

White Paper

**The Continuing Procompetitive Value of the ASCAP and BMI Consent Decrees
and the Necessity for Congressionally Coordinated
Efforts at Any Music Licensing Reform**

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Executive Summary

Congress has just completed work on a multi-year effort to modernize the multi-billion dollar business of music licensing. As it has for more than a century, Congress has once again taken the lead in identifying the trends in the rapidly evolving music industry and mediating the varied interests of competing stakeholders—all with an eye to maintaining the integrity, competitiveness, fairness, and pro-innovation goals of our national copyright system.

It could only take this step in confidence because of the continuing reliability of dual consent decrees that settled antitrust challenges by the Justice Department to the collusive practices of the two dominant performing rights organizations (PROs), the American Society of Composers, Authors, and Publishers (ASCAP) and Broadcast Music, Inc. (BMI). Today, ASCAP and BMI together account for more than 90% of all music compositions in the United States and serve the needs of thousands of songwriters and licensees. Remarkably, the consent decrees have guided the industry through decades of change, at once constraining the ability of the PROs to price as monopolists or eliminate competition, while also facilitating their most efficient practices to help promote the dissemination of music to the consuming public. Their durability is a testament to their utility.

This White Paper examines that history, including the conduct that led to the Justice Department's challenges, the solutions that it identified, and the reasons why the foundation established by the consent decrees remains essential to the proper functioning of the industry today. It also surveys the complex and carefully balanced ecosystem that has grown up in reliance on the decrees, especially key legislation, and that has facilitated an explosion of growth in music creation, consumption, and licensing. It explains:

- How the insurmountable challenges of policing and preventing copyright infringement led to the creation of ASCAP and BMI early in the last century.
- How they each developed creative solutions to the challenges of policing and securing royalties for their songwriter members, devising innovative licensing methods that facilitated efficiencies, including lower costs, which no single composer could have realized alone.
- But how, as the breadth of their repertoires grew, they crossed the line into conduct that was anticompetitive, drawing scrutiny from the Justice Department that led to multiple criminal and civil enforcement actions. Those challenges were resolved with consent decrees that constrained the ability of ASCAP and BMI to exercise their monopoly power through higher prices or strategies to limit competition, while creating conditions under which a competitive market could grow and flourish.

- The consent decrees thus had specific, pro-competitive purposes. Unlike typical antitrust decrees that simply prohibit anticompetitive conduct, the ASCAP and BMI decrees helped to “make the market” by establishing guidelines that allowed ASCAP and BMI to continue to deliver valuable efficiencies to the market place, while at the same time constraining their ability to again engage in anticompetitive pricing and strategies.
- The decrees have lasted because they continue to perform these core functions. They are not dated and have provided the industry with predictability and Congress with the necessary foundation for continuing to review and revise the legal framework that facilitates music licensing as technology and business models continue to evolve.

A critical conclusion of the White Paper is that the consent decrees remain an integral and essential feature of the interdependent ecosystem that now guides the industry, such that unilateral and precipitous changes to the decrees by the Justice Department are highly unlikely to yield a more “competitive” or less “regulatory” framework. More likely if not inevitably, absent coordination with Congress, unilateral reforms by the Justice Department are likely to disrupt the current equilibrium by favoring some stakeholders over others, and leading to years of wasteful and costly litigation.

That litigation will not lead to the creation of some idealized “free market,” but rather to a different framework, one created by and supervised by the courts. The better approach to reform, if any more is needed, is a cooperative effort with Congress, which is better situated institutionally to mediate the sometimes conflicting interests of the composers, artists, licensees, and others, to continue facilitating the evolution of an already vibrant and expanding system. The overwhelming majority of those stakeholders depend upon the predictability and stability of the system, which in large part has been safeguarded by the consent decrees.

INTRODUCTION

Today's music industry is diverse, thriving, and expanding as it navigates continuing disruption due to new technologies, changing consumption patterns, and still evolving business models for delivering music to the public. Although industry revenues peaked in 1999, and then began to decline with the transition from physical to on-line music sources, they have bounced back in the last several years as the market adjusts to the world of digital music, which now supplements the still substantial traditional revenue streams with webcasting, downloading, and subscription streaming.¹ One source estimates global music industry revenues of \$47.5 billion, with about \$17.2 billion in the U.S. alone in 2016, and projected U.S. industry revenues in excess of \$22.6 billion by 2021.² The Congressional Research Service recently found that consumer spending on recorded music alone was nearly \$9 billion in 2017, reflecting a significant upward trend in spending in 2016 and 2017, expanding the marketplace to the benefit of artists and consumers, alike.³

ASCAP and BMI have been an integral part of that industry growth and vitality. When the Supreme Court considered their practices in 1979, ASCAP had 22,000 members.⁴ According to ASCAP, today it is the largest Performing Rights Organization ("PRO") in the world, with more than 670,000 "music creator members." It licenses over 11.5 million musical works and claims to process licenses for a remarkable one trillion performances each year.⁵ In 1979, BMI represented 20,000 authors and composers and more than 10,000 publishing companies.⁶ Today it reports membership of more than 800,000 songwriters, composers, and music publishers, and issues licenses for almost 13 million musical works.⁷ According to one source, in 2016 ASCAP and BMI each distributed almost \$1 billion in royalties to their members.⁸

That vibrancy is in no small part attributable to the foundation laid in the early part of the last century, when the emerging unregulated marketplace for music licensing produced ASCAP and BMI. Their primary purpose was to protect the intellectual property rights of their members by achieving efficiencies in the policing of infringement and licensing of musical composition performance rights, efficiencies that were unavailable to individual copyright holders and licensees. But as an assemblage of ostensible competitors, ASCAP and BMI each also presented the threat of any horizontal price agreement among rivals: because joint licensing required them to establish and negotiate fees for the works in their repertoires, they both possessed the incentive and ability to exercise what antitrust lawyers and economists refer to as "market

¹ The significant decline in industry revenue after 1999 was attributable in large part to the emergence of unlicensed file sharing. With that principal cause of revenue decline substantially reduced, revenues began to and continue to rise, albeit with a different distribution reflecting the rise of digital distribution methods. See Congressional Research Service, *Money for Something: Music Licensing in the 21st Century* 2-3 (Jun. 2018) ("CRS Report 2018"), available at <https://fas.org/sgp/crs/misc/R43984.pdf>.

² Statista, U.S. Music Industry – Statistics & Facts, <https://www.statista.com/topics/1639/music/>.

³ For a recent overview of the state of the industry, see CRS Report 2018, *supra* note 1, at 2-3.

⁴ *Broadcast Music Inc. v. CBS*, 441 U.S. 1, 5 (1979).

⁵ See <https://www.ascap.com/about-us>.

⁶ *Broadcast Music, Inc.*, 441 U.S. at 5.

⁷ See <https://www.bmi.com/about>.

⁸ See <https://www.royaltyexchange.com/artist-guides/ascap-vs-bmi-vs-sesac>.

power” – the ability to charge prices above those that would prevail in a competitive market. That became increasingly true with their success. As they gained members, grew their respective repertoires, and expanded their licensing activities, concerns about their ability to dictate to the market became more acute.

This paradox drew the attention of the antitrust enforcers of the Justice Department, who recognized both the value of the PROs and the need for establishing a framework that would allow them to realize their efficiency benefits, while constraining their ability to harm consumers. The consent decrees that resulted from the Department’s scrutiny of ASCAP and BMI have been deemed essential to the competitive vitality of the industry across multiple administrations and many decades. And the decrees have not remained static – they have been reevaluated and modified when necessary to meet the changing industry landscape.

The Justice Department has consistently concluded that to create and maintain a functioning, competitive market in the music licensing industry there must be rules of engagement that at once facilitate the efficiencies of collective licensing, while protecting the public from the harms associated with the exercise of market power. Although industry stakeholders have at times differed about what safeguards are needed, there is widespread consensus that the decrees still play an essential role in enabling efficient and effective licensing.

Importantly, today the decrees serve as the foundation component of a wide-ranging and complex ecosystem comprising many component parts. That ecosystem has developed in reliance on the decrees, but now goes much further, in large part due to Congressional efforts over time to mediate the frequently conflicting interests of the many different industry stakeholders. The various parts are highly interdependent, but share one common assumption: the basic rules of the road continue to be provided by the consent decrees, which have delivered the critical certainty and stability to the industry that has allowed it to flourish. Their durability is a tribute to their utility, not a basis for claiming their obsolescence.

Reform of the industry, therefore, cannot be undertaken responsibly through piecemeal revisions to the decrees. Moreover, any dissolution of the decrees would cause substantial disruption and risk a decrease in the industry’s creative and competitive vitality. If more competition is theoretically desirable and achievable, developing an alternative framework will require a coordinated and comprehensive effort by Congress, the Department of Justice, and the Copyright Office, as well as an institutional process that will allow for mediation of the interests of the many stakeholders who depend upon the decrees for industry stability and predictability. Shock treatment could have major unintended consequences and major reforms, even if done well, would need to be implemented over time to allow for the industry to transition. These realities have been consistently acknowledged by the Justice Department, Congress, and the Copyright Office.

