

**BEFORE THE
UNITED STATES DEPARTMENT OF JUSTICE
ANTITRUST DIVISION
WASHINGTON, D.C.**

ASCAP/BMI CONSENT DECREE REVIEW

**JOINT PUBLIC COMMENTS OF
RADIO MUSIC LICENSE COMMITTEE AND
DIGITAL MEDIA ASSOCIATION**

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I. INTRODUCTION

The antitrust consent decrees that govern the “performing rights organizations” (“PROs”) known as ASCAP and BMI establish pro-competitive market corrections that are critical to the sound functioning of music licensing markets. The Antitrust Division of the U.S. Department of Justice reached that very conclusion just three years ago, when it closed a two-year review of the ongoing need for these specific consent decrees by finding that “the current system has well served music creators and music users for decades and should remain intact.” The only material changes to the music licensing ecosystem since that time—including most prominently the passage of the Music Modernization Act (“MMA”) in October 2018—make the consent decrees’ prophylactic protections against abuse more important, not less.

It would be a public policy error of the highest order for the Department to seek to eliminate or materially alter those essential, pro-consumer “rules of the road”—at least without a replacement legal regime at the ready to substitute in and perform a similar function. To set the ASCAP and BMI consent decrees on a path to termination would result in chaos in music licensing markets, ultimately diminishing the availability of music to audiences across the United States. These are not some archaic, outdated settlements of legal disputes whose relevance has long-since dissipated. They are the cornerstones of contemporary music licensing practices in industries from over-the-air radio, to digital streaming platforms, and beyond.

Ultimately, there is nothing sacrosanct about the protections afforded by the ASCAP and BMI consent decrees being embodied *in consent decrees*, as opposed to statutes, regulations, or other binding legal instruments. But the protections, themselves, are essential. And the public interest would be severely harmed if they were diluted, significantly limited, or—worse yet—put on a path to outright elimination by the Department.

II. INTEREST OF SUBMITTING PARTIES & BACKGROUND

A. The Radio Music License Committee and the Digital Media Association

The Radio Music License Committee, Inc. (“RMLC”) is a non-profit corporation based in Nashville that represents the interests of the commercial radio industry (some 10,000 over-the-air radio stations) as a common negotiating agent for public performance licenses. Its constituent radio stations each decide whether they want the RMLC to represent them in music licensing matters with any given PRO, like ASCAP and BMI. And the PROs decide whether they want to negotiate with the RMLC, and/or with individual radio stations.

The Digital Media Association (“DiMA”) is a non-profit trade group representing the most significant participants in the digital music industry—Amazon, Apple, Google, Pandora, Spotify, and YouTube. DiMA represents its members in industry negotiations and other affairs, while advocating for pro-innovation policies, legislation, and regulatory actions to promote growth, competition, and creativity in 21st Century music.

B. Incorporation of Prior Comments

The RMLC and members of DiMA have previously expressed their serious concerns regarding any scenario in which the consent decrees are terminated or “sunsetting” without a

legislative replacement at the ready. For inclusion in the record, we are submitting a substantially identical version of the relevant document (previously provided to the Department), attached hereto as Exhibit A.

The following discussion assumes familiarity with the essential points raised in that prior submission—the operative IP regime, the problems the consent decrees were designed to address, and the manner in which they do so—and will not repeat them comprehensively here.

III. THE DEPARTMENT SHOULD NOT SUNSET OR TERMINATE THE CONSENT DECREES (OR OTHERWISE ELIMINATE THEIR CORE PROTECTIONS) WITHOUT A REPLACEMENT REGIME IN PLACE

A. Terminating the Consent Decrees Would Harm Consumers

The Department has explained that a central goal of its review of so-called “legacy” antitrust judgments is to terminate judgments that “cover industries in which relevant circumstances have changed.”¹ No relevant circumstances have changed in the marketplace for public performance rights. In fact, the consent decrees remain *more* vital today than when they were first adopted. That is why the Department has repeatedly *expanded and strengthened* the consent decrees’ protections to combat continued anticompetitive behavior by the PROs in the decades since, including as recently as 1994 for the BMI decree,² and 2001 for the ASCAP decree.³ That is why the Department chose explicitly to *extend* the consent decrees’ protections to internet-based music services, rather than concluding—as PROs and publishers have urged—that technological change is a reason to eliminate those protections.⁴ That is why the Department never sought to put a time limit on the decrees as part of any of these recent review and revision processes, even those that occurred after it adopted its general policy to include sunset provisions

¹ U.S. Department of Justice, Antitrust Division, Division Update Spring 2019 (Mar. 26, 2019), <https://www.justice.gov/atr/division-operations/division-update-spring-2019/terminating-interminable>.

² The 1994 amendment to the BMI consent decree added the license-on-demand and rate court mechanisms. *United States v. Broad. Music, Inc.*, 275 F.3d 168, 172 (2d Cir. 2001); *United States v. Broad. Music, Inc.*, No. 64-CV-3787, 1994 WL 901652, at *1 (S.D.N.Y. Nov.18, 1994).

³ The 2001 amendments, among other things, “expand[ed] and clarif[ied] ASCAP’s obligation to offer certain types of music users, including background music providers and Internet companies, genuine alternatives to a blanket license, and strengthen[ed] certain provisions intended to facilitate direct licensing by ASCAP’s members.” Memorandum of the United States in Support of The Joint Motion to Enter Second Amended Final Judgment at 4, *United States v. Am. Soc. of Composers, Authors, and Publishers*, 129 F. Supp. 2d 327 (No. 41-1395), <https://www.justice.gov/atr/case-document/file/485996/download>. Indeed, the 2001 amendments to the ASCAP consent decree were also expanded to specifically encompass digital streaming services.

⁴ The 2001 amendments to the ASCAP decree explicitly extended the through-to-the-audience and per-program/per-segment licensing requirement to “on-line transmitters” and other new types of services that might be developed in the future. *Id.* at 22.

in antitrust decrees. And that is why the Department concluded, just three years ago and after conducting a two-year review in which the Department received input from a broad array of stakeholders, that “the consent decrees remain vital to an industry that has grown up in reliance on them” and that “they should therefore remain in place.”⁵

The ASCAP and BMI consent decrees have become so tightly woven into the fabric of the music industry that simply getting rid of them—whether now or five years from now—without a transition plan in place would lead to chaos in the marketplace and, ultimately, would harm consumers by increasing prices and diminishing the availability of music.

1. The Radio and Digital Music Industries Would Not Exist in Their Current Form Without the Consent Decrees

As the Department concluded in 2016, the radio and digital music industries have “developed in the context of, and in reliance on” the ASCAP and BMI consent decrees.⁶ Terminating the consent decrees will have an obvious and predictable effect on those industries: ASCAP and BMI will both dramatically increase their license fee demands and eliminate the licensing mechanisms that, over the years, have alleviated to some degree the competitive concerns inherent in these markets. Radio stations and digital music services will have no recourse against ASCAP and BMI. Some may pay, but the rate hikes would be passed on to consumers in the form of higher prices. Many others would simply choose to play less music, exit the industry entirely, or choose not to enter it in the first place. That result, of course, would adversely affect songwriters more than anyone.

These concerns are not hypothetical; predicting what would happen without the ASCAP and BMI consent decrees requires no imagination. The early history of the radio industry’s relationship with ASCAP, before the existence of the consent decrees, is illustrative. As radio began to grow in the 1930s, ASCAP—which at the time licensed 80% of all music performed on the radio—became increasingly aggressive about its licensing demands.⁷ In 1940, ASCAP announced that it would more than double its license fee starting in 1941, from the already extortionate rate of 5% of a station’s advertising revenue.⁸ The fee was so untenable that many radio broadcasters stopped performing ASCAP music entirely at the start of the new year in 1941, and were instead forced to play music that was in the public domain. BMI, which had been founded in 1939 by the radio industry as its own music licensing agent, offered radio stations more competitive rates, but had a limited selection of music. As a Congressional report later noted, “it

⁵ U.S. Department of Justice, Statement of the Department of Justice on the Closing of the Antitrust Division’s Review of the ASCAP and BMI Consent Decrees 22 (2016).

⁶ *Id.*

⁷ John Cirace, *CBS v. ASCAP: An Economic Analysis of a Political Problem*, 47 Fordham L. Rev. 277, 287-288 (1978).

⁸ John Schneider, *This Boycott Changed American Music*, RadioWorld, May 4, 2015, <https://www.radioworld.com/columns-and-views/this-boycott-changed-american-music>.

was the public that was most effected, deprived as it was of the best in current American popular music.”⁹

Fortunately, the Department acted swiftly, conducting an antitrust investigation into ASCAP, and entering into the consent decree by March of 1941. As a result, ASCAP later that year “agreed to accept 2.25% from local radio stations”—less than half of what ASCAP was able to extract from radio stations in 1935; and that rate remained in place for nearly the next two decades.¹⁰ Based on similar concerns, the Department also investigated and entered into a consent decree with BMI in the same year.

