ECONOMIC CONSIDERATIONS FOR MODIFICATION AND TERMINATION OF THE ASCAP CONSENT DECREE

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I. Harmful Effects of Regulation on Competition for Licensing Music Performance Rights

Music performance rights are licensed to users through four PROs as well as directly by music publishers. The two unregulated PROs and individual publishers that directly license performance rights for works in their catalogs are free to determine whether and how to license users. Unregulated PROs are free to set the terms on which they accept and contract with members, and their membership is by invitation only.[1] ASCAP and BMI, however, remain subject to their respective consent decrees that govern their relationships with potential members and with users. Those decrees, although amended periodically over time, originally were entered into in 1941 when performance rights ownership, use, and the institutions and technologies for licensing music performance rights differed substantially from the situation today.

ASCAP's Decree (and the similar decree that governs BMI) limit how the regulated PROs can interact with their members/affiliates and users. For example, the ASCAP Decree limits the length of contracts into which ASCAP can enter and requires ASCAP to make available certain types of licenses and to license every applicant. The Decree also makes ASCAP subject to oversight by a Rate court to which users (and ASCAP) can appeal if they fail to reach a negotiated agreement. The Rate court not only has ultimate authority over the rates that ASCAP can charge users, but it also rules on ASCAP's obligations to offer

[1] "While [SESAC] is looking to expand its business, one strategy that likely will remain in place is its focus on signing premium copyrights. Unlike ASCAP and BMI, songwriters have to be invited to join SESAC, and the organization is selective about who it extends invitations to." *SESAC Gets New Leadership, Plans to Greatly Expand*, Billboard, July 31, 2014, https://www.billboard.com/articles/business/6203852/sesac-leadership-plans-expand. SESAC and GMR are subject to antitrust and other laws, but not to any restrictions that are unique to the particular rights that they control.

certain types of licenses (e.g., requiring that it offer an Adjustable Fee Blanket License because the Court found that such a license was required by the ASCAP Decree[2]), prohibits ASCAP from allowing partial withdrawals or partial grants of members' rights (because it found that the Decree did not permit partial grants/withdrawals[3]), and has ultimate authority to determine whether one user is "similarly situated" to another (and thus is entitled to comparable rates and terms under the Decree[4]). The Consent Decree currently denies ASCAP the operating flexibility that its unregulated competitors and unregulated firms generally possess, and imposes obligations on ASCAP that are not required of its unregulated competitors, including individual publishers licensing directly and organizations that license on behalf of rights holders (such as SESAC and Global Music Rights ("GMR")). As a consequence of its own Consent Decree, BMI is subject to similar restrictions and obligations (although the decrees differ in some ways) not imposed on its unregulated competitors.[5]

As a consequence, the unregulated PROs are growing at ASCAP's expense.[6] One report claims that, by the time of its buyout by Blackstone in 2017, SESAC had doubled "in

[2] *In re THP Capstar Acquisition Corp.*, 756 F. Supp. 2d 516 (S.D.N.Y. 2010).

[3] *In re Petition of Pandora Media, Inc. v. ASCAP*, 2013 WL 5211927 (S.D.N.Y. Sept. 17, 2013).

[4] *See, e.g.*, *In re Petition of Pandora Media, Inc. v. ASCAP*, 6 F. Supp. 3d 317, 355 (S.D.N.Y. 2014) ("Pandora argues that it is 'similarly situated' to the RMLC licensees and is accordingly entitled by the terms of AFJ2 to the RMLC 1.70% rate… Pandora has failed to show that it is entitled to the 1.70% RMLC rate as the result of being similarly situated, within the meaning of AFJ2, to the RMLC member radio stations.").

[5] In this report, I focus on ASCAP but the economic principles and analysis that I present generally apply to BMI as well to the extent its decree has similar provisions and effects.