It would be a serious and harmful mistake for the Justice Department to act precipitously and unilaterally to modify or abandon the consent decrees. Doing so will not lead to some idealized, free, unregulated, and more competitive market. It will instead disrupt a well-functioning and largely competitive industry, benefitting some interests at the expense of others, and almost certainly triggering widespread, costly private litigation. Neither will it necessarily

improve long-term innovation incentives. Rather, it might increase them for some, but diminish them for others. Moreover, an abrupt withdrawal of the decrees could leave open an essential seat at the table: the Justice Department's voice as an advocate for competition in any future system. Although it could of course still offer its views to Congress and other government agencies, and intervene in private litigation, the pro-competitive values of the decrees could be lost, with no guarantee that the resulting void will be filled by Congress and the courts, whose actions might lead to *less* competitive results.

To better understand the complexity of the industry and the essential role still played by the consent decrees, we set forth below a brief account of the well-known origins and evolution of ASCAP and BMI, with a focus on their role in facilitating competition. We then look at their role in the broader musical licensing system, and conclude with a discussion of the demanding standards for altering these still-functioning and purposeful consent decrees, as well as the benefits of an incremental, cooperative, and coordinated approach to any desirable reforms.

I. THE ORIGINS AND EVOLUTION OF THE ASCAP & BMI CONSENT DECREES: A COMPETITION PERSPECTIVE

A. Market Failures Led to the Creation of ASCAP and BMI

The storied origins of both ASCAP and BMI are well-known. As the Supreme Court recounted in 1979, "In 1914, Victor Herbert and a handful of other composers organized ASCAP because those who performed copyrighted music for profit were so numerous and widespread, and most performances so fleeting, that as a practical matter it was impossible for the many individual copyright owners to negotiate with and license the users and to detect unauthorized uses."⁹ These inherent characteristics of the music marketplace led composers to search for a collective solution that would preserve the copyrights granted to them by Congress in 1897 and with that their incentives to create. It would also free them from being personally saddled with the time and expense of policing infringement, time better devoted to creating more music.¹⁰ Similarly, the Society of European Stage Authors and Composers (SESAC) was founded in 1930, followed by BMI in 1939. They have been joined most recently by Global Music Rights, the youngest of the PROs.¹¹

From a competition perspective, it is important to recognize that both ASCAP and BMI thus originated in a competitive marketplace.¹² From the outset, and by design, their goal was to correct for a market failure that undermined the rights that had been granted by Congress to promote the incentive to create music. They were also conceived to reduce the impossibly high transaction costs of deterring copyright infringement. As the Supreme Court and many commentators have consistently recognized, those costs and challenges include policing often isolated, repeated, and frequent unauthorized use, facilitating broad, spontaneous, and

⁹ *Broadcast Music*, 441 U.S. at 5-6.

¹⁰ *Id.* at 5.

¹¹ See <https://globalmusicrights.com/>.

¹² As is discussed in Part IIC, *infra*, however, from the perspective of licensees today, there is little if any competition between the PROs. Due to the breadth of the repertoires of ASCAP and BMI, as well as their distinct repertoires, licensees must seek licenses from both.

unhindered performances, identifying licensors and licensees, and facilitating negotiations for licenses to protect their intellectual property. These are tasks that the overwhelming majority of individual composers and licensees are not well-suited or well-situated to perform. As one highly regarded commentator has observed:

PROs are indispensable intermediaries between the large number of artists who produce music and the even larger public that wants to hear it. Without a PRO, each artist would have to enter into a direct licensing agreement with each of thousands of consumers. The price for each individual license would in all likelihood be small, especially on a per-play basis. Using a PRO intermediary dramatically reduces the transaction costs. Individual members enter into master agreements with a PRO, which in turn becomes their agent in dealing with end users. The PRO negotiates the fees paid to the PRO, a holdback for administrative expenses, and the allocation of revenues among its members.¹³

These purposes remain critical and evident today in the operation of ASCAP and BMI. They are also evident in the persistent, continuing, and expansive interest of both licensors and licensees in utilizing their services. One-on-one negotiations remain the exception in the industry. And although there are certainly an elite few composer-musicians who might reach a stage at which the breadth of their own repertory and their degree of success facilitates such negotiations—and possibly even opting out of ASCAP and BMI altogether—altering the entire system for their sake would likely harm the many others for whom individual negotiations remain implausible. ASCAP and BMI remain the only viable option for those many others. Indeed, one of the more challenging aspects of the legislative process when it has turned its attention to the music industry has been undertaking cost-benefit analyses that successfully balance the varying interests of a wide-range of stakeholders. As is discussed in Part III, below, not surprisingly, therefore, the PROs still serve industry-critical purposes, helping to reduce transaction costs for their many members and providing an efficient means of licensing.

B. The PRO Paradox and the Consent Decrees: Why Private Solutions to Market Failure Led to Anticompetitive Conduct That Threatened to Overwhelm the Efficiency Benefits of Joint Licensing

By the late 1930s, the success of ASCAP (and later BMI) also drew the attention of the Justice Department. In both criminal and civil cases filed in early 1941, the Justice Department charged that:

ASCAP and its members had entered into a combination to license performance rights exclusively through ASCAP and thereby eliminate competition among members, to require music users to take a blanket license covering all of the compositions in ASCAP's repertory, to refuse to grant licenses to music users that had protested the fees demanded by ASCAP, and to allow large publisher

¹³ Richard A Epstein, *Antitrust Consent Decrees in Theory and Practice: Why Less is More* 31 (2007). Epstein also observes, however, that “the creation of PROs also creates a serious antitrust problem, which in turn leads to tricky judgments on legal enforcement.” *Id.*

members to control the Society and the distribution of its revenues to the detriment of ASCAP's other members.¹⁴

The challenged conduct reflected economic incentives that were seemingly inevitable given the characteristics of the industry and that led to market-wide anticompetitive results.

As already noted, the “performing rights paradox” is that some means of collective licensing is necessary to achieve highly valuable efficiencies, but it also risks the exercise of market power, especially when, as was and remains the case with ASCAP and BMI, PROs prove so attractive that they amass substantial proportions of the industry into negotiating blocks that could, if left unchecked, distort competition. This was already apparent in 1941, remained so for decades, and remains so today. As the Supreme Court observed in 1979, “[a]lmost every domestic copyrighted composition is in the repertory either of ASCAP, with a total of three million compositions, or of BMI, with one million.”¹⁵ As noted, above, today the number of compositions within those combined repertories is approaching 25 million and still accounts for more than 90% of all compositions.¹⁶

As a consequence, by the time it commenced civil and criminal proceedings against ASCAP in 1940, the Justice Department had concluded that this was not an industry for which the “free market” alone was an acceptable option. Such a market could lead to but one outcome: market power and consequent consumer harm. Although coordination among the composers was necessary to achieve the efficiencies that prompted the creation of both ASCAP and later BMI, with success came the power to set prices. As Attorney General Robert Jackson later recalled, “The basic problem was that if ASCAP were dissolved, each producer in the United States would be pretty much at the mercy of the exploiters of his music, because he couldn’t individually afford to check and determine violations of his copyright.... On the other hand, if nothing was done, it left ASCAP with pretty much a monopoly of the situation.”¹⁷ The challenge for the Justice Department and the industry was to identify a framework that could preserve efficiency, yet guard against the exercise of market power. That became, and remains, the essential function of the ASCAP and BMI consent decrees.

C. The Characteristics of the Consent Decrees and their Procompetitive Purposes

The dilemma for antitrust enforcement was this: how might it preserve the desirable aspects of ASCAP, yet preclude the bad? This question was called when, in December 1940, then Attorney General Robert H. Jackson announced that he was authorizing Assistant Attorney

¹⁴ Memorandum of the United States in Support of the Joint Motion to Enter Second Amended Final Judgment, *United States v. ASCAP*, Civ. Action N. 41-1395, at 10 (S.D.N.Y. 2000), <https://www.justice.gov/atr/case-document/memorandum-united-states-support-joint-motion-enter-second-amended-final-judgment>. The Memorandum notes that nine days after the entry of the consent decrees in the civil case, “ASCAP, its president and its entire board of directors were convicted in the criminal case on pleas of *nolo contendere*.” *Id.* n.11.

¹⁵ *Broadcast Music*, 441 U.S. at 6.

¹⁶ See CRS Report 2018, *supra* note 1, at 28 (“Together, ASCAP and BMI, which operate on a not-for-profit basis, represent 90% of songs available for licensing in the United States.”).

¹⁷ Robert H. Jackson, Oral History 426 (Box 190, 1952-53) (on file in the Robert H. Jackson Papers, Library of Congress, Manuscript Division).

General Thurman Arnold to commence criminal proceedings against ASCAP for, among other offenses, “illegal price fixing.”

