

**ASCAP'S RESPONSE TO THE DEPARTMENT OF JUSTICE'S
JUNE 5, 2019 REQUEST FOR PUBLIC COMMENTS
CONCERNING THE ASCAP AND BMI CONSENT DECREES**

August 9, 2019

The American Society of Composers, Authors and Publishers (“ASCAP”) respectfully submits these public comments, together with the annexed paper of Professor Kevin M. Murphy, in response to the Antitrust Division’s June 5, 2019 Request for Public Comments concerning the operative ASCAP Consent Decree (the “Second Amended Final Judgment” or “AFJ2”) and the consent decree governing the operations of Broadcast Music, Inc. (“BMI”) (the “BMI Consent Decree”).

ASCAP believes that the time has come to modernize its World War II–era Consent Decree to permit ASCAP to compete more fairly with its unregulated competitors and on a level playing field with BMI by ensuring that the ASCAP and BMI consent decrees, which today include different restrictions and requirements, are identical. To accomplish this, ASCAP proposes tearing up the ASCAP Decree (and the BMI Consent Decree) and immediately replacing both ancient decrees with a new, more limited Decree (the “Transitional Decree”) that would be operative for only a reasonable sunset period, at the end of which the Department of Justice’s ongoing regulation would end and ASCAP and BMI would compete in a free market. ASCAP’s proposal is in keeping with 40 years of Antitrust Division policy and practice acknowledging that perpetual decrees are not in the public interest and that consent decrees should terminate after ten years or less. It is also consistent with the Antitrust Division’s current judgment termination initiative, in which the Division has undertaken a review of more than 1,000 legacy antitrust consent decrees that no longer protect competition.

In addition to being in line with Division policy, the proposed transition period would allow both licensees and the PROs to work together to prepare over time for the sunset of the decrees. ASCAP recognizes that the termination of a 78-year-old decree is not to be undertaken casually and cannot be achieved instantaneously. That is why ASCAP is not advocating for

immediate termination of the Consent Decree but, instead, favors an orderly and deliberate process over a set transition period, which will minimize market disruption and allow ASCAP, its members, and licensees adequate time to prepare to operate in a free market.

To that end, the Transitional Decree would contain only four core requirements that will facilitate a smooth transition to a free market and that ASCAP understands are important to music users:

- (1) the non-exclusivity requirement;
- (2) the requirement to license all applicants upon request;
- (3) the Rate Court; and
- (4) the availability of alternatives to the blanket license.

Replacing AFJ2 with the Transitional Decree would enable the Division to harmonize the ASCAP and BMI decrees and eliminate the substantive differences between them, allowing ASCAP and BMI, for the first time, to be governed by consent decrees that are identical in scope, requirements, and language.

* * *

As set forth below, there are compelling legal and economic justifications for beginning the process of modernizing the ASCAP Consent Decree.

First, substantial changes in antitrust law over the last eight decades, including precedent rejecting challenges to ASCAP's licensing practices, necessitate restatement and, ultimately, sunset of the Decree. Originally entered in 1941, and last updated in 2001, the ASCAP Consent Decree is predicated on now-disfavored legal doctrines. Decades of transformational Supreme Court precedent and industrial organization economics have made obsolete many

provisions of a consent decree that was, in effect, designed to regulate licensing behavior that would no longer be considered *per se* unlawful or presumptively anticompetitive.

Second, the complex, competitive public performance rights marketplace that exists today bears little resemblance to the marketplace of 1941, when the Decree was originally entered, or of 2001, when the Decree was last modified. Indeed, developments since the entry of AFJ2—including new technologies, means of content delivery, and market entrants, none of which AFJ2 anticipated—have irreversibly changed the music industry and public performance rights licensing. ASCAP is now one of four domestic performing rights organizations (“PROs”). It is no exaggeration to say that songwriters, composers, music publishers, licensees, and consumers have more choice than at any other time in the history of recorded music. Along with those PROs, foreign PROs, and music publishers that directly license, ASCAP is one of many licensing options for both rights holders and music users. Technology has changed—and improved—how licensees of all kinds, and of varying resources, can monitor and control their music use. Furthermore, the music marketplace has undergone several transformations and expansions, with consolidation hitting multiple sectors of the economy and all types of licensees, from media companies, to background music services, to traditional ASCAP general licensees.

These pervasive changes in the industry apply with particular force to ASCAP’s licensees that are global media conglomerates (*e.g.*, Comcast/NBCU; AT&T/Time Warner/Turner, now WarnerMedia; Disney/Fox, which also owns the ABC television network; Liberty Media/SiriusXM/Pandora; Viacom, which acquired multichannel network AwesomenessTV and streaming service Pluto TV in the last year; and Discovery/Scripps) and tech mega-platforms (*e.g.*, Google, Facebook, Apple, Amazon, and Netflix). These multi-billion-dollar media giants are many times larger than ASCAP, and with extraordinary and concentrated market

share and negotiating power, they no longer need the protection of a consent decree that was designed to shield small users from the power of a dominant ASCAP whose only competitor was a nascent BMI. Notwithstanding these developments in the law and the marketplace, the Consent Decree has largely remained the same for eight decades: constraining ASCAP from exercising market power that it now does not have; regulating—in perpetuity—conduct that is no longer considered *per se* unlawful and, in fact, that is considered procompetitive; stifling ASCAP’s effort to innovate in the music licensing marketplace and leaving it as the only market actor prohibited from licensing to music users multiple rights to clear and perform music; and restricting ASCAP from engaging in licensing activities that its competitors engage in freely, often at the request of licensees. As a consequence, as Professor Murphy explains, ASCAP is prevented from engaging in efficient and procompetitive conduct.

ASCAP recognizes, however, that for 78 years the ASCAP Consent Decree (along with a similar decree that governs BMI) has been a staple of the performing rights marketplace—“a fact of economic and legal life in this industry.” *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 13 (1979) (“*CBS*”). Rights holders, music users, and PROs have operated in the shadow of the ASCAP and BMI decrees and, in varying degrees, organized their music use and licensing practices around them. We know that terminating the ASCAP Decree and moving to a free market cannot be accomplished without careful planning and consideration. That is why ASCAP proposes, to ensure an orderly transition and minimize disruption to rights holders and licensees, a two-step process, in which (i) the current Decree is immediately replaced with a Transitional Decree that includes only a set of four core Decree requirements upon which music users and rights holders currently rely and that uses identical language as any modified BMI decree, and (ii) the Transitional Decree is ultimately terminated after a reasonable sunset period.

Proceeding in this manner will ease the transition to a free market while immediately removing from the Decree the vast majority of restrictions and requirements that no longer serve a procompetitive purpose and constrain ASCAP's ability to compete effectively in the current dynamic market for public performance rights.

These public comments proceed in four parts:

In Part I, we provide an overview of the relevant legal doctrines undergirding the Consent Decree and explain how those doctrines and, thus, the Decree—which is rooted in the antitrust law of 1941, when the Decree was first entered—are inconsistent with modern antitrust law and policy. Indeed, much of the conduct at issue in the 1941 case against ASCAP, and addressed in the Decree to this day,¹ is no longer illegal under the antitrust laws that exist in 2019. As a result, there is no longer a doctrinal antitrust justification for the Decree.

In Part II, we describe developments in the market for public performance rights during the long life of the Decree. These changes—in how music is distributed and consumed, in the size and scale of licensees and the profile of ASCAP's competitors and licensees, and in licensees' demands for services—have eroded ASCAP's market power and fundamentally altered how ASCAP must operate in the marketplace. As a result, the Decree is no longer required to protect competition in the performing rights marketplace.

Part III summarizes the attached submission of Professor Kevin M. Murphy. In his paper, Professor Murphy shows how uneven regulation and industry changes have combined to distort the market for public performance rights, which has hampered innovation and impeded

¹ The Consent Decree was last updated in 2001 to address changes in the market for public performance rights since the entry of the prior Decree, the Amended Final Judgment (“AFJ”), in 1950. Neither the AFJ nor AFJ2 was modified to account for developments in the antitrust laws or to alleviate restrictions on ASCAP in light of those developments. *See generally* Dep't of Justice, Mem. of the United States in Support of the Joint Motion to Enter Second Amended Final Judgment, *United States v. Am. Soc'y of Composers, Authors & Publishers*, No. 41-cv-1395 (S.D.N.Y. Sept. 4, 2000), at 17–18.

ASCAP's ability to compete with its unregulated competitors. In determining whether and how to modify or terminate the Decree, Professor Murphy shows that the Division should consider which provisions, if any, currently further the Decree's purported objective—to mitigate the adverse effects on competition that may flow from collective licensing—and which provisions undermine that purpose, serving only to erode ASCAP's competitive position vis-à-vis its unregulated competitors.

Finally, in Part IV, we set forth our proposal for the future of the ASCAP Consent Decree: (i) immediate replacement of AFJ2 with a Transitional Decree that retains certain core features of AFJ2—non-exclusive licensing, “automatic” licensing upon request, the Rate Court, and alternatives to the blanket license, and (ii) ultimately, following a reasonable sunset period, termination of the Decree. Our proposed Transitional Decree would operate during the interim sunset period and enable an orderly transition to a free market. It would also immediately eliminate all of the provisions of AFJ2 that challenge ASCAP's ability to compete, innovate, and respond to modern licensee demands, while keeping in place during the transitional period those provisions of the Decree that are likely most important to licensees as they ready themselves for a free and competitive performing rights marketplace.

I. The Consent Decree Is Based on Antitrust Doctrines that Have Been Superseded by Case Law Developments

Led by Assistant Attorney General Thurman Arnold, the Justice Department filed its complaint against ASCAP on February 26, 1941. The complaint broadly attacked ASCAP's licensing practices, and, to a large extent, its very existence.