Contrast the radio industry’s pre-consent-decree experience with the experience of early digital music services. As the digital music industry began to expand rapidly in the 2000s, the ability to obtain licenses for public performances of musical compositions was not a significant impediment, notwithstanding the PROs’ best efforts (as discussed below). That is entirely because of the protections afforded by the consent decrees: immediate, blanket licensing; non-discrimination on royalty rates; and the rate court backstop to ensure reasonable fees. The industry was thus able to flourish, introducing innovative new products and delivering the fruits of competition to listeners, precisely because the Department had acted to extend the consent decrees’ protections to the developing digital music marketplace.¹¹

As explained below, without the consent decrees, ASCAP and BMI have every incentive to engage in anticompetitive conduct. But this time, it will be worse, because of changes in law and industry practice:

- Today, almost no musical works are in the public domain. Continual, retroactive extensions of copyright terms have meant that the only category of works that are reliably in the public domain is those published before 1924.¹²
- Direct licensing of performance rights from music publishers would today raise the same anticompetitive concerns as licensing of rights from the PROs. A handful of major publishers have, in recent decades, amassed enormous catalogs, such that the top four publishers—Sony/ATV, Universal Music Publishing Group, Kobalt, and Warner/Chappell Music—control interests in the vast majority of popular music.¹³

⁹ *The Television Broadcasting Industry*, Report of the Antitrust Subcomm. of the Comm. on the Judiciary of the H. Rep., H. Rep. No. 86-607, at 117-18 (June 24, 1957), <https://bit.ly/2ykfGpr>.

¹⁰ *Id.*

¹¹ See *supra* note 4. The digital music industry was also aided by the Digital Performance Right in Sound Recordings Act, Pub. L. 104-39, 109 Stat. 336 (1995), which established an efficient statutory licensing scheme for webcasting companies. See generally 17 U.S.C. § 114(f).

¹² See generally Cornell University Library, Copyright Information Center, *Copyright Term and the Public Domain in the United States*, <https://copyright.cornell.edu/publicdomain>.

¹³ See, e.g., Ed Christman, *Publisher’s Quarterly: Sony/ATV reigns Again as Concord Breaks Into Top 10*, *Billboard* (May 9, 2019), <https://www.billboard.com/articles/business/8510805/music-publishers-quarterly-q1-sonyatv-hot-100-radio> (noting that, of the 100 most played radio songs in

Several represent catalogs with interests in more public performance rights in the aggregate than the rights held by the PROs SESAC or GMR.

- The PROs’ repertoires, and the publishers’ catalogs are no longer substitutes for each other, if they ever were. In part, this is because of the exponential growth in the number of co-writers of popular songs,¹⁴ as well as rights owners’ recent insistence that public performance rights in each co-writer’s share be separately licensed (*i.e.*, so-called “fractional” licensing). To operate effectively, a radio station or digital music service now typically needs licenses from every co-writer of every song it plays. In practice, then, a station or service needs licenses from every PRO, and would need them from every publisher controlling any portion of any commercial or popular works too if it were to attempt to engage in direct licensing. As a result, ASCAP and BMI do not compete against each other, at all, for licensees. So there is no hope that any such “competition” would redound to the benefit of music users and listeners.
- Digital music services have to “clear” rights in an exponentially greater number of works to meet consumer demand. The very existence of such valuable services—which have put virtually the entire corpus of recorded music at the fingertips of every consumer and deliver ever-increasing revenues to creators and rights owners—depends on mechanisms to efficiently obtain permission to use tens of millions of works every year.¹⁵
- Despite promising to release a joint repertory database last year,¹⁶ ASCAP and BMI continue to fail to provide licensees with complete, authoritative information about the

the first quarter of 2019, Sony/ATV controlled an interest in 56 and Universal controlled an interest in 51).

¹⁴ According to one study, in the 1960s, an average hit song on the Billboard Top 10 had 1.87 writers and 1.68 publishers. In the 2010s, that number increased to an average of 4.07 writers and 6 publishers. Music Reports, Music Reports’ Songdex Analysis Shows Trend Toward More Songwriters and Publishers for Top Hits Since 1960’s (Aug. 4, 2017), <https://www.musicreports.com/?rt=c7&article=music-reports-songdex-analysis>. The top 10 streaming hits in 2018 in the United States each had an average of 9.1 songwriters. Tim Ingham, *How to Have a Streaming Hit in the USA: Hire 9.1 Songwriters (and a Rap Artist)*, Music Business Worldwide (Jan. 6, 2019), <https://www.musicbusinessworldwide.com/how-to-have-a-streaming-hit-in-the-us-hire-9-1-songwriters-and-a-rap-artist/>.

¹⁵ For instance, as of April 2019, Spotify had nearly 50 million tracks available on the service and nearly 40,000 tracks were being added every single day. See Spotify Technology S.A., Q1 Earnings Conference Call, April 29, 2019, <https://www.nasdaq.com/aspx/call-transcript.aspx?StoryId=4257719&Title=spotify-technology-sa-spot-ceo-daniel-ek-on-q1-2019-results-earnings-call-transcript>.

¹⁶ ASCAP & BMI Announce Creation Of A New Comprehensive Musical Works Database To Increase Ownership Transparency In Performing Rights Licensing (July 26, 2017), <https://www.ascap.com/press/2017/07-26-ascap-bmi-database> (“The joint database will roll out in

songs they license. This serves only to increase ASCAP and BMI's leverage in negotiations. For instance, in its most recent license agreement with RMLC, ASCAP represented that it possessed a specific share of performances on radio based on its understanding of the songs it controls.¹⁷ BMI has now disputed ASCAP's claim and urged that BMI's share of performances is significantly higher than ASCAP's, relying on its own understanding of what songs it and ASCAP respectively control.¹⁸ RMLC, meanwhile, is handicapped in its ability to test any of these claims using authoritative data, because neither ASCAP nor BMI provide potential licensees with bulk, machine-readable access to their repertory databases, and both disclaim the reliability of what limited information they do provide on their websites.¹⁹ Radio and digital music services are regularly forced to enter into license negotiations where the PROs claim to collectively control well over 100% of performances on the relevant service (or where they are simply unable to ascertain what they are, and are not, licensing).

In short, the radio and digital music industries have been able to evolve as they have only by virtue of the protections afforded by the consent decrees. Without them, competition in these markets does not truly exist, and the quality and number of products that consumers ultimately enjoy will invariably be diminished.

2. The PROs Have the Ability and Incentive to Engage in Anticompetitive Conduct in the Absence of the Consent Decrees

There is no need to wonder what ASCAP and BMI will do in the absence of the consent decrees. Both have openly admitted that they intend to increase prices dramatically, and not a level that is commensurate with any plausible measure of their repertoires' actual value.²⁰

phases with Phase One expected to launch by the end of 2018, and include the majority of ASCAP and BMI registered songs.”).

¹⁷ Pet. of Radio Music License Comm. for Determination of Reasonable Final License Fees ¶ 15, *Radio Music License Comm. v. Broad. Music Inc.*, No. 18-cv-4420, R.1 (S.D.N.Y. May 17, 2018).

¹⁸ Resp. of Broad. Music Inc. ¶ 4, *Radio Music License Comm. v. Broad. Music Inc.*, No. 18-cv-4420, R.1 (S.D.N.Y. May 17, 2018) (“BMI’s internal analyses show that BMI has a significantly greater market share than any other domestic PRO, including ASCAP.”).

¹⁹ ASCAP, ACE Terms of Use Agreement, <https://www.ascap.com/help/legal/ace-terms-of-use> (“Although ASCAP uses reasonable efforts to update ACE and improve the accuracy of the information contained therein, ASCAP makes no guarantees, warranties or representations of any kind with regard to and cannot ensure the accuracy, completeness, timeliness, quality or reliability of any information made available on and through ACE.”).

²⁰ See Elizabeth Matthews, CEO, ASCAP, Statement Before the S Comm. on the Judiciary, Subcomm. on Antitrust, Competition Policy and Consumer Rights 14 (Mar. 10, 2015) (“It is clear that the legal and regulatory restrictions imposed on ASCAP by the Consent Decree and the Copyright Act severely limit ASCAP’s members from achieving competitive market rates for their works.”); Resp. of Broad. Music Inc. ¶ 20, *Radio Music License Comm. v. Broad. Music Inc.*, No. 18-cv-4420, R.1 (S.D.N.Y. May 17, 2018) (urging that the “distorting effects of the compulsory

Publishers have admitted the same. For instance, Universal Music Publishing Group told the Department in 2014 that it believed “the rates for songwriters and copyright owners should be considerably higher.”²¹ The National Music Publishers’ Association has likewise decried the supposedly “depressed rates that result from the consent decrees.”²² It is textbook economics that unchecked price increases attributable to market power will ultimately harm consumers by reducing output below the competitive level.²³

But even putting aside the preceding litany of admissions that the PROs’ goal here is to raise prices, a cursory examination of ASCAP’s and BMI’s recent behavior—with the consent decrees in place—demonstrates that ASCAP and BMI have not just the incentive but also the ability to engage in anticompetitive conduct.²⁴

For instance, just three years ago, the Department investigated ASCAP for entering into agreements that granted to ASCAP *exclusive* rights to license public performance rights—thus violating a central restriction that has been in place since the consent decrees were adopted in 1941.²⁵ ASCAP and the Department entered into a settlement under which ASCAP agreed to pay the United States \$1.75 million, in part to reimburse the government for its investigation.