[6] According to SESAC's chairman and CEO John Josephson, "Unlike [ASCAP and BMI], we are not subject to a consent decree, so we license in a free market, which we believe enables us to achieve better outcomes. We take a selective approach to our affiliation activities and have a smaller affiliate base than our principal competitors, which we believe enables us to deliver a higher level of responsiveness and service." *SESAC Chief John Josephson Is Bullish on the Future of Music Rights*, Variety, June 13, 2017.

both size and profitability during the past five years."[7] According to its CEO and Chairman, "Today, the flow of royalties across all our different platforms – not just our domestic PRO, but our mechanical rights administration business, and European business – is well over $400 million a year. That makes us one of the largest rights organizations in the world."[8] As has been publicly reported, GMR has signed up a number of important composers that were previously members/affiliates of ASCAP and BMI.[9]

One of the most common rationales for regulating a firm or industry is because it has natural monopoly features. For example, AT&T was regulated when it was the only long-distance carrier, and electric utilities that traditionally were local monopolies were subject to regulation.

Regulation is less frequent when a firm is large but not a natural monopoly, because regulation is costly and generally allocates resources less efficiently than the marketplace. For example, as Alfred Kahn explained, "The problem is that continued regulation of the incumbent companies in the presence of freedom of entry of essentially unregulated competitors introduces a host of distortions… In these circumstances, we cannot know to what extent the competition that has sprung up is competition on the basis of efficiency, to

[7] https://www.billboard.com/articles/business/7780128/john-josephson-sesac-pro-chairman-interview-photos.

[8] "SESAC's John Josephson Talks About Music Rights and Monetization," Max the Trax, May 5, 2018, http://maxthetrax.com/2018/05/05/sesacs-john-josephson-talks-music-rights-monetization/.

[9] Ben Sisario, *New Venture Seeks Higher Royalties for Songwriters*, N.Y. Times, Oct. 29, 2014, https://www.nytimes.com/2014/10/30/business/media/new-venture-seeks-higher-royalties-for-songwriters.html.

what extent instead it has been made possible only by the continued artificial restrictions on the prices and activities of the regulated companies."[10]

When some but not all firms in an industry are regulated, regulation will typically disadvantage a regulated firm relative to its unregulated competitors. The reason is simple: an unregulated profit-maximizing firm will make optimal choices across all the dimensions on which it can compete – price, quality, product features, product selection etc. – but a regulated company is constrained on one or more of the dimensions on which competition occurs. These additional constraints will force the firm to make "conditional" profit-maximizing decisions that are less profitable overall. For example, a firm that is compelled to charge prices lower than it would find optimal if it were unregulated will select the optimal combination of quality, features and supply conditional on that price, but its resulting offering will be less attractive than if it could charge a market-determined price. While regulation may be intended only to prevent noncompetitive conduct associated with the regulated firm's size (i.e., what is claimed to be its market power derived from size), in practice this occurs by forcing the firm to make sub-optimal decisions about all the ways in which it can compete. Regulations that govern behavior other than price (such as what types of licenses must be offered or who must be offered a license) similarly will distort a wide range of choices made by the regulated firm.

Regulating a large firm in an industry where evidence has shown that entry is possible and unregulated firms have been successful and expanded is particularly likely to harm competition. A regulated firm that has succeeded despite competition from

[10] Kahn, Alfred E. "The Economics of Regulation: Principles and Institutions." MIT Press Books 1 (1988). *See also* Stigler, George J. "The theory of economic regulation." The Bell Journal of Economics and Management Science (1971): 3-21.

unregulated firms likely has succeeded because of its efficiency and its ability to offer customers high quality service. However, regulation that restricts the firm's flexibility to price and to adapt its services to satisfy changing demands of the marketplace will erode the regulated firm's efficiency, which in turn eventually will deprive its customers of high-quality service and induce customers (in the case of PROs, both suppliers and users of music performance rights) to switch to the regulated firm's competitors, even though the regulated firm could offer a superior option absent regulation.