The legal doctrines underlying the Justice Department's 1941 complaint as a general matter, and as applied to ASCAP's particular licensing practices in particular, have changed significantly in the intervening years. Most importantly, in 1979, the Supreme Court

rejected a challenge by CBS to ASCAP and BMI’s blanket licensing practices. *See Broad. Music, Inc. v. CBS*, 441 U.S. 1 (1979). The Court found that, the practices of ASCAP and BMI were not price fixing within the meaning of the Sherman Act because they did not have “plainly anticompetitive” effects. 441 U.S. at 9. To the contrary, the Court recognized the valid, procompetitive justifications of the blanket license insofar as it was “a different product” and “accompanies the integration of sales, monitoring, and enforcement against unauthorized copyright use.” *Id.* at 20, 22. ASCAP and the blanket licensing system “developed together out of the practical situation in the marketplace” where a “middleman with a blanket license was an obvious necessity if the thousands of individual negotiations” by “thousands of users, thousands of copyright owners, and millions of compositions . . . were to be avoided.” *Id.* at 20–21. The ASCAP system resulted in “substantial lowering of costs” and increased ease of obtaining copyright permissions for thousands of users in the market. *Id.*²

Beyond the specific recognition of ASCAP’s procompetitive purposes and the rejection of the arguments that such arrangements constitute *per se* unlawful price fixing, antitrust doctrines relating to many of the specific licensing practices challenged in 1941 have evolved as well. Contractual exclusivity, viewed with such deep suspicion at the time of the *ASCAP* complaint, has since been recognized in judicial opinions as an often important means of securing joint investments and preventing free riding. In *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961), the Supreme Court recognized the benefits of exclusivity and held that exclusive dealing is not illegal under the antitrust laws unless it substantially forecloses

² On remand, the Second Circuit finally dismissed CBS’s challenge to the blanket license. Because the Supreme Court held that the blanket license was not a *per se* violation of the antitrust laws, its restraining effect had to be proved before liability under Section 1 of the Sherman Act could be found. The Second Circuit found no such restraining effect and, instead, affirmed the District Court’s original conclusion that CBS had failed to prove that the existence of the blanket license had restrained competition. *See Columbia Broad. Sys., Inc. v. Am. Soc’y Composers, Authors & Publishers*, 620 F.2d 930, 937–39 (2d Cir. 1980).

competition. Similarly, courts have held that exclusivity provisions among joint venturers are not presumptively suspect, but only potentially unlawful under the rule of reason when they harm competition. *See Am. Needle Inc. v. NFL*, 560 U.S. 183, 195–96 (2010); *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 170–71 (1964); *United States v. Visa USA, Inc.*, 344 F.3d 229, 238–39 (2d Cir. 2003); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 214 (D.C. Cir. 1986). As a business model, ASCAP passes muster under the rule of reason due to the substantial benefits of collective licensing to songwriters, composers, music publishers, and licensees. Without the existence of ASCAP and other PROs, the music licensing process for virtually all music users would be far less efficient.

The judicial belief that offering different contractual terms to different customers—or price discrimination—is uniformly harmful and anticompetitive has also subsided. In *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 36 n.4 (1984) (O’Connor, J, concurring in the judgment), Justice O’Connor’s concurring opinion recognized that “[p]rice discrimination may . . . decrease rather than increase the economic costs of a seller’s market power.” Reflecting the dramatic shift in judicial attitudes and doctrines from the earlier era, Judge Easterbrook has explained that, “[s]o far as the Sherman Act is concerned, [] there’s nothing wrong with price discrimination.” *R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper!*, 462 F.3d 690, 695 (7th Cir. 2006). Even in a case arising under the Robinson-Patman Act (which would have no application to the licensing of music performance rights), to prevail today in a secondary line price discrimination case (where the defendant’s discriminatory pricing is alleged to harm competition at the level of the firms receiving the discriminatory prices—the apparent concern in the *ASCAP* case), a plaintiff would have to show harm to the competitive process. *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 181 (2006) (“[W]e would resist interpretation geared

more to the protection of existing *competitors* than to the stimulation of *competition*.”). The mere fact of dealing differently with different sets of customers no longer constitutes suspect conduct under the antitrust laws. The undifferentiated hostility to price discrimination manifested in the 1941 *ASCAP* complaint—and reflected in the Decree to this day (*see* AFJ2 § IV(C))—no longer reflects prevailing antitrust doctrine.

Courts have also retreated from the view, strongly held in 1941, that dominant firms have duties to do business with all comers and that a dominant firm’s selective refusal to deal with certain customers is inherently suspect under the antitrust laws. In *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 407 (2004), the Supreme Court held that the “mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system.” Accordingly, absent exclusionary conduct, charging higher prices will not be found unlawful. *Id.* Courts have recognized that the *Trinko* doctrine includes the terms on which a company licenses its intellectual property to customers. *See, e.g., MiniFrame Ltd. v. Microsoft Corp.*, 551 Fed. App’x 1 (2d Cir. 2013). The courts’ unwillingness to apply *per se* analysis to refusals to deal extends to circumstances where market power may be created by joint ventures or other concerted action.

In sum, and as summarized in the table below, subsequent developments in antitrust law have substantially undermined the legal foundations of the 1941 *ASCAP* challenge, both in the general attitudes of the courts and agencies toward antitrust law and as to the specific practices under consideration. The Consent Decree is predicated on legal doctrines and attitudes that no longer hold. It is an edifice whose foundation has eroded. Reconsideration of the Consent Decree is therefore warranted, with *ASCAP*’s conduct evaluated under current precedent, by reference to current market conditions. *See, e.g., United States v. Am. Cyanamid Co.*, 719 F.2d 558, 567 (2d

Cir. 1983) (remanding “for the district court to apply the factors for analyzing the legality of a vertical merger set forth by” contemporary precedent and to “make findings of fact as to the current state of the . . . market”).

Comparison of ASCAP Complaint Allegations, Decree Provisions, and Modern Antitrust Law			
1941 Complaint Allegation	1941 Consent Decree Provision	AFJ2 Provision	Current Law
ASCAP was created, maintained, and utilized “as an instrumentality for promoting and maintaining” an illegal price fixing conspiracy. Compl. at 10, 12.	Section II includes 11 provisions enjoining ASCAP’s conduct.	Section IV includes eight terms enjoining ASCAP’s conduct. AFJ2 regulates licensing (AFJ2 §§ V–VIII), rate setting (AFJ2 § IX), and ASCAP’s relationship with its members (AFJ2 § XI).	ASCAP’s blanket licensing practices are not price fixing under the Sherman Act and have “plainly procompetitive effects.” <i>CBS</i> , 441 U.S. at 9, 20–21.
ASCAP entered into exclusive contracts in the form of refusing to allow individual copyright holders to license outside of ASCAP. Compl. at 11–12.	ASCAP shall not accept exclusive rights from members or issue exclusive licenses to licensees. 1941 Decree § II(1).	ASCAP cannot accept exclusive rights or issue exclusive licenses, and it cannot limit, restrict, or interfere with its members’ right to license directly. AFJ2 § IV(A)–(B).	Contractual exclusivity is an important means of securing joint investments and preventing free riding; exclusivity provisions among joint venturers are not presumptively suspect and are evaluated under the rule of reason. <i>See, e.g., Tampa Electric Co.</i> , 365 U.S. at 327; <i>Am. Needle</i> , 560 U.S. at 195–96.
ASCAP refused to license copyrighted music except for at the royalty rates demanded by ASCAP, and withdrew licenses from radio stations that refused to accept licenses on the prices and terms offered by ASCAP. Compl. at 16.	ASCAP shall not refuse to offer a license requested by the prospective licensee. 1941 Decree § II(6)–(7).	ASCAP must issue licenses upon request. AFJ2 § VI.	The Supreme Court has held that arrangements like ASCAP’s that lead to the introduction of new products (<i>i.e.</i> , the blanket license) can be lawful. <i>CBS</i> , 441 U.S. at 19–23; <i>see also Wallace v. IBM Corp.</i> , 467 F.3d 1104, 1107 (7th Cir. 2006) (“agreements that yield new products that would not arise through unilateral action are lawful”). Charging high prices, absent exclusionary conduct, is not unlawful. <i>See, e.g., Trinko</i> , 540 U.S. at 407 (“mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an

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			important element of the free-market system. . . . the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.”).
ASCAP discriminated on license terms among licensees by offering, for example, more advantageous terms to radio stations owned by newspapers than to other radio stations. Compl. at 16.	ASCAP shall not enter into, recognize as valid, or perform any license which results in discriminating in price or terms between similarly situated licensees. 1941 Decree § II(2).	ASCAP is enjoined from entering into, recognizing, enforcing or claiming any rights under any license for rights of public performance which discriminates in license fees or other terms and conditions between licensees similarly situated. AFJ2 § IV(C).	Courts no longer view price discrimination (offering different contractual terms to different customers) as uniformly harmful and anticompetitive. <i>See, e.g., Jefferson Parish</i> , 466 U.S. at 36 n.4; <i>R.J. Reynolds</i> , 462 F. 3d at 695.
ASCAP restricted membership to songwriters and composers who had written or composed and had regularly published not less than five copyrighted musical compositions and to publishers as were approved by the board of directors. Compl. at 11.	ASCAP shall not require as a condition precedent to eligibility for author or composer membership the regular publication of more than one musical composition or writing by any person who regularly practices the profession of writing music or lyrics. 1941 Decree § II(11).	ASCAP must take all applicants for membership meeting certain minimal requirements. AFJ2 § XI(A).	Courts recognize that, to accomplish certain goals, associations like ASCAP must have limiting membership criteria. Such limitations are permitted where the goal justifies self-regulation and the limitations are reasonably related to the goal. <i>See, e.g., Calif. Dental Ass’n v. FTC</i> , 525 U.S. 756, 778 (1999) (applying rule of reason to claims that dental association’s advertising restrictions were anticompetitive); <i>DM Research v. Coll. of Am. Pathologists</i> , 170 F.3d 53, 57 (1st Cir. 1999).

II. The Market for Public Performance Rights Has Changed Substantially Since 1941—and 2001

Just as the antitrust laws have evolved over the last several decades, the market for public performance rights is vastly different today than it was in 1941, when the Decree was first entered, or in 2001, when it was last modified. Technological innovations, powerful new market entrants, and shifting consumer preferences have fundamentally changed the music industry. At the same time, ASCAP now faces substantial new competition—from multiple domestic PROs, foreign PROs that are engaged in far-flung licensing outside of their home territories, and from rights holders that choose (and now have new means and opportunities) to license their works directly to music users. Consequently, the Decree is no longer required to protect competition in the performing rights marketplace.

Four particularly important recent developments have transformed the market for public performance rights in a fundamental manner that render the Decree superfluous from a competitive standpoint:

Changes in content distribution and consumption. There have been unprecedented developments in how music is distributed, consumed, and monetized—marked by paradigm-shifting changes to content delivery mechanisms and an explosion in the amount of music performed by licensees. Since the entry of the Consent Decree in 1941, entertainment has evolved in significant ways: First, from a world in which radio was dominant to one centered around television; then, cable and satellite offerings emerged, and the four broadcast television networks and traditional AM/FM radio stations faced new competition from more than 500 cable and satellite television networks and hundreds of satellite radio stations; today, digital streaming services eclipse all of these offerings.