The solution was to be found in the consent decree first negotiated with ASCAP in 1941 and later reviewed, updated, and modified in 1950 and again in 2001.¹⁸ These decrees were directed at the specific conduct that had been identified by the Justice Department and were built on a set of core principles, including (1) preservation of the efficiencies associated with collective licensing by authorizing, but not mandating, blanket licensing; (2) precluding the exercise of collective market power by requiring non-exclusivity to preserve the competitive option of individual licensing; (3) non-discrimination against similarly situated licensees; and (4) consistent and predictable dispute resolution when direct negotiations proved unsuccessful. These four core provisions of the decree collectively enabled a competitive marketplace to take shape.

Even as it argued to the Supreme Court in *Broadcast Music* that blanket licensing should not be condemned as per se unreasonable, the Justice Department cautioned that “[a]s the lengthy litigation between the United States and the performing rights societies indicates, however, blanket licensing may raise serious antitrust problems.”¹⁹ The breadth of the two principal PROs, it noted, “create[s] opportunities for collaboration and oligopolistic behavior.”²⁰ That threat has not diminished over the years; if anything, it has increased.

The principal solution for that threat has been non-exclusivity, which has proven to be a cornerstone feature since the first decree was entered in 1941. Paragraph IVB of the 2001 Decree, “Prohibited Conduct,” includes and reiterates that “ASCAP is enjoined and restrained from ... [l]imiting, restricting, or interfering with the right of any member to issue, directly or through an agent other than a performing rights organization, non-exclusive licenses to music users for rights of public performance.” As a result, individual composers who join ASCAP retain the right to engage with licensees directly in individual negotiations or indirectly through other PROs and non-PROs, such as publishing houses and brokers.

Reflecting the unwavering judgment of the Justice Department, non-exclusivity was and remains a precondition to retaining a competitive market for music rights given the success and potential market power of ASCAP – *and it is guaranteed solely by the consent decrees*. Indeed, it was the non-exclusivity feature of the 1950 decree that saved ASCAP’s blanket license from per se condemnation before the Supreme Court in 1979. The Supreme Court emphatically instructed that “the substantial restraints placed on ASCAP and its members by the consent

¹⁸ The Justice Department undertook a lengthy and in-depth review of the decrees most recently in 2014-2016, concluding that no modifications were warranted. *See* <https://www.justice.gov/atr/file/882101/download>. The Justice Department again indicated an interest in reviewing the ASCAP and BMI decrees in 2018 as part of a broader review of its consent decrees. *See* <https://www.justice.gov/atr/JudgmentTermination>.

¹⁹ Brief for the United States as Amicus Curiae, at 23, 1978 WL 207043, *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 4-5 (1979) (“Brief of the United States”).

²⁰ *Id.* at 24.

decree must not be ignored.”²¹ Principal among those was the decree’s provision that “members may grant ASCAP only nonexclusive rights to license their works for public performance.”²²

In allowing for blanket licensing, but requiring non-exclusivity of licensing rights, the decree thus became the foundation for preserving the efficiency and competition-enhancing features of the PROs. As the Justice Department argued with respect to the blanket license in its Brief Amicus Curiae to the Supreme Court in 1978:

The blanket license ... provides immediate access to music as soon as it is written, provides flexibility in making last-minute programming changes, and provides broad indemnification against infringement suits and competing claims for the use of the same work. The blanket license also saves enormous costs that would otherwise be required to transact the purchase of individual licenses for single performances, especially in the case of music users such as radio stations that frequently play music.

If such a comprehensive product, with its offer of savings, is to be available at all, it must be assembled and marketed through a society such as ASCAP, and the members of the society necessarily must agree on the price at which the product is to be sold....²³

It was for these reasons that the Justice Department argued the blanket license ought not be subjected to per se condemnation, but should be evaluated instead under a full rule of reason. And the Court agreed. It observed in 1979, that “the decree is a fact of economic and legal life in this industry”²⁴ – and not a bad one, but a pro-competitive one that helped to persuade the Court that per se condemnation of the blanket license was unwarranted.

Similarly, non-exclusivity was front and center when the case was remanded to the U.S. Court of Appeals for the Second Circuit for an assessment of the blanket license under a more comprehensive rule of reason, which includes assessment of both anticompetitive harms and procompetitive benefits.²⁵ The first feature of the decree noted by the court of appeals was its prohibition of restrictions on member rights. Concluding that “[t]he composers thus retain the legal right to bypass ASCAP and license performing rights directly....,” the court observed that if the “opportunity [of direct licensing] is fully available, and if copyright owners retain unimpaired independence to set competitive prices for individual licenses to a licensee willing to deal with them, the blanket license is not a restraint of trade.”²⁶ Non-exclusivity creates the

²¹ *Broadcast Music*, 441 U.S. at 24. As was true in the Supreme Court, although this White Paper largely references the ASCAP decree, the BMI decree is substantially alike in relevant part and so all references to the ASCAP decree should be understood as applying to both decrees.

²² *Id.* at 11.

²³ Brief of the United States, *supra* note 19, at 10. The Assistant Attorney General in charge of the Antitrust Division at that time was John H. Shenefield and Frank H. Easterbrook, who was then a Deputy Solicitor General, argued for the United States as amicus curiae by leave of the Court.

²⁴ *Broadcast Music*, 441 U.S. at 13.

²⁵ *CBS, Inc. v. ASCAP*, 620 F.2d 930 (2d Cir. 1980).

²⁶ *Id.* at 936.

essential market alternative that eliminates the competitive threat that would otherwise obtain from ASCAP's blanket licensing. That had been the foundation finding of the district court and it persuaded the court of appeals that the blanket license passed muster under the rule of reason – indeed, that the plaintiff had failed to even show that blanket licensing had any anticompetitive effect. That conclusion followed largely due to the protections of the consent decree.²⁷

Two other provisions of the ASCAP consent decree remain critical to its pro-competition mission.

Under Paragraph VI of the 2001 Decree, “ASCAP is ... directed to grant to any music user making a written request ... a non-exclusive license to perform all of the works in the ASCAP repertory.” This license-on-application requirement, however, is subject to two important provisos that protect ASCAP members. First, such licenses are not royalty free; to the contrary, under Paragraph IX of the decree, all licenses are subject to the payment of royalties. Second, and also important, is that ASCAP is not required to honor such a request to any music user who is in material breach or default of any other license agreement, as with failure to pay.

These two provisions strike an important balance that at once protects ASCAP members from unauthorized use and vulnerable licensees from exploitation as a consequence of ASCAP's market power. ASCAP cannot use the threat of depriving access to a license as a negotiating strategy to extract excess royalties and licensees cannot avoid the obligation to pay a royalty fee.²⁸ As we discuss further in Section ID, below, Paragraph IX further provides a dispute resolution mechanism if ASCAP and a prospective licensee cannot reach terms through negotiation, ensuring that access to its repertory will not be royalty free. Finally, Paragraph IVF of the Decree provides further protection to ASCAP's members by preserving to ASCAP the right to initiate litigation on a member's behalf to restrict unauthorized performances.

The pro-competitive role of the consent decrees was again emphasized by the Justice Department when it concluded its most recent, two year review of the decrees in 2016. The Justice Department reiterated: “The consent decrees seek to prevent the anticompetitive exercise of market power while preserving the transformative benefits of blanket licensing”²⁹ It continued, noting that owing to the consent decrees “industry participants have benefited from the ‘unplanned, rapid and indemnified access’ to the vast repertories of songs that each PRO's

²⁷ *Id.* The central role of non-exclusivity has also been emphasized by the courts when interpreting the scope of the decree. *See, e.g.*, *United States v. ASCAP (In re Salem Media of Cal. Inc.)*, 902 F. Supp. 411, 422 (S.D.N.Y. 1995) (“The availability of source or direct licensing has been recognized as a counterweight to ASCAP's bargaining power.”).

²⁸ At the conclusion of its two year review of the consent decrees in 2016, the Justice Department rejected a request to modify the decrees to permit fractional licensing precisely because it would alter this balance to the detriment of competition. *See* Statement of the Department of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees, at 13-16 (Aug. 2016) (“DOJ 2016 Closing Statement”), <https://www.justice.gov/atr/file/882101/download>.

²⁹ *Id.* at 2. *See also* United States Copyright Office, *Copyright and the Music Marketplace: A Report of the Register of Copyrights* 145 (Feb. 2015) (“The PRO consent decrees are the result of the government's attempt to balance the efficiencies of collective licensing with concerns about anticompetitive conduct.”) (“Copyright Office 2015 Report”), <https://copyright.gov/docs/musiclicensingstudy/>. By citing this Report, we do not mean to endorse any of its recommendations.

blanket licenses make available.”³⁰ Commentators continue to recognize that the combination of blanket licensing and the consent decree protections helped the industry to realize efficiencies while protecting against the exercise of market power.³¹

Although there are surely debates within the music industry about how best to compensate composers and others, there is no evidence that the decrees have impeded innovation, creativity, market output, or any other dimension of competition. To the contrary, the industry has experienced exponential growth owing in part to an explosion of innovation, much of it fueled by technology, and it continues to flourish.