The harmful impact of regulation of some but not all market participants has been illustrated in a different context. In an article that I co-authored, I explained why partial economic reform in countries, such as occurred in Russia, can create worse outcomes than if all market participants are subject to the same reform or the same regulations.[11] The reason is that resources (inputs) flow into the unregulated sector even if those inputs would create more value if they were available to the regulated firms. The end result can be lower output than with complete regulation, rather than the increased output and efficiency that was the intended result of the partial deregulation and would likely be achieved through fuller deregulation. A similar impact is a likely result of partial deregulation of performance rights licensing. For example, the highest valued inputs (copyrights) will flow to the unregulated PROs even if unregulated PROs are less efficient than the regulated PROs from the point of view of users and rights owners.

Regulation of some, but not all, competitors also harms the marketplace because it reduces the competitive constraint on unregulated competitors. An unregulated

[11] Kevin M. Murphy, Andrei Shleifer and Robert W. Vishny, "The Transition to a Market Economy: Pitfalls of Partial Reform," 107 Quarterly Journal of Economics 898 (1992).

competitor that knows its primary rivals are restricted in their ability to satisfy consumers' demands will feel less competitive pressure to innovate and price competitively.

A. Impact of Regulation when a Firm Is an Intermediary

ASCAP is an intermediary that facilitates transactions between its members (music creators) and users who perform those members' musical works. ASCAP does not own music performance rights or perform music. As an intermediary, it must compete for both sets of customers. It competes for members, who can choose among PROs or can choose to self-supply performance rights licensing services for the works that they control. It competes for users, especially users (such as background music services and Pandora) that can adjust their music use to favor particular publishers' catalogs and can directly license works from publishers.

When there are efficiencies from licensing multiple rights and users prefer to obtain multiple rights from a single firm and even in a single negotiation, then regulation that interferes with an intermediary's flexibility to serve both suppliers and users will be especially harmful and disadvantageous to the regulated firm. For example, limitations on the services a regulated firm can provide to members, such as restrictions on which of the members' rights it can offer to license, may cause the regulated firm to lose membership to unregulated firms free to license multiple music rights. And, when it has fewer members, the intermediary may be less attractive to rights users, since users value both the number and quality of the rights that they can obtain in negotiations with the intermediary.

Importantly, ASCAP increasingly competes for members and users against its members' ability to self-supply licensing and other services to enable them to monetize their intellectual property rights. Decree provisions that constrain ASCAP's ability to

obtain competitive compensation for the value of its members' copyrights create incentives for members to license directly or through unregulated PROs even if ASCAP is more efficient at providing services such as monitoring infringement, negotiating licenses, surveying performances, collecting royalties, distributing earnings, identifying new users etc. Thus, because of regulation, ASCAP could lose out in competition with unregulated PROs and publishers' increased ability to self-supply, leading to less efficient licensing to the detriment of both licensors and licensees as well as ultimate consumers of music performances.

B. Requiring a Regulated Intermediary to Serve Everyone Will Lead to Inefficiencies

The ASCAP Consent Decree requires ASCAP to accept both all applicants for membership and all applicants for a license. Neither obligation is imposed on unregulated PROs or on music publishers. ASCAP's unregulated competitors can and do select which songwriters they will represent and they can refuse to license applicants if they cannot agree to mutually satisfactory licensing terms.

As a consequence, under its Consent Decree ASCAP may become a supplier of last resort – a PRO that members and users can turn to if they cannot obtain more favorable terms elsewhere. I understand that some of the members that it must serve impose disproportionately high costs and provide disproportionately low returns to ASCAP, which is why unregulated PROs do not invite them to be members. To the extent that ASCAP cannot impose those incremental costs only on the members responsible for those costs, it could be forced to recover those costs from its other members. In doing so, it could create incentives for more attractive members to move to another PRO where they are not burdened with these shared costs. Thus, imposing on ASCAP an obligation to accept all

applicants may create incentives for members that generate the greatest value to leave or not join ASCAP but instead license directly or through unregulated PROs, even if ASCAP is more efficient. The impact would be to weaken ASCAP as it increasingly serves only members that are not attractive to its unregulated competitors because they are not as profitable to serve.