Indeed, nothing has been more transformational to the entertainment industry (and to how music is performed) than the emergence of digital streaming services in the last 20 years. Between 1941 and 2001, most licensees—radio and television stations, cable networks, and bars and restaurants—publicly performed musical compositions on a “one-to-many” basis (*i.e.*, via a single linear stream to many listeners simultaneously). With the advent of new technologies, the increasing availability of wireless and broadband services, and the proliferation of devices capable of streaming audio and video content, the model for content distribution and consumption that held true for more than 60 years has materially changed over the last two decades, and with increasing rapidity in the past few years. These developments have led to the creation of huge online platforms that generate eye-popping revenues and profits for these digital giants. At the same time, royalties for songwriters and composers have not grown at a rate consistent with songwriters’ and composers’ ability to support themselves as professional creators. Although the proliferation of digital service providers has resulted in more music being performed than ever before, the fees paid for the use of that music have not kept pace.

Streaming music platforms offering customizable listening experiences, such as Pandora and Spotify, were nascent services in 2001; today, they have supplanted physical music sales and digital downloads and are now the primary means by which consumers listen to music.³ Satellite radio services that charged consumers annual or monthly subscription fees were a novelty in 2001; today, SiriusXM, the only remaining U.S. satellite service, is a standard feature in most

³ Ed Christman, *Nielsen 360 Study Finds Consumers Love Streaming Music, But Radio Still Strong*, BILLBOARD, Nov. 15, 2017, <https://www.billboard.com/articles/business/8031468/nielsen-music-360-2017-report-streaming>; Nielsen, *Time with Tunes: How Technology is Driving Music Consumption*, Nov. 2, 2017, <https://www.nielsen.com/us/en/insights/news/2017/time-with-tunes-how-technology-is-driving-music-consumption.html>; Nielsen Music, *U.S. Music 360, 2017 Reports Highlights*, at 7–8, available at <https://www.nielsen.com/us/en/insights/reports/2017/music-360-2017-highlights.html>. As of 2018, streaming music accounted for three quarters of U.S. music industry revenues. See Recording Industry Ass’n of Am., RIAA 2018 Year-End Music Industry Revenue Report at 1, <http://www.riaa.com/wp-content/uploads/2019/02/RIAA-2018-Year-End-Music-Industry-Revenue-Report.pdf>.

new cars—enabled, as of 2017, in more than 100 million vehicles and offering wall-to-wall, mostly commercial-free music on dozens of genre-oriented and artist-dedicated channels.⁴ Digital audiovisual services, like Hulu and Netflix, provide consumers with a previously unthinkable on-demand library of programming and have changed the way people watch television.

Consequently, consumers now can enjoy more music from more services on more devices than ever before—far more than traditional broadcasters ever offered. Nielsen reports that, in 2017, Americans spent on average 32 hours per week listening to music, primarily through digital streaming services—an increase of 5.5 hours over the previous year.⁵ As a result of these increased listening hours, and the wall-to-wall nature of digital services’ music output, these services perform a massive number of songs. In 2013, ASCAP processed 250 billion performances of its members’ musical works.⁶ In 2016, fueled in part by the explosion of digital services, ASCAP processed more than *one trillion performances*, a 300-percent increase in just three years.⁷ That number continues to increase, placing significant resource demands on ASCAP.

Emergence of new, sophisticated licensees with dominant market positions. With market consolidation and the emergence of global media conglomerates and tech mega-platforms, ASCAP now routinely negotiates with large, sophisticated music users that dominate their respective industries and are able to exercise substantial buyer power. Consider just a handful of ASCAP’s most significant licensees, each of which dwarfs ASCAP in its scale and revenue:

⁴ Sirius XM Holdings Inc., Annual Report (Form 10-K), Letter to Shareholders, at 2 (Jan. 31, 2018).

⁵ Nielsen Music, U.S. Music 360, 2017 Reports Highlights, at 7, *available at* <https://www.nielsen.com/us/en/insights/reports/2017/music-360-2017-highlights.html>; Nielsen, *Time with Tunes: How Technology is Driving Music Consumption*, Nov. 11, 2017, <https://www.nielsen.com/us/en/insights/news/2017/time-with-tunes-how-technology-is-driving-music-consumption.html>.

⁶ ASCAP 2013 Annual Report at 3, https://www.ascap.com/~/_media/files/pdf/about/annual-reports/2013-annual-report.pdf.

⁷ ASCAP 2016 Annual Report at 5, https://www.ascap.com/~/_media/files/pdf/about/annual-reports/2016-annual-report.pdf.

Comcast/NBCU, Disney/Fox, Viacom, Apple Music, YouTube, Amazon, Spotify, SiriusXM/Pandora, the radio industry, and Netflix.

ASCAP is a member-run PRO of more than 720,000 songwriters, composers, and music publishers that operates on a not-for-profit basis. Although ASCAP collected approximately \$1.227 billion in revenues in 2018, consistent with its non-profit membership model, more than \$1.109 billion—or about 90 percent of collected revenues—was distributed as royalty payments to ASCAP members.⁸

By contrast, Apple, which owns Apple Music, has been valued as high as \$1 trillion, and the Apple Music service has more than 50 million paid subscribers.⁹ Amazon, which operates the Prime streaming and Music Unlimited Services, and also offers video services for rent or purchase, has also hit the \$1 trillion valuation mark.¹⁰ And Alphabet, parent company of Google and owner of YouTube and Google Play, is close behind Apple and Amazon, valued at \$851 billion.¹¹ Comcast/NBCU, a global media conglomerate that offers cable communications services, cable networks, broadcast networks, theme parks, and filmed entertainment, is valued at \$192 billion.¹² In April 2018, Spotify, the leading global digital music service and the largest such service in the United States, began trading on the New York Stock Exchange, in the largest direct

⁸ Press Release, ASCAP Annual Revenue and Distributions Continue to Break Records: 2018 Revenue Tops \$1.227 Billion; Distributions Hit \$1.109 Billion (May 1, 2019), <https://www.ascap.com/press/2019/05/05-01-financials-release>.

⁹ Adam Shell, *Who could join Apple in Wall Street's \$1 trillion stock club?*, USA TODAY, Aug. 5, 2018, <https://www.usatoday.com/story/money/2018/08/05/amazon-google-microsoft-within-striking-distance-joining-apple-wall-street-1-trillion-stock-club/899066002/>; Anne Steele & Tripp Mickle, *Apple Music Overtakes Spotify in Paid U.S. Subscribers*, WALL ST. J., Apr. 5, 2019, <https://www.wsj.com/articles/apple-music-overtakes-spotify-in-u-s-subscribers-11554475924>.

¹⁰ David Streitfeld, *Amazon Hits \$1,000,000,000,000 in Value, Following Apple*, N.Y. TIMES, Sept. 4, 2018, <https://www.nytimes.com/2018/09/04/technology/amazon-stock-price-1-trillion-value.html>.

¹¹ Shell, *supra* note 9.

¹² #57 Comcast on the Forbes Top 100 Digital Companies List 2018, FORBES, May 15, 2019, <https://www.forbes.com/companies/comcast/?list=top-digital-companies#43a5f41952c1>.

listing on record, with the company then valued at more than \$26 billion.¹³ In July 2018, shareholders agreed to the \$71.3 billion acquisition of 21st Century Fox by the Walt Disney Company.¹⁴ The combined Disney/Fox owns the ABC television network, multiple cable networks and local television stations, and a significant stake in streaming service Hulu; in May 2019, it agreed to acquire Comcast’s one-third share of Hulu, which would give it full ownership of the service.¹⁵ In February 2019, SiriusXM acquired Pandora Media for \$3.5 billion—a combination of a satellite radio service and a digital audio service that makes it “the world’s largest audio entertainment company.”¹⁶ Viacom acquired AwesomenessTV, a youth-oriented digital media company and multi-channel network, in 2018, and it purchased Pluto TV, a streaming service, in 2019.¹⁷ As a result of consolidation in the radio industry, four companies control nearly 2,000 radio stations across the United States.¹⁸ And Netflix has nearly 150 million paying

¹³ Chuck Mikolajczak & Stephen Nellis, *Spotify shares jump in record-setting direct listing*, REUTERS, Apr. 3, 2018, <https://www.reuters.com/article/us-spotify-ipo/spotify-shares-jump-in-record-setting-direct-listing-idUSKCN1HA12B>.

¹⁴ Edmund Lee & Brooks Barnes, *Disney and Fox Shareholders Approve Deal, Ending Corporate Duel*, N.Y. TIMES, July 27, 2018, <https://www.nytimes.com/2018/07/27/business/media/disney-fox-merger-vote.html>.

¹⁵ Lee & Barnes, *supra* note 14; Edmund Lee, *Disney to Buy Comcast’s Hulu Stake and Take Full Control of Streaming Service*, N.Y. TIMES, May 14, 2019, <https://www.nytimes.com/2019/05/14/business/media/disney-hulu-comcast.html>.

¹⁶ Jem Aswad, *Sirius XM Completes Acquisition of Pandora*, VARIETY, Feb. 1, 2019, <https://variety.com/2019/biz/news/sirius-xm-completes-acquisition-of-pandora-1203125882/>.

¹⁷ Todd Spangler, *Viacom Acquires AwesomenessTV; CEO Jordan Levin to Depart*, VARIETY, July 27, 2018, <https://variety.com/2018/digital/news/viacom-acquires-awesomenesstv-jordan-levin-exit-1202888377/>; Dade Hayes, *Viacom Closes \$340M Pickup of Pluto TV*, DEADLINE, Mar. 4, 2019, <https://deadline.com/2019/03/viacom-closes-340m-pickup-of-pluto-tv-1202568860/>.

¹⁸ iHeartMedia, Inc., the largest owner of radio stations in the United States, owns more than 850 stations. *See Our Stations*, iHeartMedia, Inc., <https://www.iheartmedia.com/iheartmedia/stations> (last visited Aug. 7, 2019). Cumulus Media owns and operates 428 radio stations. *See Cumulus Media*, <https://www.cumulusmedia.com/> (last visited Aug. 7, 2019). Townsquare Media, Inc.’s local media assets include 321 radio stations. *See Local Media*, Townsquare Media, <http://www.townsquaremedia.com/local-media/overview> (last visited Aug. 7, 2019). Entercom owns more than 235 radio stations. *See Entercom*, <https://entercom.com/> (last visited Aug. 7, 2019). Due to the size of iHeart, it would make no economic sense for ASCAP to withhold a license even in the absence of the Consent Decree.

subscribers, yearly revenue of nearly \$16 billion, and a market cap of approximately \$150 billion.¹⁹

With their substantial buyer power, these large, sophisticated licensees are able to negotiate acceptable license terms and conditions with ASCAP and other licensors on an arm’s-length basis.