Relatedly, in 2014, as part of rate court litigation between Pandora and ASCAP, the court found that “the evidence at trial revealed troubling coordination between Sony, [Universal Music Publishing Group], and ASCAP, which implicates a core antitrust concern underlying [the consent

licensing obligation under the BMI and ASCAP consent decrees” leads to lower than competitive rates).

²¹ Universal Music Publishing Group, Comment Letter on Justice Department Review of ASCAP and BMI Consent Decrees (2004), <https://www.justice.gov/sites/default/files/atr/legacy/2014/09/24/307988.pdf>.

²² David Israelite, *Regulations Are Killing the Songwriting Stars*, National Music Publishers’ Association (last visited July 29, 2019), <https://nmpa.org/regulations-are-killing-the-songwriting-stars/>.

²³ The suggestion that current rates are *below* the competitive level is belied by the unbroken series of judicial findings that ASCAP and BMI wield market power over licensees and do not hesitate to exploit it. *See, e.g., 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).

²⁴ *See, e.g., West Penn Alleghany Health System, Inc. v. UPMC*, 627 F.3d 85, 100 (3d Cir. 2010) (“Anticompetitive effects include increased prices, reduced output, and reduced quality.”).

²⁵ Memorandum in Support of the United States’ Unopposed Motion to Enter Proposed Settlement Agreement and Order, No. 41-1395 (S.D.N.Y. May 12, 2016) <https://www.justice.gov/atr/file/851446/download>. The consent decrees’ requirement for non-exclusive licensing by ASCAP and BMI is a critical protection that allows for a measure of potential competition for license terms between individual rights owners, on one hand, and PROs, on the other.

decree].”²⁶ Specifically, the court found that Universal “pressured ASCAP to reject the Pandora license ASCAP’s executives had negotiated”—telling ASCAP to “be strong” when deciding whether to settle—and that “Sony threatened to sue ASCAP if it entered into a license with Pandora” before Sony’s withdrawal from new media rights from ASCAP took effect. Thus, the court concluded, “ASCAP, Sony, and UMPG did not act as if they were competitors with each other in their negotiations with Pandora.”²⁷ The Second Circuit affirmed the rate court’s judgment, including a finding that ASCAP and its major publisher members had entered into invalid modifications of their membership agreements designed to deprive digital music licensees of the protections of the ASCAP decree.²⁸

The ongoing need for the consent decrees’ protections is further underscored by the fact that the ASCAP and BMI rate courts have been more active in the past 12 years than at any point during their existence. This is largely because the PROs have targeted new forms of digital music delivery with aggressive license fee demands—a repeat of the efforts to leverage market power over the then-burgeoning radio industry in the 1940s, and the cable television industry in the 1990s.²⁹ Even rate-court cases involving traditional media companies involve claims that growing digital distribution warrants significant deviation from prevailing license rates.³⁰ In each case, the rate courts have been there to stop them. For example, ASCAP sought \$41 million from an entity

²⁶ *In re Pandora Media, Inc.*, 6 F. Supp. 3d 317 (S.D.N.Y. 2014).

²⁷ *Id.* at 357-58.

²⁸ *Pandora Media, Inc. v. ASCAP*, 785 F. 3d 73 (2d Cir. 2015). In this decision, the Second Circuit implicitly affirmed a similar holding by the BMI rate court.

²⁹ *See, e.g., Am. Soc. of Composers, Authors, & Publishers v. MobiTV, Inc.*, 671 F.3d 76 (2d Cir. 2012) (seeking supracompetitive rates for mobile and internet television and radio); *United States v. Am. Soc. of Composers, Authors, & Publishers*, 627 F.3d 64 (2d Cir. 2010) (seeking supracompetitive rates for internet services); *Broadcast Music, Inc. v. Pandora Media, Inc.*, 140 F. Supp. 3d 267 (S.D.N.Y. 2015) (seeking over 40% rate increase for internet radio); *In re Pandora Media, Inc.*, 6 F. Supp. 3d 317 (S.D.N.Y. 2014), *aff’d Pandora Media, Inc. v. ASCAP*, 785 F.3d 73 (2d Cir. 2015) (seeking supracompetitive rates for internet radio); *In re Cellco P’ship*, 663 F. Supp. 2d 363 (S.D.N.Y. 2009); *United States v. Am. Soc. of Composers, Authors, & Publishers*, 607 F. Supp. 2d 562 (S.D.N.Y. 2009).

³⁰ *WPIX, Inc. v. Broad. Music, Inc.*, 2011 WL 1630996 (S.D.N.Y. Apr. 28, 2011); Response of Broadcast Music, Inc. to the Petition of Radio Music License Committee, Inc. for the Determination of Reasonable Final License Fees, *Radio Music License Comm., Inc. v. Broad. Music, Inc.* (No. 18-CV-4420-LLS) (S.D.N.Y. Mar. 25, 2018); Answer, *ESPN, Inc. v. Broad. Music Inc.*, No. 16-CV-1067-LLS, Dkt. No.10 at ¶ 16 (S.D.N.Y. March 8, 2016); Final Order, *in re Application of the Cromwell Grp.*, No. 10-CV-5210 (S.D.N.Y. Sept. 30, 2014); Final Order, *Withers Broadcasting Co. of Ill., LLC v. Broad. Music, Inc.*, No. 10-CV-4779-LLS (S.D.N.Y. Aug. 30, 2012).

called MobiTV that provided radio and television content to customers of wireless phone carriers; the court ruled that ASCAP was entitled only to \$405,000.³¹

Indeed, the Department has repeatedly recognized that the PROs' tendency toward anticompetitive conduct is a reason to *expand* the consent decrees' protections. For instance, in 2001, the Department recognized that the "per-program" provisions of the ASCAP decree "proved to be less effective than intended in facilitating direct licensing and promoting competition among PROs."³² In particular, "notwithstanding the clear requirement in the [consent decree] that ASCAP offer broadcasters a genuine choice between a per-program and a blanket license, ASCAP . . . consistently resisted offering broadcasters a realistic opportunity to take a per-program license."³³ Accordingly, the Department insisted on "expand[ing] and clarify[ing] ASCAP's obligations to offer licenses for which fees vary depending on the users' performances of ASCAP-licensed music," while also expanding those obligations to encompass "on-line transmitters, on-line users, and background/foreground music services."³⁴

Time has shown that those expansions added necessary and valuable checks to the PROs' monopoly power. To be sure, the consent decrees do not solve all of the existing problems in this space. And all things equal, additional enhancements could materially improve the operation of the marketplace—for example, mandates for full-work licensing, uniform license-in effect rules, and holding the PROs to their unmet promise to make publicly available, meaningfully usable databases containing current repertory information. But the fact that there are challenges yet to be solved does not mean that the consent decrees fail to perform critical functions with respect to the problems they do address.

The conduct of unregulated PROs, such as SESAC, further illustrates the likelihood of anticompetitive actions by ASCAP and BMI in the absence of the protections of the consent decrees. SESAC was sued both by RMLC and the Television Music License Committee. In both cases, settlements were reached after the courts found evidence that SESAC had engaged in concerted action and violated the Sherman Antitrust Act.³⁵ In the RMLC's case in particular, the court found that the RMLC found a "likelihood of success on the merits,"³⁶ and subsequently ruled that "SESAC's anticompetitive conduct has driven up the price of copyright licenses and deteriorated the quality of service[.]"³⁷ In the first rate-setting arbitration between RMLC and

³¹ *In re Application of MobiTV, Inc.*, 712 F. Supp. 2d 206 (S.D.N.Y. 2010), *aff'd sub nom ASCAP v. MobiTV, Inc.*, 681 F.3d 76 (2d Cir. 2012).

³² Memorandum of the United States, *supra* note 3, at 24.

³³ *Id.*

³⁴ *Id.* at 25.

³⁵ *Meredith Corp. v. SESAC, LLC*, 1 F. Supp. 3d 180 (S.D.N.Y. 2014) (denying SESAC's motion for summary judgment); *Radio Music License Committee, Inc. v. SESAC, Inc.*, 29 F. Supp. 3d 487 (E.D. Pa. 2014).

³⁶ *Radio Music License Committee, Inc. v. SESAC, Inc.*, 2013 WL 12114098, at *22 (E.D. Pa. Dec. 23, 2013).

³⁷ *Radio Music License Committee, Inc. v. SESAC, Inc.*, 29 F. Supp. 3d 487, 502 (E.D. Pa. 2014).

SESAC under the ensuing settlement agreement, the arbitrators found that SESAC’s radio rate card charged stations over 100% more than what the panel concluded was a “reasonable” fee.³⁸ RMLC has also filed suit against GMR, asserting similar antitrust claims and alleging other anticompetitive conduct.³⁹

The upshot of all this is that without the consent decrees, businesses will see their PRO bills go through the roof, as they will have little ability to push back on whatever price the PROs and larger publishers demand. Small businesses and new enterprises will be particularly affected by this imbalance in market power. In economic terms, ASCAP and BMI would extract monopoly rents, depressing output below the competitive level and reducing welfare in the aggregate.

