

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

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Broadcast Music, Inc. (“BMI”) submits these public comments in response to the request of the Antitrust Division of the Department of Justice (the “DOJ”) pursuant to its review of the consent decree in *United States v. BMI*, Civ. No. 64-Civ-3787 (the “Decree”). The DOJ initiated this public comment period as part of its ongoing initiative to review legacy antitrust judgments. BMI believes that the Decree has become an impediment to innovation and should be substantially modified, and ultimately terminated, to remove unnecessary restrictions that do not further a legitimate public interest and constrain BMI’s ability to best serve songwriters, composers, music publishers and music users.

The Decree reflects an outdated model of antitrust enforcement by regulation. It imposes an inflexible contract structure and a judicial rate-setting process that are unresponsive to market needs, impede BMI (and other music industry participants) from adapting to changes in the marketplace, stifle innovation, and are unnecessary to preserve competition.

Ending the perpetual regulation of BMI and the American Society of Composers, Authors, and Publishers (“ASCAP”) (and by extension, large swaths of the music industry) is long overdue. The music licensing marketplace and the modern antitrust framework for assessing competition in that marketplace are virtually unrecognizable from those that existed when the BMI and ASCAP consent decrees were initially entered in 1941. At least four fundamental changes in the legal framework and competitive landscape make modification, and ultimately termination, of the Decree a necessity.

**Technology has revolutionized music use, distribution, and licensing.** When the Decree was entered, the public performance of music licensed by BMI was either live or analog. There was no cable television, satellite radio, internet or digital streaming. These advances in technology have transformed both the way music is distributed and consumed and the licensing

and administration of rights necessary to facilitate that consumption.

**Competition in music rights management and public performing rights licensing has proliferated.** On the rights management side, when the Decree was entered, BMI and ASCAP were the only viable performing rights organizations (“PROs”) through which most songwriters and publishers could license and manage their rights in the United States. Since then, SESAC Performing Rights, LLC (“SESAC”) and Global Music Rights LLC (“GMR”) have emerged as significant domestic PROs that compete with BMI and ASCAP for affiliates/members.

Other collective rights management organizations, such as SoundExchange and international PROs, also are emerging as competitive alternatives. None of these rights management organizations are subject to consent decrees.

BMI’s own affiliates are increasingly licensing their catalogs directly to music users. The largest publishers own and manage substantial catalogs. They too are unregulated.

The Decree thus reduces BMI’s ability to compete in the market by restricting BMI’s ability to innovate alongside these new competitors and/or its own affiliates.

On the licensing side, when the Decree was entered, most music users had no practical alternative to taking a blanket license from BMI. Technology, accumulation of significant catalogs by major publishers, consolidation of BMI’s licensing counterparties, and the growth of companies that advise users on how to reduce their music licensing fees and facilitate direct licensing (such as Music Reports, Inc.) have changed that landscape dramatically. Today there are robust competitive alternatives to licensing through BMI—and those alternatives are only increasing.

**The music industry, particularly music distribution, has consolidated, shifting the balance of power.** When the Decree was entered, BMI's licensees were principally mom-and-pop operations—local radio and television stations, individual concert halls, bars, and restaurants. That is no longer the case in many industries. Consolidation has swept across the television, radio, satellite, and concert promotion industries. Digital licensees include powerful and highly sophisticated multinational corporations. Even local restaurants and coffee shops are increasingly being replaced by national chains. As a result, large music users with which BMI negotiates often have greater bargaining leverage relative to music creators and BMI. Large music users also have the size and resources to invest in developing alternative licensing arrangements, including robust direct licensing programs, and have done so effectively. And small users generally avail themselves of form agreements that often result in those users paying minimal fees.

**Modern antitrust policy, case law, and enforcement are incompatible with the Decree.** First, the Decree is perpetual. All modern consent decrees contain a sunset provision providing for automatic termination. Maintaining the current Decree in perpetuity is not defensible. The Decree should be modified, in line with modern consent decrees, to incorporate a sunset provision that would give the marketplace an appropriate transition period to adapt to licensing in a free market. Second, the Decree reflects outdated antitrust doctrine that viewed a range of vertical conduct as "*per se*" unlawful. Prevailing antitrust law now treats this same vertical conduct as competitively neutral or procompetitive.

**BMI strongly disagrees with the assertion by some music users that their businesses are reliant on the Decree and that they would be unable to survive in its absence.** The core elements of BMI's Decree that users claim to rely on, such as the automatic license and rate

court provisions, were not incorporated into the Decree until 1994. Traditional industries such as radio and television were able to license BMI's works for decades prior to the additions of these provisions. These and other provisions of the Decree are not necessary for the industry's survival. Legacy users have shown that they were able to grow and thrive absent these provisions. New, innovative media services should be able to do the same.

**Nonetheless, BMI would support maintaining certain provisions of the Decree to help transition the industry without disruption.** The transitional decree should maintain four elements that will facilitate a transition to a free market: (1) automatic licensing subject to an automatic mechanism for the payment of interim fees; (2) access to the rate court, as reformed by the Music Modernization Act; (3) the continued ability of affiliated songwriters, composers, and music publishers to directly license their works; and (4) alternatives to the blanket license, including the adjustable fee blanket license and the per-program license. Modernizing the Decree while maintaining these four elements will provide continuity and certainty to the industry. It will give the marketplace the appropriate time and framework to shift to licensing in a free market while removing the anachronistic provisions that now serve no competitive purposes and stifle innovation and competition.

Once the Decree is terminated, BMI will be on equal footing with its competitors and will be able to innovate and compete free of the chilling effect of the Decree. As a result, it will be better able to meet the demands of a dynamic global marketplace that requires agility, flexibility, and innovation to meet the needs of modern music users, consumers, and creators.

Critically, BMI (like all other market participants) will remain subject to the constraints of the antitrust laws, which music users have employed effectively to restrain conduct they (or, indeed, the DOJ) believe is anticompetitive in the music licensing marketplace. Accordingly, the

DOJ will be able to resume its role as enforcer of the antitrust laws, rather than the *de facto* regulator of the music licensing industry.

## **I. THE BMI CONSENT DECREE**

BMI has operated under a consent decree for almost the entirety of its existence. In what was uniformly viewed as a procompetitive move, BMI entered the music licensing marketplace in 1939 as an alternative to ASCAP.<sup>1</sup> The DOJ commenced antitrust investigations against ASCAP (and then BMI) in the early 1940s. The antitrust concerns animating these challenges were twofold: (1) that songwriters, composers, and publishers could be denied representation by a PRO and therefore might have no practical ability to protect, enforce, and monetize the public performance right in their works; and (2) that the PROs were licensing works on an exclusive basis and offering only blanket licenses, regardless of the needs of the music user.

In 1941, BMI entered into its first consent decree with the DOJ<sup>2</sup> to resolve the challenge and avoid protracted litigation. Both the suit against the nascent BMI and the resulting consent decree were considered “friendly” counterparts to the DOJ’s investigation of ASCAP and its ensuing consent decree.<sup>3</sup>

In 1964, at the urging of ASCAP, the DOJ sued BMI on the theory that BMI was illegally

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<sup>1</sup> BMI was the third entrant to the market, as it was preceded by both ASCAP and SESAC. However, SESAC was not viewed as a meaningful competitor for ASCAP because its repertoire was much more limited in size and genre.

<sup>2</sup> *United States v. Broad. Music, Inc.*, 1940-43 Trade Cas. ¶ 56,096 (E.D. Wis. 1941).

<sup>3</sup> See Mem. from Hugh P. Morrison, Jr., Gen. Litig. Section to Donald F. Turner, Assistant Attorney General, Antitrust Div., *United States v. Broad. Music, Inc., et al.*, 64 Civ. 3787 (S.D.N.Y.) (Nov. 22, 1966) (“Morrison Memo”) at 1 (“The suit is often considered to be a ‘friendly’ suit, since these events occurred during ASCAP’s heyday, and the Department supposedly did everything possible to insure BMI’s success against the monopolistic ASCAP.”).

acting to *lower* prices for music performances.<sup>4</sup> BMI and the DOJ negotiated the 1966 Decree to settle that litigation. The provisions of the Decree were generally consistent with the framework of the “friendly” 1941 decree and provided almost none of the relief sought in the DOJ’s complaint.<sup>5</sup> The Decree was subsequently amended in 1994 when BMI moved, with the DOJ’s consent, to add the automatic licensing and rate court mechanisms,<sup>6</sup> in an effort to end the spate of private antitrust claims that music users asserted against it when rate negotiations stalled.

## II. MODIFICATION OF THE DECREE IS IN THE PUBLIC INTEREST

Federal Rule of Civil Procedure 60(b) authorizes a party to seek “‘relief from a final judgment, order, or proceeding,’ including modifications of consent decrees.”<sup>7</sup> The rule states that grounds for modification or termination exist where “applying [the consent decree] prospectively is no longer equitable” or for “any other reason that justifies relief.”<sup>8</sup> The Supreme Court has held that such relief is justified where a party “establish[es] 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.”<sup>9</sup> The Second Circuit has held that modification or termination of a consent decree may be “appropriate even though the purpose of the decree has not been achieved . . . [where there are] significant changes in the factual or legal climate.”<sup>10</sup>

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<sup>4</sup> See *id.* at 2, 5.

<sup>5</sup> See *id.* at 4 (“[T]he complaint sought to force BMI’s broadcaster-shareholders to divest BMI stock,” a remedy that the DOJ later concluded was not merited and it ultimately did not seek.); *United States v. Broad. Music, Inc.*, 1966 Trade Cas. (CCH) ¶ 74,941 (S.D.N.Y. 1966).

<sup>6</sup> See *United States v. Broad. Music, Inc.*, 1996–1 Trade Cas. ¶ 71,378 (S.D.N.Y. 1994).