Moreover, specific arguments about how some stakeholders might do even better under alternative regimes often disregard the benefits of the current one and the probability that some of its benefits could be sacrificed if change geared to favor one group over another is implemented without consideration of the whole.³² Today, consumers benefit from the consent decrees, which have facilitated easy access, robust availability of a wide-range of music, and affordability. Licensors, too, have benefitted for some of the very same reasons, as is evidenced by the very large number of composers for whom licensing through ASCAP and BMI remains the most-efficient, preferred method of licensing, and the decrees continue to promote their creativity and productivity.³³

³⁰ DOJ 2016 Closing Statement, *supra* note 28, at 2, *quoting* Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1, 20 (1979). The Closing Statement later elaborates on the point:

Despite strong areas of disagreement among industry stakeholders as to issues raised in the Division’s solicitations of public comments, there is broad consensus that ASCAP and BMI provide a valuable service to both music users and PRO members. The PROs allow music users to obtain immediate access through licenses that protect them from copyright infringement risk to millions of works controlled by the hundreds of thousands of songwriters, composers, and publishers that have contributed songs to the PROs.

Id. at 10.

³¹ See, e.g., Gus Hurwitz, *Delrahim: “Don’t Stop Believing in the Music Decrees*, CPI Journal (Aug. 9, 2018), <https://www.competitionpolicyinternational.com/delrahim-dont-stop-believing-in-the-music-decrees/> (describing the decrees and observing that “DOJ struck a bargain that worked”). Hurwitz continues:

It [DOJ] agreed to allow ASCAP and BMI ... to bundle the song rights of many competing publishers and songwriters into a product called the blanket license. On its face, this looks like price fixing – each PRO is a group of competitors coming together and agreeing to sell all of their content for a common price. But there are also massive benefits to consumers of licensing music this way, because they don’t need to negotiate with every single artist whose music they may want to use at events and other public setting. So the DOJ agreed to allow [ASCAP and BMI] ... to engage in potentially problematic but overwhelmingly beneficial bundled licensing, so long as [they] ... agreed to certain rules.

³² As the Justice Department observed in 2016, “Despite strong areas of disagreement among industry stakeholders ... there is broad consensus that ASCAP and BMI provide a valuable service to both music users and PRO members.” DOJ 2016 Closing Statement, *supra* note 28, at 10.

³³ See DOJ 2016 Closing Statement, *supra* note 28, at 10-11:

(Continued...)

Despite the passage of time and the evolution of the industry, the fundamental concerns that led the Justice Department to challenge ASCAP and BMI remain. It has repeatedly concluded, that an entirely “free market” option is unavailable and some means must exist to harness market forces to continue to facilitate efficiency, yet protect against the exercise of market power by ASCAP and BMI.

D. The Consent Decrees Facilitate the Operation of a Competitive Marketplace

Some critics have sought to label the consent decrees generally, and their dispute resolution provisions in particular, “regulation,” as if the term is necessarily pejorative and as if application of the label alone provides a reason to abandon the decrees. But as the Supreme Court itself cautioned in *Broadcast Music* “easy labels do not always supply ready answers.”³⁴

“Regulation” and “competition” are not mutually exclusive methods of organizing markets. To the contrary, in many industries a degree of regulation is necessary to create the conditions for competition and the two can work in tandem. As is true for financial markets, sports leagues, and the professions, to name a few examples, guardrails and rules must be established to facilitate competition and protect against incentives to collude with rivals or to exclude new competitors.

Intellectual property provides a further illustration. Patents and copyrights are granted by the government and only exist by force of law. Federal law defines the conditions under which they can be created, as well as their scope, terms, and duration. When disputes arise concerning the scope or exercise of these rights, including the royalties that are owed for their use, parties turn to direct negotiations or, that failing, to the courts through litigation to resolve their disputes. And they are administered by agencies of the federal government, the United States Patent and Trademark Office and the U.S. Copyright Office. By its very nature, therefore, intellectual property is “regulated” as a necessary incident to realizing its procompetitive, pro-creative, and pro-innovation purposes.

In the case of music licensing, competition would not be possible without some degree of regulation and that has been the primary function of the consent decrees, supplemented by the system of copyrights constructed by Congress. One classic example is the Supreme Court’s decision in *Board of Trade of City of Chicago v. United States*,³⁵ a case lost by the Justice

For many songwriters and composers, affiliating with a PRO and contributing their works to the PRO’s repertory provides the only practical way of licensing their works. While direct licensing to individual music users always remains available as an alternative for music creators, individual music creators would often find it infeasible to themselves enter into licenses with all of the bars, restaurants, radio stations, television stations, and other music users to which ASCAP and BMI license. Even where direct negotiations are possible, users and creators may find PRO licenses more efficient. Moreover, the PROs have developed valuable expertise in distributing revenues among the hundreds of thousands of copyright holders, and creators generally trust that ASCAP and BMI will fairly distribute licensing proceeds.

³⁴ *Broadcast Music*, 441 U.S. at 8.

³⁵ 246 U.S. 231 (1918).

Department when it sought to condemn a key component of the regulatory framework designed by the Board of Trade to facilitate commodities trading. As was true of CBS's case against ASCAP and BMI, the government sought to condemn the Board's practices as per se unlawful, i.e., without considering its purposes and actual market effects. Now a bedrock precedent for antitrust law's "rule of reason," *Chicago Board of Trade* rejected the government's antitrust claims, holding that the challenged rule, which established hours for trading, "created a public market" and in a number of ways helped to facilitate competition among rival sellers.³⁶ Regulation, the Court concluded, helped to foster competition.

Importantly, in *Broadcast Music*, the Supreme Court viewed this specific characteristic of *Chicago Board of Trade* as also being true for music licensing. In its view, the ASCAP consent decree created the conditions under which ASCAP could assemble and offer for sale the blanket license, a product that no individual composer could offer on her own: "ASCAP, in short, made a market in which individual composers are inherently unable to compete fully effectively."³⁷ ASCAP and BMI could only accomplish that feat, however, with the protections provided by the consent decrees.

Other examples can be found in team sports, where the courts have consistently recognized the necessity of "rules of the game" to enable competitive contests to take place. Specifically relying on its earlier decision in *Broadcast Music*, in *NCAA v. Board of Regents of the University of Oklahoma*,³⁸ for example, the Court again rejected application of the per se label, reasoning that in the case of the NCAA "what is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all."³⁹

Many additional examples could be cited from other industries, including the professions, where the Court has repeatedly acknowledged the value of regulation in creating the conditions for effective competition.⁴⁰ The consistent principle that links them all is that "regulation" can either facilitate trade even as it channels it through targeted restraints or harm competition – it depends. The role of the rule of reason is to distinguish between such instances. As *Chicago Board of Trade* famously held, "[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."⁴¹ Simply labeling the ASCAP and BMI consent decrees

³⁶ *Id.* at 240 (emphasis added).

³⁷ *Broadcast Music*, 441 U.S. at 22-23. The Court further observed that *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), a case that remains the benchmark for illustrating per se unlawful price-fixing by rivals, distinguished *Chicago Board of Trade* "on the ground that among the effects of the challenged rule there 'was the creation of a public market.'" *Id.*, n.41.

³⁸ *NCAA v. Bd. of Regents of the Univ. of Oklahoma*, 468 U.S. 85 (1984).

³⁹ *Id.* at 101.

⁴⁰ See, e.g., *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978) (striking down provision in code of ethics that prohibited competitive bidding); *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) (condemning effort by competing attorneys to collectively coerce an increase in the fees paid by the District of Columbia for criminal defense representation); *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999) (rejecting FTC challenge to professional association's advertising regulations).

⁴¹ *Chicago Board of Trade*, 246 U.S. at 238. See also *Nat'l Soc'y Prof'l Eng'rs.*, 435 U.S. at 691.

as “regulation” thus says nothing about their utility. Virtually all complex industries face some degree of regulation, both government-imposed and self-imposed.

Another frequently mischaracterized component of the ASCAP consent decree is its dispute resolution mechanism, which provides for United States District Court evaluation of unresolved disputes between licensors and licensees. Referred to as “rate courts,” here the “regulation” label is often put forth in derogation of the important and pro-competitive role they play. As already noted, the dispute resolution provisions of the consent decrees are an integral part of their functioning and serve specific pro-competitive purposes. They help to provide the predictability, certainty, and judicial expertise necessary to keep the process of music licensing from becoming bogged down due to disputes over royalty rates. They also serve an important procompetitive function, by preserving the blanket license as a genuinely competitive option.⁴²

This last point was well-made by the court of appeals on remand from the Supreme Court in *Broadcast Music*. In seeking to force ASCAP and BMI to offer smaller package alternatives to the blanket license, CBS argued that negotiations with individual composers left it open to being exploited, as a licensee, to what it described as “hold-ups.” Citing the district court’s specific findings, the court of appeals rejected CBS’s argument, noting that just as the option of individual negotiations served as a competitive check on the PRO’s ability to charge higher prices, the option of blanket licensing provided a competitive alternative that counterbalanced any threat of exploitation by individual licensors.