Comparison of 2018 Revenues and Cash Reserves – ASCAP vs. Major Licensees²⁰		
Firm	2018 Revenues	Cash Reserves
Apple	\$265.595 billion	\$25.913 billion
Amazon	\$232.887 billion	\$31.750 billion
Alphabet	\$136.819 billion	\$16.701 billion
Comcast/NBCU	\$94.507 billion	\$3.814 billion
Netflix	\$15.794 billion	\$3.794 billion
Viacom	\$12.943 billion	\$1.557 billion
Spotify	€5.259 billion	€891 million
SiriusXM	\$5.771 billion	\$54.431 million
ASCAP	\$1.227 billion	\$0 ASCAP keeps no profits or cash reserves

New opportunities for licensees to engage in direct and source licensing. Many licensees continue to prefer to license works through ASCAP and other PROs because they value the efficiencies and wide selection offered by blanket licensing and the services provided by the PROs. For some licensees, however, large-scale direct licensing and source licensing and buyouts

¹⁹ Netflix Quarterly Shareholder Letter at 1 (Apr. 16, 2019), https://s22.q4cdn.com/959853165/files/doc_financials/quarterly_reports/2019/q1/FINAL-Q119-Shareholder-Letter.pdf; Netflix Inc., Annual Report (Form 10-K) at 17 (Jan. 29, 2019); Eric J. Savitz, *Stream This: Netflix Stock Could Double From Here, Analyst Says*, BARRON’S, May 31, 2019, <https://www.barrons.com/articles/netflix-stock-could-double-again-analyst-says-51559309461>.

²⁰ See Press Release, ASCAP Annual Revenue and Distributions Continue to Break Records: 2018 Revenue tops \$1.227 Billion; Distributions Hit \$1.109 Billion (May 1, 2019), <https://www.ascap.com/press/2019/05/05-01-financials-release>; Alphabet Inc., Annual Report (Form 10-K) at 24, 46 (Feb. 5, 2019); Amazon.com Inc., Annual Report (Form 10-K) at 17, 39 (Feb. 1, 2019); Apple Inc., Annual Report (Form 10-K) at 21, 40 (Nov. 5, 2018); Comcast Corp., Annual Report (Form 10-K) at 33, 70 (Jan. 31, 2019); Netflix Inc., Annual Report (Form 10-K) at 17, 43 (Jan. 29, 2019); Pandora Media, Inc., Form 8-K at 4 (Jan. 18, 2019); Pandora Media, Inc., 10-Q at 3 (Nov. 5, 2018); Sirius XM Holdings Inc., Annual Report (Form 10-K) at 24 (Jan. 30, 2019); Spotify Technology S.A., Annual and transition report of foreign private issuers (Form 20-F) at 5 (Feb. 12, 2019); Viacom Inc., Annual Report (Form 10-K) at 34, 64 (Nov. 16, 2018).

have become more viable alternatives to PRO licensing—aided in part by technological changes and the emergence of new services that make such licensing more efficient.

Television stations and cable networks have long engaged in direct and source licensing—choosing to license performance rights directly from the rights holder for music performed in programs they produce and broadcast.²¹ Hundreds of local television stations engage in direct licensing that allows those stations to take a per-program rather than blanket license from ASCAP. Discovery, which operates popular cable channels TLC, Animal Planet, HGTV, Food Network, OWN, and Travel Channel, enters into production arrangements with third parties and wholly owned production studios to develop and produce content. Under these arrangements, Discovery “retain[s] editorial control and own[s] most or all of the rights” to the content, in exchange for Discovery’s payment of all development and production costs.²² ESPN directly licenses most of the music performed across its networks, relying on PRO blanket licenses principally to cover performances of incidental and ambient music.²³ And now the next generation of audio visual programming suppliers—digital audio visual streaming services—are following in the footsteps of traditional broadcasters. Netflix, which produces a substantial amount of original content, has increased its use in its original programming of directly licensed music and music licensed at the source and in some cases bought out completely; in 2017, Netflix reached an

²¹ Indeed, the requirement that ASCAP offer a per-program license as an alternative to the blanket license is in the Consent Decree “to ensure that broadcasters, who generally have some ability to anticipate and control the music they perform, could reduce the fees they would otherwise owe to ASCAP by substituting music from another PRO’s repertory or obtaining licenses directly from rights holders.” Mem. of the United States in Support of the Joint Motion to Enter Second Amended Final Judgment, *supra* note 1, at 23–24.

²² Discovery, Inc., Annual Report (Form 10-K), at 18 (Mar. 4, 2019).

²³ Anandashankar Mazumdar, *ESPN Settles Dispute Over Music Licensing Fees*, INTELLECTUAL PROPERTY ON BLOOMBERG LAW, Feb. 2, 2017, <https://www.bna.com/espn-settles-dispute-n57982083202/>.

agreement with BMG under which BMG will exclusively manage and administer Netflix's music publishing rights for its original programming outside of the United States.²⁴

Digital audio services are also engaging in an increased amount of direct licensing. As discussed below (*see, infra*, Part IV), these services require several licenses in addition to public performance licenses to operate their services, including licenses for sound recordings, mechanical rights, and lyric display rights. Thus, licensing directly from publishers, who can offer mechanical rights in addition to public performance rights in a single license package, is an efficient and attractive licensing option for these digital licensees. To that end, Pandora has entered into direct publishing deals with at least six major and mid-major music publishers and has publicly touted the benefits of these licenses to their shareholders.²⁵ Similarly, Apple Music and YouTube have entered into multiple direct publisher licenses.²⁶ Facebook and Amazon Prime Music have not only entered into direct licenses with major music publishers; each has entered into thousands of direct licenses with independent publishers with the help of the Harry Fox Agency (now owned by SESAC) in the case of Facebook and MRI in the case of Amazon.

²⁴ David Z. Morris, *Netflix Original Content Has Grown By 88% This Year, But Old TV Still Rules the Remote*, FORTUNE, Aug. 12, 2018, <http://fortune.com/2018/08/12/netflix-original-content-has-grown-by-88-this-year-but-old-tv-still-rules-the-remote/>; Press Release, US: Netflix signs exclusive music publishing deal with BMG (Feb. 2, 2017), <https://www.bmg.com/us/news/netflix-signs-exclusive-music-publishing-agreement.html>.

²⁵ Press Release, Pandora Strikes US Licensing Deal with BMG (Sept. 11, 2014), <http://investor.pandora.com/file/Index?KeyFile=25235409>; Press Release, Sony/ATV Music Publishing and Pandora Sign Unprecedented Licensing Agreement (Nov. 5, 2015), <http://investor.pandora.com/file/Index?KeyFile=31758502>; Press Release, SONGS Music Publishing and Pandora Sign Licensing Agreement Continuing Pandora's Advancements into Direct Deals (Dec. 8, 2015), <http://investor.pandora.com/file/Index?KeyFile=32168517>; Press Release, Warner/Chappell Music and Pandora Sign Licensing Agreement (Dec. 15, 2015), <http://investor.pandora.com/file/Index?KeyFile=32247176>; Press Release, Downtown Music Publishing and Pandora Sign Licensing Agreement Continuing Pandora's Advancements Into Direct Deals (Dec. 21, 2015), <http://investor.pandora.com/file/Index?KeyFile=32322440>; Atlas Music Publishing and Pandora Sign Licensing Agreement (Dec. 23, 2015), <http://investor.pandora.com/file/Index?KeyFile=32349168>.

²⁶ *See Services, Digital, Sony/ATV Music Publishing*, <https://www.sonyatv.com/en/services> (last visited Aug. 7, 2019) (citing direct deals with Spotify, Apple Music, Google Play, and YouTube, among others); Press Release, Downtown x YouTube | Direct Performance License (Apr. 12, 2016), <https://www.dmpgroup.com/news/2016/04/downtown-x-youtube-direct-performance-license> (announcing direct deal for performing rights between YouTube and Downtown Music Publishing).

In addition, thanks to new technologies and services that aid in the tracking of music performances, all licensees—particularly large digital services and cable networks that have devoted significant technological resources to these practices—can more easily monitor their music use, enabling them to perform only those works encompassed by their direct licenses and to license around the PROs, including ASCAP.²⁷ Comprehensive rights databases maintained by the PROs and certain music publishers²⁸ also have made direct licensing a more attractive and sustainable option for licensees and eased licensing friction.²⁹ Through their access to these databases, licensees have unprecedented transparency into the contents of licensors’ repertoires and catalogs and the ownership of the songs they perform. Despite unfounded complaints of many

²⁷ Music Reports, Inc. (MRI) provides a wide range of services to licensees, including cue sheet management, per-program license administration, music rights clearance, and song claiming. See Music Reports, <https://www.musicreports.com/?rt=c1> (last visited Aug. 7, 2019); Ed Christman, *Publishing Briefs: Music Reports Inc. Administered Over \$500M in 2016*, BILLBOARD, Mar. 2, 2017, <https://www.billboard.com/articles/business/7709314/publishing-briefs-music-reports-mri-warner-chappell>. BMAT provides music monitoring services to PROs, labels, music publishers, digital services, and other media companies. See About, BMAT, <https://www.bmat.com/#home-about> (last visited Aug. 7, 2019); Clients, BMAT, <https://www.bmat.com/bmat-clients/> (last visited Aug. 7, 2019). LyricFind provides a “customized search solution” to its licensees that enables them to identify music based on lyrics. See About LyricFind, LyricFind, <https://www.lyricfind.com/index.php?id=202> (last visited Aug. 7, 2019); see also *Broad. Music, Inc. v. Pandora Media, Inc.*, 140 F. Supp. 3d 267, 283 (S.D.N.Y. 2015) (describing how Pandora used LyricFind and repertoire databases maintained by ASCAP and BMI to avoid performing works published by BMG).

²⁸ ASCAP is committed to providing transparency about the contents of the ASCAP repertoire and, to that end, has made several improvements to its publicly available ACE database in the last several years, including (i) upgrading ACE to permit users to view or download the catalogs of any ASCAP writer or publisher member and (ii) displaying ownership share information on ACE. See ACE Repertory, ASCAP, <https://www.ascap.com/repertory> (last visited Aug. 7, 2019). BMI, SESAC, GMR, and major publishers also offer public databases that enable licensees to search their repertoires and understand the scope of rights covered under their respective licenses. See, e.g., BMI Repertoire, BMI, <https://repertoire.bmi.com/StartPage.aspx> (last visited Aug. 7, 2019); Repertory, SESAC, <https://www.sesac.com/#/repertory/search> (last visited Aug. 7, 2019); Catalog, Global Music Rights, <https://globalmusicrights.com/Catalog> (last visited Aug. 7, 2019); Music Search, Universal Music Publishing Group, <https://www.umusicpub.com/us/Digital-Music-Library/search> (last visited Aug. 7, 2019).