<sup>7</sup> *United States v. Apple, Inc.*, 791 F.3d 290, 336 (2d Cir. 2015) (quoting Fed. R. Civ. P. 60(b)) (citations omitted).

<sup>8</sup> Fed. R. Civ. P. 60(b)(5), (6).

<sup>9</sup> *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 393 (1992).

<sup>10</sup> *United States v. Eastman Kodak Co.*, 63 F.3d 95, 102 (2d Cir. 1995).

As described below, the legal framework and competitive conditions that applied to BMI's business when the Decree was entered and last amended have changed dramatically, alleviating the antitrust concerns that originally animated the Decree. As a result, the Decree no longer serves the purposes for which it was intended, necessitating its modification and, ultimately, its termination.

**A. The Decree Is Inconsistent with Modern Antitrust Law and Policy**

1. *No Modern Consent Decree Provides for Perpetual Regulation.*

When BMI first entered into a consent decree in 1941, antitrust consent decrees typically had no end date. The opposite is true today. No modern antitrust consent decree is perpetual. It has long been recognized that a consent decree is not a means for the judiciary or executive branch to regulate a company—and by extension an industry—in perpetuity. That is why, in 1979, the DOJ established a policy of limiting the life of any consent decree by introducing a “sunset provision” to all decrees that generally results in the decree’s automatic termination after no more than ten years.<sup>11</sup> As the current Antitrust Division Manual explains, “[t]he 1979 change in policy was based on a judgment that perpetual decrees were not in the public interest.”<sup>12</sup> Thus, if BMI negotiated a consent decree with the DOJ to settle an identical antitrust challenge today, such a decree would be restricted to a limited duration.

The purpose of a modern antitrust decree is to constrain a defendant’s actions “both to

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<sup>11</sup> See U.S. Dep’t of Justice Antitrust Division Manual at § III-149 (5th ed. 2017).

<sup>12</sup> *Id.*



avoid a recurrence of the violation and eliminate its consequences.”<sup>13</sup> However, those restraints must “represent[] a *reasonable* method of eliminating the consequences of the illegal conduct.”<sup>14</sup>

BMI has never been found to have violated any antitrust laws and the DOJ has never brought an enforcement action against BMI.<sup>15</sup> Indeed, the procompetitive benefits of BMI’s blanket license have been recognized by the Supreme Court and the Second Circuit.<sup>16</sup> As the Supreme Court concluded, the blanket license provides procompetitive efficiencies for rights holders, who could not individually license, monitor, or enforce the millions of public performances of their works, and for licensees, who would otherwise find it less efficient to clear the public performance rights.<sup>17</sup> On remand from the Supreme Court’s decision, the Second Circuit held that the blanket license was lawful under the rule of reason.<sup>18</sup>

Nevertheless, BMI has spent the last 77 years subject to a consent decree that broadly regulates its vertical relationships with its affiliates and licensees in ways that are now at odds with modern antitrust laws.

2. *The Decree Is Premised on Outdated Antitrust Policy and Economic Theory.*

The Decree is the quintessential example of “[a] decree [that is] rendered obsolete by

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<sup>13</sup> See *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 697 (1978) (after finding defendant violated the Sherman Act, district court empowered to fashion appropriate restraints on defendant’s future activities “both to avoid a recurrence of the violation and eliminate its consequences”).

<sup>14</sup> *Id.* at 698 (emphasis added).

<sup>15</sup> The DOJ has conducted several routine investigations of BMI over the years, and, on each occasion, the DOJ has closed its investigation after concluding there was no basis for any enforcement action.

<sup>16</sup> See, e.g., *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 20–21 (1979) (describing the procompetitive efficiencies offered by the blanket license).

<sup>17</sup> *Id.*

<sup>18</sup> *Columbia Broad. Sys., Inc. v. Am. Soc’y of Composers, Authors & Publishers*, 620 F.2d 930, 938 (2d Cir. 1980).

changes in our understanding of the way markets work and, as a result, changes in the law.”<sup>19</sup>

Notably, at the time the Decree was entered, courts treated a relatively broad array of vertical conduct as *per se* unlawful. Today, vertical conduct and restraints (including those covered by the Decree) are subject to the rule of reason, which requires an economic analysis of the effects of the restraint, including its procompetitive benefits.<sup>20</sup>

As described further in Section III below, many of the restrictions in the Decree are vestiges of outdated antitrust policy, case law, and economic theory that have been disavowed. For example, the Decree prohibits BMI from vertically integrating into a music publishing or recording business, which could prevent BMI from, for example, being acquired by or partnering with a music publisher or label.<sup>21</sup> However, modern economic theory and antitrust law recognizes the procompetitive benefits of product extensions and vertical integration.<sup>22</sup> If an antitrust challenge were contemplated against BMI today, the DOJ would not seek—and no court would grant—such “*per se*” restrictions and injunctions against vertical conduct that is typically

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<sup>19</sup> M. DeBow, *Judicial Regulation of Industry: An Analysis of Antitrust Consent Decrees*, 1987 U. Chi. Legal F. 353, 358 (1987).

<sup>20</sup> The purpose behind the rule of reason analysis is to “distinguish[] between restraints with anticompetitive effects that are harmful to the consumer and restraints stimulating competition that are in the consumer’s best interest.” *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007).

<sup>21</sup> Decree § IV(B).

<sup>22</sup> See, e.g., *United States v. Columbia Steel Co.*, 334 U.S. 495, 525 (1948) (vertical integration, without more, not unlawful); *Port Dock & Stone Corp. v. Oldcastle Ne., Inc.*, 507 F.3d 117, 124 (2d Cir. 2007) (“Vertical expansion by a monopolist, without more, does not violate Section 2 of the Sherman Act. . . . [W]hen a monopolist has acquired its monopoly power at one level of a product market, its vertical expansion into another level of the same product market will ordinarily be for the purpose of increasing its efficiency, which is a prototypical valid business purpose.”); *Byars v. Bluff City News Co.*, 609 F.2d 843, 860–61 (6th Cir. 1979) (vertical integration not usually anticompetitive because, at least in theory, firm will vertically integrate only when it is at least as efficient as firms into whose markets it vertically integrates).

regarded as benign or even procompetitive under modern antitrust law.

3. *Absent the Decree, BMI Would Remain Subject to the Antitrust Laws.*

Termination of an antitrust decree leaves the parties “fully subject to the antitrust laws of general application.”<sup>23</sup> Thus, if, after the Decree was modified or terminated, BMI were to engage in any anticompetitive activity, it still would be subject to government antitrust enforcement actions and private antitrust claims for treble damages and injunctive relief. BMI serves as an intermediary between music creators and music users in a two-sided market, and its conduct is constrained by the potential for antitrust claims from participants on both sides of the market.<sup>24</sup> Indeed, the Supreme Court has recently affirmed that both direct purchasers (such as music users) and content providers (such as music creators) can pursue claims against the intermediaries with whom they contract.<sup>25</sup> Modification or termination of the consent decree would not affect these powerful constraints on BMI’s conduct.

SESAC and GMR are both cases in point. SESAC has operated for decades without the constraints of a consent decree and music users have pursued antitrust claims challenging certain of SESAC’s activities, causing SESAC to modify its licensing practices to resolve those claims.<sup>26</sup> In the course of resolving certain of these claims, SESAC has even agreed to

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<sup>23</sup> *United States v. Loew’s Inc.*, 783 F. Supp. 211, 214 (S.D.N.Y. 1992).

<sup>24</sup> *See Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1525 (2019) (intermediary in two-sided market subject to antitrust liability for claims of anticompetitive conduct from parties on both demand side and supply side). BMI’s position as the intermediary between music creators and music users, and the network effects it creates, also constrains the prices that it may charge to either side for its services. *See Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2281 (2018). The value of BMI’s services increases as the number of music creators and music users it serves increases. *See id.*

<sup>25</sup> *See id.*

<sup>26</sup> *See, e.g., Meredith Corp. v. SESAC LLC*, 1 F. Supp. 3d 180 (S.D.N.Y. 2014).

mechanisms that imitate the restrictions of the Decree. For example, to resolve an antitrust suit brought against it by the Radio Music License Committee (“RMLC”), SESAC agreed to an arbitration process that would “impose some rate setting parameters upon SESAC that would mirror the consent decree process that has been in place with ASCAP and BMI for decades . . . .”<sup>27</sup> GMR has been subject to antitrust claims as well, despite being a new entrant in the PRO arena.<sup>28</sup> In 2016, the RMLC brought antitrust claims against GMR and sought to enjoin it from extracting “exorbitant” fees for a license to the works within its repertoire.<sup>29</sup> RMLC alleged that GMR violated the antitrust laws, *inter alia*, by entering into *de facto* exclusive licenses with its affiliates and failing to offer any meaningful alternative to its blanket license.<sup>30</sup> These antitrust claims against SESAC and GMR underscore the fact that music users and the DOJ would have full recourse under the antitrust laws to challenge any BMI practice that even arguably crossed the line.<sup>31</sup> There is thus no need to require BMI to operate within the straitjacket of a perpetual consent decree.

## **B. Changes in the Marketplace Have Rendered the Decree Unnecessary**

1. *Music Creators Have Numerous Competitive Alternatives to Affiliating with BMI or ASCAP.*

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<sup>27</sup> E. Christman, *SESAC Settles Antitrust Suit Brought by Commercial Radio Group*, BILLBOARD (July 24, 2015), <https://www.billboard.com/articles/business/6641868/sesac-settles-antitrust-suit-rmlc-commercial-radio-group>.

<sup>28</sup> See Compl., *Radio Music License Comm., Inc. v. Glob. Music Rights, LLC*, Civ. No. 16-06076 (E.D. Pa. filed Nov. 18, 2016).