In short, the court found that CBS could always return to ASCAP for a blanket license. And why might it not again find itself in a position to be exploited? The court reasoned: “it [CBS] would be entitled, *under the consent decree*, to assure itself of continued performing rights by immediately obtaining a renewed blanket license.”⁴³ The court of appeals continued: “Indeed, Paragraph IX of the ASCAP decree permits CBS to use any music covered by a license application, without payment of a fee, subject to whatever fees are subsequently negotiated or determined to be reasonable by the court if negotiations fail.”⁴⁴ As previously described in Section IC, the combination of the license-on-application and dispute resolution provisions of the decree, therefore, also serve the procompetitive purpose of ensuring that the blanket license remains a realistic competitive alternative to individual licenses, creating a competitive equilibrium unavailable absent the consent decrees. And that feature, too, contributed to the courts’ conclusion that the blanket license did not have any anticompetitive effect.

It is a misnomer, therefore, to characterize the dispute resolution mechanism simply as “regulation” and the courts as “rate regulators.” The courts are summoned only when the parties fail to reach agreement on terms—and at least one study demonstrated that reliance on the courts is the rare exception.⁴⁵ The decrees have provided stability and predictability over time, serving

⁴² The Supreme Court had also noted the importance of the dispute resolution provisions of the decree, which prevent ASCAP from exercising its market power against licensees. *Broadcast Music*, 441 U.S. at 11-12.

⁴³ 620 F.2d at 938 (emphasis added).

⁴⁴ *Id.*

⁴⁵ See Daniel A. Crane, *Bargaining in the Shadow of Rate-Setting Courts*, 76 Antitrust L.J. 307, 311 (2009) (“ASCAP and BMI engage in thousands of licensing transactions on behalf of hundreds of thousands of composers, (Continued...)”)

as an essential dispute resolution mechanism that is preferable to repeated litigation.⁴⁶ The fact that alternative methods of dispute resolution can be imagined doesn't alter the more critical fact: there must be a predictable mechanism for resolving royalty disputes as an alternative to repeated litigation before different courts and judges. Such an approach would be antithetical to the goal of maintaining a predictable and well-functioning system of music licensing.

As we next explain in Part II, although the consent decrees remain quite important in the industry, they do not stand alone in providing the industry framework for music licensing. And that in part explains why altering them in isolation could lead to unanticipated and unintended consequences.

II. THE CONSENT DECREES SERVE AS AN INDISPENSABLE FOUNDATION OF A MUCH MORE WIDE-RANGING LEGAL FRAMEWORK THAT FACILITATES MUSIC CREATION AND AUTHORIZED COPYRIGHT USE

Although today's music industry is in many ways far more expansive and complex than ever, the ASCAP and BMI consent decrees still provide the solid foundation that enables it to operate efficiently and with regard to the many interests of its varied stakeholders. Yet from even before ASCAP and BMI were created, it has been Congress, not the Justice Department or the courts, which has taken primary responsibility for establishing and managing the U.S. system of music copyrights.

In this portion of the White Paper, we briefly summarize some of the principal Congressional activities related to copyrights and music licensing in order to demonstrate the critical role still played by the consent decrees, but the lead role that has been consistently played by Congress.⁴⁷ What clearly emerges is that the consent decrees and the applicable legislation have been and remain highly interdependent.

A. The Interdependence of the Consent Decrees and Copyright Legislation

As with other forms of intellectual property, a well-functioning system of enforceable legal rights is necessary to enable both songwriters and recording artists to capture the economic value of their creative investments. Moreover, as we have already explained,⁴⁸ because artist compensation in many cases involves a very large number of relatively small transactions, licensing collectives, such as the PROs, help to overcome market failures to support compensation for artists and facilitate the dissemination of music to the many types of

songwriters, lyricists, and music publishers, and only a small fraction of these end up in rate-setting proceedings.”). Professor Crane goes on to observe that the mere presence of the option of judicial resolution of rate disputes functions to discipline the PROs and constrain their ability to charge monopoly rates: “If we take the underlying antitrust claims seriously . . . actual rate setting is rare because the shadow of the rate-setting court frames the bargain sufficiently to eliminate the defendant's ability to charge an unfettered monopoly price.” *Id.* at 312.

⁴⁶ The value of the dispute resolution mechanism was so evident, that even though a similar provision had not been included in the original BMI consent decree, BMI successfully sought to have it added when the BMI decree was modified in 1994. *See* Final Judgment, *United States v. Broadcast Music, Inc.*, Civ. No. 64-Civ-3787, ¶¶ IV, XIV (S.D.N.Y. 1966) (as amended Nov. 18, 1994), <https://www.justice.gov/atr/case-document/file/489866/download>.

⁴⁷ For a more comprehensive account of the history of legislation related to music licensing, see CRS Report 2018, *supra* note 1.

⁴⁸ *See supra*, Section IA.

consumers. The consent decrees have made that possible in a way that guards against abusive practices and the aggregation and exercise of market power.

But ASCAP and BMI and the consent decrees are just one component of a larger legal and institutional framework – what has been described as a broad “ecosystem”⁴⁹ – that has evolved continually over the past century along with changes in technology and consumer demand. As technology has opened new markets and shifted revenue away from past business models, Congress has responded by creating new rights that allow artists to capture a portion of the additional market value that was created.

In the nineteenth century, songwriters earned revenues primarily through the sale of copyrighted sheet music. In 1897, Congress amended the Copyright Act to create a public performance right for songwriters. This new law gave songwriters the right to earn revenue from the public performance of their compositions. But without more, the right was unenforceable.⁵⁰ Songs were performed in thousands of venues spread across the country. There was no cost-effective way for songwriters (or publishers) and venues to identify each use in advance or for songwriters to police unauthorized use of their copyrights. As is discussed above, and as was acknowledged by the Supreme Court in *Broadcast Music*, the PROs developed to solve that problem by reducing the costs of monitoring the market and enforcing rights.

As the distribution of songs shifted from sheet music to piano rolls and phonograph records, Congress again responded. The 1909 Copyright Act gave songwriters a mechanical copyright, which covered reproduction of their songs in a fixed audio medium. Due to concerns that the then dominant player-piano manufacturer would use exclusive licensing to protect its market position, Congress established a compulsory license system, which has been amended several times to balance stakeholder interests and ease administrative costs.⁵¹

This same process has played out multiple times over the past decades. New technologies, business models, and marketplace developments have emerged and in each case they have led Congress to reconsider whether the existing legal framework is sufficient to allow artists to capture an appropriate share of the rewards from their creative investment, while not impeding the dissemination and consumption of their works.

Presented with evidence of widespread private audiotape copying of phonograph records in the 1960s, for example, Congress passed the 1971 Sound Recording Act, which gave recording artists their first enforceable mechanical rights to sound recordings and applied to recordings created after 1972.⁵² And after internet and satellite radio began to put new competitive pressures on record sales in the 1990s, Congress again responded, passing the Digital Performance Right in Sound Recordings Act (“DPRA”) and the Digital Millennium

⁴⁹ DOJ 2016 Closing Statement, *supra* note 28, at 5 (noting the “important role ASCAP and BMI play in the U.S. music ecosystem, focusing in particular on the procompetitive benefits that industry participants recognize the PROs offer.”).

⁵⁰ Copyright Office 2015 Report, *supra* note 28, at 32.

⁵¹ CRS Report 2018, *supra* note 1, at 9-11.

⁵² Pub. L. No. 92-140 (1971). The 1971 Copyright Act applied only to sound recordings created after 1972. CRS 2018 Report, *supra* note 1, at 16.

Copyright Act (“DPMCA”), which, among other things, gave recording artists first-time rights over public performance of recordings through digital medium.⁵³

B. The Music Modernization Act⁵⁴

Indeed, in the area of music copyright, Congress has typically been responsive, and taken bi-partisan steps to protect the concerns of artists in a manner that is acceptable to the broader music industry ecosystem. That pattern is continuing today. On October 11, 2018, the Orrin G. Hatch-Bob Goodlatte Music Modernization Act was signed into law by the President. Among other things, the MMA improves the process for collection and distribution of mechanical rights-related royalties and promotes continued innovation of music distribution methods and technologies. The law also extends public performance rights to recording artists for recordings made before 1972 (such as Aretha Franklin’s iconic recording of Otis Redding’s “RESPECT”), and modifies the dispute resolution procedures and evidentiary rules under the BMI and ASCAP consent decrees that are used to settle disagreements about royalty rates.⁵⁵ The MMA also requires that the Department of Justice notify Congress before filing any motion in federal court to terminate the Consent Decrees or impose sunset provisions.

The MMA illustrates two constants that explain why Congress has played such an important role in easing the transition of the industry through many periods of change. First, institutionally, Congress is the entity best-suited to mediate the often competing interests of the many stakeholders in today’s complex industry. Equally important, however, is that in striking compromises between these competing interests, Congress has assumed, and relied upon, the continuation of the consent decrees. This reliance was abundantly clear when the bipartisan leadership of the House and Senate Judiciary Committees, upon learning of the Justice Department’s plans to possibly terminate the consent decrees, expressed deep concern that doing so without an alternative framework in place would result in “serious disruption in the marketplace,” and sought assurances that the Department would work with Congress before taking any such action.⁵⁶ Those decrees provide the foundation for ensuring that songwriters are

⁵³ Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39 (1995); Digital Millennium Copyright Act, Pub. L. No. 105-304 (1998); CRS Report 2018, *supra* note 1, at 43-44.