²⁹ See Marah Eakin, *An insider explains how songs get into TV shows and movies*, THE A.V. CLUB, June 16, 2015, <https://tv.avclub.com/an-insider-explains-how-songs-get-into-tv-shows-and-mov-1798281002> (interview with music supervisor describing how technology and database transparency have facilitated TV licensing: “We used to have to call BMI or ASCAP on the phone, and we were sent to a research department and would ask who owned the song, and there’d be another phone or fax number—so there’d be a lot of faxing and phoning and, by nature, you’d lose days. You’d lose clearance days on a tight TV schedule. Now, we go to the great websites that BMI or ASCAP have and everything is pretty easy. A lot of clearances are digital so that moves faster. The mechanics, as far as licensing, have really opened up.”).

licensees and their representatives, ASCAP’s public-facing ACE repertory database shows the title and necessary licensing information for every work properly registered with and available for licensing by ASCAP. Further, ASCAP is actively working to improve the quality of the information available to licensees and rights holders. In 2017, ASCAP announced that it had joined forces with BMI on a multi-phase project to reconcile the two PROs’ databases and, in the future, deliver to rights holders and licensees ownership-share information reconciled between the two PROs.

Increased competition among licensors, most of which are not subject to consent decrees. ASCAP also faces increased competition from other PROs and from its own members. Where ASCAP once was “the only significant organization offering copyright administration services for performance rights to rights holders in the United States,”³⁰ it now faces robust competition from three domestic PROs: BMI, which has market share almost as large as that of ASCAP; SESAC, which is now owned by private equity giant Blackstone, has increased the size and prominence of its repertory in the last 20 years, and purchased the Harry Fox Agency in 2015; and a new, “boutique” PRO, Global Music Rights, Inc. (“GMR”), which licenses the musical works of a small but high-profile group of songwriters, composers, and publishers with valuable catalogs and sustained radio and digital airplay.³¹ Only BMI is subject to a consent decree; SESAC and GMR remain unregulated.

³⁰ Mem. of the United States in Support of the Joint Motion to Enter Second Amended Final Judgment, *supra* note 1, at 16.

³¹ ASCAP represents more than 720,000 songwriters, composers, and music publishers and has a repertory of more than 11.5 million songs. *See* About Us, ASCAP, <https://www.ascap.com/about-us> (last visited Aug. 7, 2019). BMI’s repertory includes 14 million musical works created and owned by more than 900,000 songwriters, composers, and music publishers. *See* About, BMI, <https://www.bmi.com/about> (last visited Aug. 7, 2019). SESAC has approximately 30,000 affiliates, including Adele, Bob Dylan, and Neil Diamond, and a repertory of more than 400,000 songs. *See* About SESAC, SESAC, <https://www.sesac.com/#/our-history> (last visited Aug. 7, 2019). GMR has a repertory of approximately 41,000 songs, written by 81 songwriters and composers, including Bruce Springsteen, Bruno Mars, John Lennon, Pharrell Williams, and Lindsey Buckingham. *See* Global Music Rights, <https://globalmusicrights.com> (last visited Aug. 7, 2019). Only recently, another putative PRO

Since the Consent Decree was last updated, foreign PROs, such as SOCAN in Canada, PRS for Music in the United Kingdom, and SACEM in France, also have increased in size, expanded their range of services, and extended their businesses beyond their borders. These foreign PROs represent hundreds of thousands of rights holders, license on both a national and multi-territory basis, and—in contrast to ASCAP, which is restricted under the Consent Decree—are able to provide a full spectrum of rights management services to affiliates and licensees.³² They are also collaborating with each other, and with publishers, in order to expand their reach further: In 2016, PRS, STIM in Sweden, and GEMA in Germany launched the “world’s first integrated licensing and processing hub,” which provides matching and processing services, middle-office administrative services, and “consolidated licensing” of PRS, STIM, and GEMA’s multi-territory, pan-European online rights for their 250,000 members and affiliates.³³ Several foreign hubs—including ARESA/GEMA, SOLAR/PRS, SACEM, and MINT/SESAC—also have partnered with music publishers Sony, BMG, UMPG, and Warner Chappell to license those publishers’ mechanical and performance rights to digital services on a multi-territorial basis.

ASCAP also faces competition from its own members in the form of increased direct licensing. (*See, supra*, pp. 17–19.) Indeed, Sony/ATV Music Publishing, ASCAP’s largest

competitor, Pro Music Rights, has emerged. *See* Pro Music Rights, <https://promusicrights.com/> (last visited Aug. 7, 2019).

³² For example, SOCAN, which has 150,000 affiliates, licenses both public performance rights and reproduction rights. *See* Rights Management, SOCAN, <http://www.socan.com/what-socan-does/rights-management/> (last visited Aug. 7, 2019). PRS for Music is comprised of Performing Right Society (PRS), which pays royalties to members when their works are broadcast, publicly performed, streamed, or downloaded, and Mechanical-Copyright Protection Society (MCPS), which pays royalties to members when their music is copied as a CD or DVD, streamed or downloaded, or used in television, film, or radio. *See* PRS and MCPS, PRS for Music, <https://www.prsformusic.com/what-we-do/prs-and-mcps> (last visited Aug. 7, 2019). SACEM in France collects and distributes royalties for public performance and reproduction rights to its more than 169,000 members and licenses digital rights on a multi-territorial basis. *See* SACEM in a Nutshell, SACEM, <https://societe.sacem.fr/en/in-short> (last visited Aug. 7, 2019); SACEM Innovation, SACEM, <https://societe.sacem.fr/en/innovation> (last visited Aug. 7, 2019).

³³ *See* ICE: The world’s first integrated licensing and processing hub, PRS for Music, <https://www.prsformusic.com/what-we-do/who-we-work-with/ice> (last visited Aug. 7, 2019).

publisher member, “has entered into direct deals around the world with virtually all of the significant digital music services including Spotify, Apple Music, SoundCloud, Deezer, Google Play, YouTube and many others.”³⁴ According to the publication *Music and Copyright*, the major publishers account for 58.8 percent of worldwide performance revenues. Each of the major publishers controls a very significant repertory in terms of size and can license its public performance rights directly,³⁵ and because they are not subject to consent decrees, they are free to enter into licenses covering both public performance and mechanical rights.

Rights holders thus have more options than ever before with respect to how to license their works. Similarly, licensees have multiple options for securing public performance rights and can choose to license around ASCAP—a fact that will require ASCAP to negotiate license agreements with competitive rates and other terms and conditions in a free market without the Consent Decree.³⁶

³⁴ Services, Digital, Sony/ATV Music Publishing, <https://www.sonyatv.com/en/services> (last visited Aug. 7, 2019).

³⁵ See *UMG and WMG make recorded-music market share gains, Sony outperforms in publishing*, MUSIC & COPYRIGHT, May 15, 2018, <https://musicandcopyright.wordpress.com/2018/05/15/umg-and-wmg-make-recorded-music-market-share-gains-sony-outperforms-in-publishing/>. Sony/ATV Music Publishing owns or administers more than three million copyrights. See About, Sony/ATV Music Publishing, <https://www.sonyatv.com/en/about> (last visited Aug. 7, 2019). Universal Music Publishing Group has a catalog of more than three million songs. See Film, TV + Media, Universal Music Publishing Group, <https://www.umusicpub.com/us/FilmAndTv.aspx> (last visited Aug. 7, 2019). BMG represents three million works. See Music Publishing, BMG, <https://www.bmg.com/us/publishing.html> (last visited Aug. 7, 2019). Warner Chappell Music represents more than one million copyrights worldwide. See About Us, Warner Chappell Music, <http://www.warnerchappell.com/about> (last visited Aug. 7, 2019). Kobalt represents more than 600,000 copyrights. See Press Release, Kobalt Music Enters Into Strategic Licensing and Distribution Deal with NetEase in China (Dec. 4, 2017), <https://www.kobaltmusic.com/press/kobalt-music-enters-into-strategic-licensing-and-distribution-deal-with-netease-in-china>.

³⁶ The Division recognized the power of competition from other licensors to constrain ASCAP in AFJ2, which vacated the 1960 Order and thus eliminated continued oversight of ASCAP’s distribution practices by the Division and the Court. In its brief in support of AFJ2, the Division explained:

Moreover, the market for administering performance rights on behalf of writers and publishers has changed significantly since the 1960 Order was entered. BMI now has a market share roughly equivalent to ASCAP’s and provides rights holders with a significant competitive alternative to ASCAP. SESAC, although still substantially smaller than the other two PROs, has been growing rapidly and has succeeded in attracting a number of well-known songwriters. Competition from BMI and SESAC is likely to be far more effective in disciplining ASCAP’s distribution practices than regulation by the Department or

* * *

These developments show that the Consent Decree has fulfilled its purpose and enabled the growth of a robust, competitive market for public performance rights, thus justifying termination.³⁷ Transitioning from a Decree-regulated market to a free market will encourage continued innovation in the licensing marketplace, promote the benefits of collective licensing, and advance the public interest in free competition.

Of course, replacing AFJ2 with the Transitional Decree and ultimately terminating the Decree will not relieve ASCAP of its obligations to comply with the law. Free-market licensing will not free ASCAP from the legal and economic restraints of the antitrust laws nor from future enforcement actions by the Division or private antitrust litigation if ASCAP were to violate those laws.³⁸ Here, the experiences of SESAC and GMR are illustrative. Neither PRO is regulated by a consent decree, but both SESAC and GMR have been defendants in private antitrust

the Court. If a member becomes dissatisfied with the way ASCAP distributes its revenue, it can move to one of the other PROs.

Mem. of the United States in Support of the Joint Motion to Enter Second Amended Final Judgment, *supra* note 1, at 42.

³⁷ Federal Rule of Civil Procedure 60(b)(5) provides that “the court may relieve a party . . . from a final judgment, order, or proceeding” where “applying it prospectively is no longer equitable.” Fed. R. Civ. P. 60(b); *see also Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 380, 393 (1992) (finding that “a significant change in facts or law warrants revision of the decree and that the proposed modification is suitably tailored to the changed circumstance”); *United States v. Eastman Kodak Co.*, 63 F.3d 95, 101–02 (2d Cir. 1995) (“In most cases, the antitrust defendant should be prepared to demonstrate that the basic purpose of the consent decrees—the elimination of monopoly and unduly restrictive practices—have been achieved. . . . Of course, cases may arise in which modification or termination of a consent decree is appropriate even though the purpose of the decree has not been achieved. For example, there may be significant changes in the factual or legal climate.”).