<sup>29</sup> *Id.* ¶ 3.

<sup>30</sup> *Id.* ¶¶ 4–8.

<sup>31</sup> Indeed, the power of certain industry stakeholders that advocate for the continued regulation of PROs is such that they are often subject to scrutiny for alleged antitrust violations themselves. See, e.g., Compl., *Glob. Music Rights, LLC v. Radio Music License Comm., Inc.*, Case No. 2:16-cv-09051-TJH-AS (C.D. Cal. filed Dec. 6, 2016) (alleging that the RMLC “operates an illegal cartel”).

In 1941, when BMI first entered into the Decree, the DOJ was concerned that songwriters and publishers had no meaningful alternatives to BMI and ASCAP to administer and license their public performance rights in the United States. Indeed, even SESAC was a boutique licensing organization that was not viewed as a meaningful competitor to ASCAP or BMI. The competitive landscape has shifted dramatically since then.

There are now four domestic PROs competing to attract songwriters and publishers to represent and administer their works. SESAC has transformed from a small organization of European stage authors into a for-profit enterprise owned by a venture capital firm, and is now believed to be worth at least \$1 billion.<sup>32</sup> GMR, the most recent entrant to the marketplace, has gained traction since it was formed in 2013 and its market share in commercial radio is believed to equal or even exceed that of the long-established SESAC.<sup>33</sup> Free from the restrictions of a consent decree, GMR has successfully attracted a select group of clients with promises of higher royalties.<sup>34</sup>

Similarly, foreign PROs—which historically licensed and administered the complete

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<sup>32</sup> In early 2013, a 75% interest in SESAC was sold to private equity fund Rizvi Traverse for a reported price of approximately \$600 million. A. Das, *Music Rights Company SESAC Sells Majority Stake*, WALL ST. J. (Jan. 2, 2013 6:14 PM), <https://blogs.wsj.com/deals/2013/01/02/music-rights-company-sesac-sells-majority-stake/>. Four years later, in early 2017, Rizvi Traverse sold its interest in SESAC to Blackstone Core Equity Partners in a deal rumored to be valued at \$1 billion. E. Christman, *Was Blackstone's SESAC Acquisition a \$1 Billion Deal?*, BILLBOARD (Jan. 6, 2017), <https://www.billboard.com/articles/business/7647846/blackstone-sesac-acquisition-price>.

<sup>33</sup> *Compare* Compl. at ¶53, *Radio Music License Comm., Inc. v. Global Music Rights, LLC*, Civ. No. 16-06076 (E.D. Pa. Nov. 18, 2016) (estimating GMR's share of radio performances as between 5%-7.5%), with E. Christman, *SESAC's Negotiations with Radio Group Result in Higher than Expected Licensing Rate*, BILLBOARD (July 31, 2017), <https://www.billboard.com/articles/business/7882148/sesacs-rlc-negotiations-radio-group-higher-licensing-rate> (reporting that the RMLC assigned SESAC a 5% market share).

<sup>34</sup> E. Gardner, *BMI Demands Licensing Documents from Irving Azoff-Led Competitor*, BILLBOARD (Sept. 12, 2018), <https://www.billboard.com/articles/business/8474952/bmi-demands-licensing-documents-from-irving-azoff-led-competitor>.

universe of works in their respective territories—are increasingly expanding their geographic reach and now compete and license on a multi-territory, multi-rights basis. For example, the Society of Composers, Authors and Music Publishers of Canada (“SOCAN”) (Canada), PRS for Music (“PRS”) (U.K.), and Société des Auteurs, Compositeurs, et Éditeurs de Musique (“SACEM”) (France) all have client bases in excess of 100,000 members. They also have reciprocal representation agreements with PROs around the world, allowing them to essentially represent a global repertoire within their territories (as opposed to the four U.S. PROs, which each represent only a subset of that universe of works within the United States). PRS and SACEM each have client bases that they represent on a multi-territory, multi-rights basis, offering international digital service providers a one-stop shop for certain repertoires on a regional, and, in some cases, world-wide, basis.<sup>35</sup> SOCAN has purchased businesses within the United States that service rights that are complementary to public performance rights<sup>36</sup> and has begun offering administrative services in territories outside of Canada.<sup>37</sup> Like SESAC and

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<sup>35</sup> See Press Release, SACEM and SOCAN Sign an Unprecedented Transatlantic Agreement (June 3, 2016), <https://societe.sacem.fr/en/press-resources/per-publication/press-releases/sacem-and-socan-sign-an-unprecedented-transatlantic-agreement>; Press Release, SACEM Announces Three Multi-Territorial Deals with Facebook (Mar. 19, 2018), <https://societe.sacem.fr/en/news/our-society/sacem-announces-three-multi-territorial-deals-with-facebook> (use of SOCAN’s repertoire was also included in the deals); *Multi-territory licensing*, PRS FOR MUSIC, <https://www.prsformusic.com/royalties/online-royalties/multi-territory-licensing>.

<sup>36</sup> In 2016, SOCAN bought Seattle-based MediaNet Digital Inc., which creates technology used to better collect real-time song-streaming data online, and New York-based Audiam, which audits and polices services such as YouTube to properly license content for reproduction royalties. *SOCAN acquires Montreal rights agency SODRAC in bid to deliver better returns*, GLOBE & MAIL (July 31, 2018), <https://www.theglobeandmail.com/arts/music/article-socan-acquires-montreal-rights-agency-sodrac-in-bid-to-deliver-better/>.

<sup>37</sup> See *SOCAN Signs Admin Deal with Ducapro*, MUSIC BUSINESS WORLDWIDE (May 8, 2018), <https://www.musicbusinessworldwide.com/socan-signs-admin-deal-with-dutch-caribbean-pro-ducapro/>; see also Press Release, SOCAN Launches Dataclef Music Services (Oct. 22, 2018), <https://www.socan.com/socan-launches-dataclef-music-services/>.

GMR, these PROs are able to more freely compete while engaging in related business lines and conduct without the constraints that BMI is subject to under the Decree.<sup>38</sup>

Furthermore, major music publishers such as Universal Music Publishing Group (“UMPG”), Sony/ATV Music Publishing (“Sony/ATV”), and BMG Rights Management GmbH (“BMG”) have very significant catalogs in their own right (larger than those of SESAC and GMR) and provide a meaningful alternative to BMI’s blanket license by directly licensing the works of their own songwriters and those with whom they have representation agreements. Sony/ATV’s and UMPG’s catalogs each represent a substantial portion of BMI’s total repertoire<sup>39</sup> and include major songwriters like Taylor Swift and Lady Gaga (Sony/ATV) and Eminem and Keith Urban (UMPG). Like songwriters, these publishers have the ability to remove their rights from BMI at the end of each affiliation term. Since there are many alternative organizations (including the publisher itself) that would be willing and able to license those rights, BMI must act competitively to respond to their needs or risk being displaced.

Additionally, other collective licensing entities and rights management organizations have significant client bases and relationships in the industry and are well-positioned to expand their activities to include the licensing of public performance rights in musical works. For

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<sup>38</sup> For example, SOCAN recently acquired a reproduction rights business. *See* J. O’Kane, *SOCAN acquires Montreal rights agency SODRAC in bid to deliver better returns*, GLOBE & MAIL (July 31, 2018), <https://www.theglobeandmail.com/arts/music/article-socan-acquires-montreal-rights-agency-sodrac-in-bid-to-deliver-better/>.

<sup>39</sup> *See* SONY CORP., SUPPLEMENTAL INFORMATION FOR THE CONSOLIDATED FINANCIAL RESULTS FOR THE FOURTH QUARTER ENDED MARCH 31, 2019 11 (Apr. 26, 2019), [https://www.sony.net/SonyInfo/IR/library/presen/er/pdf/18q4\\_supplement.pdf](https://www.sony.net/SonyInfo/IR/library/presen/er/pdf/18q4_supplement.pdf) (listing 4.53 million songs in music publishing catalog); *Universal Music Publishing Group Promotes Kevin Cady to Head of Finance*, VARIETY (July 5, 2017), <https://variety.com/2017/music/news/universal-music-publishing-group-kevin-cady-head-finance-1202488082/> (Universal “represents a collection of 3 million songs”).

example, SoundExchange already collects and distributes royalties for licensing complementary rights in the same works that digital music services need to digitally stream and reproduce sound recordings in the United States. SoundExchange serves a community of 170,000 artists, rights owners, and record labels, and is understood to be expanding into additional lines of services for a variety of customers.<sup>40</sup> SoundExchange recently acquired the Canadian Music Reproduction Rights Agency (“CMRRA”), and promoted the acquisition as providing it with “a unique opportunity to offer a broad and comprehensive range of services to rights holders in both sound recordings and music publishing and music users alike across North America.”<sup>41</sup>

SoundExchange also created SXWorks, which “offers administration and back-office services for publishers to support multiple licensing configurations” and “will provide a robust platform capable of managing vast volumes of musical repertoire and rights data.”<sup>42</sup> SXWorks endeavors to “improve efficiency and transparency in the industry and ensure the music ecosystem can accurately track, report and compensate rights owners and creators for music usage.”<sup>43</sup> It has recently launched NOI Lookup, which allows publishers and songwriters to search address

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<sup>40</sup> Press Release, SoundExchange, SoundExchange Appoints Richard Conlon Chief Corporate Development Officer (Sept. 19, 2018), <https://www.prnewswire.com/news-releases/soundexchange-appoints-richard-conlon-chief-corporate-development-officer-300715140.html> (noting the company’s expansion “into additional lines of services for labels, artists, music publishers and licensees”).

<sup>41</sup> Press Release, SoundExchange, SoundExchange Acquires Canadian Musical Reproduction Rights Agency (CMRRA) (May 15, 2017), <https://www.soundexchange.com/news/soundexchange-acquires-canadian-musical-reproduction-rights-agency-cmrra/>.