The same is true of regulations that require ASCAP to license some users at below-market rates that then become benchmarks for "similarly situated" users. An unregulated PRO would negotiate rates with each user based on the value that the PRO provides to and receives by licensing that user, which could result in seemingly "similarly situated" users paying different license fees because they value the underlying performance rights differently. An unregulated PRO also might not agree to provide certain forms of license (e.g., a per-program license) at a rate set at a predetermined ratio to the blanket license fee, but instead would use relative rates to create incentives for the user to choose the efficient blanket license over less efficient alternative forms that are more costly to administer and result in less efficient music use.[12] Again, being unable to deny a user a license as a tool to negotiate a market fee could induce some users to choose less efficient forms of license (e.g., a per-program license) rather than the efficient blanket license, or move to other PROs that may not be as efficient as ASCAP.

[12] I explained in a White Paper that I submitted to the U.S. Department of Justice in 2012 titled *The Collective Licensing of Music Performance Rights: Market Power, Competition and Direct Licensing* ("2012 White Paper") that the blanket license encourages efficient use of copyrighted works: "[T]he blanket license allows the user to make unlimited performances of the licensed works at no marginal cost," so the user "is incentivized to choose which works to perform and how much to perform each work in the way that creates the greatest possible value" (p. 8).

II. Revision or Elimination of the ASCAP Consent Decree Should Be Guided by an Understanding of the Competitive Concerns It Was Intended to Address

In my view, the DOJ should base revisions (and consider elimination) of the ASCAP Consent Decree on whether the Decree overall and each of its provisions further the objective of mitigating and/or eliminating any adverse effects on competition that might flow from collective licensing by ASCAP on behalf of its members. (These same considerations would apply to revisions or elimination of the BMI decree.) I understand that concerns about the potential for independent publishers to cooperate in setting license fees for a blanket license covering their works motivated the DOJ's original challenge to ASCAP's conduct and the entry of the ASCAP Decree in 1941. These concerns have been mitigated by the growth of BMI and SESAC,[13] which compete with ASCAP for members, and by entry of and competition from GMR, as well as by changes in technology and the nature of music performance use that have enabled publishers to license directly (with the assistance of new forms of intermediary) more easily. Going forward, changes to the Consent Decree that reduce the harmful effects of regulation and that further encourage competition among PROs and between PROs and individual publishers will be procompetitive.

Consent Decree provisions that prevent ASCAP from expanding the options that it offers to the marketplace should be eliminated immediately, because an expanded scope of

[13] "Since 1992, when [SESAC] came under the ownership of entrepreneur Stephen Swid and other investors including Allen & Co., SESAC's annual revenue grew from $9 million per year to an estimated $167 million in in 2013 . . . with rights managements at the center of digital distribution, SESAC sees an opportunity to expand beyond performance rights, into neighboring rights, synchronization and (possibly) mechanical licensing, which means growing beyond the role of a performance rights organization (PRO)." *See SESAC Gets New Leadership, Plans to Greatly Expand*, Billboard, July 31, 2014, https://www.billboard.com/articles/business/6203852/sesac-leadership-plans-expand. SESAC subsequently purchased the Harry Fox Agency, which collects and distributes mechanical license fees for music publishers.

services is not a potential anticompetitive outcome of collective licensing. Contrary to concerns that ASCAP on behalf of its members would *refuse* to provide certain alternatives, which may have motivated the Consent Decree, prohibitions on what ASCAP can do today likely serve only to limit the number of efficient options and suppliers available to copyright owners and users of music performance and other music rights. Restrictions on ASCAP's ability to license mechanical and synchronization rights, for example, which BMI, SESAC and GMR are free to do for their affiliates and which I understand some users have requested that ASCAP also do, serve no procompetitive purpose but simply prevent a potentially efficient competitor from enhancing competition. Similarly, limiting the length of contracts that ASCAP can offer to users takes away an alternative that users would value if ASCAP is incentivized to provide greater value in exchange.