³⁸ *See United States v. Loew’s, Inc.*, 783 F. Supp. 211, 214 (S.D.N.Y. 1992) (terminating antitrust decree where government noted that “motion picture exhibit industry is fully subject to the antitrust laws of general application,” and therefore “recurrence of the type of anticompetitive conduct enjoined by the . . . Judgment would still be prohibited under existing law”); *United States v. Eastman Kodak Co.*, 853 F. Supp. 1454, 1478 (W.D.N.Y. 1994), *aff’d*, 63 F.3d 95 (2d Cir. 1995) (in granting application to eliminate section of decree that prohibited sale of “private label” film, district court stated that “elimination of Section X does not mean that Kodak will no longer be subject to the antitrust laws of this country. If Kodak or its competitors were to engage in predatory pricing, the Government may exercise its responsibility to file suit to enforce existing statutory barriers to anticompetitive behavior”).

lawsuits brought by music users challenging their licensing practices.³⁹ Although the lawsuit against GMR is still pending, the cases brought against SESAC in the last decade resulted in various agreed-upon conduct restrictions that will govern SESAC's dealings with local television stations and radio stations through 2035 and 2034, respectively—demonstrating that consent decrees are not the only means to attempt to challenge PRO conduct.⁴⁰

III. An Asymmetrical Regulatory Environment Creates Market Distortions

As set forth in the accompanying economic paper of Professor Kevin M. Murphy, a regulatory framework like that currently operative in the public performance rights marketplace—in which ASCAP and BMI operate under consent decrees but other PROs and licensors do not—distorts the marketplace and curbs innovation. As Professor Murphy explains, there is little rationale for regulatory oversight of PROs given the current, competitive licensing marketplace. In addition, as he observes, regulation is inherently less efficient and more costly than competition. *See* Murphy at 3–5. In addition, continued regulation (and the implicit subsidization of ASCAP's non-regulated competitors) necessarily constrains ASCAP's ability to compete and may, in the intermediate and long run, erode ASCAP's ability to provide the innovative services that its customers demand and deserve in the rapidly changing market for the licensing of performance rights. *See id.*

Professor Murphy notes that these constraints could be particularly harmful to a firm like ASCAP, which functions as an intermediary and competes for both incoming rights (from

³⁹ *See Meredith Corp. v. SESAC, LLC*, 1 F. Supp. 3d 180 (S.D.N.Y. 2014) (granting in part and denying in part SESAC's motion for summary judgment); *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650 (S.D.N.Y. 2015) (approving settlement); *Radio Music License Committee, Inc. v. SESAC, Inc.*, 29 F. Supp. 3d 487 (E.D. Pa. 2014) (granting in part and denying in part SESAC's motion to dismiss); Complaint, *Radio Music License Committee, Inc. v. Global Music Rights, LLC*, No. 16-cv-06076 (E.D. Pa. Nov. 18, 2016).

⁴⁰ *Meredith*, 87 F. Supp. 3d at 657–58; Settlement Agreement, *Radio Music License Committee, Inc. v. SESAC Inc., et al.*, No. 12-cv-05807 (E.D. Pa.), <http://dehayf5mhw1h7.cloudfront.net/wp-content/uploads/sites/893/2017/09/22194517/Final-SESAC-RMLC-Settlement-Agreement.pdf>.

rights holders) and outgoing rights (to licensees). *Id.* at 6. While subject to regulation that interferes with its ability to serve its members and music users, ASCAP could lose out to its unregulated competitors in competition for these rights, even though ASCAP is more efficient than unregulated competitors. *Id.* at 7. Similarly, regulation that requires an intermediary like ASCAP to serve everyone—to accept all applicants for membership and licensing—imposes costs on ASCAP and its members and encourages users to take less efficient forms of license. *Id.* at 7–8.

For these reasons, Professor Murphy concludes that the Division should eliminate unnecessary regulation of ASCAP, understanding that, absent the Decree, ASCAP would still be subject to the antitrust laws. *Id.* at 9–14. In determining what current regulation is unnecessary and should be eliminated, the Division should be guided by whether the provisions of AFJ2 under consideration further (or undermine) the Decree’s purported objective: to mitigate or eliminate the adverse effects on competition that may flow from collective licensing. *Id.* at 9. For example, regulation that constrains ASCAP’s ability to compete with other PROs and its own members, that prevents ASCAP from adopting practices used by its unregulated competitors, or that reduces ASCAP’s opportunities to license through the marketplace should be eliminated. *Id.* at 10–12. Such restrictions do not prevent anticompetitive conduct but instead prevent ASCAP from competing with unregulated entities. *Id.* at 10–11. By contrast, as Professor Murphy shows, the Division should consider whether retaining certain provisions of the Decree—such as those described by ASCAP in Part IV, below—would facilitate the functioning of the performance rights market during a defined sunset period. *Id.* at 16–17. Although these provisions may not lead to outcomes that ordinarily would flow from competition, certain market participants claim to have relied on them and made investments based on them; thus, retaining these provisions for a defined

period of time, with a set expiration date, would allow the industry to prepare for, and ease the transition to, an unregulated marketplace. *Id.*

IV. ASCAP Favors an Orderly Transition to a Free Market and the Adoption of a Transitional Decree that Retains Some, But Not All, of AFJ2's Requirements

Because of the substantial changes in the legal and competitive landscape, and the market distortions created by the current regulatory model, ASCAP believes that there are compelling reasons to terminate the ASCAP Consent Decree. In its current form, the Decree imposes a litany of restrictions on ASCAP's business—restrictions designed to address conduct that would no longer be considered *per se* illegal under modern antitrust law but, instead, would be viewed as procompetitive and efficiency-enhancing. *See, supra*, pp. 6–11. Compliance with the Decree's provisions also comes at a steep price to ASCAP: The terms of the Decree inhibit ASCAP's ability to adjust to changing market conditions and prevent ASCAP from providing services requested by its members and licensees. The Decree also imposes real dollar costs on ASCAP—in compliance procedures, training, and legal fees—and has imposed many tens of millions of dollars in such costs on ASCAP in the last decade, thereby reducing the revenues available for distribution to its members, including its songwriter members who can ill afford to bear those costs.

Nonetheless, ASCAP recognizes that the termination of AJF2 cannot be achieved instantaneously. Accordingly, ASCAP favors an orderly and deliberate process over a set transition period, which will minimize market disruption and allow ASCAP, its members, and licensees adequate time to prepare to operate in a free market.

To that end, ASCAP proposes that the Division provide for a reasonable sunset period, during which ASCAP and its licensees can plan for the new market environment. In addition, ASCAP requests that the Consent Decree be immediately replaced with a Transitional

Decree that includes only certain core provisions of AFJ2, removes all other restrictions and requirements, and harmonizes the language used in the ASCAP and BMI decrees. This Transitional Decree, which would be operative during the sunset period, would begin to bring balance to the market and bring the Decree more in line with existing antitrust law. Importantly, the Transitional Decree would keep in place licensing provisions that are most important to music users, but would remove the remainder of the provisions that stifle ASCAP’s ability to innovate and put it at a competitive disadvantage vis-à-vis its unregulated competitors and, in some respects, BMI. Adopting such a Transitional Decree would facilitate the move to a free market and permit ASCAP to begin operating outside of the constraints of the Decree while nonetheless still subject to certain longstanding requirements and to the oversight of the Division and the Court.

A. The Transitional Decree Would Retain Core Requirements Important to Licensees and Members

Under ASCAP’s proposal, the streamlined Transitional Decree would retain four central requirements of AFJ2, modify the interim licensing process to provide additional protections to ASCAP and its members, and add a new sunset provision.

Non-exclusive licensing. The Transitional Decree would preserve the requirement that ASCAP can license only on a non-exclusive basis, thereby maintaining for rights holders and licensees the ability to license works directly, outside of the PROs. AFJ2 § IV(A).

Licensing upon request, with a modified interim fee process. The Transitional Decree would retain the requirement that ASCAP must “grant to any music user making a written request therefor a non-exclusive license to perform all of the works in the ASCAP repertory.” AFJ2 § VI.⁴¹ Maintaining this so-called “automatic” license to all of the works (and shares of

⁴¹ The Transitional Decree also would retain the exception to this automatic license, which provides that “ASCAP shall not be required to issue a license to any music user that is in material breach or default of any license agreement by failing to pay to ASCAP any license fee that is indisputably owed to ASCAP.” AFJ2 § VI.

works) in ASCAP’s repertory would preserve one of the procompetitive benefits of the blanket license cited by the Supreme Court in *CBS* (and often cited by music users as a core Decree protection)—“allow[ing] the licensee immediate use of covered compositions, without the delay of prior individual negotiations.” *CBS*, 441 U.S. at 22. ASCAP’s current proposal does not allow withdrawal of digital rights by music publishers, but we are continuing to study the issue and consult with industry stakeholders.

Although ASCAP proposes to maintain the Decree’s guarantee of a right to perform its entire repertory of music upon application for a license, ASCAP believes that it is critically important to reform the application and negotiation process to require music users to begin paying some license fees to ASCAP (and, accordingly, to its songwriter and publisher members), even if there has been no agreement on an interim or final fee. AFJ2 currently prescribes specific time periods for ASCAP and an applicant to negotiate a license, during which ASCAP may request from the user information necessary to quote a license fee; in the event they cannot agree on a license during the prescribed time periods, either ASCAP or an applicant may thereafter commence a Rate Court proceeding to set a reasonable fee. *See* AFJ2 § IX. But AFJ2 does not expressly require the payment of fees after the expiration of the negotiation period if the parties have not yet agreed on final fees, nor does it *compel* either party to commence a Rate Court proceeding absent agreement. It also provides no recourse to ASCAP, other than expensive Rate Court litigation, if an applicant refuses to provide requested information necessary to quote a fee. Thus, music users can—and do—strategically engage in protracted licensing negotiations with ASCAP. Some choose to rely solely on the automatic license following their application, failing to provide ASCAP with critical revenue and music use information, never entering into an interim or a final license with ASCAP, and, to the detriment of ASCAP’s members, never paying *any*

license fees whatsoever for their performance of music in the ASCAP repertory unless ASCAP undertakes the time and expense of initiating a Rate Court proceeding.

To address these issues, ASCAP proposes two modifications in the Transitional Decree. *First*, the Decree should be modified to require applicants to provide information necessary to quote a reasonable fee within 30 days of ASCAP requesting such information, including specifically information concerning revenues and music use that are critical to the determination of a reasonable fee. The other deadlines provided in AFJ2 § IX(A) concerning ASCAP's time to quote an interim fee and the parties' rights to seek relief from the Rate Court would still apply. *Second*, the Decree should be modified to require applicants to begin paying a minimum interim fee to ASCAP, retroactive to the date of their application, within 90 days from the date when ASCAP advises the music user of the fee that it deems reasonable or requests additional information from the music user.