<sup>42</sup> Press Release, SXWorks, Music Publishers Join SXWorks Board of Directors (Dec. 7, 2017), <https://www.prnewswire.com/news-releases/music-publishers-join-sxworks-board-of-directors-300568363.html>.

<sup>43</sup> *Id.*



unknown Notice of Intention to Use filings made with the U.S. Copyright Office.<sup>44</sup> Further, SXWorks is under consideration to serve as the technology partner for the Mechanical Licensing Collective, which will permit it to track, capture, and disseminate mechanical royalties.<sup>45</sup> SoundExchange recently hired a former BMI executive to lead its expansion into additional lines of services for music creators and licensees and coordinate services across its growing portfolio of subsidiary companies.<sup>46</sup>

2. *Music Users Have Numerous Competitive Alternatives to Licensing through BMI's Blanket License.*

In 1941, the DOJ was concerned that music users had no meaningful competitive alternative to taking a blanket license through BMI. Today, although many music users still prefer the efficiencies of BMI's blanket license, licensees have many alternatives and have chosen to use them when it has been economically efficient to do so.

(a) Direct licensing by music publishers is increasing.

Music publishers, including UMPG, Sony/ATV, BMG and others, have developed significant portfolios of musical works and can offer users a genuine alternative to a blanket license from a PRO.<sup>47</sup> Even independent publishers, with the assistance of technology, can

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<sup>44</sup> Press Release, SXWorks, [sxworks launches new services for music publishers and songwriters](https://www.soundexchange.com/2018/06/20/sxworks-launches-new-services-music-publishers-songwriters/) (June 20, 2018), <https://www.soundexchange.com/2018/06/20/sxworks-launches-new-services-music-publishers-songwriters/>.

<sup>45</sup> See P. Resnikoff, *Music Publishers Request \$26-48 Million Just to Start the MLC – With Annual Operating Costs Approaching \$40 Million*, DIGITAL MUSIC NEWS (Mar. 17, 2019), <https://www.digitalmusicnews.com/2019/03/27/major-publishers-mlc-submissions/> (noting that SXWorks is “widely believed to [be] the pre-selected partner”).

<sup>46</sup> SoundExchange, *supra* note 40.

<sup>47</sup> See *Broad. Music, Inc. v. DMX Inc.*, 683 F.3d 32, 38, 42, 48 (2d Cir. 2012) (affirming the rate court choice to set the value of an adjustable fee blanket license between BMI and DMX by benchmarking it at the value of approximately 550 direct licenses between DMX and music publishers, as this “reflected the competitive market”; also noting that DMX secured a direct license with Sony/ATV Music Publishing—

efficiently engage in direct licensing with music users.<sup>48</sup>

Several factors have driven the growth in direct licensing.

Advances in music technology that allow music users to accurately track performances have facilitated the use and growth of direct licensing options and substantially reduced the cost of license administration. Developments in data tracking and music-recognition technology are significantly improving the ability of music users to actively and accurately track, ingest, log, and report public performances of works.<sup>49</sup> Advances in technology have also facilitated the electronic submission of cue sheets and other critical information by music users, program producers, and rights holders. These technologies have lowered the administrative burden and overhead required to ensure that royalties are collected and paid to the songwriters, composers, and publishers who own the public performance rights in the works performed.<sup>50</sup> As a result, even smaller rights owners will be able to track the use of their repertoires and enforce their

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“one of the industry’s largest music publishers”); *see also* Comments Submitted to the Dep’t of Justice in Connection with its Review of the ASCAP and BMI Consent Decrees: “Split Works” at 36 (Nov. 20, 2015), Sony/ATV Music Publishing LLC, <https://www.justice.gov/atr/public/ascapbmi2015/ascapbmi6.pdf> (noting that in 2013, Sony withdrew its new media rights from BMI and ASCAP and entered into direct licensing deals with YouTube, iTunes Radio, Pandora, and Google Play). Sony/ATV continues to engage in direct licensing even after the withdrawal of new media rights was ruled impermissible under the BMI and ASCAP consent decrees.

<sup>48</sup> For example, in 2016, Downtown Music Publishing expanded its licensing agreement with YouTube to directly license performance rights for the songs within its repertoire. Press Release, Downtown Music Publishing, Downtown x YouTube | Direct Performance License (Apr. 6, 2016), <https://www.dmpgroup.com/news/2016/04/downtown-x-youtube-direct-performance-license>.

<sup>49</sup> *See, e.g.,* P. Resnikoff, *Music Recognition Technology Will Generate Millions for Indie Artists—But Only If Distributors & PROs Play Ball*, DIGITAL MUSIC NEWS (July 8, 2018), <https://www.digitalmusicnews.com/2018/07/08/music-recognition-technology-mrt-2019/>.

<sup>50</sup> Digital use and the increase in the sheer amount of data presents the new challenge of analyzing and processing exponentially larger amounts of information. Although currently offsetting many of the cost savings, BMI expects that technology will continue to develop to reduce this administrative burden as well.

rights. It is no longer always necessary to have the scale and resources of a PRO to monitor, identify and distribute royalty payments.

For example, in 2016, Music Reports, Inc. (“MRI”), administered over \$500 million in royalty payments for mechanical, public performance, and synchronization rights by processing more than 600 billion performances on digital music services, social network applications, and television broadcasts.<sup>51</sup> MRI has developed technology that allows “rights owners to register and correct their catalogs, including offering a claiming system to fix songs with missing and faulty data, as well as helping to find cover recordings.”<sup>52</sup> It also allows rights owners to “access full archives of their licensing, royalty reporting and payment histories, and showing publishers’ relative performance across on-demand streaming services.”<sup>53</sup> It also offers tools that allow music users to avoid engaging with PROs entirely, as it has developed “a portal that allowed music services like Pandora and Amazon to enter into direct licensing deals with publishers.”<sup>54</sup>

New technology also allows users to more easily curate around music content they would prefer not to license. With increased information transparency and reduced switching costs, users no longer need to take a blanket license (or claim that they are compelled to do so) because they are now able to identify and control what music is contained in programs.

Television and radio broadcasters have been able to do this for decades. Both, along with

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<sup>51</sup> E. 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>.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

background music services, have directly licensed, or curated around, works in the BMI repertoire embedded within their original programming to reduce their overall cost of licensing.<sup>55</sup> Through BMI's per-program license and the adjustable fee blanket license, hundreds of television and radio stations are able to obtain credit for public performances of works licensed directly or at the source.<sup>56</sup>

Recently, Pandora, Spotify, and other digital media companies successfully avoided licensing entire repertoires of certain publishers. Pandora, for example, opted to remove BMG musical works from its streaming services for six months. By using data from the ASCAP and BMI online repertoire databases and third-party services such as LyricFind, Pandora successfully curated around the BMG catalog.<sup>57</sup>

This ability to license selectively will only increase as new options and tools that improve access to data and facilitate the use of that data are developed and made available to the public.

In fact, BMI and ASCAP are leading this effort. Specifically, BMI and ASCAP are working on an initiative to provide a reconciled set of information related to who has the right to license the musical works within their respective repertoires to the public.<sup>58</sup> This dataset will include comprehensive information on the vast majority of all musical works licensed in the

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<sup>55</sup> The fee for the blanket license also must be adjusted to reflect any direct licenses that music users have negotiated with BMI's affiliates in what is called an adjustable fee blanket license. *See, e.g., DMX Inc.*, 683 F.3d at 42–43 (describing an adjustable fee blanket license requested from BMI); *United States v. Broad. Music, Inc. (In re AEI Music Network, Inc.)*, 275 F.3d 168, 176 (2d Cir. 2001).

<sup>56</sup> *See* Decree §§ VIII(B) and IX(C), respectively. As noted below, BMI supports preserving the per-program license and adjustable fee blanket license in a modified decree.

<sup>57</sup> *See Broad. Music, Inc. v. Pandora Media, Inc.*, 140 F. Supp. 3d 267, 283 (S.D.N.Y. 2015).

<sup>58</sup> *See* Press Release, ASCAP, ASCAP & BMI Announce Creation of a New Comprehensive Musical Works Database to Increase Ownership Transparency in Performing Rights Licensing (July 26, 2017), <https://www.ascap.com/press/2017/07-26-ascap-bmi-database>.

United States and is expected to be available to the public within the next six months.

Additionally, as part of the Music Modernization Act, a new copyright licensing organization, the Mechanical Licensing Collective, “will create and maintain the world’s most thorough database of music composition copyrights and their owners.”<sup>59</sup>

In addition to tracking music spins and ownership, new technology has made it easier than ever for music creators to connect directly with music users. A variety of firms, including TuneCore, CD Baby, INgrooves, Songtrust, and The Orchard, have created platforms that allow publishers and songwriters to make their music available and licensable on the internet, facilitating their ability to directly license various music uses.

Digital music use has made direct licensing more attractive and feasible. Music streaming now captures 75% of all revenue generated by the U.S. music industry.<sup>60</sup> To digitally stream music, digital music services (*e.g.*, Spotify, Pandora, and Apple) often need to negotiate directly with publishers for other required rights in addition to public performance rights. Licensing directly with music publishers is a more attractive option for these users for two reasons. First, publishers can license a variety of rights (such as mechanical, synchronization, lyric display, and public performance rights) that users require. Second, publishers are able to efficiently bundle those same rights and provide “one-stop shop” licensing for music users.

While the Second Circuit recently confirmed that BMI is permitted to bundle rights,<sup>61</sup> the

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<sup>59</sup> J. Miranda, *The Music Modernization Act Will Create a New Copyright Licensing Organization Called the ‘MLC’. What Will It Look Like?*, Digital Music News (May 6, 2018), <https://www.digitalmusicnews.com/2018/05/06/music-modernization-act-mma-mechanical-licensing-collective-mlc/>.