The common denominator of all of these problems is harm to consumers. Prices to end-users will rise, as businesses of all stripes—not just radio stations and digital music services, but bars, restaurants, shops, music venues, etc.—have to either pass on higher public performance license costs to their own patrons or otherwise cut back on their use of music. And at the same time, the quality and variety of products offered to consumers will decrease, as companies decline to enter the market and investment shifts to opportunities outside the music industry, leading to a narrower selection of products, and less music produced overall. These are problems that will be felt in every Congressional district in the United States, by ordinary Americans, whose experience interacting with music will necessarily change dramatically.

3. Termination of the Consent Decrees Would Replace a Stable Licensing Regime With a Disarray of Private Antitrust Lawsuits and a Patchwork of Private Settlements

While many small businesses will have no ability to fight back against ASCAP’s and BMI’s efforts to dramatically increase prices, others will turn to the courts. Companies and industries with the wherewithal to fund litigation will file private antitrust suits against ASCAP and BMI, followed by years and years of protracted and expensive litigation. Compared with the *status quo*, in which the deadweight loss of massive legal fees is not required to preserve the core protections afforded by the ASCAP and BMI consent decrees, none of this litigation will bring any benefit to consumers or increase consumer welfare in any way.

The National Music Publishers’ Association—a trade association representing U.S. music publishers—has at least feigned confidence about the PROs’ chances in such litigation, relying on the Supreme Court’s decision in *BMI v. CBS*.⁴⁰ What the NMPA’s public position ignores,

³⁸ Radio Music License Committee, *Arbitrators Side with Radio and Reduce SESAC License Fees* (July 31, 2017), <http://dehayf5mhw1h7.cloudfront.net/wp-content/uploads/sites/893/2017/09/22194403/RMLC-SESAC-press-release-07312017.pdf>.

³⁹ Complaint, *Radio Music License Comm.*, 2017 WL 104307 (No. 16-6076), <http://dehayf5mhw1h7.cloudfront.net/wp-content/uploads/sites/893/2017/09/22194414/GMR-Complaint.pdf>.

⁴⁰ See David Israelite, National Music Publishers’ Association Responses to Questions for the Record from Senator Richard Blumenthal, May 15, 2018, <https://www.judiciary.senate.gov/imo/media/doc/Israelite%20Responses%20to%20QFRs.pdf> (citing *BMI v. CBS*, 441 U.S. 1 (1979)).

however, is the degree to which that case—and other private antitrust suits against the PROs in the consent-decree era—relied on the existence of the decrees as an effective constraint on anticompetitive conduct. The Supreme Court, in concluding that blanket licensing was not a *per se* violation of the antitrust laws, explained that “the substantial restraints placed on ASCAP and its members by the consent decree must not be ignored.”⁴¹ Other courts have drawn upon the same reasoning.⁴² Thus, in any future antitrust litigation in a world without the decrees, ASCAP and BMI will be forced to defend their business practices without resort to the core instrument that assuaged courts’ concerns about their exploitation of market power in past cases.

Indeed, the concern over serial antitrust litigation is what led BMI, in 1994, to agree to expand its decree to provide for the automatic grant of a license on request, thereby “eliminating BMI’s copyright law-derived right to withhold access to its repertoire,” and to establish a rate court mechanism in the event that BMI and an applicant could not agree to a reasonable fee.⁴³ BMI explained that the “impetus for modification” was, in substantial part, to “avoid repeated, expensive, and fruitless antitrust litigation” with music licensees. As BMI observed, “[f]or lack of an independent fee-setting forum, BMI has been forced into repeated copyright infringement and antitrust litigation with many major music users when the parties fail to reach agreement over BMI’s license fees.”⁴⁴ Elimination of the decrees will simply result in a repeat of the problem that the 1994 amendment was meant to address.

⁴¹ *Broad. Music Inc. v. Columbia Broad. Sys., Inc.* 441 U.S. 1, 23-24 (1979). Indeed, BMI itself has acknowledged the importance of the consent decrees to ASCAP’s and BMI’s defense of antitrust litigation. See Memo. of Broad. Music, Inc. in Support of Motion to Modify Consent Decree, *United States v. Broad. Music, Inc.*, No. 64 Civ. 3787, 1994 WL 16189513 (S.D.N.Y. Jun. 27, 1994) (explaining that in the *BMI v. CBS* case, the “Supreme Court held that the BMI and ASCAP blanket licenses were not *per se* illegal, specifically noting the existence of the BMI and ASCAP Consent Decrees and, especially, the existence of the ASCAP judicial fee-setting mechanism as indicia that the licensing practices of ASCAP and BMI were reasonable”); see also *id.* (“[T]he Second Circuit found the offer of the blanket license to be no restraint at all because of the availability of direct licensing, basing its ruling in part on the existence of ASCAP’s rate court.”).

⁴² See, e.g., *K-91, Inc. v. Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967) (“ASCAP cannot be accused of fixing prices because every applicant to ASCAP has a right under the consent decree to invoke the authority of the United States District Court for the Southern District of New York to fix a reasonable fee whenever the applicant believes that the price proposed by ASCAP is unreasonable[.]”); *Buffalo Broad. Co. v. ASCAP*, 744 F.2d 917, 923 (2d Cir. 1984).

⁴³ Memo. of Broad. Music, Inc. in Support of Motion to Modify Consent Decree, *United States v. Broad. Music, Inc.*, No. 64 Civ. 3787, 1994 WL 16189513 (S.D.N.Y. Jun. 27, 1994); *United States v. Broad. Music, Inc.*, No. 64-CV-3787, 1994 WL 901652, at *1 (S.D.N.Y. Nov. 18, 1994) (granting motion, as modified); see also *United States v. Broad. Music, Inc.*, 275 F.3d 168, 172-73 (2d Cir. 2001) (describing this history).

⁴⁴ Memo. of Broad. Music, Inc. in Support of Motion to Modify Consent Decree, *United States v. Broad. Music, Inc.*, No. 64 Civ. 3787, 1994 WL 16189513 (S.D.N.Y. Jun. 27, 1994).

In the end, what will predictably occur in the event of termination is a patchwork of protection—with individual industries or even individual companies entering private settlement agreements with the PROs that provide differing levels of protection. This outcome, of course, leaves out the smallest licensees, or licensees for whom even supra-competitive rates are not sufficient to justify the cost and expense of private antitrust litigation.⁴⁵ Again, this is not hypothetical. As noted above, SESAC succumbed to suits by the television and radio industry, such that both have certain protections against anticompetitive conduct via the mechanism of private antitrust settlement agreements. But those protections do not extend to any other class of licensee, or even to all radio stations.

B. Adding a “Sunset” Provision to the Decrees Is No Solution

ASCAP and BMI have both publicly urged the inclusion of a “sunset” provision to their decrees.⁴⁶ But there is no reason to believe that the structural competition issues described above will simply solve themselves three, five, or ten years from now. This may explain why, in spite of the Department’s 1979 enactment of a policy to include sunset provisions in antitrust decrees, the comprehensive overhauls of the ASCAP and BMI decrees in 2001 and 1994, respectively, included no sunset provisions. In fact, the problems addressed by the ASCAP and BMI decrees have only gotten worse as the volume of music that services must license continues to increase exponentially.

To the extent the Department believes that it can force Congress to act by attaching a self-destruct timer to the decrees, that is a serious error. Doing that will only make a legislative solution *less* likely, not more. The PROs and music publishers will have no incentive to come to the table to craft such a solution if they know that they will be able to fully leverage their market power by holding out for a few years.

C. Allowing Partial Withdrawals of Digital Rights Is No Solution

Publishers have attempted in recent years to withdraw rights to license so-called “new media” services from ASCAP and BMI, so that those services would have to clear public performance rights directly with the major music publishers. Both the ASCAP and BMI rate courts rejected those efforts.⁴⁷ The Department also determined that modification of the consent decrees to permit such “partial withdrawal” was inappropriate in light of the uncertainty regarding whether the PROs offer “full-work” or “fractional” licenses. The Department noted, however, that the impact of such withdrawal would be more significant if the PROs were to offer only fractional

⁴⁵ As the U.S. Supreme Court has noted, antitrust litigation is so expensive that even large companies would reasonably balk before taking it on. *See Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1967 (2007) (noting the “unusually high cost of discovery in antitrust cases”).

⁴⁶ ASCAP, *BMI President & CEO Mike O’Neill and ASCAP CEO Elizabeth Matthews Issue Open Letter to the Industry on Consent Decree Reform* (Feb. 28, 2019), <https://www.ascap.com/press/2019/02/02-28-ascap-bmi-announcement>.