From submissions by some users in connection with the DOJ's previous consideration of amending the ASCAP and BMI consent decrees, it is clear that some users are concerned that ASCAP and BMI might adopt certain practices of their smaller, unregulated competitors if regulatory restrictions were reduced or the Decrees were amended to permit those PROs to have the same flexibility as its unregulated competitors. Such concerns should not be a reason to maintain the ASCAP Decree (or the similar BMI decree), but instead should be evidence that the Decree's effects have evolved from preventing possible anticompetitive conduct to preventing ASCAP from competing. The fact that small PROs or publishers unilaterally adopt practices that ASCAP also might adopt if not restricted by the Consent Decree is evidence that those practices are the result of competition arising from the incentives of the individual copyright owners and the demands of users, and are not motivated by anticompetitive incentives arising from

collective licensing by a PRO with a large catalog and many members. An antitrust consent decree should not be used to force a regulated entity to offer products or services on terms that buyers might want, but that sellers would not offer for reasons independent of the potential anticompetitive conduct that the decree seeks to prevent (in this case, the exercise of market power by a collective seller with a large catalog and many members).

As a matter of economics, it is important to eliminate any provisions of the ASCAP Consent Decree that reduce the opportunity for licensing of performance rights through the marketplace at market-determined rates, because rate regulation – especially long divorced from market-based rates – has the potential to create significant distortions. In an unregulated market, both the buyer and the seller can refuse to license, which gives the parties an incentive to negotiate a licensing agreement with terms under which they split the economic surplus generated by use of the licensed music. In a free market, a negotiated agreement would be the expected outcome: The buyer and the seller would still license, but the license rate would be determined by the user's willingness to pay (demand) and the licensor's willingness to license (supply). The user's willingness to pay is a determinant of the competitive negotiated outcome because, absent a voluntary agreement, the user cannot perform the music.[14] In the regulated marketplace created by the ASCAP Consent Decree, ASCAP cannot refuse to license rights to perform compositions in its catalog to any

[14] Negotiations result in market rates only if both parties can refuse to transact. If the seller must grant a compulsory license and thus does not have the ability to withhold use, and the user does not face the prospect of doing without the ability to perform the music, then the user's willingness to pay (a key determinant of market prices) plays no role in the parties' negotiations. This is the situation under the Consent Decree: regulated PROs (and by extension their members/affiliates) must offer a license to any user that applies for one, while the ability of users to license directly from rights holders prevents a PRO from charging fees above those that the user would pay if there were no PRO when PRO licensing is non-exclusive (i.e., the user is not forced to license through the PRO).

user, and the user's willingness to pay does not factor directly into the negotiated rates as long as the user would prefer the rate set by the Rate Court (or negotiated in the shadow of the Rate Court) to doing without the works in question.

Reductions in transactions costs and changes in the marketplace, including the growth of third parties that facilitate licensing transactions outside the PROs, have made direct licensing more attractive to publishers. Where competitive, technological, institutional and other conditions have evolved so that competition from the marketplace can constrain any potential anticompetitive conduct of concern when the Decree was imposed, then there no longer is competitive justification for maintaining the Decree and its continuation likely will cause more harm than good.

III. Terminating the Consent Decree Would Not Free ASCAP and Its Members from Antitrust Oversight

Eliminating the Consent Decree or any of its provisions would not free ASCAP and its members from antitrust oversight. Recent litigation filed by music users against PROs not subject to a consent decree shows that private entities will use the courts when they view a PRO's conduct as inconsistent with antitrust laws.[15] Indeed, recent litigation filed against SESAC and GMR makes clear that users' dissatisfaction with some PRO pricing and other practices is not due to the PRO's size – GMR, for example, was founded only in 2013, claims only a limited membership and controls much smaller music catalogues than some

[15] *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*, Civ. No. 16-06076 (E.D. Pa. filed Nov. 18, 2016).

individual publishers[16] – but instead because copyright owners unilaterally control valuable music performance rights and are using unregulated PROs to seek market rates from those who perform their works.[17]

Many music users – e.g., Apple Music, YouTube, Amazon, and Netflix – are large sophisticated companies capable of bringing litigation if ASCAP collectively with its members engages in anticompetitive conduct. And many smaller music users are represented by industry trade groups, such as the Radio Music Licensing Committee and Television Music Licensing Committee, which have experience and expertise to represent their members' interests in negotiations and in potential litigation against ASCAP.