<sup>60</sup> Recording Indus. Ass’n of Am., Mid-Year 2018 RIAA Music Revenues Report, <https://www.riaa.com/wp-content/uploads/2018/09/RIAA-Mid-Year-2018-Revenue-Report.pdf>.

<sup>61</sup> *United States v. Broad. Music, Inc.*, 720 F. App’x 14, 16–17 (2d Cir. 2017) (holding that BMI is not enjoined from any activity not expressly prohibited in the Decree).

express prohibition on bundling in the ASCAP consent decree previously led to uncertainty regarding BMI's ability to do so. This is an example of how the Decree has impeded BMI's ability to meet marketplace demand for more efficient licensing solutions.

In addition to the consolidation of music publishers, media companies—including current BMI licensees—have aggregated their programming, increasing their purchasing power and economies of scale, thereby increasing the efficiency of direct licensing:

- Major technology and internet companies, like Amazon, Google, Apple, and Netflix, now dominate the entertainment landscape.
- Digital music streaming is dominated by Spotify, Pandora and Apple Music.<sup>62</sup>
- In radio, large media companies actively acquired local stations following the passage of the Telecommunications Act of 1996.<sup>63</sup> For example, iHeart Media now owns more than 800 broadcast and digital-only radio stations from 150 cities.<sup>64</sup>
- The cable and television broadcasting industry also has consolidated significantly. Most recently, in December 2018, Nexstar Media Group agreed to purchase Tribune Media.<sup>65</sup> The combined company's reach will extend to 39% of the country.<sup>66</sup> Its

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<sup>62</sup> See F. Richter, *The Music Streaming Landscape*, STATISTA (Dec. 14, 2017), <https://www.statista.com/chart/5152/music-streaming-subscribers/>.

<sup>63</sup> Comments of musicFIRST Coalition and Future of Music Coalition at i (Sept. 24, 2018), <http://musicfirstcoalition.org/wp-content/uploads/2018/09/MUSICFIRST-FMC-FCC-COMMENT-FINAL.pdf>.

<sup>64</sup> Press Release, iHeart Media, Inc., Greater Media Radio Stations Join iHeartRadio Digital Platform (Jan. 9, 2012), <https://www.iheartmedia.com/press/greater-media-radio-stations-join-iheartradio-digital-platform>.

<sup>65</sup> P. Bond, *Nexstar's \$6.4 Billion Tribune Buy Spurs More Dealmaking*, HOLLYWOOD REPORTER (Dec. 7, 2018), <https://www.hollywoodreporter.com/news/nexstars-64-billion-tribune-buy-spurs-more-dealmaking-1166501>.

<sup>66</sup> *Id.*

largest competitor, Sinclair Broadcast Group, reached 38% of the country as of May 2017.<sup>67</sup>

- Content creators also have consolidated. For example, The Walt Disney Company purchased 21st Century Fox<sup>68</sup> and is launching a streaming service (Disney+) that will allow it to distribute its content directly to consumers.<sup>69</sup>
- SiriusXM, which (itself the product of merger) is now the only commercial satellite radio service in the United States, recently acquired Pandora Media to create “the world’s largest audio entertainment company.”<sup>70</sup>
- Background music services have consolidated into a single player, Mood Media, which acquired competitors including Muzak and DMX.<sup>71</sup>
- The live concert industry has also transformed, shifting away from the hundreds of regional promoters to national mega-promoters like Live Nation Worldwide, Inc. and Anschutz Entertainment Group (“AEG”).<sup>72</sup>

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<sup>67</sup> M. Snider, *\$4 billion TV deal creates nation's largest broadcaster*, USA TODAY (May 7, 2017), <https://www.usatoday.com/story/money/business/2017/05/07/sinclair-broadcasting-buy-tribune-media-4-billion-deal-reports-say/101409222/>.

<sup>68</sup> B. Barnes, *Disney Moves from Behemoth to Colossus with Closing of Fox Deal*, N.Y. TIMES (Mar. 20, 2019), <https://www.nytimes.com/2019/03/20/business/media/walt-disney-21st-century-fox-deal.html>.

<sup>69</sup> N. Jarvey, *Disney+ Launch Date, Price and Additional Details Revealed*, HOLLYWOOD REPORTER (Apr. 11, 2019), <https://www.hollywoodreporter.com/news/disney-launch-date-price-additional-details-revealed-1201341>.

<sup>70</sup> J. Aswad, *Sirius XM Completes Acquisition of Pandora*, VARIETY (Feb. 1, 2019), <https://variety.com/2019/biz/news/sirius-xm-completes-acquisition-of-pandora-1203125882/>.

<sup>71</sup> J. Horn, *Mood Media rebrands, merges music services*, STRATEGY (Feb. 14, 2013), <http://strategyonline.ca/2013/02/14/mood-media-rebrands-merges-music-services/>.

<sup>72</sup> B. Sisario & G. Bowley, *Live Nation Rules Music Ticketing, Some Say with Threats*, N.Y. TIMES (Apr. 1, 2018), <https://www.nytimes.com/2018/04/01/arts/music/live-nation-ticketmaster.html>.

- There has also been significant vertical consolidation within the media industry. Programming distributors have acquired ownership stakes in content providers in an attempt to turn what were previously programming expenses into a potential source of revenue.<sup>73</sup> For example, in 2011, Comcast Corporation acquired NBC Universal, “creating a \$30 billion media behemoth that controls not just how television shows and movies are made but how they are delivered to people’s homes.”<sup>74</sup> More recently, AT&T’s acquisition of Time Warner “unite[d] the nation’s second-largest mobile phone provider, third-largest home broadband provider, and second-largest pay-TV provider with a deep well of content.”<sup>75</sup>

(b) Source licensing is increasing.

An increasing number of program producers are source licensing the public performance rights for music within their programs and embedding these public performance rights in the programs. For such programs, no additional license must be obtained for the public performance, either from a PRO or through a direct license with a music publisher:

- ESPN Inc. obtains the majority of the rights required for the programming it produces through source or direct licenses with music publishers—including BMI affiliates—

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<sup>73</sup> Fed. Comm’n Comm’n, Eighteenth Report on the Status of Competition in the Market for the Delivery of Video Programming ¶ 48 (Jan. 17, 2017), <https://www.fcc.gov/general/media-bureau-reports-industry>.

<sup>74</sup> Y. Adegoke & D. Levine, *Comcast completes NBC Universal merger*, REUTERS (Jan. 29, 2011), <https://www.reuters.com/article/us-comcast-nbc/comcast-completes-nbc-universal-merger-idUSTRE70S2WZ20110129>.

<sup>75</sup> K. Finley, *The AT&T-Time Warner Merger Is a Done Deal. Now What?*, WIRED (June 12, 2018), <https://www.wired.com/story/the-atandt-time-warner-merger-is-a-done-deal-now-what/>.



and through “work-for-hire” agreements with songwriters/artists.<sup>76</sup> ESPN also requires all of its third-party program producers to pre-clear music at the source for all programming to be aired on ESPN.<sup>77</sup>

- Discovery, Inc., owner of the Discovery Channel, TLC, Animal Planet, Food Network, HGTV, and the Travel Channel, among others, engages with third parties or wholly-owned production studios to develop and produce original content.<sup>78</sup> Discovery retains editorial control and owns all or most of the rights in exchange for paying all development and production costs.<sup>79</sup>
- Other market participants, such as Netflix, are increasingly partnering directly with copyright owners to develop their own new programming content.<sup>80</sup> For example, Netflix is actively working with songwriters and artists to build a body of works whose copyrights it will own. Netflix recently signed an agreement with BMG to administer its music publishing rights outside the United States.<sup>81</sup>

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<sup>76</sup> Petition of ESPN, Inc. for the Determination of Reasonable Final License Fees at ¶4, *ESPN, Inc. v. Broad. Music, Inc.*, No. 16-cv-1067 (S.D.N.Y. Feb. 11, 2016) (ECF No. 1).

<sup>77</sup> *Id.*

<sup>78</sup> Discovery Inc., Annual Report (Form 10-K) at 18 (Mar. 1, 2019).

<sup>79</sup> *Id.*

<sup>80</sup> See, e.g., B. Desowitz, *How The Clash Became an Integral Part of the “Stranger Things” Musical Emmy Nomination*, INDIEWIRE (Aug. 18, 2017), <https://www.indiewire.com/2017/08/stranger-things-the-clash-should-i-stay-or-should-go-emmy-nomination-1201867771/> (detailing the efforts of a Netflix original show’s music supervisor to convince a band to license one of its songs).

<sup>81</sup> See M. Schneider, *Netflix Taps BMG for Music Publishing Rights Outside U.S.*, BILLBOARD (Feb. 2, 2017), <https://www.billboard.com/articles/business/7677752/netflix-bmg-music-publishing-rights-originals>.

(c) New licensing models, demanded by music users, incentivize rights holders to license their works.

The emergence of claims-based licensing models by music users presents another alternative licensing model to the blanket license.<sup>82</sup> One of the hallmarks of the blanket license is that the amount payable under the license does not vary during the term of the agreement no matter how much of a rights holder’s music is performed.<sup>83</sup> By contrast, in a claims-based license model, copyright holders must “claim” the performances during each reporting period and fees are calculated based on the percentage of claimed performances to total performances. In a claims-based system, music users also take responsibility for tracking their performances and providing to all rights holders a comprehensive set of information on works performed against which they can claim their rights. Certain users require pre-registration of rights, automatically process the performances, and calculate the fee payable based on the works registered.