Rate Court. The Transitional Decree would preserve the Rate Court (as amended by the Music Modernization Act, which was signed into law on October 11, 2018⁴²) as a mechanism for the determination of a reasonable fee when ASCAP and a music user cannot agree. *See generally* AFJ2 § IX. Although we continue to view the Rate Court as an expensive and inefficient method for rate setting, ASCAP also understands that music users claim to rely on the Rate Court and value its protections and procedures.⁴³ Thus, ASCAP does not object to maintaining the Rate Court during this transition period—not only to respond to licensee concerns

⁴² Orrin G. Hatch–Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, § 104, 132 Stat. 3676, 3726 (2018).

⁴³ *See, e.g.*, Comments of the Radio Music License Committee, Inc. and the Television Music License Committee, LLC at 8–10 (Aug. 6, 2014), <https://www.justice.gov/atr/page/file/1082141/download>; Comments of Pandora Media, Inc. In Response to the Department of Justice's Review of the ASCAP and BMI Consent Decrees at 26–27 (Aug. 6, 2014), <https://www.justice.gov/sites/default/files/atr/legacy/2014/08/27/307973.pdf>.

but also to retain a familiar forum for dispute resolution during what will certainly be a period of adjustment and experimentation.

Existing alternatives to the blanket license. The Transitional Decree would preserve the availability to music users of existing, alternative forms of license, such as the per-program license and the adjustable fee blanket license. *See* AFJ2 § VII; *Broad. Music, Inc. v. DMX Inc.*, 683 F.3d 32, 43–44 (2d Cir. 2012). One of ASCAP’s goals in transitioning to a free market is to be able to respond to licensee demands more effectively, including by offering alternative licensing arrangements that meet the changing needs of users and members in the dynamic licensing market. Retaining existing alternative forms of license requested by music users is consistent with that objective.

We note that, since the entry of AFJ2, no user has ever sought a per-segment license, which is among the alternative forms of license ASCAP is required to offer under Section VII of the Decree. Accordingly, ASCAP requests that the Division eliminate the per-segment license requirement in the Transitional Decree.

Sunset provision. The Transitional Decree would include a sunset provision, providing that the Decree would terminate after a reasonable sunset period. Inclusion of a sunset provision in the Decree is in line with 40 years of Antitrust Division policy and practice. As of 1979, the Division determined that “perpetual decrees were not in the public interest,” and thereafter has included sunset provisions, of ten years or less, in its consent decrees as a matter of course.⁴⁴ Further, courts presented with motions to terminate antitrust consent decrees entered

⁴⁴ *See* Dep’t of Justice, Antitrust Division Manual at III-147 (5th ed., last updated April 2018). *See also* Press Release, Department of Justice Announces Initiative to Terminate “Legacy” Antitrust Judgments (Apr. 25, 2018), <https://www.justice.gov/opa/pr/department-justice-announces-initiative-terminate-legacy-antitrust-judgments> (“In 1979, the Division adopted the general practice of including sunset provisions that automatically terminate judgments, usually 10 years from entry.”); Dep’t of Justice, Antitrust Division, Department of Justice’s Initiative to Seek Termination of Legacy Antitrust Judgments, 83 Fed. Reg. 19,837 (May 4, 2018) (same).

prior to 1979 have approved termination of those decrees subject to phase-out or sunset provisions, or instructed lower courts to consider such a phase-out.⁴⁵

B. The Transitional Decree Would Eliminate Requirements of AFJ2 that Impede ASCAP’s Ability to Compete and Innovate

The Transitional Decree would preserve several core components of AFJ2, but, crucially, it also would eliminate all other provisions of AFJ2—including several restrictions and requirements that impose costs on ASCAP and that currently impede ASCAP’s ability to compete with other PROs and licensors. Contrary to the supposed purpose of the Decree to protect competition, several provisions of AFJ2 actually place ASCAP at a competitive disadvantage compared to other PROs, prevent ASCAP from providing the kinds of innovative, custom services that licensees demand in the changing marketplace, and hinder ASCAP’s ability to attract and retain members.⁴⁶

1. Several Provisions of AFJ2 Place ASCAP at a Competitive Disadvantage With Respect to Other PROs, Including BMI

As discussed in Part III, above, and in Professor Murphy’s paper, the current U.S. regulatory regime, under which two PROs are subject to antitrust consent decrees and continued

⁴⁵ See *United States v. Int’l Bus. Machines Corp.*, No. 52 CIV. 72-344 TPG, 1997 WL 217588, at *4 (S.D.N.Y. May 1, 1997), *aff’d*, 163 F.3d 737 (2d Cir. 1998) (“The court concludes that the granting of the joint motion of the Government and IBM, and the consequent phasing out of the remaining provisions of the 1956 consent decree, present no material threat of violation of §§ 1 and 2 of the Sherman Act.”); *United States v. Am. Cyanamid Co.*, 719 F.2d 558, 567 (2d Cir. 1983) (instructing district court, if it deemed phase-out of consent decree to be appropriate, to determine appropriate duration for phase-out).

⁴⁶ For the reasons discussed above, ASCAP proposes to retain in the Transitional Decree the so-called “automatic” license and the Rate Court as a forum for the determination of a reasonable license fee. To be clear, however, these provisions also place ASCAP at a significant competitive disadvantage vis-à-vis its unregulated competitors. Unlike SESAC and GMR, ASCAP cannot refuse to license a user that has requested a license from ASCAP (except when a licensee is in breach and default of a prior license) or otherwise prevent a user from performing works in the ASCAP repertory prior to agreement on reasonable license fees to compensate ASCAP’s members. Similarly, because of the “automatic” license and the fact that the expense of Rate Court is something that ASCAP strives to avoid, certain music users have strategically delayed or extended license negotiations for months or years, during which they have avoided paying fair license fees to ASCAP’s members, and they are resistant to rate adjustments, even when market benchmarks demonstrate that such adjustments are appropriate. By contrast, SESAC and GMR may refuse to license users that seek to pay their affiliates below-market rates.

oversight by the Department of Justice and two PROs are not, creates market asymmetries and distortions that harm, rather than promote, competition. This issue is particularly acute for ASCAP, whose Consent Decree imposes restrictions to which no other market participant—including its regulated competitor, BMI—is subject. Three provisions in particular cause competitive harm to ASCAP vis-à-vis its PRO competitors, and eliminating them would benefit ASCAP, its members, and the wider licensing marketplace.

(a) *Restriction on Licensing Rights Other Than Rights of Public Performance (AFJ2 § IV(A))*

Section IV(A) of AFJ2 currently prohibits ASCAP from acquiring any foreign or domestic rights in musical compositions other than rights of public performance and from licensing to music users rights other than rights of public performance. AFJ2 § IV(A).⁴⁷ By contrast, not one of ASCAP’s competitors—not BMI, SESAC, GMR, major publishers, or foreign PROs—is subject to a similar restriction.⁴⁸ These competitors are free to acquire mechanical, synchronization, and other rights from their affiliates and to license those rights to users, on a standalone basis or along with public performance rights.⁴⁹

⁴⁷ Section IV(A) provides that ASCAP is “enjoined and restrained from . . . [h]olding, acquiring, licensing, enforcing, or negotiating concerning any foreign or domestic rights in copyrighted musical compositions other than rights of public performance on a non-exclusive basis.” To the extent that some portion of Section IV(A) remains in the Transitional Decree (because, for example, it retains the non-exclusivity requirement (*see, supra*, p. 28)), this provision should be modified to address only domestic rights, not foreign rights. *See also, infra*, pp. 34–36 (addressing AFJ2 § III, concerning extraterritorial application of certain Decree provisions).

⁴⁸ SESAC, which purchased the Harry Fox Agency in September 2015, touts its “ability to offer singular licenses for the works of its affiliated writers and publishers that aggregate both performance and mechanical rights.” *See About SESAC, supra* note 31. Through foreign hubs, publishers are licensing mechanical and foreign rights to digital services on a multi-territorial basis. *See, e.g., BMG Expands Licensing Deal With GEMA to Reach Digital Services in Russia, Turkey*, BILLBOARD, Oct. 25, 2018, <https://www.billboard.com/articles/business/8481656/bmg-digital-licensing-deal-gema-aresa-streaming> (describing BMG’s deal with GEMA and its subsidiary ARESA to license BMG’s Anglo-American catalog to Spotify, Apple Music, Deezer, and other digital services in 38 European countries, Russia, Turkey, and territories throughout Middle East and Africa).

⁴⁹ *See, e.g.,* Press Release, Downtown x YouTube | Direct Performance License, *supra* note 26 (announcing direct deal for performing rights between YouTube and Downtown Music Publishing, expanding existing licensing arrangement between Downtown and YouTube for mechanical rights: “By including performance rights, the new

Prohibiting ASCAP from engaging in similar licensing practices places artificial and asymmetrical restrictions on ASCAP’s conduct, in markets for rights where ASCAP does not exercise, and never has exercised, market power. Moreover, it denies ASCAP’s members and licensees a valuable service that they increasingly demand. In particular, digital services, like YouTube, Spotify, and Netflix, require more than public performance rights to operate their services, and most of the major digital audio services have entered into direct licenses for both performance and mechanical rights with major music publishers in the United States or their licensing hubs outside of the United States. Although publishers and their hubs have entered into direct licenses, publishers still rely on ASCAP and BMI to administer (*i.e.*, calculate and make payments under) these direct licenses because ASCAP and BMI maintain the most up-to-date and accurate information about their writer members/affiliates. Under a Transitional Decree without this licensing limitation, ASCAP could provide the one-stop shopping, rights-clearance services these licensees prefer, while also offering members the opportunity to license all of their rights through their trusted PRO. Whether or not ASCAP ultimately offers these services, and successfully builds a licensing business beyond public performance rights, should be dictated by market demands, not by the Consent Decree.

(b) Extraterritorial Application of the Decree (AFJ2 § III)

Section III of AFJ2 provides that the “injunctions and requirements” imposed on ASCAP in Section IV(A) and IV(B) of AFJ2—the requirement to license on a non-exclusive basis, the restriction on licensing multiple rights, and the injunction against interfering with direct licensing—apply both inside *and outside* of the United States. BMI’s decree contains no such

deal expands the breadth of rights licensed to YouTube and facilitates more streamlined payments from Downtown to its songwriter clients.”).

prohibition, applying only to licensing within the United States. *See* BMI Consent Decree § III. Although, as discussed above, ASCAP proposes to retain the non-exclusivity provision and is committed to preserving direct licensing opportunities for its members, there is no compelling reason why these restrictions should apply extraterritorially, particularly when the identical restrictions in BMI’s decree have no ex-U.S. application.