Requiring music users to rely on the same antitrust protections that govern ASCAP's competitors will reduce the likelihood that ASCAP will be subject to limitations on its pricing and conduct that do not remedy anticompetitive conduct but instead provide users with benefits that they would not obtain in a competitive market. And it would enable ASCAP to demonstrate that, for users for which different music performance rights are complements rather than substitutes, the competitive price of a blanket license supplied by a licensor of a large number of copyrights will be lower, not higher, than the competitive price if each right were licensed individually or even through multiple, smaller PROs or individual publishers.[18] Thus, concerns raised by music performance users about ASCAP's

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[16] As of October, 23, 2018, GMR listed 78 songwriters as affiliates, including Bruce Springsteen, Bruno Mars, John Lennon, Pharrell Williams, and Lindsey Buckingham. *See* https://globalmusicrights.com/Catalog. The Sony/ATV website lists many more songwriters (https://www.sonyatv.com/en/songwriters).

[17] Shleifer, Andrei. "Understanding Regulation," European Financial Management 11, no. 4 (2005): 439-451 ("So what are the circumstances where regulation is the appropriate strategy of enforcing good conduct? The basic implication of the theory is that the resort to regulation is only necessary when the level of disorder is too high for private orderings and even courts to deal with successfully" (p. 446)).

[18] I described the economics underlying this conclusion in detail in my 2012 White Paper.

size and its policies would be subject to application of antitrust economics and court oversight, not assumed to be justified because of the historic Consent Decree.

IV. Termination of the Decree or Some of Its Provisions Will Benefit Some and May Harm Other Users of ASCAP's Services, Which Is the Outcome of Competition

Competition will be enhanced by eventual termination of the ASCAP Consent Decree and, during a transitional period, many of its provisions. However, moving from a regulated to a more competitive marketplace may not benefit all of ASCAP's members or music performance users to the same extent. Indeed, as discussed above, provisions in the Consent Decree that require ASCAP to accept all applicants for membership and licenses and to treat all "similarly situated" users the same likely have resulted in cross-subsidization of some members by others and some users by others. In a more competitive market for licensing music performance rights, ASCAP, like its unregulated competitors, will have the flexibility to differentiate terms of service across members and users based on competitive conditions – cost and demand. While this will increase efficiency overall, it may result in some users and creators that are costly to serve being worse off than they are today.

Those who argue for maintaining the ASCAP and BMI decrees likely will point to the value that users obtain today by "forcing" songwriters and publishers to license collectively and to grant a compulsory license, subject to Rate Court oversight. This is revealed by some users' desire that ASCAP and BMI be compelled to continue to license in certain ways – for example, that ASCAP must license every applicant upon request, and that ASCAP's members must license all their performance rights for any work that the member assigns to ASCAP (i.e., no partial grants or withdrawals). In other words, some users argue that

ASCAP's members *should be required to* engage in the collective conduct that the DOJ claimed created antitrust concern.

Changes to the Consent Decree that increase competition between PROs and publishers and reduce the impact of regulation might lead to higher, market-based rates for some users if, as publishers and I have argued, rates imposed by the ASCAP Rate Court and negotiated in the shadow of that court are below market levels. But that is the expected outcome of unrestricted competition and the increased flexibility of publishers to unilaterally control use of their intellectual property. Concern that some users may be worse off (at least for an interim period) in a more competitive marketplace does not justify imposing obligations on ASCAP and BMI that their unregulated competitors—including both individual publishers licensing directly and organizations that license on behalf of rights holders (such as SESAC and GMR))—do not incur if these obligations are not justified by the claimed anticompetitive conduct that led to the Decree.