The increasing use of source and direct licensing arrangements and alternative licensing models means that there are now even more robust alternatives to BMI’s blanket license than when alternatives to BMI’s blanket license were last judicially considered and found to be viable.<sup>84</sup>

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<sup>82</sup> For example, the Mechanical Licensing Collective, established by the Music Modernization Act, will engage in claims-based licensing. Miranda, *supra* note 59.

<sup>83</sup> *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 5 (1979) (“Fees for blanket licenses are ordinarily a percentage of total revenues or a flat dollar amount, and do not directly depend on the amount or type of music used.”).

<sup>84</sup> *See id.* at 20; *Columbia Broad. Sys., Inc. v. Am. Soc’y of Composers, Authors & Publishers*, 620 F.2d 930, 938 (2d Cir. 1980) (direct licensing viable alternative); *see also Buffalo Broad. Co., Inc. v. Am. Soc’y of Composers, Authors & Publishers*, 744 F.2d 917, 926–32 (2d Cir. 1984) (determining that the per-programming license, source licensing, and direct licensing were viable alternatives to the blanket license).

3. *The Decree Serves No Purpose for Large Swaths of Music Users.*

Many music users benefit from licenses that were put in place without resort to the rate court or any other provision of the Decree. This is particularly true of BMI's general licensees, many of whom are small businesses that have benefited from a form of general license with minimal fees that BMI developed prior to the addition of the rate court in the 1994 amendment to the Decree.

Minimizing transaction costs and maximizing licensing efficiencies is of primary importance to these small users<sup>85</sup> and to BMI. For instance, BMI's Music License for Eating & Drinking Establishments calculates fees based on a simple formula that combines the type of music used by an establishment (jukebox, live performance, karaoke, etc.) with the establishment's occupancy to charge fees that are affordable for these establishments. BMI's goal is to maximize license coverage by making it as cost-effective and efficient as possible for these establishments to take the license.

The shared economic incentives of BMI and its general licensees resulted in efficient licensing outcomes independently of the rate court<sup>86</sup> and would continue in the absence of the Decree. Moreover, these small businesses (and the larger membership organizations to which they belong) will continue to have the protections of the antitrust laws absent the Decree.

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<sup>85</sup> See, e.g., Comments of the Oklahoma Restaurant Ass'n Submitted to the Dep't of Justice in Connection with its 2014 Review of the ASCAP and BMI Consent Decrees (July 31, 2014), <https://www.justice.gov/sites/default/files/atr/legacy/2014/08/13/307601.pdf> ("It is important that Performance Rights Organizations like BMI be allowed to act as a 'one-stop-shop' for musical works rights in order to provide maximum value and efficiency to our members.").

<sup>86</sup> Although under 17 U.S.C. § 513(2), individual proprietors who own fewer than seven non-publicly traded establishments have the right to challenge license fees in the federal district courts in which their establishments are located, they rarely do so.

For all of these reasons, the Decree is no longer necessary to preserve competition in the music performance licensing marketplace. Furthermore, the continued existence of the Decree in a dynamic and increasingly global music licensing marketplace has the perverse effect of restricting competition and impeding innovation by BMI, as well as other stakeholders throughout the entire industry.

### **III. THE DECREE IMPEDES INNOVATION AND COMPETITION**

The Decree impairs BMI's ability to innovate, and distorts competition in three important ways. *First*, certain prohibitions in the Decree conflict with modern antitrust law and prevent BMI from pursuing business activities that are now viewed as benign or even procompetitive. *Second*, BMI is regulated by a contractual framework that was negotiated more than 70 years ago, and did not contemplate the music distribution models and licensing practices that are prevalent today. As a result, BMI (and on occasion, the DOJ) has needed to expend significant time and resources analyzing and defending whether certain practices comply with the terms of an antiquated Decree, rather than whether they comply with the underlying antitrust laws. *Third*, BMI's competitors—which include SESAC and GMR, SoundExchange, and its partners and affiliates including international PROs and music publishers—are able to offer a broader range of services to meet the needs of music creators and users. By contrast, BMI and ASCAP are constrained by their consent decrees from offering comparable services to their members and music users.

These effects are discussed in further detail below.

#### **A. The Decree Prohibits Procompetitive Licensing Conduct**

1. *The Decree's Per Se Prohibition on Treating "Similarly Situated" Licensees Differently Is Not Procompetitive.*

The Decree prevents BMI from “enter[ing] into . . . any performing rights license agreement [that] discriminat[es] in rates or terms between licensees similarly situated.”<sup>87</sup> There is no basis in modern antitrust case law to justify maintaining what is in effect a *per se* prohibition on treating customers differently. To the contrary, modern antitrust law and economic theory recognizes that sellers (even monopolists) should be permitted to provide different economics (including rates and terms) to different customers because this may increase overall output and total welfare.<sup>88</sup>

To be clear, it is BMI’s intention to continue to treat all licensees fairly and to quote reasonable rates consistent with those in the licensee’s particular market. However, as described below, this provision goes beyond ensuring that music users are treated fairly, and reduces innovation and efficiencies.

(a) The “similarly situated” obligation distorts pricing incentives.

First, by requiring BMI to license to all “similarly situated” users at the same rate and on the same terms, the Decree, in effect, has created a regulated “most favored nation” (“MFN”) licensing obligation. While MFNs can be commercially reasonable and even procompetitive,

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<sup>87</sup> Decree § VIII(A).

<sup>88</sup> See Dennis W. Carlton & Ken Heyer, *Appropriate Antitrust Policy Towards Single-Firm Conduct*, DEP’T OF JUSTICE ANTITRUST DIV. ECON. ANALYSIS GRP. (Jan. 2008), [https://www.justice.gov/atr/appropriate-antitrust-policy-towards-single-firm-conduct#N\\_20](https://www.justice.gov/atr/appropriate-antitrust-policy-towards-single-firm-conduct#N_20). Although certain forms of price discrimination are prohibited under the Robinson-Patman Act, this Act does not apply to the licensing of intellectual property. See, e.g., *First Comics, Inc. v. World Color Press, Inc.*, 884 F.2d 1033, 1036 (7th Cir. 1989) (defining the “commodities” to which the Robinson-Patman Act applies as “goods, wares, merchandise, machinery or supplies” (citing *Columbia Broad. Sys., Inc. v. Amana Refrigeration, Inc.*, 295 F.2d 375, 378 (7th Cir. 1961))); see also *Tri-State Broad. Co. v. United Press Int’l, Inc.*, 396 F.2d 268, 270 (5th Cir. 1966) (contract for sale of news information services not a sale of a “commodity” within contemplation of the Robinson-Patman Act). Furthermore, the price discrimination prohibition has been substantially eviscerated by the courts and federal antitrust enforcers have declined to bring any enforcement actions under the Robinson-Patman Act for decades.

MFNs also have been recognized, in certain circumstances, to have anticompetitive effects as well. For example, MFN obligations can discourage a seller from lowering prices for potential future buyers once the seller has set a price and entered into an MFN provision with one initial buyer (an economic phenomenon known as “price stickiness”). The global MFN requirement in the Decree thus economically disincentivizes BMI from lowering its prices or offering more innovative licensing terms. The more times a seller enters into a transaction that includes an MFN provision, the less likely the seller is to lower prices because the overall associated costs continue to increase.<sup>89</sup> This provision also incentivizes BMI to offer rates and conditions that are standardized to all users that could be deemed to be “similarly situated” rather than negotiate customized rates and terms that better reflect business models and needs of particular users.

The unregulated PROs are not similarly limited, placing BMI at a competitive disadvantage. For example, SESAC frequently alters its rate quote depending on the nature of the licensee or the market in which it resides. A small, local radio station will pay less for the public performance rights to SESAC’s repertoire than one broadcasting to New York City. SESAC also can treat differently two licensees that superficially appear to be similar but in fact operate in different economic environments. Although BMI has the ability to make business distinctions to justify different rates, the looming threat of an alleged Decree violation chills its

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<sup>89</sup> MFNs also may reduce competition by facilitating horizontal coordination among competitors to standardize rates and terms in an industry. See *United States v. Apple, Inc.*, 791 F.3d 290, 305, 320 (2d Cir. 2015) (noting that MFNs can be misused to achieve anticompetitive ends). For these reasons, a number of recent DOJ consent decrees have prohibited, rather than required, the use of MFN provisions. See, e.g., Final Judgment as to Defs. Verlagsgruppe Georg Von Holtzbrinck GMBH & Holtzbrinck Publishers, LLC D/B/A MacMillan at 10, *United States v. Apple, Inc.*, 12-cv-2826 (Aug. 12, 2013) (ECF No. 354); Final Judgment as to Defs. The Penguin Grp., a Div. of Pearson PLC, and Penguin Grp. (USA), Inc. at 11, *United States v. Apple, Inc.*, 12-cv-2826 (May 17, 2018) (ECF No. 259); Final Judgment as to Defs. Hachette, HarperCollins, and Simon & Schuster at 11, *United States v. Apple, Inc.*, 12-cv-2826 (Sept. 6, 2012) (ECF No. 119).

propensity to do so and, thus, limits BMI’s ability to offer rates tailored to the attributes of its customers.

The Decree also prohibits BMI, “during the term of any license agreements,” from making “any voluntary reductions in the fees payable” unless doing it for “any or all classes of licensees in response to changing conditions affecting the value or marketability of its catalogue.”<sup>90</sup> This prohibition prevents BMI from lowering prices in reaction to market forces unless it does so on a class-wide basis, which again, is a form of MFN that inhibits price competition.

(b) The “similarly situated” obligation stifles innovation and experimentation.

Second, the “similarly situated” requirement inhibits BMI from supporting new licensing structures or royalty arrangements. BMI cannot offer an experimental licensing structure or fee arrangement on a trial basis to a particular user without bearing the risk that other users claiming to be “similarly situated” will assert that they are entitled to the same deal, even before the feasibility of such a license can be evaluated. As a consequence, BMI is constrained from efficiently testing alternative licensing options that might ultimately meet a new market need and benefit consumers.