⁴⁷ *In re Pandora Media, Inc.*, 6 F. Supp. 3d 317, 357-58 (S.D.N.Y. 2014); *Broadcast Music, Inc. v. Pandora Media, Inc.*, 140 F. Supp. 3d 267, 290-91 (S.D.N.Y. 2015).

licenses.⁴⁸ “If the PROs were to offer fractional licenses,” the Department explained, “then a digital user would be unable to rely on a license from the PRO to perform any work in which a partially withdrawing publisher owned any fractional interest.”⁴⁹

Indeed, the publishers’ claim that partial withdrawal is necessary because the technology for delivering music has changed gets matters exactly backwards. The relevant markets here are *not* consumer markets for music services; the consent decrees’ effects play out upstream, at the level of licensing performance rights for musical works, which are a critical input into the downstream consumer-facing products that have seen so much innovation in recent years. The advent of those popular, customer-level digital technologies has made licensing the relevant rights *more* challenging, not less, for digital companies.

After all, any person with a smartphone, a free app, and an internet connection can become a one-person music publisher, record label and digital distributor. Ensuring that those creators can find an audience means that digital companies have to clear rights in an exponentially greater number of works than their analog forebears ever did. Accordingly, should the publishers renew their request to modify the consent decrees to permit partial withdrawal of “new media” rights from ASCAP and BMI, it should be rejected again. As economist Dr. Adam Jaffe explained to the Department in 2014 when it considered this question for the first time, “[t]he available evidence suggests . . . that the consequence of allowing partial withdrawal would be solely to allow publishers to exercise market power to increase performance royalties.”⁵⁰ That market power, moreover, has been amplified by two factors: the growth in split works (where one work is owned fractionally by different rights owners) and the practice of fractional licensing (where to use a work you need to obtain a license from all co-owners separately).

The anticompetitive effects of partial withdrawal are readily illustrated by a real-world example: the hit song “Old Town Road” by Lil Nas X. That song, according to separate searches of ASCAP and BMI’s respective repertory databases, is controlled by three separate publishers: Universal Music Publishing Group, Downtown Music Publishing, and Kobalt Songs Music Publishing. ASCAP and BMI claim to offer only a “fractional license” for the shares represented by their respective members: BMI claims to offer a license only to Universal’s and Downtown’s shares, and ASCAP to Kobalt’s share. So, as the PROs see it, a digital service that wants to stream “Old Town Road” today needs a license from both ASCAP and BMI. This is bad enough. But things would get *worse* if Universal were to “partially withdraw” its share from BMI. A digital music service would then need to clear rights from *three* entities to play that same song: ASCAP, BMI, and Universal. This result, of course, does nothing for competition or consumer welfare; it simply allows publishers to impose an added tax on the digital economy—with all of the predictable, concomitant output reductions that such incremental hold-ups invariably entail.

⁴⁸ Statement of the Department of Justice, *supra* note 5 at 16-17.

⁴⁹ *Id.* at 16.

⁵⁰ Netflix, Inc., Comment Letter on Justice Department Review of ASCAP and BMI Consent Decrees (2004) at Appx. A, 12, <https://www.justice.gov/sites/default/files/atr/legacy/2014/08/20/307908.pdf>.

More broadly, if partial withdrawal were allowed, it would necessitate a thorough reexamination of the market power of the major music publishers. As noted above, through consolidation, the four largest music publishers control the vast majority of interests in U.S. music publishing rights. Those mergers were allowed to occur, in part, because of the pricing constraints imposed by the consent decrees. Although the merger control documents of the relevant U.S. agencies are not publicly available, the European Union specifically cited the practice of licensing rights through collecting societies as a reason why the mergers did not raise competition concerns.⁵¹ Furthermore, given the publishers' current position regarding fractional licensing (which they adopted only recently, after having previously asserted the opposite views), the measures of market share used by those agencies were almost certainly flawed. For instance, if four publishers hypothetically possessed a quarter of a share of every song in existence, a simplistic analysis might suggest that each publisher roughly has a 25% share of some relevant market.⁵² This, of course, would be incorrect: in a world of fractional licensing, each publisher would wield a complete hold-up right, as anyone wishing to use any song would need a license from each publisher. And their interests would be entirely complementary, rather than competitive with each other. After all, nothing any of them could license, on their own, would actually yield legal permission to play *anything*; a license from *each* of them would be required in order for *any* of the licenses to be at all useful. This is the “free market” which the music publishers seem most focused on attaining—and it is easy to see why. It is one in which they are shielded from the pressures of competition.

D. The Department Should Defer to Congress and Abstain From any Action to Materially Alter the Consent Decrees Until a Legislative Solution Is in Place

When it closed its last investigation into the ASCAP and BMI consent decrees in 2016, the Department concluded by “encourag[ing] the development of a comprehensive legislative solution that ensures a competitive marketplace and obviates the need for continued Division oversight of the PROs.”⁵³ And, to be sure, such a legislative solution, if crafted appropriately, could be a valuable substitute for the consent decrees. But it would be a serious error—and indeed, contrary

⁵¹ European Commission Decision, Universal/BMG Music Group Publishing, Case No. M.4404 (May 22, 2007) at 42-44, http://ec.europa.eu/competition/mergers/cases/decisions/m4404_20070522_20600_en.pdf (“While the parties’ economic weight will become larger after the merger, this will not allow Universal to price independently. The licensing tariffs may not under the current rules differ per publisher. It is therefore unlikely that the parties could impose price increases for mechanical and performance rights for traditional applications after the merger.”); European Commission Decision, Sony/EMI Music Publishing, Case No. M.8989 (Oct. 26, 2018) at 14-18, http://ec.europa.eu/competition/mergers/cases/decisions/m8989_610_7.pdf (“The Parties submit that collecting societies are responsible for granting licences for both mechanical and performance rights to users on a fair and non-discriminatory basis and that the tariffs charged under these licences are standard Therefore, music publishers are not able to influence users’ decisions through price or other contractual terms.”).

⁵² Cf. European Commission Decision, *supra* note 49, Case No. M.4404 at 65 (relying on the “revenue based market share” of publishers).

⁵³ Statement of the Department of Justice, *supra* note 5 at 22.

to Congressional intent—to take steps toward eliminating the consent decrees without a sensible legislative framework already in place.

As an initial matter, Congress has repeatedly ratified the consent decrees, both implicitly and explicitly. In the 1976 Copyright Act, Congress established a series of compulsory licensing mechanisms to cover uses not already covered by the compulsory licensing provisions of the ASCAP and BMI consent decrees.⁵⁴ This included a compulsory license covering public performances of musical works for noncommercial television and radio broadcasters, which remains in place today.⁵⁵ Congress also has, over the years, explicitly embedded the ASCAP and BMI consent decrees in related legislation that expressly addresses and relies on the protections the decrees afford.⁵⁶

As part of the legislative process that led to the enactment of the MMA last fall, Congress comprehensively examined the music licensing system in the United States, including the ASCAP and BMI consent decrees, and the parallel compulsory licensing regime for mechanical rights.⁵⁷ While the Department, in its current review, has referred to “changes in the music industry” since the decrees were first put in place as a reason for the decrees’ potential termination, Congress already weighed these changes as part of that process. Far from deciding that these changes meant the compulsory license for mechanical rights—which dates back to 1909—needed to be replaced by “the free market,” Congress created a *new* and comprehensive compulsory blanket license for mechanical rights. Congress also made a targeted change to the consent-decree regime, by providing for the random assignment of district court judges to rate court proceedings,⁵⁸ but otherwise left the decrees intact.⁵⁹

⁵⁴ *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 15 (1979) (explaining that “Congress itself, in the new Copyright Act, has chosen to employ the blanket license and similar practices” modeled on the ASCAP and BMI consent decrees, and listing examples).

⁵⁵ See 17 U.S.C. § 118.

⁵⁶ See, e.g., 17 U.S.C. § 513 (prescribing 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”); 17 U.S.C. § 114(d)(3)(C) (relying on a “performance rights society representing the copyright owner” to provide licenses to non-interactive services publicly perform a sound recording).

⁵⁷ See, e.g., *Music Licensing Under Title 17 (Part I & II) Before the Subcomm. on Courts, Intellectual Property, and the Internet of the Comm. on the Judiciary, House of Representatives*, No. 113-105, 113th Cong. (2014).

⁵⁸ MMA, § 104 (codified in 28 U.S.C. § 137(b)).

⁵⁹ To be clear, Congress possesses the power to modify or eliminate the prospective effect of the ASCAP and BMI consent decrees, if it so chooses. It exercised similar authority, for example, in the Telecommunications Act of 1996, which explicitly displaced the antitrust consent decree governing AT&T and the Bell operating companies. Telecommunications Act of 1996 § 601(a)(1), Pub.L. No. 104-104, 110 Stat. at 143; see also *SBC Communications, Inc. v. FCC*, 154 F.3d 226, 232 (5th Cir. 1998) (describing the operation of this provision of the Act).