V. The Aim of an Interim Decree Should Be To Ease the Transition to a Fully Competitive and Unregulated Marketplace

I understand that ASCAP is not requesting immediate termination of the Decree, but instead is proposing to enter into a modified transitional Decree that would give performance rights owners and users time to better prepare for a fully competitive and unregulated marketplace. To the extent that users and rights holders must adapt to a future where ASCAP is unregulated, their transition will be encouraged by explicit

recognition in the Decree that these remaining limitations on ASCAP's freedom to compete are temporary and will be lifted after a defined sunset period.[19]

All provisions in a transitional modified Consent Decree should be justified as protecting investments that users may have made in reliance on provisions of AFJ2 that might not be an outcome under competition. The provisions that ASCAP proposes for the transitional decree satisfy this criterion. ASCAP will continue to guarantee applicants traditional forms of license on request, with payment of an interim license fee and subject to oversight by the Rate Court. Thus, users that have relied on the ability to obtain a compulsory license for a large number of music performances immediately upon request will continue to have this guarantee (not available from ASCAP's unregulated competitors) while they adapt to the increased uncertainty associated with obtaining licenses for music performance rights in a free market.

Other provisions of the current Consent Decree do not satisfy this criterion, however. For example, there is no reason to expect that members or users have invested in business models based on an assumption that ASCAP can neither innovate nor expand the scope of services it offers. Therefore, restrictions on acquiring and licensing public performance rights outside of the United States, licensing members' rights in musical

[19] The "deadline" effect is widely recognized in economics (e.g., that labor negotiations most frequently are settled at the last minute just before contract expiration), including in experimental analysis by Nobel Prize winner Alvin Roth and coauthors who found "that a striking concentration of agreements reached in the very last seconds before the deadline. This 'deadline effect' appears to be quite robust." Alvin E. Roth, J. Keith Murnighan, and Francoise Schoumaker, "The Deadline Effect in Bargaining: Some Experimental Evidence," 78 American Economic Review 806 (1988). As a matter of economics, firms will have a greater incentive to adapt to changed circumstances when they are working toward a specific deadline rather than an uncertain deadline that is based on future events or conditions, in part because the parties will control to some extent whether those events or conditions are realized and can act strategically if delay serves their self-interest.

works other than performance rights, and licensing movie theaters should be eliminated.[20] These prohibitions serve only to prevent ASCAP from expanding competition by doing more, not less, should it decide that there are profitable opportunities to expand and should users request that ASCAP provide these services.

Similarly, certain provisions in the Consent Decree could deter ASCAP from innovating because it increases its costs to do so. For example, requiring ASCAP to treat "similarly situated" users the same for new types of contracts could reduce ASCAP's incentive to experiment with new license forms or potentially new methods of compensation with one or a limited number of users, because it would have to make the same offering at an equivalent rate available to all users that might claim to be "similarly situated."[21] Limitations on the length of contracts with users to which ASCAP can commit also may prevent ASCAP from engaging in contractual arrangements that it expects to be profitable only if the parties commit to a relationship longer than five years.

VI. Conclusion

Evolution in ASCAP's practices when it is not subject to current provisions in the Decree will eliminate distortions currently created by the Decree that prevent the marketplace from working efficiently, that penalize ASCAP and its members and that prevent other users and creators from benefiting from the enhanced competition that an unregulated ASCAP would provide.

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[20] The only firms that may have relied on these types of restrictions on ASCAP's flexibility are ASCAP's competitors; but such reliance is precisely the type of anticompetitive outcome that the Consent Decree may have created and that should be eliminated immediately for the benefit of users and licensees.

[21] While I understand that ASCAP is not explicitly requesting that any expanded services that it offers when it is subject to the transitional modified Decree be exempt from Rate Court oversight, the procompetitive effects of ASCAP's ability to expand its offerings will be severely limited if ASCAP is not free to offer new services at market rates without regulatory oversight.