⁵⁴ What has been named the Hatch-Goodlatte Music Modernization Act integrates three previously introduced Senate Bills, S. 2334, S. 2393, and S. 2625 into S. 2823, which was identical to H.R. 5447. *See* S. Rep. No. 115-339, at 2 (2018), <https://www.congress.gov/congressional-report/115th-congress/senate-report/339/>. *See also* H.R. Rep. No. 115-651 (2018).

⁵⁵ H.R. 5447 (2018); CRS Report 2018, *supra* note 1, at 30-32.

⁵⁶ *See* Letter from Senators Chuck Grassley and Dianne Feinstein, and Representatives Bob Goodlatte and Jerrold Nadler, to Hon. Makan Delrahim, Assistant Attorney General, Antitrust Division, United States Department of Justice (Jun. 8, 2018) (“the marketplace for licensing public performance rights in musical works has been shaped for decades” by the consent decrees; termination of the decrees “without a clear alternative framework in place would result in serious disruption in the marketplace, harming creators, copyright owners, licensees, and consumers”). *See also* Letter from Senators Amy Klobuchar, Patrick Leahy, Richard Blumenthal & Cory A. Booker to Makan Delrahim, Assistant Attorney General, Antitrust Division, United States Department of Justice (Jun. 7, 2018) (“As the music industry has developed in reliance on [the ASCAP and BMI consent decrees] . . . and music licensing legislation before Congress assumes the continued existence of the framework established under [the] consent decrees, we urge the Division to allow consumers, industry representatives, and members of Congress to negotiate and develop an alternative solution – without the threat of litigation or the market disruption that would result from altering the current regime – before the Division takes any action to weaken or terminate” the decrees.).

compensated for public performance of their work in a cost-effective way that does not detract from the creative process.

Any change in the underlying framework that would alter stakeholder returns could easily destroy the consensus that supports not only the MMA, but past legislation. Though some have argued that the decrees might be improved upon, as we shall demonstrate in Part IIIB, below, abrupt withdrawal of the consent decrees without legislation in place to ensure the continued smooth functioning of the market will almost certainly lead to litigation and associated uncertainty, making both artists and consumers worse off.

C. The Consent Decrees Have Endured Because they Continue to Serve an Essential Role and Have Not Stood in the Way of Innovation or Competition

Reeling off a list of the many changes in music formats that have developed since the consent decrees were first entered does not provide an evident basis for declaring them to be relics of the past. Doing so ignores two salient facts that suggest quite the opposite: (1) those changes have come about regardless of the decrees, and, (2) although technology has changed the PRO Paradox has not: blanket licensing remains efficient, but the PROs, if unconstrained, would have every incentive to exercise their considerable market power.

Importantly, there is no evidence to suggest that the consent decrees have harmed competition or slowed innovation in the music industry. To the contrary, as the Justice Department has repeatedly emphasized, under the framework established by Congress and the consent decrees, competition between PROs and songwriters plays an important complementary role in constraining any exercise of market power by the PROs and in driving choice and innovation in the sector.

As discussed above, the non-exclusivity provisions in both the ASCAP and BMI consent decrees help to “make the market,” because they insure that music users can seek licenses directly from individual rights holders or publishers as an alternative to the blanket license. Moreover, meaningful competition exists between PROs and alternatives to the PROs with regard to attracting and retaining artists, although licensees continue to face the marketplace reality that there is little if any competition between ASCAP and BMI from the perspective of the distribution side. As the Justice Department explained in association with the adoption of the amended consent decree in 2001, “competition to attract and keep composers and songwriters presently exists among ASCAP, BMI, and SESAC,” noting that competition from SESAC “has pushed ASCAP to improve its music tracking system.”⁵⁷ Today ASCAP and BMI face additional competition for artist retention from Global Music Rights (“GMR”), a fourth U.S. PRO that entered the market in 2013 with the specific goal of enhancing choice for artists,⁵⁸ as

⁵⁷ *United States v. ASCAP*, No. 41-139 (S.D.N.Y. Mar. 16, 2001), Memorandum of the United States in Response to Public Comments on the Joint Motion to Enter Second Amended Final Judgement, at 39-41, <https://www.justice.gov/atr/case-document/file/485971/download>.

⁵⁸ See Ben Sisario, *New Venture Seeks Higher Royalties for Songwriters*, N.Y. Times, Oct. 29, 2014. Though GMR’s catalog is small relative to BMI or ASCAP, its successful entry demonstrates that the consent decrees have not stifled competition to attract artists.

well as music streaming services, which have engaged in direct negotiations with rights holders.⁵⁹

Finally, and what is abundantly clear, is that the observed decline in artist revenue that began in the 1990s was not caused by the consent decrees, but instead by relatively abrupt and consequential changes in the technology and business models associated with music distribution and licensing. Indeed, and as noted above, that trend has reversed in recent years with the partial demise of unauthorized music file sharing services and the rise of licensed streaming services. Today, songs can produce revenues from more sources than ever before, including one-time payments from digital sales, publisher advances, physical media sales, synch licenses, and other fees, such as from ringtones, and continuing royalty streams from broadcast radio, interactive and non-interactive streaming, satellite and cable TV, live music venues, and bars and restaurants.⁶⁰

That transition could not have occurred absent the consent decrees, which provided a constant and invaluable foundation during a period of relative turmoil.⁶¹ Throughout this period, the consent decrees continued to provide a predictable foundation for the vast majority of artists and licensees, one that has accommodated and not impeded the most rapid and consequential period of change in the industry's history. That certainty and predictability would be lost, and the continuing adaptations already in motion within the industry would be disrupted, if the decrees were to be abandoned or substantially modified. It would also harm, not advance, the interests of artists.⁶² Not surprising, therefore, is that although some stakeholders have called for reforms, none have called for outright abandonment of the consent decrees without the creation of an alternative framework to facilitate licensing and competition—and that includes ASCAP and BMI.⁶³ Most efforts have focused on rebalancing the allocation of licensing revenues, refining the system, and better adapting it to the changes that have taken place, without abandoning the foundation upon which it has been built – the consent decrees.

⁵⁹ See Ben Sisario, *Spotify's Licensing Deals Are Putting Labels on Edge*, N.Y. Times, Sept. 6, 2018.

⁶⁰ See <http://money.futureofmusic.org/wordpress/wp-content/uploads/2012/01/revenue-streams-handoutlist.pdf> (identifying “45 distinct ways that US-based musicians and songwriters can generate revenue from their compositions, performances, sound recordings, brand, and/or knowledge of the craft.”)

⁶¹ As one commentator recently observed in reference to the decrees, “it is fair to say that much of today’s music industry is built around them. These decrees simply cannot be ended without disrupting an entire industry.” Hurwitz, *supra* note 31.

⁶² Copyright Report 2015, *supra* note 28, at 74.

⁶³ Both ASCAP and BMI submitted comments to the Justice Department in connection with its 2014-16 review of the consent decrees, and although both requested reforms, neither proposed that the decrees be terminated. See Public Comments of the American Society of Composers, Authors and Publishers Regarding Review of the ASCAP and BMI Consent Decrees (Aug. 4, 2014), <https://www.justice.gov/sites/default/files/atr/legacy/2014/08/14/307803.pdf>; Public Comments of Broadcast Music, Inc., U.S. Department of Justice, Antitrust Division, Review of Consent Decree in United States v. Broadcast Music, Inc. (Aug. 6, 2014), <https://www.justice.gov/atr/page/file/1086751/download>. It is not at all surprising that neither PRO sought termination of the decrees. Both understood that if the decrees were to be terminated they would once again, and instantly, be the subject of antitrust claims. As one court has recognized, “The conduct restrictions in [the ASCAP and BMI consent decrees] . . . have significantly weakened the strength of modern-day antitrust claims against ASCAP and BMI. The existence of these restraints has assuredly helped insulate ASCAP and BMI from antitrust liability over the past 50 years.” *Meredith Corp. v. SESAC, LLC.*, 87 F. Supp.3d 650, 664 n.11 (S.D.N.Y. 2015).

As we will discuss in the next and final section of this White Paper, only Congress, in coordination with the Justice Department and the Copyright Office, is in a position to accommodate and mediate the broad and clashing interests of today's stakeholders to provide a framework for the future that will support both artists and consumers.

III. THE CONTINUED NECESSITY OF A MARKET FRAMEWORK FOR THE INDUSTRY

In this final section of the White Paper, we turn to the standards that have been established by the courts and by the Justice Department for terminating consent decrees. We show that the conditions typically required for such decree terminations have not been met. And although some have argued that the decrees' defenders bear the burden of demonstrating the continued utility of the decrees, it is well established that the burden instead lies with those who would seek to terminate them to show that the decrees have achieved their goals and are no longer needed – and it is a demanding one, especially in the face of long-standing industry reliance.