Congress could not have been more clear about its intent. In the committee report accompanying the legislation, Congress explained that “the ASCAP and BMI consent decrees have fundamentally shaped the marketplace for licensing public performance rights in musical works for nearly 80 years and entire industries have developed around them.”⁶⁰ It went on to note:

There is serious concern that terminating the ASCAP and BMI decrees without a clear alternative framework in place would result in serious disruption in the marketplace, harming creators, copyright owners, licensees, and consumers. **In fact, sections of the [MMA] assume the continued existence of the decrees** Enacting the [MMA] only to see the Department of Justice move forward with seeking termination of the decrees without a workable alternative framework could displace the [MMA]’s improvements to the marketplace with new questions and uncertainties for songwriters and copyright owners, licensees and consumers.⁶¹

Any effort to weaken, sunset or terminate the consent decrees would conflict with this expressed policy intent, including by actively undermining and even nullifying the parallel compulsory licensing provisions that Congress just enacted. There would be no point in establishing a single blanket compulsory license for mechanical rights under Section 115—a key benefit that drove passage of the MMA—if a music user had to separately clear the public performance rights in all the same compositions without a similar license with equivalent protections.⁶² In short, Congress enacted the MMA to make music licensing easier, not harder, and diluting the protections of the decrees in any respect would undo that effort.

IV. THE DEPARTMENT’S STATUTORY MANDATE TO STUDY THE IMPACT OF TERMINATION REQUIRES A LONGER AND MORE EXTENSIVE PUBLIC COMMENT PERIOD

A. Section 105 of the MMA Requires a Thorough Study and Comment Period

In recognition of the continued importance of the consent decrees to the success of the carefully created reforms adopted as part of the MMA, and the music industry generally, Congress limited the Department’s authority to terminate the consent decrees. Specifically, Section 105 of the MMA states that “[b]efore filing . . . a motion to terminate” or sunset any of the consent decrees,

⁶⁰ S. Rep. 115-339, at 16 (2018).

⁶¹ *Id.* at 16-17.

⁶² 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.”); *see also* 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) at 1-2 (explaining that the MMA “assumes the continued existence of the framework established under the consent decrees”).

the Department “shall” provide the House and Senate Judiciary Committees with a written impact report.⁶³ That report must include “information regarding the impact of the proposed termination on the market for licensing the public performance of musical works[,]” together with an explanation of the Department’s process for reviewing the decrees and a summary of public comments on any potential modification, termination, or sunseting of the consent decrees.⁶⁴

Although the MMA does not provide specific instructions to the Department on the analytical and public-participation process that is required, Congress has elsewhere provided a ready-made example of a deliberative process that would allow for meaningful study and public involvement: the Federal Advisory Committee.⁶⁵ We encourage the Department to establish a Federal Advisory Committee to review the consent decrees, to ensure that the Department’s ultimate report to lawmakers is supported by a statutory process to which Congress has given its blessing, and to facilitate public participation on an important regulatory issue. The use of a Federal Advisory Committee would go far toward improving the Department’s current procedural approach to the consent decrees’ review—which, as detailed below, is not adequate.

B. The 65-Day Comment Period Provided by the Department Is Insufficient

The Department has established a period of 65 days for the submission of voluntary comments on the potential termination or sunseting of the consent decrees (extended from an original comment period of only 35 days).⁶⁶ But 65 days is an insufficient amount of time to analyze the effects of such a seismic change in the industry—much less to complete that analysis and incorporate it into a public comment. As a result, the Department’s process for gathering public comments (and for reviewing the consent decrees more broadly) serves neither the text nor the purposes of Section 105 of the MMA. As an initial matter, the impact report contemplated by the MMA must be *delivered to Congress* “not later than a reasonable time” before the filing of any motion to terminate the consent decrees.⁶⁷ The MMA’s sponsors understood that “a reasonable time” for these purposes “means at least 90 days before a motion to terminate is filed, in order to provide adequate notice to Congress.”⁶⁸ The comment period must perforce be longer: it takes more time to gather, analyze, and prepare industry data in the first instance than it does to review a *summary* of data that has already been synthesized. Indeed, a bill to create a blanket license for mechanical rights was introduced and debated in Congress in 2006.⁶⁹ And even after the MMA

⁶³ MMA, Pub. L. No. 115-264, § 105(c)(1)(B), 132 Stat. 3676 (2018).

⁶⁴ *Id.* § 105(c)(1)(B), (c)(2)(B).

⁶⁵ *See* 5 U.S.C. App. 2.

⁶⁶ “The period for public comment ends August 9, 2019 The original 35 day comment period is now extended to 65 days.” *See* <https://www.justice.gov/atr/antitrust-consent-decree-review-ascap-and-bmi-2019>.

⁶⁷ MMA, Pub. L. No. 115-264, § 105(c)(2)(A), 132 Stat. 3676 (2018).

⁶⁸ 164 Cong. Rec. S6335 (daily ed. Sept. 26, 2018) (statement of Sen. Hatch). In addition, in the Senate version of the bill, that 90-day minimum was explicit. *See* MMA, S. 2823, 115th Cong., § 105(c)(2)(A) (2018); *see also* S. Rep. 115-339, at 17 (2018).

⁶⁹ Section 115 Reform Act of 2006, H.R. 5553, 109th Cong.

was introduced, it took Congress 20 months to finalize and pass the legislation.⁷⁰ Congress cannot conceivably condense that process into 90 days unless the Department’s comment period and accompanying study and report are extraordinarily robust, with ample time afforded to carefully gather relevant evidence.

More broadly, the abbreviated process for public comment that the Department has adopted here compares unfavorably with the extensive process that Congress itself went through before even drafting the MMA, let alone enacting it. To ensure that the music licensing reforms it adopted would, in fact, achieve the desired results, Congress engaged in a comprehensive, multi-year review of the music licensing marketplace. That review included extensive public hearings and policy studies by the U.S. Copyright Office⁷¹ and U.S. Patent and Trademark Office,⁷² a comprehensive report by the Congressional Research Service,⁷³ and multiple hearings by the House and Senate Judiciary Committees,⁷⁴ including a “listening tour” featuring field hearings held all over the country at which Congress heard directly from those that would be most impacted from changes to the music licensing system.⁷⁵ The Department simply cannot engage in the same level of public participation in 65 days.

The process the Department has contemplated is also dramatically more truncated than the Department’s own past procedures under the consent ASCAP and BMI decrees, in particular:

- After the seminal *Alden-Rochelle* decision in July 1948, ASCAP, the Department, and the broader industry began negotiations “for a complete overhauling” of the 1941 consent decree.⁷⁶ That process took almost *two years*: the revised consent decree was not submitted to the supervising judge (and also to the *Alden-Rochelle* judge) until

⁷⁰ The AMP Act, H.R. 881, 115th Cong. (2017) was introduced in the House in February 2017. The MMA, which incorporated the substance of that bill, was passed in October 2018.

⁷¹ Register of Copyrights, Copyright and the Music Marketplace (2015), <https://www.copyright.gov/docs/musiclicensingstudy/copyright-and-the-music-marketplace.pdf>.

⁷² U.S. Department of Commerce, Internet Policy Task Force, White Paper on Remixes, First Sale, and Statutory Damages (2016), <https://www.uspto.gov/learning-and-resources/ip-policy/copyright/white-paper-remixes-first-sale-and-statutory-damages>.

⁷³ Congressional Research Service, Copyright Licensing in Music Distribution, Reproduction, and Public Performance (2015), https://www.everycrsreport.com/files/20150922_RL33631_ac1ea4ba5b4b4e44eb3a831e1c9d124ce2deda0e.pdf.

⁷⁴ See, e.g., *Protecting and Promoting Music Creation for the 21st Century: Hearing Before the Senate Judiciary Comm.*, 115th Cong. (2018); *Hearing on H.R. 3945, the Copyright Alternative in Small-Claims Enforcement Act of 2017 Before the House Comm. on the Judiciary*, 115th Cong. (2018).

⁷⁵ Press Release, Judiciary Committee of the House of Representatives, Goodlatte and Conyers Announce Copyright Review Listening Tour (Sept. 10, 2015), <https://republicans-judiciary.house.gov/press-release/goodlatte-conyers-announce-copyright-review-listening-tour/>.

⁷⁶ *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 900 (S.D.N.Y. 1948).

March 1950.⁷⁷ And that was at a time when the music licensing issues were far less complex.

- The 2001 amendments to the ASCAP decree only came after a “comprehensive review of the markets for music performance rights, and of the efficacy of the AFJ in promoting competition among rights holders and limiting ASCAP’s ability to exercise market power.”⁷⁸ That review began *in 1995*.⁷⁹
- The Department’s most recent review of the ASCAP and BMI consent decrees stretched two years (2014-2016), and substantially overlapped with the Copyright Office’s own review of the music licensing system more generally. Representatives from the Department attended the public hearings held by the Copyright Office, and thus heard directly from affected stakeholders all over the country.

The 65-day comment period is also difficult to square with the government’s approach to other complex regulatory areas. In the context of merger review, for example, the Federal Trade Commission’s new model timing agreement proposes a waiting period of 90 days after substantial compliance to ensure adequate time for agency review.⁸⁰ And even that period is substantially shorter than the average duration of an investigation into a significant merger in recent years, which exceeds ten months.⁸¹

Indeed, if anything, the merger control analogy vastly *understates* the problems posed by the potential termination of the consent decrees, which would have substantial consequences for

⁷⁷ *Id.*

⁷⁸ *Supra* note 4.

