated requests of legislators with relevant oversight responsibilities to proceed cautiously and deliberately in its assessment of the appropriate path forward. If further written material from the parties here, including a separate economist's report, would be helpful, we would be pleased to provide one upon request.