Removing this requirement also would be consistent with the Division’s decision to modify, and ultimately terminate, the Foreign Decree. The Foreign Decree, which was entered the same day as the AFJ, arose out of exclusive licensing arrangements that ASCAP had entered into with 25 foreign PROs that were members of the world-wide PRO confederation, CISAC.⁵⁰ The judgment was intended to prohibit ASCAP from engaging in anticompetitive activities in combination with CISAC and other foreign PROs—specifically, to hinder BMI’s efforts to compete when providing services to rights holders.⁵¹ In 1997, the Division moved to modify the Foreign Decree to eliminate most of its restrictions because, among other things, those provisions were potentially “impeding ASCAP’s ability to compete with BMI”; in fact, circumstances in the market had changed so significantly since 1950 that the Division concluded that “ASCAP’s ability to demand that it be, in the United States, the exclusive representative for a foreign PRO [had] been severely undercut by BMI’s development.”⁵² The Court approved the requested modifications, leaving only the restrictions on exclusive licensing and interference with direct

⁵⁰ *See* Dep’t of Justice, Mem. In Support of the Application to Modify the Consent Judgment, *United States v. Am. Soc’y of Composers, Authors and Publishers*, No. 42-245 (S.D.N.Y. July 29, 1997), at 2–3, 7–8.

⁵¹ *Id.* at 7; *see also* Mem. of the United States in Support of the Joint Motion to Enter Second Amended Final Judgment, *supra* note 1, at 11.

⁵² Dep’t of Justice, Mem. In Support of the Application to Modify the Consent Judgment, *supra* note 50, at 7–8; *see also id.* at 8–9 (citing emergence of SESAC and noting that BMI and SESAC “place a significant competitive check on ASCAP’s ability to enter exclusive licensing arrangements with foreign PROs”).

licensing.⁵³ The same principles that led the Division to conclude in 1997 that most of the Foreign Decree should be terminated justify ending all of the foreign restrictions now. Today, robust international competition—among ASCAP, BMI, SESAC, GMR, multi-national music publishers, and foreign societies licensing on a multi-territory basis—provides an even more “significant competitive check on ASCAP’s ability to enter exclusive licensing arrangements with foreign PROs” than any provision of AFJ2.⁵⁴ If anything, the continued operation of these extraterritorial restrictions “imped[e] ASCAP’s ability to compete with BMI” and other licensors.⁵⁵

(c) Injunction Against Licensing Movie Theaters (AFJ2 § IV(E))

As a consequence of the 1948 *Alden-Rochelle* decision, the Consent Decree enjoins ASCAP from granting licenses to movie theaters for the public performance of music synchronized with motion pictures. AFJ2 § IV(E); *see also Alden-Rochelle, Inc. v. Am. Soc’y of Composers, Authors & Publishers*, 80 F. Supp. 888, 894–95 (S.D.N.Y. 1948) (holding that ASCAP’s practice of prohibiting members from negotiating directly with movie theaters for public performance rights violated Section 1 of Sherman Act). Because the market for public performance rights has changed significantly since 1948 (*see, supra*, Part II), ASCAP today lacks the monopoly power ascribed to it in *Alden-Rochelle*. 80 F. Supp. at 894–95. Accordingly, as discussed above with respect to licensing multiple rights, this restriction serves only to impose artificial barriers on ASCAP’s conduct, to deny music users (and ASCAP members) choice in licensing these rights,

⁵³ *See* Order Modifying Judgment, *United States v. Am. Soc’y of Composers, Authors & Publishers*, No. 41-cv-1395 (S.D.N.Y. Nov. 14, 1997). In 2001, during negotiations over AFJ2, ASCAP and the Division agreed to consolidate the original ASCAP case and the foreign case, with a single final judgment; to incorporate the remaining provisions of the Foreign Decree into AFJ2; and to terminate the Foreign Decree. *See* Mem. of the United States in Support of the Joint Motion to Enter Second Amended Final Judgment, *supra* note 1, at 18–19; Order Vacating the Final Judgment and Dismissing the Action, *United States v. Am. Soc’y of Composers, Authors & Publishers*, No. 41-cv-1395 (relates to former Civ. Action No. 42-245) (S.D.N.Y. June 13, 2001).

⁵⁴ Dep’t of Justice, Mem. In Support of the Application to Modify the Consent Judgment, *supra* note 50, at 8–9.

⁵⁵ *Id.* at 7.

and to reduce price competition in this category of licensees. Moreover, the restriction puts ASCAP at a competitive disadvantage not only with unregulated PROs, but with BMI, which has never had a comparable restriction. It is also contrary to established licensing practices outside of the United States, where PROs are permitted to license public performance rights to movie theaters and distribute those revenues to their members and affiliates.

2. Certain Provisions of AFJ2 Impede Procompetitive Innovation in Licensing and Prevent ASCAP from Responding to Industry Developments and Demands

Several outdated provisions of AFJ2 also restrain ASCAP from responding to licensees' demands for custom services and license structures—options that its unregulated competitors are able to offer freely because they are unencumbered by a consent decree. Forcing ASCAP to compete on such asymmetrical terms places ASCAP (and the members it represents) at a competitive disadvantage vis-à-vis other market participants and denies licensees the full complement of licensing choices they now seek from PROs and, when licensing directly, large publishers. These requirements also compromise ASCAP's ability to continue to play the important role it has played in the public performance rights market for more than a century—as a leader in fostering innovation in collective licensing and in providing services to members and music users that promote an efficient and well-functioning marketplace.

(a) Similarly Situated Requirement (AFJ2 § IV(C))

Chief among these innovation-hindering provisions is AFJ2's injunction against ASCAP “[e]ntering into, recognizing, enforcing or claiming any rights under any license for rights of public performance which discriminates in license fees or other terms and conditions between licensees similarly situated.” AFJ2 § IV(C). The requirement that ASCAP license all “similarly situated” licensees at the same rates and under the same terms hampers ASCAP's capacity to offer customized contractual terms unique to individual parties, which licensees, particularly large

digital services, increasingly demand. It also forecloses opportunities to try (and to experiment with) new licensing arrangements and services. ASCAP cannot, for example, beta test a new licensing structure with one licensee—and determine whether it works, whether it can be improved, and whether it meets the needs of ASCAP and users—without offering that structure to *all* similarly situated users. Eliminating the similarly situated requirement will encourage such experimentation and permit ASCAP to act nimbly in response to customer requests. As Professor Murphy explains, prohibiting ASCAP from innovating and expanding its services penalizes ASCAP and its members and prevents market participants from benefitting from the enhanced competition that an unregulated ASCAP would provide. *See* Murphy at 10–12.

(b) *Injunction Against Granting Licenses in Excess of Five Years’ Duration (AFJ2 § IV(D))*

AFJ2 also imposes arbitrary limits on ASCAP’s licensing capacity by enjoining ASCAP from “[g]ranting any license to any music user for rights of public performance in excess of five years’ duration.” AFJ2 § IV(D). Neither ASCAP’s unregulated PRO competitors—SESAC and GMR—nor large music publishers that engage in direct licensing are subject to these time restrictions on their licenses. For good reason: There is no justification, as a practical matter or as a matter of antitrust policy, to establish a bright-line rule limiting contracts for intellectual property to a specific duration.⁵⁶ Eliminating this provision would enable ASCAP to offer contract terms commensurate with those offered by its unregulated competitors.

Long-term contracts can serve a procompetitive function for the music licensing marketplace. ASCAP’s licensing negotiations with users often extend for months, or even years,

⁵⁶ *See* U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 4.2 (2017) (“Consistent with their approach to less restrictive alternative analysis generally, the [Division and FTC] will not attempt to draw fine distinctions regarding duration; rather, their focus will be on situations in which the duration clearly exceeds the period needed to achieve the procompetitive efficiency.”).

and consequently consume enormous resources for ASCAP and licensees. Permitting ASCAP to enter into licenses in excess of five years may increase licensing efficiency by reducing the frequency of such negotiations and providing longer-term certainty to ASCAP, its members, and its licensees. Of course, ASCAP could not impose longer-term contracts on music users. Indeed, in today's rapidly changing marketplace, many users prefer shorter-term contracts of less than five years, and ASCAP is always responsive to those requests. Nonetheless, if a specific music user (or a class of music users) determines that a long-term license would be beneficial, ASCAP should have the option to respond to that market demand.

3. Other Provisions of AFJ2 Hinder ASCAP's Ability to Compete for Members

Certain provisions of the Decree also hinder ASCAP's ability to compete for and retain members.

(a) *Requirement to Accept All Applicants for Membership (AFJ2 § XI(A))*

The Consent Decree provides that ASCAP must accept all applicants for membership as long as they have met certain minimal requirements, *see* AFJ2 § XI(A)—a requirement that has the perhaps unintended effect of discouraging competition for rights holders among PROs and encouraging the growth of ASCAP's repertory and market share.⁵⁷ ASCAP should be given greater freedom to establish its membership criteria and to determine whether applicants will be permitted to join ASCAP. Providing this discretion will encourage ASCAP (and others) to innovate in order to distinguish their membership services from those offered by competitor PROs and, thus, promote PRO competition for rights holders—a longstanding goal of

⁵⁷ It is not clear what, if any, procompetitive function a provision requiring ASCAP to continue to grow in membership and repertory size serves, given that the Consent Decree's principal purpose is to constrain the exercise of market power that may flow from ASCAP's aggregation of rights.

the Division.⁵⁸ Eliminating this requirement also would alleviate administrative and other burdens on ASCAP.

(b) *Restriction on Licensing Multiple Rights (AFJ2 § IV(A))*

Finally, AFJ2’s prohibition on licensing multiple rights (*see, supra*, pp. 33–34) also constrains competition for members because, unlike BMI, SESAC, and GMR, ASCAP can license only public performance rights for its members. Thus, rights holders who wish to associate with a PRO that can function as a full-service rights management organization that will license all of their rights have many options—but ASCAP is not one of them.

* * *

ASCAP appreciates the Division’s interest in, and willingness to review, the continued operation and effectiveness of the ASCAP Consent Decree. As set forth above, and in the accompanying paper of Professor Murphy, changes in the law and the competitive landscape have rendered the 78-year-old Decree unnecessary; indeed, at this point, the continued regulatory overhang of the Decree is having an adverse impact on ASCAP’s ability to innovate and compete with both its regulated and unregulated competitors. As a result, the time has come to terminate this ancient consent judgment, subject to the transition regime that we outline above, which will facilitate the transition to a free market in performing rights. Unshackled by the Consent Decree, the free market will yield new innovations and benefits to songwriters, licensees, and users for decades to come.

⁵⁸ *See, e.g.*, AFJ2 § XI(B); Mem. of the United States in Support of the Joint Motion to Enter Second Amended Final Judgment, *supra* note 1, at 40.