⁷⁹ See *Musical licensing in restaurants and retail and other establishments: Hearing before the Subcomm. on Courts and Intellectual Property of the Committee on the Judiciary, House of Representatives*, 105th Cong. 50 (July 17, 1997) (reproducing letter from Assistant Attorney General Andrew Fois, to Rep. Sensenbrenner, which stated, “[B]ecause the industry has changed substantially since the decrees were entered and last modified, in November 1995 the Division initiated a comprehensive review to determine whether the two decrees have been effective in preventing ASCAP and BMI from unreasonably restraining competition in music licensing, and whether any modifications to the decree are warranted.”); see also Irv Lichtman, *Justice Dept. Asks For Change In Decree Restricting ASCAP Abroad*, *Billboard*, Aug. 9, 1997, at 6, <https://bit.ly/2YwPyCe> (noting the Department’s “ongoing comprehensive review of various federal consent decrees governing the activities of performing rights groups ASCAP and BMI”).

⁸⁰ Federal Trade Commission, *Timing is Everything: The Model Timing Agreement* (Aug. 7, 2018), <https://www.ftc.gov/news-events/blogs/competition-matters/2018/08/timing-everything-model-timing-agreement>.

⁸¹ See Dechert LLP, *DAMITT Q1 2019: New Insights on Reverse Break Fees in U.S. and Pull-and-Refiles in EU; Government Shutdown Impacts Q1 Results in U.S.* (Apr. 23, 2019), <https://www.dechert.com/knowledge/publication/2019/4/damitt-q1-2019--significant-antitrust-merger-investigations-decl.html>.

virtually *every* participant in the entire U.S. music industry. It bears repeating that the consent decrees are the only safeguard standing between consumers and a series of eminently predictable antitrust violations by the PROs.⁸² The task of analyzing the consequences that would flow from the removal of that safeguard is far more complex—and urgent—than the issues that must be analyzed in merger review; as Congress noted, the consent decrees “have fundamentally shaped the marketplace . . . for nearly 80 years and entire industries have developed around them.”⁸³ Virtually no merger review bears such heavy implications for such a large swath of the economy, but here again, the Department has provided *less* time for the public to comment on matters of significantly greater complexity and importance.

Consider, by way of contrast with the Department’s current process, other major, industry-wide deregulatory initiatives. For example, the regulatory impact analyses contemplated by OMB Circular A-4 require a number of steps that cannot be performed in the time period the Department has provided for comment here—*e.g.*, studies of the ranges and consequences of regulatory alternatives, quantifications and monetizations of the benefits and costs of the regulatory options, studies of their *non*-monetary benefits and costs, and a characterization of the analytical uncertainties.⁸⁴ These requirements bespeak a rigor and level of depth that the Department’s current process makes impossible.

An additional example is the Federal Communications Commission’s recent revisions to broadband internet regulation (eliminating the prior policy of “net neutrality”), which allowed for four months of public comment, among many other procedural steps, and even then was criticized as not being sufficiently thorough.⁸⁵ Similarly, the Department of Transportation (“DOT”)’s review of antitrust immunity for transatlantic airline alliances is a process that generally plays out over years, through the formal taking and evaluation of evidence, the participation of intervenors and interested parties with compulsory process rights, and the solicitation of multiple rounds of public comments.⁸⁶ As the economist Diana Moss noted at a recent roundtable hosted by Assistant Attorney General Delrahim, the extensive record in DOT airline proceedings provides one of the best data sources for evaluating the efficacy of antitrust policy.⁸⁷ *That* is the standard for which the Department must strive (and, under Section 105 of the MMA, deliver to Congress) before

⁸² *E.g.*, *BMI*, 441 U.S. at 23-24.

⁸³ S. Rep. 115-339, at 16 (2018).

⁸⁴ *See* Office of Information and Regulatory Affairs, Regulatory Impact Analysis: A Primer, https://www.reginfo.gov/public/jsp/Utilities/circular-a-4_regulatory-impact-analysis-a-primer.pdf.

⁸⁵ The FCC’s comment period extended from May 2017 through August 30, 2017. *See* Dec. 14, 2017 Ruling in 17-108, at ¶¶ 18-19, <https://www.fcc.gov/document/fcc-releases-restoring-internet-freedom-order>.

⁸⁶ *See, e.g.*, DOT-OST-2004-19214.

⁸⁷ *See* U.S. Department of Justice, Antitrust Division, Roundtable Discussion Series on Competition & Deregulation 125 (2018), <https://www.justice.gov/atr/page/file/1120641/download>.

taking action that would fundamentally disrupt the commercial and regulatory architecture of the music industry.

C. An Adequate Comment Period Would Require an Opportunity to Collect and Present Industry Data Through Expert Analysis

The core problem with the Department’s short comment period is that it makes quantitative and econometric analyses impossible. Those analyses are the keystone of modern antitrust law, and by depriving the public of an opportunity to develop and present them, the Department is effectively shutting its ears to an essential—if not the *most* essential—factor in its decision.

That method is not only shortsighted; it is also contrary to the Division’s internal policies. The current edition of the Division’s Manual states that there are “two separate paths to decree termination[,]” an “expedited path” and “the traditional approach.”⁸⁸ But the expedited path is not available “when there is a pattern of noncompliance with the decree or there is longstanding reliance by industry participants on the decree”—which is the case here.⁸⁹ Instead, the “traditional approach” that is specified in the Division’s 1999 protocol applies.⁹⁰ That protocol requires legacy defendants—here, ASCAP and BMI—to submit “to significant discovery” that “Division staff” must carefully review.⁹¹ Under the policy, it is the defendants’ obligation to provide substantial “information up-front,” which the Division can supplement and refine through further requests.⁹²

Robust data collection would be the first step toward creating an adequate public process. The second step would be to provide interested parties with an opportunity to assess that data—or, to the extent they already possess other relevant data through prior litigations, an opportunity to lift the terms of any protective order that limits the data’s use to that specific case. The next step would be an opportunity to engage in a thorough, quantitative discussion regarding the likely anticompetitive effects of terminating the consent decrees.

Here again, the aviation industry provides an instructive example. In 2011, the Division’s Economic Analysis Group (“EAG”) conducted a quantitative study of “the competitive effects and efficiencies associated with” airline alliance antitrust immunity.⁹³ That study provides a model for performing a data-driven analysis of deregulation and its anticompetitive effects. Specifically, EAG analyzed a random but statistically significant sample of ticket prices from a dataset covering quarterly airline traffic between the 20 largest U.S. and European cities over a five-year period. EAG then adjusted that data to control for factors that drive price differences but are not

⁸⁸ Antitrust Division Manual (5th ed.) at III-147.

⁸⁹ *Id.* at III-146; *see supra* note 23 (describing contempt settlement between ASCAP and the Department).

⁹⁰ Antitrust Division Manual (5th ed.) at III-148.

⁹¹ *Id.*

⁹² *Id.*

⁹³ William Gillespie and Oliver M. Richard, U.S. Department of Justice, Antitrust Immunity and International Airline Alliances (Feb. 2011), <https://www.justice.gov/atr/antitrust-immunity-and-international-airline-alliances>.

attributable to antitrust immunity (such as differences in the services or costs of the airlines), and performed a regression analysis to assess the competitive impact of antitrust immunity.⁹⁴

A similar analysis is possible here—and, to comply with Section 105 of the MMA, *necessary*. Notably, the EAG has not published any study concerning the music industry since 1993—*before* the last amendments of both of the consent decrees—and this would appear to be the perfect opportunity to do so.⁹⁵ At a minimum, an empirical study of the licensing revenues of ASCAP and BMI (using real-world data) is required, together with predictions of the likely effects on competition that would result from the termination, sunseting, or other modification of the consent decrees. In addition, no study would be complete without a meaningful probe of the internal discussions within ASCAP and BMI—and the major publishers as well, as the members of both organizations—regarding the relevant issues and competitive outlook in the event the decrees cease to exist. No less rigor applies in the case of any other important antitrust analysis, such as merger review.⁹⁶

Lastly, because of the enormous public interest in maintaining the consent decrees, parties such as RMLC and DiMA should have the opportunity to review and comment on the detailed empirical analysis that Section 105 of the MMA requires—as well as the opportunity to submit their own expert economic analyses. On the current schedule, that is impossible. If there is to be a meaningful public comment process, with informed input from the impacted stakeholders and a substantive study of the relevant data, a significantly longer comment period is required.

V. CONCLUSION

We thank the Department for its attention to this submission, and look forward to continuing our participation and dialogue with the Department on these important issues.

⁹⁴ *Id.*

⁹⁵ *See generally* U.S. Department of Justice, EAG Discussion Papers Before 2006, <https://www.justice.gov/atr/eag-discussion-papers-2006> (last visited July 30, 2019).

⁹⁶ *See* U.S. Department of Justice, Model Voluntary Request Letter (2018), <https://www.justice.gov/atr/page/file/1111341/download>.