The business tools that encourage innovation—for example, a pilot program with a single licensee by which new license terms and forms could be tested—are denied to BMI as a result of its “similarly situated” obligation. These requirements chill BMI’s ability to support emerging distribution models that would benefit consumers.

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<sup>90</sup> Decree § X(B).

(c) The “similarly situated” obligation creates inefficiency and increases transaction costs.

Third, the “similarly situated” requirement has unnecessarily increased the transaction costs of negotiating licenses for decades. In order to maintain compliance with the Decree, BMI cannot negotiate new rates or contract terms with a significant music user unless it also cancels existing licenses for all other “similarly situated” music users within an industry. Otherwise, the significant music user could simply demand the legacy rates and terms that still applied to other “similarly situated” music users and BMI would be required to offer them or risk being held in contempt of the Decree. This restriction has imposed enormous burdens on BMI as it has tried to adjust many of its prevailing rates and terms to account for market changes. Since BMI is obligated to offer the same terms to “similarly situated” parties, before BMI can negotiate a new license with one licensee, as a practical matter it must cancel the licenses of all “similarly situated” licensees to avoid running afoul of the “similarly situated” requirement.<sup>91</sup> By way of example, BMI cancelled its then-standard license for digital music services before offering a new digital music service form license to Pandora, the license at issue in *BMI v. Pandora*.<sup>92</sup> Similarly, with respect to live concerts, BMI recently cancelled all concert promoter licenses so that it can introduce a new license with different fees and terms to the market.

Categorical licenses for classes of users are not, on their own, inefficient. However, a mechanism that requires the cancellation of the licenses of all “similarly situated” users to enable

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<sup>91</sup> Were it not to do so, a potential licensee could simply demand that BMI offer it the same terms as the prior license in the market.

<sup>92</sup> See *Broad. Music, Inc. v. Pandora*, 140 F. Supp. 3d 267, 274–75 (S.D.N.Y. 2015) (describing BMI’s transition from its 1995 “BMI Web Site Performance Agreement” to its 2011 “Music Service Web Site Music Performance Agreement” to its 2012 “Music Service Music Performance License Agreement” in order to adjust to the changing marketplace).



BMI to negotiate differing terms and rates with a single user inhibits competition, creates licensing inefficiencies, and imposes unnecessary transaction costs. The cancellation and renegotiation of licensing rates and terms for an entire class of users is extraordinarily inefficient and BMI could avoid doing so, but for the Decree’s “similarly situated” requirement. There is no public interest in maintaining a provision with such effects. Without this prohibition, BMI would be free to make competitive offers based on the economic circumstances and market opportunities presented by each licensee, rather than be constrained by a one-size-fits-all limitation in the category.

2. *BMI Cannot Offer Volume Discounts to Incentivize Music Use.*

The Decree prevents BMI from “enter[ing] into any agreement for the acquisition or the licensing of performing rights which requires the recording or public performance of any stated amount or percentage of music.”<sup>93</sup>

This prohibition prevents BMI from offering volume discounts in the form of lower rates in return for a music user performing a greater percentage of BMI-licensed music. This is directly at odds with modern antitrust law, which treats volume discounts as unequivocally procompetitive.<sup>94</sup> The prohibition also limits competition. In addition, it arguably would prevent BMI from offering licenses for “all-BMI” programming at preferable rates, which would enable music services to provide new music channels from BMI at lower cost to consumers while curating around the content of other PROs and avoiding taking additional licenses. In this way, content from BMI could be an effective substitute for content from another PRO and music

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<sup>93</sup> Decree § VI(B).

<sup>94</sup> See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) (“[C]utting prices in order to increase business often is the very essence of competition.”).

users would only need to take one license, which in turn would stimulate competition among the PROs to provide that license. The Decree’s restrictions inhibit these types of procompetitive licensing solutions, are unnecessary to address any anticompetitive concerns and prevent BMI’s affiliates—songwriters and publishers—from earning greater royalties by promoting more performances of their licensed works. Multiple stakeholders in the music licensing marketplace would benefit from removing this unnecessary and competition-inhibiting prohibition.

Indeed, unregulated participants in the music licensing marketplace routinely offer incentives to encourage additional plays of the music within their repertoires.<sup>95</sup> For example, it has become commonplace for music services to obtain an exclusivity window (usually a number of weeks) to debut new songs.<sup>96</sup> BMI, however, has felt constrained from offering such incentives because of the possibility other music users might argue that BMI was violating its obligation to offer identical terms and conditions to all “similarly situated” users. In the absence of the Decree, if any market participant was concerned that BMI was attempting to impose anticompetitive restrictions beyond incentivizing users to play its music (such as long-term exclusivity that foreclosed competition), that user—and the DOJ—could rely on the general antitrust laws to constrain any actual or threatened anticompetitive conduct.<sup>97</sup>

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<sup>95</sup> See *Pandora*, 140 F. Supp. 3d at 292 (describing the agreement between Pandora and BMG as “[f]or the same dollar amount . . . encourag[ing] additional spins of BMG music on Pandora, which increase[s] sound recording fees paid to BMG and promote[s] BMG artists and writers”).

<sup>96</sup> See, e.g., D. Rys, *Beyonce's 'Lemonade' Release: Tidal Has Streaming Exclusive 'In Perpetuity,' Purchase Exclusive Ends at 10 P.M.*, BILLBOARD (Apr. 24, 2016), <https://www.billboard.com/articles/news/7341800/how-long-beyonce-lemonade-tidal-streaming-exclusive> (also describing limited exclusive releases).

<sup>97</sup> See, e.g., *McWane, Inc. v. Fed. Trade Comm’n*, 783 F.3d 814 (11th Cir. 2015); *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254 (3d Cir. 2012); *United States v. Dentsply Int’l, Inc.*, 399 F.3d 181 (3d Cir. 2005).

3. *Until Recently, ASCAP’s Prohibition on Offering Bundled Licenses Deterred BMI from Offering Bundled Licensing Options.*

Music distribution increasingly occurs through digital streaming, which requires licensing multiple rights, including some or all of performance rights, mechanical rights, synchronization rights, lyric display, distribution, and reproduction rights. The most efficient licensing solution for digital streaming services would be a bundled license for the full set of rights.

Historically, however, BMI has refrained from licensing music rights other than the public performance right, and has not negotiated with its affiliates for the right to license these rights. Although the Decree does not prohibit BMI from bundling other music-related rights in licenses for performance rights in musical compositions, ASCAP’s consent decree explicitly prohibits ASCAP from doing so.<sup>98</sup> Because courts have stated that BMI’s and ASCAP’s decrees should be interpreted consistently,<sup>99</sup> BMI historically did not seek to bundle these rights for fear that a court would read the two PRO decrees in a consistent manner and impute a prohibition against BMI from offering bundled licenses. Although the Second Circuit has now clearly affirmed that BMI is permitted to engage in any activity that is not expressly prohibited by the Decree,<sup>100</sup> for decades the restrictions in ASCAP’s consent decree deterred BMI from

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<sup>98</sup> See *United States v. Am. Soc’y of Composers & Publishers*, 2011-2 Trade Cas. ¶ 73, 474 (S.D.N.Y. 2011), § IV(A) (enjoining and restraining ASCAP 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”).

<sup>99</sup> See, e.g., *United States v. Broad. Music, Inc.*, 316 F.3d 189, 194 (2d Cir. 2003) (“We see no reason why our approach to this case should differ from any of the numerous occasion on which we have reviewed rate court decisions pursuant to the ASCAP consent decree.”); *Broad. Music, Inc. v. DMX Inc.*, 683 F.3d 32, 36, 44 (2d Cir. 2012) (referring to “two separate, but largely similar, consent decrees” and observing, “[u]nder the AFJ2 and the BMI Decree, ASCAP and BMI are required “to grant any music user making a written request therefor a non-exclusive license to perform all of the works within the ASCAP repertory”).

<sup>100</sup> *United States v. Broad. Music, Inc.*, 720 F. App’x 14, 16–17 (2d Cir. 2017) (BMI permitted to engage in conduct “unless a clear and unambiguous command of the decree would thereby be violated”).

developing or acquiring the means to offer an efficient “one-stop shop” for licensing rights for the musical works in its repertoire. This would have benefited users and its affiliates alike, and is an example of how differences in the two consent decrees, and a focus on decree compliance rather than antitrust compliance, can have potentially unanticipated anticompetitive effects.

These restrictions also distort competition in the marketplace because ASCAP’s and BMI’s competitors, including unregulated PROs and music publishers, are able to offer licenses for multiple rights. For example, in 2015, SESAC purchased the Harry Fox Agency, acquiring its significant mechanical rights repertoire.<sup>101</sup> As a result, through the Harry Fox Agency, SESAC is able to administer multi-rights licensing<sup>102</sup> and could offer a license that bundled performing and mechanical rights. The ability to service licenses for multiple rights—and potentially offer a bundled license—is a significant competitive advantage that meets a clear marketplace need.

Indeed, stakeholders in the music licensing marketplace have long advocated for the ability of BMI to offer bundled licenses.<sup>103</sup> For example, in a 2014 submission of public comments to the United States Copyright Office’s Notice of Inquiry regarding its 2014-2015

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<sup>101</sup> See E. Christman, *SESAC Finalizes Acquisition of Harry Fox Agency*, BILLBOARD (Sept. 14, 2015), <https://www.billboard.com/articles/business/6693385/sesac-finalizes-acquisition-of-harry-fox-agency> (detailing SESAC’s acquisition of Harry Fox Agency).