In closing, we will refer back to Part II to show that the industry is far past the time when the Justice Department can simply abandon or even substantially modify the decrees through unilateral action without harmful consequences. As Congress and even the Justice Department itself have concluded after in-depth consideration, if significant reforms are needed, they must be the product of a coordinated and carefully considered evaluation of the interests of all of the affected stakeholders.

A. Under Long-Standing Legal Precedent and the Antitrust Division's Own Standards There is No Basis for Abandoning the ASCAP and BMI Consent Decrees

Government agencies and commentators continue to voice the concern that if left unchecked ASCAP and BMI, as the largest aggregators and licensors of music rights, will invariably exploit their market position. Withdrawing the decrees, or even significantly modifying them, without ample regard for this threat would invite abuse through more restrictive terms and lower royalties for composers and significantly higher royalties for licensees. It would also be unsupportable as a matter of law and sound competition policy.

As is true for remedies generally, the typical antitrust consent decree enjoins conduct deemed to be anticompetitive in order to prevent its recurrence and often includes provisions designed to help restore competitive conditions.⁶⁴ Perhaps the best case for revisiting and dissolving a consent decree, therefore, arises when the goals of the decree have been achieved, i.e., the offending conduct has ceased, impediments to competition have been successfully eliminated, and competitive conditions have been restored. Termination may also be appropriate when market conditions have so changed that the decree's protections are no longer of value.

⁶⁴ As the Supreme Court held in *Nat'l Soc'y of Prof'l Eng'rs.*, 435 U.S. at 697-98, it follows from a finding of an antitrust violation that courts are "empowered to fashion appropriate restraints on the [defendant's activities] both to avoid recurrence of the violation and to eliminate its consequences.... The standard against which the [remedial] order must be judged is whether the relief represents a reasonable method of eliminating the consequences of the illegal conduct."

This standard was established at the urging of the Justice Department in *United States v. United Shoe Machinery Corp.*, where the Supreme Court held: “a [consent] decree ... may not be changed in the interests of the defendants if the purposes of the litigation as incorporated in the decree ... have not been fully achieved.”⁶⁵ Similarly, relying on and further elaborating on *United Shoe Machinery*, the Second Circuit has held that “[i]n most cases, the antitrust defendant should be prepared to demonstrate that the basic purposes of the consent decrees...have been achieved.”⁶⁶ It then added: “an antitrust defendant should not be relieved of the restrictions that it voluntarily accepted until the *purpose of the decree has been substantially effectuated*, or when time and experience demonstrate that the decree “*is not properly adapted to accomplishing its purposes.*”⁶⁷

In contrast to these more typical antitrust decrees, however, the ASCAP and BMI decrees were not intended to repair the marketplace by eliminating anticompetitive conduct and thereby restoring competitive conditions. Quite to the contrary, these decrees endorsed the core anticompetitive conduct, the blanket license, but created the conditions under which the market could function competitively. Unless market conditions were to radically change, they can only “accomplish their purposes” by remaining in force and no such showing has been made or even argued by ASCAP or BMI.

Dissolving these decrees would also be inconsistent with the Justice Department’s own stated policies. The Antitrust Division’s very recently revised Manual provides that “legacy decrees,” ought not be terminated “when there is a pattern of noncompliance with the decree or there is longstanding reliance by industry participants on the decree.”⁶⁸ In support of this standard, the 2018 Manual also cites to a 2011 Department Memorandum supporting termination of a consent decree with Merck, in which it more fully elaborated on the appropriate standard for *continuing* older consent decrees:

⁶⁵ 391 U.S. 244, 248 (1968). In *United Shoe Machinery*, the goal of the decree was “the elimination of monopoly and restrictive practices,” goals which had not been achieved after ten years, leading the government under the then head of the Antitrust Division, Donald F. Turner, to seek modification of the decree to enhance its remedies. *Id.* See also *New York v. Microsoft Corp.*, 531 F. Supp. 2d 141 (D.D.C. 2008). In support of its decision to extend the consent decree that had settled the governments’ antitrust case against Microsoft, the court set forth the collective standards that courts had previously relied upon in considering termination or modification of a consent decree, including whether the decree had accomplished its intended result, had achieved its “principal objects,” had successfully unfettered the market from anti-competitive conduct, and eliminated the consequences of the defendant’s anticompetitive conduct. *Id.* at 172-73.

⁶⁶ *United States v. Eastman Kodak Co.*, 63 F.3d 95, 101 (2d Cir. 1995).

⁶⁷ *Id.* at 102, quoting *King-Seely Thermos Co. v. Aladdin Indus., Inc.*, 418 F.2d 31, 35 (2d Cir. 1969) (emphasis added). Importantly, the Second Circuit approved Kodak’s request to dissolve the 1921 and 1954 decrees against it, which related to photographic film, only after concluding that the relevant market had significantly expanded since the time of the decree and that Kodak no longer possessed market power over film. *Id.* at 109.

⁶⁸ U.S. Dep’t of Justice, Antitrust Division Manual III-148 (5th ed. 2018), <https://www.justice.gov/atr/file/761141/download>. The Manual continues: “Although the Division has supported terminating many legacy decrees, it routinely conducted a full investigation into possible changes in the market or law even when it believed that the decree should be presumptively terminated.” See also DOJ 2016 Closing Statement, *supra* note 28, at 22 (“the Division has concluded that the industry has developed in the context of, and in reliance on, these consent decrees and that they should therefore remain in place.”).

Among the circumstances where continuation of a decree entered more than ten years ago may be in the public interest are: a pattern of noncompliance by the parties with significant provisions of the decree; a continuing need for the decree's restrictions to preserve a competitive industry structure; and longstanding reliance by industry participants on the decree as an essential substitute for other forms of industry-specific regulation where market failure cannot be remedied through structural relief.⁶⁹

Although the Justice Department concluded in *Merck* that “[n]one of these circumstances is present in this case,” and hence it supported dissolution of the decree there, *all of them* are present in the case of the ASCAP and BMI decrees.

As recently as 2016, the Justice Department settled civil contempt claims against ASCAP when it accused ASCAP of entering into exclusive rights arrangements of the sort specifically prohibited by the consent decree.⁷⁰ Moreover, although there have surely been important changes in the industry, there is “a continuing need for the decree's restrictions to preserve a competitive industry structure,” i.e., to check the power of the PROs. And as noted above, the entire industry, Congress, and the Copyright Office, have all come to rely on the decrees. Under these circumstances, those who would seek to dissolve the decrees should bear a heavy burden to demonstrate that the competitive threat addressed by the decrees has dissipated – no such showing has or could be made.

This is not to suggest that the decrees ought not continue to evolve and adapt. But they cannot be fairly characterized as presumptively “dated.” Age and utility ought not be equated absent hard evidence that the decrees no longer serve important purposes and are affirmatively harmful to competition, on balance. As noted above, the rule of reason analysis conducted by the court of appeals following remand from the Supreme Court in *Broadcast Music* is instructive for its conclusion that the blanket license passed muster *because of* the mandated provisions of the consent decrees.

B. Creating a Modern Framework for the Music Licensing Industry Can Only Be Achieved Cooperatively and Incrementally

⁶⁹ Memorandum of the United States in Response to the Motion of Merck & Co., Inc. to Terminate Consent Decree, at 8 n.10, <https://www.justice.gov/atr/case-document/file/502916/download>. See also Letter from Stephen E. Boyd, Assistant Attorney General, to Hon. Charles E. Grassley, Chairman, Committee on the Judiciary, United States Senate 2 (Jun. 18, 2018) (“A limited number of... legacy judgments will require special consideration, given particular circumstances such as pending legislation or potential disruption to the marketplace if a judgment were terminated. The Division will be mindful of such situations and appropriately weight all factors in determining what actions to take in such circumstances.”).

⁷⁰ See *United States v. ASCAP*, 2016-1 Trade Cas. (CCH) ¶ 79,669 (S.D.N.Y. 2016). See also Press Release, *Justice Department Settles Civil Contempt Claim against ASCAP for Entering into 150 Exclusive Contracts with Songwriters and Music Publishers* (May 12, 2016) (ASCAP paid \$1.75 million and was required to reform its licensing practices), <https://www.justice.gov/opa/pr/justice-department-settles-civil-contempt-claim-against-ascap-entering-150-exclusive>. See also *Civil Contempt Suit Filed Against ASCAP*, N.Y. Times, (Mar. 12, 1964), <https://www.nytimes.com/1964/03/12/archives/civil-contempt-suit-filed-against-ascap.html>.