EXHIBIT A

**TO THE AUGUST 9, 2019 JOINT PUBLIC COMMENTS
OF THE RADIO MUSIC LICENSE COMMITTEE
AND THE DIGITAL MEDIA ASSOCIATION**

**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

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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. 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.⁹⁷ A digital radio service (like Pandora, historically) needs the same license, plus permission to use the sound recording.⁹⁸ An on-demand service (one 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.⁹⁹ 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.¹⁰⁰

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 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

⁹⁷ See 17 U.S.C. § 106(4) (granting musical composition copyright owners the exclusive right to publicly perform their works in any medium).

⁹⁸ 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).

⁹⁹ 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).

¹⁰⁰ 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).

“CRB,” the authority to set the price of the licenses that digital radio services need for *sound recordings*.¹⁰¹ Second, Congress has deputized the CRB to set the default price of *mechanical licenses*.¹⁰² 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 different type of public-facing music user in the United States—including digital and over-the-air radio, TV, and all other media services.¹⁰³

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.¹⁰⁴ 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.¹⁰⁵

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.

¹⁰¹ See 17 U.S.C. §§ 112(e), 114(f) (establishing the operative compulsory license framework).

¹⁰² See 17 U.S.C. § 115(c)(3)(C) (same).

¹⁰³ 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.

¹⁰⁴ 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”).

¹⁰⁵ 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”).

Exh. A – Joint RMLC/DiMA Comments

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);¹⁰⁶
- 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;¹⁰⁷
- 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 agree to, absent the distorting effects of ASCAP and BMI's market power;¹⁰⁸
- 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;¹⁰⁹ 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).¹¹⁰

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

¹⁰⁶ 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).

¹⁰⁷ AFJ2 § VI; BMI Consent Decree § XIV(A).

¹⁰⁸ AFJ2 § IX; BMI Consent Decree § XIV.

¹⁰⁹ AFJ2 § IV(B); BMI Consent Decree § IV(A).

¹¹⁰ 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.

extract.¹¹¹ As a result, people tend to play more music. The proliferation of new entrants in digital streaming markets 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.

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).¹¹² 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.¹¹³

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

¹¹¹ 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).

¹¹² 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.”).

¹¹³ 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).

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.¹¹⁴

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.¹¹⁵

In 2014, at ASCAP and BMI’s request, the Department of Justice “opened an inquiry into the operation and effectiveness of the consent decrees.”¹¹⁶ 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.”¹¹⁷

Nothing of substance has changed since then.

¹¹⁴ [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”).

¹¹⁵ 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).

¹¹⁶ 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”).

¹¹⁷ *Id.* at 3.

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-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.¹¹⁸

Virtually the entire music-using public thus must take a license from both ASCAP and BMI.¹¹⁹ That is certainly true for each of the signatories to this White Paper.

¹¹⁸ [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).

¹¹⁹ 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

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. 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.¹²⁰ 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 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

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.

¹²⁰ 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.*

in order to broadcast the programs they have already licensed and paid for.¹²¹ As a result, deals with ASCAP and BMI are effectively unavoidable.

Digital Music Services: Whenever a digital music service in the United States streams a song to a listener—whether via an internet radio product or an “interactive” (*i.e.*, on-demand) service—that conduct constitutes a public performance of the musical composition embodied in the sound recording, which thus requires a license. All such services generally obtain those licenses from PROs, and have no choice but to deal with both ASCAP and BMI. As noted above, they also takes licenses from the owners of the copyrights in the sound recordings they streams, as well as “mechanical licenses” to use the underlying musical compositions via on-demand, interactive products.

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.¹²² 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

¹²¹ 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.

¹²² 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[.]”).

given song, and that they offer alternatives to the standard blanket license that make direct deals with rights owners economically viable.¹²³

Music licensing by local television stations under the consent decrees illustrates the critical role they play in protecting and promoting competition. Today, 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).¹²⁴ 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.¹²⁵

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.¹²⁶ As the 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."¹²⁷ This is precisely the conduct that the ASCAP and BMI consent decrees restrain and that ASCAP and BMI have historically chafed against.¹²⁸

Digital music services are similarly subject to potential anticompetitive hold-up by ASCAP and BMI absent the consent decrees. Having sunk massive costs into licensing other slices of

¹²³ 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.

¹²⁴ 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).

¹²⁵ See DOJ Brief Supporting ASCAP Consent Decree Modification at 15.

¹²⁶ 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 deteriorated the quality of service insofar as customers only have the option of purchasing a blanket license.").

¹²⁷ *Id.* at 501.

¹²⁸ See *supra* pp. 9-10.

copyright in sound recordings and musical compositions, they are 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 digital music services obtain: without the consent decrees’ protections against monopoly pricing and other consumer harms, these would be unable to license the public performance rights for their customer-facing products at anything resembling competitively reasonable rates. Their output, measured on a variety of metrics (from users to usage and beyond), would go materially down. The result would be a predictable—indeed inescapable—decline in consumer welfare.

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.¹²⁹ In other words, even if a music user spent millions of dollars developing its service or 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.¹³⁰

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.¹³¹ In the

¹²⁹ 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.

¹³⁰ 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.”).

¹³¹ *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

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 agency.”¹³² 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.¹³³

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.”¹³⁴ The pending legislative overhaul of large swaths of the music copyright regime, the Music Modernization Act, similarly engages directly with various provisions of the U.S. Code that specifically concern how the ASCAP and BMI consent decrees are to operate.¹³⁵ For DOJ to seek to rescind those very consent decrees *now* would contravene the legislative intent to work within

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.”).

¹³² See Letter from Acting Assistant Attorney General Markus to Senator Leahy (June 20, 1995), 141 Cong. Rec. S11945-04, S11962.

¹³³ 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).

¹³⁴ See 17 U.S.C. § 513.

¹³⁵ 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”).

the framework they establish—as the Chairs and ranking members of the key Congressional committees with relevant oversight responsibilities have recently explained.¹³⁶

* * *

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.”¹³⁷ The need for non-exclusivity and other protections that mitigate the anticompetitive effects of ASCAP 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.¹³⁸ Antitrust consent decrees are not some rogue form of regulation without legislative imprimatur.

¹³⁶ 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 \(2018-2022\) \(C.R.B. Jan. 26, 2018\) \(Initial Determination\)](#).

¹³⁷ See ASCAP/BMI Consent Decree Review Closing Statement at 22.

¹³⁸ See 15 U.S.C. § 16.

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.

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.”¹³⁹ 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.¹⁴⁰

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.

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.¹⁴¹ 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.¹⁴²

In these circumstances, “empowering the Court to resolve licensing disputes when negotiations between BMI [and ASCAP] and music users break down is sound enforcement

¹³⁹ See *United States v. Eastman Kodak Co.*, 63 F.3d 95, 98 (2d Cir. 1995).

¹⁴⁰ *Id.*

¹⁴¹ 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”).

¹⁴² 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 \(Apr. 19, 2018\)](#).

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 itself.¹⁴³ The ASCAP and BMI consent decrees are among the leading examples of an ongoing antitrust remedy overseen by a court that is manifestly *appropriate*.¹⁴⁴

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.”¹⁴⁵ “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.”¹⁴⁶ 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.”¹⁴⁷

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.¹⁴⁸ 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.¹⁴⁹ The Antitrust Division’s own

¹⁴³ 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).

¹⁴⁴ 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.

¹⁴⁵ *United States v. Int’l Bus. Machs. Corp.*, 163 F.3d 737, 740 (2d Cir. 1998) (internal quotation marks omitted).

¹⁴⁶ *Kodak*, 63 F.3d at 101.

¹⁴⁷ *Id.* at 102.

¹⁴⁸ See *supra* n. 46.

¹⁴⁹ See *supra* n. 38 and accompanying text; *cf.* 17 U.S.C. § 114(i).

operating procedures strongly counsel against terminating consent decrees in circumstances like these.¹⁵⁰

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 exploiting their market power is the rate court process established by the consent decrees.¹⁵¹

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.¹⁵² 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.¹⁵³

DOJ already decided where the “public interest” lies here, and it is in *preserving* the ASCAP and BMI consent decrees.¹⁵⁴ For the agency to suddenly do a 180 now would not just be bizarre policy; it would have significant legal 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.”¹⁵⁵ 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

¹⁵⁰ United States Dept. of Justice, *Antitrust Division Manual*, at § III-146 (5th ed. 2017).

¹⁵¹ See *supra* n. 19.

¹⁵² 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”).

¹⁵³ 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).

¹⁵⁴ See ASCAP/BMI Consent Decree Review Closing Statement at 2.

¹⁵⁵ *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 698 (1991).

“which conflicts with the agency’s earlier interpretation is entitled to considerably less deference than a consistently held agency view.”¹⁵⁶

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.”¹⁵⁷ 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.

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.¹⁵⁸ 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 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

¹⁵⁶ *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 447 n.30 (1987) (internal quotation marks omitted).

¹⁵⁷ *Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 590 (2013) (Ginsburg, J., dissenting).

¹⁵⁸ 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.](#)

Congressional action.¹⁵⁹ 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.¹⁶⁰ Doubly so where the political economy cannot actually be reliably predicted to yield 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.

¹⁵⁹ 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*.

¹⁶⁰ *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.”).