As has been true since ASCAP and BMI were founded, a competitive market for music rights cannot and will not develop on its own in some idealized “free market.” As the Court observed in *NCAA*, this is an industry in which horizontal restraints are necessary for the product to be available at all, and, as the Court observed in *Broadcast Music*, the blanket license is a product that no individual composer could supply. If blanket licensing remains a desirable method of disseminating music, policing infringement, and compensating the vast majority of artists, therefore, some legal boundaries must be in place for the PROs. If those boundaries are abandoned without Congressional engagement, the likeliest result will not be an unregulated market, but a new system of regulation that will emerge after costly, lengthy, and unpredictable litigation ending in myriad private settlements and a new phalanx of court-imposed restrictions. Ironically, courts, not Congress or the Justice Department, will design the next copyright licensing system.⁷¹

As we have explained, although the free market produced the blanket license with all of its attendant efficiencies for both rights holders and licensees, it also allowed ASCAP and BMI to develop into a competitive threat. The consent decrees provided the missing rules of the road – guardrails that allowed ASCAP and BMI to operate, but with protections for licensees and ultimately consumers. Competition was preserved, therefore, and the industry succeeded, because of a combination of market forces and the limitations imposed by the consent decrees. Together, these forces worked in tandem to produce a thriving and adaptable market that has endured.

These two foundation goals of the ASCAP and BMI consent decrees, to preserve the efficiencies of blanket licensing and guard against collusion and the exercise of market power, remain vital today - perhaps even more so than when the decrees were first entered. They cannot be achieved in a vacuum and will not be achieved if ASCAP and BMI are relieved of their obligations under the decrees.

As we have described in Part II, the consent decrees have also provided the foundation upon which Congress has built and continually refined the broader system in which copyrights to music works are secured and licensed. Abrupt, unilateral termination by the Justice Department at this late date would also undermine the efficacy of years of Congressional and Copyright Office efforts to guide the industry through periods of change.

It is telling, yet not surprising, therefore, that in the last five years the Justice Department, Congressional leaders tasked with developing the MMA, and the Copyright Office all have reached the same conclusion: if change is needed, it cannot be achieved through unilateral action

⁷¹ This concern is hardly fanciful. There is a long history of litigation relating to the decrees. *See, e.g., United States v. Broad. Music, Inc.*, 720 Fed. Appx. 14, 2017-2 Trade Cas. (CCH) ¶ 80,228 (2d Cir. 2017); *Pandora Media, Inc. v. ASCAP*, 785 F.3d 73 (2d Cir. 2015). Perhaps more importantly, there has been considerable and continuing litigation outside the context of the decrees in connection with entities not covered by the decrees. *See, e.g., Radio Music License Comm., Inc. v. Global Music Rights, LLC*, 2017 WL 3449606 (C.D. Calif. 2017); *Radio Music License Comm., Inc. v. SESAC, Inc.*, 29 F. Supp. 3d 487 (E.D. Pa. 2014); *Meredith Corp. v. SESAC LLC*, 1 F. Supp. 3d 180 (S.D.N.Y. 2014). It is further notable that *Meredith*, a class action, was resolved when the district court approved a settlement that includes many of the kinds of features to be found in the ASCAP and BMI consent decrees. *See Meredith Corp. v. SESAC, LLC*, 87 F. Supp.3d 650 (S.D.N.Y. 2015).

by the Justice Department to reform or terminate the consent decrees. The rival interests of stakeholders are complex and may not always include a commitment to a “competitive” marketplace, so much as an effort to alter the allocation of royalties. Understandably, rights holders may seek to increase their royalties, whereas those seeking to prevent increases in royalty rates may fear becoming the victims of the exercise of market power by PROs, publishers, and some artists. But competition, and the antitrust laws that seek to protect it, are ultimately about consumer welfare, so the interests of consumers must remain paramount. Change will require a coordinated and cooperative effort led by Congress, which alone has the institutional advantages necessary to weigh and mediate the competing self-interests of stakeholders.

In early 2014, the Copyright Office undertook a year-long study of the music marketplace, producing a comprehensive report on the state of music licensing.⁷² The Report reviewed the long history of music licensing and the interests of the many industry stakeholders and proposed a series of recommended reforms – directed to Congress. From the outset, however, the Report’s Preface acknowledged that “the problems in the music marketplace need to be evaluated as a whole, rather than as isolated or individual concerns of particular stakeholders.” Already aware that the Justice Department had commenced its own review at the request of ASCAP and BMI in 2014, and without knowing the ultimate outcome of that review, the Office concluded:

Many pertinent considerations have been raised in the DOJ’s parallel consideration of the ASCAP and BMI consent decrees. The Office strongly endorses that review, and—in light of the significant impact of the decrees in today’s performance-driven music market—hopes it will result in a productive reconsideration of the 75-year-old decrees. At the same time, *the Office observes that it is Congress, not the DOJ, that has the ability to address the full range of issues that encumber our music licensing system, which go far beyond the consent decrees.*⁷³

During the same time period, and at the request of ASCAP and BMI, the Justice Department also undertook what turned out to be a multi-year review of the consent decrees. In the first round it solicited comments on a wide range of fundamental questions, including whether the decrees continue to serve procompetitive purposes, whether they have any adverse effects on competition, and whether any significant modifications were warranted.⁷⁴ After receiving over 200 comments from a wide-range of stakeholders who expressed many different views about the decrees,⁷⁵ the Department invited a second round of comments focused on three

⁷² Copyright Office Report, *supra* note 28. By citing this Report, we do not mean to endorse any of its recommendations.

⁷³ Copyright Office 2015 Report, *supra* note 28, at 150 (emphasis added).

⁷⁴ See <https://www.justice.gov/atr/ascap-bmi-decree-review>.

⁷⁵ See <https://www.justice.gov/atr/public-comments>.

more focused, potential reforms.⁷⁶ This call for comments produced over 130 additional comments.⁷⁷

At the end of its two-year study, the Department came to essentially the same conclusion:

....[T]he 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. However, the Division recognizes the incongruity in the oversight over the licensing of performance rights and other copyrights in compositions and sound recordings and believes that the protections provided by the consent decrees could be addressed through a legislative solution that brings performance rights licensing under a similar regulatory umbrella as other rights. *The Division encourages the development of a comprehensive legislative solution that ensures a competitive marketplace and obviates the need for continued Division oversight of the PROs.*⁷⁸

The constant across these extensive, recent studies is an awareness of the thoroughgoing interdependence of the decrees and the framework that Congress has carefully constructed over more than a century. Reforms, if they are to come, cannot be accomplished piecemeal, and cannot be accomplished effectively solely within the four corners of the decrees. Indeed, Congressional efforts have continued with the MMA, which was developed in part to respond to these and industry calls for Congressional action. A bi-partisan group of Congressional leaders working on the MMA, too, have observed that “the marketplace for licensing public performance rights in musical works has been shaped for decades” by the consent decrees, and that termination of the decrees “without a clear alternative framework in place would result in serious disruption in the marketplace, harming creators, copyright owners, licensees, and consumers.”⁷⁹

⁷⁶ See <https://www.justice.gov/atr/ascap-and-bmi-consent-decree-review-request-public-comments-2015>.

⁷⁷ See <https://www.justice.gov/atr/ASCAP-BMI-comments-2015>

⁷⁸ DOJ 2016 Closing Statement, *supra* note 28, at 22 (emphasis added). See also Hurwitz, *supra* note 31:

...[T]he ASCAP and BMI consent decrees are worth keeping unless there is a way to remove them without disrupting the industry built upon them. Unfortunately, that may be an impossible task for the DOJ to accomplish on its own. Removing these consent decrees requires putting something new in their place. But fundamentally, the DOJ is not a regulatory agency: it has limited ability to craft the new rules that the industry would need to rely upon were the PRO consent decrees rescinded. That is a task that only Congress can accomplish.

⁷⁹ Letter from Senators Chuck Grassley and Dianne Feinstein, and Representatives, Bob Goodlatte and Jerrold Nadler, to Hon. Makan Delrahim, Assistant Attorney General, Antitrust Division, United States Department of Justice (Jun. 8, 2018). See also Letter from Senators Amy Klobuchar, Patrick Leahy, Richard Blumenthal & Cory A. Booker to Makan Delrahim, Assistant Attorney General, Antitrust Division, United States Department of Justice (Jun. 7, 2018) (“As the music industry has developed in reliance on [the ASCAP and BMI consent decrees] ... and music licensing legislation before Congress assumes the continued existence of the framework established under [the] consent decrees, we urge the Division to allow consumers, industry representatives, and members of Congress to negotiate and develop an alternative solution – without the threat of litigation or the market disruption that would result from altering the current regime – before the Division takes any action to weaken or terminate” the decrees.).

None of this is to suggest that further improvement might not be made through the consent decrees. But the Justice Department will have abdicated its role as a pro-competition advocate if it unilaterally and precipitously withdraws the decrees and ignores the invitation from Congress to instead engage fully in the process of reform despite the probability that it will take time and patience.

CONCLUSION

If competition is to continue to flourish, and perhaps even improve, it is essential that the Justice Department remain active and engaged in helping to establish market-based ground rules that will continue to promote competition and innovation as have the consent decrees.

Even assuming that the integrated system that now exists could be improved from the perspective of competition, however, the Justice Department, acting alone, lacks the ability to move the entire system in that direction by simply terminating or even modifying the consent decrees. Doing so would surely lead to uncertainty, disruption, and harmful - if unintended - consequences. It would also leave a vacuum that would be filled by legislation under stressed conditions and pointless litigation.