<sup>102</sup> E. Christman, *SESAC Gets New Leadership, Plans to Greatly Expand*, BILLBOARD (July 31, 2014), <https://www.billboard.com/articles/business/6203852/sesac-leadership-plans-expand> (noting that SESAC’s acquisition of Harry Fox Agency would allow it to move into interactive streaming, which requires both performance and mechanical licensing—which the author noted ASCAP was prohibited from doing under its consent decree and some debate about BMI’s ability to do so under the Decree).

<sup>103</sup> See, e.g., Comments of the Production Music Ass’n, at 1, *In re Music Licensing Study*, No. 2014-03, [https://www.copyright.gov/policy/musiclicensingstudy/comments/Docket2014\\_3/extension\\_comments/Production\\_Music\\_Association\\_PMA.pdf](https://www.copyright.gov/policy/musiclicensingstudy/comments/Docket2014_3/extension_comments/Production_Music_Association_PMA.pdf) (“The PMA supports bundled licensing of all rights. Practically speaking, ASCAP and BMI should be allowed to represent all composition rights in a piece of music.”).

Music Licensing Study, the Society of Composers and Lyricists stated that it “believe[d] that music creators w[ould] be best served by rights collection organizations having the ability to bundle all rights and the clearance thereof, creating ‘one-stop-shops’ for end users.”<sup>104</sup>

Similarly, the Digital Media Association (“DiMA”), whose members included Amazon, Apple, Google/YouTube, Microsoft, and Pandora, advocated for “[a] mechanism . . . that enables the collective administration of an ‘all-in’ combined mechanical and performance royalty.”<sup>105</sup>

Likewise, the Copyright Office Report concluded, “[t]here appears to be broad consensus among stakeholders that PROs and other licensing entities should be able to bundle performance rights with reproduction and distribution rights, and potentially other rights to meet the needs of modern music services.”<sup>106</sup>

## **B. The Decree Constrains Competition for Songwriters and Publishers**

The Decree limits BMI’s ability to compete for affiliates by limiting its affiliation agreements to five-year terms and preventing it from offering guaranteed advances to certain prospective affiliates currently under contract with other PROs.

1. *BMI Cannot Enter Affiliation Agreements for a Term Longer than Five Years.*

The Decree prohibits BMI from “enter[ing] into any contract with a writer or publisher

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<sup>104</sup> Comments of the Soc’y of Composers and Lyricists at 12, *In re Music Licensing Study*, No. 2014-03, [https://www.copyright.gov/policy/musiclicensingstudy/comments/Docket2014\\_3/Society\\_of\\_Composers\\_and\\_Lyricists\\_MLS\\_2014.pdf](https://www.copyright.gov/policy/musiclicensingstudy/comments/Docket2014_3/Society_of_Composers_and_Lyricists_MLS_2014.pdf).

<sup>105</sup> Comments of the Digital Media Ass’n (“DiMA”) at 25, *In re Music Licensing Study*, No. 2014-03, [https://www.copyright.gov/policy/musiclicensingstudy/comments/Docket2014\\_3/Digital\\_Media\\_Association\\_MLS\\_2014](https://www.copyright.gov/policy/musiclicensingstudy/comments/Docket2014_3/Digital_Media_Association_MLS_2014).

<sup>106</sup> *Copyright and the Music Marketplace: A Report of the Register of Copyrights*, UNITED STATES COPYRIGHT OFFICE (Feb. 2015), <https://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf>.

requiring such writer or publisher to grant . . . performing rights for a period in excess of five years.”<sup>107</sup>

There is no *per se* antitrust prohibition on contracting with counterparties for a term that exceeds five years. Duration is only one of several elements that courts consider when evaluating licensing arrangements under the rule of reason and the federal antitrust agencies have explicitly rejected the use of *per se* rules in this area: “[T]he Agencies will not attempt to draw fine line distinctions regarding duration; rather, their focus will be on situations in which the duration exceeds the period needed to achieve the procompetitive efficiency.”<sup>108</sup>

The arbitrary five-year limit for affiliation agreements reduces the benefits that BMI can provide to affiliates and constrains BMI’s ability to compete with unregulated PROs. For example, while BMI understands that SESAC’s standard publisher affiliation agreement—like its own—is effective for a five-year term, SESAC is free to offer affiliation agreements in excess of this standard term—and has done so.<sup>109</sup> On a strict reading of the Decree, BMI could not respond to a competitive proposal from SESAC by offering a longer term and higher advances even when an affiliate affirmatively requested those terms. Permitting affiliation agreements to exceed five years would allow BMI to offer more generous and customized services to affiliates, including advances and other benefits that are predicated on a longer-term relationship. In turn, this would give users greater certainty that they could rely on licenses to BMI’s repertoire on a longer term basis while curating around the repertoire of other PROs. BMI would also be able

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<sup>107</sup> Decree § V(B).

<sup>108</sup> U.S. DEP’T OF JUSTICE AND FED. TRADE COMM’N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY (2017) § 4.2.

<sup>109</sup> See *Meredith Corp. v. SESAC LLC*, 1 F. Supp. 3d 180, 207 (S.D.N.Y. 2014) (identifying an affiliation agreement effective for 12 years).

to more effectively invest in new talent and make additional investments to promote existing affiliates.

There is no practical risk that BMI could somehow coerce all of its members into long-term affiliation agreements. If songwriters or publishers had concerns about the duration of BMI's affiliation agreements, they would remain free to not sign with BMI and move to another PRO or license directly through a publisher or other licensing entity. Likewise, BMI's competitors could seek relief under the antitrust laws if they had concerns about the anticompetitive impact of BMI's affiliation agreements. Thus, in the absence of the Decree, the competitive alternatives in the market and the constraints of the antitrust laws disincentivize anticompetitive conduct with respect to affiliation agreements.

2. *BMI Cannot Offer Guarantees to Certain Prospective Affiliates.*

The Decree also prohibits BMI from “offer[ing] or agree[ing] to make payments in advance for a stated period for future performing rights which are not either repayable or to be earned by means of a future performance” to any songwriter or publisher under contract with another PRO.<sup>110</sup> This restriction limits the ability of BMI to compete for new affiliates and, again, artificially suppresses the remuneration that songwriters and publishers can receive.

Paying guarantees to songwriters and publishers is lawful (indeed procompetitive) under the antitrust laws and there is no economic reason to prohibit payments simply because they are not based on actual performances. BMI should be permitted to offer guarantees (which are not necessarily recoupable against future performances) as well as advances (which are recoupable

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<sup>110</sup> Decree § VII(B). This restriction does not apply if the songwriter or publisher was a previous BMI affiliate or if the PRO with which it is currently under contract also makes non-repayable advance payments.

against future performances) to songwriters and music publishers under contract with another PRO provided they are not conditioned on anticompetitive restrictions. To date, the DOJ has only raised concerns about advance payments made by other PROs when they have prevented affiliates from directly licensing their works (which has never been part of any BMI advance agreement).<sup>111</sup> Again, to the extent that a PRO's advances have prevented direct licensing or have had other actual or threatened anticompetitive effects, the antitrust laws have effectively addressed these concerns. In *Meredith*, for example, a putative class of television stations alleged that SESAC illegally restrained trade by providing certain affiliates with significant advances if they agreed to penalties and other terms that effectively prevented them from direct licensing.<sup>112</sup> SESAC ultimately settled the case and adjusted its practices.

3. *BMI Is Required to Contract with All Publishers and Composers.*

The Decree requires BMI “to enter into a contract providing for the licensing by [BMI] of performance rights with any [eligible] writer . . . or . . . publisher . . . .”<sup>113</sup>

A requirement that BMI must represent any and all rights holders, under threat of a possible contempt proceeding, is inconsistent with modern antitrust laws. Indeed, the Supreme Court recognizes that parties are free to contract or refuse to do so.<sup>114</sup> To be clear, BMI has no

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<sup>111</sup> See *Meredith*, 1 F. Supp. 3d at 213–14; see also Mem. in Supp. of United States’ Unopposed Mot. to Enter Proposed Settlement Agreement and Order at 4–5, *United States v. Am. Soc’y of Composers, Authors & Publishers*, 41 Civ. 1395 (May 12, 2016) (ECF No. 750) (in which the DOJ took issue with ASCAP’s practice of paying advances only after it “inserted into many . . . advance . . . agreements [terms] providing that ASCAP would be the exclusive licensor of the members’ rights”).

<sup>112</sup> *Id.* at 193.

<sup>113</sup> Decree § V(A).

<sup>114</sup> *Verizon Commc’ns, Inc. v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398, 408 (2004) (“Thus, as a general matter, the Sherman Act ‘does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.’” (citing *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919))).



intention of turning away publishers or songwriters that desire to affiliate with it. BMI made its name by supporting country, jazz, and R&B artists who could not gain entry into ASCAP. However, BMI should not be at risk of a Decree violation (and the possibility of contempt proceedings) simply because it fails to enter into, or maintain, an affiliation agreement.

This prohibition also inhibits innovation. SESAC and GMR are able to differentiate themselves competitively in order to attract new affiliates. For example, in 2013, GMR entered the market as a boutique PRO and sought to attract a distinct group of publishers and composers that owned high-value works and believed they had been unable to achieve rates reflecting the fair market value of their compositions as a result of the consent decree constraints. GMR began representing these rights holders and successfully licensed their works at higher rates. Similarly, SESAC holds itself out as an “invitation-only” PRO.<sup>115</sup> It would likewise be procompetitive for BMI to have the ability and flexibility to attract affiliates and offer a competitive bundle of services driven by market forces. It should not be prevented from doing so because it is required to contract with all eligible rights holders under the Decree.

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In sum, there are irreconcilable differences between the antitrust laws and the Decree’s prohibitions, which are unnecessary, inefficient, and inhibit competition and innovation. To address these anomalies, the Decree must be modified and ultimately terminated. The end result would be an industry free to evolve in response to market forces, and a BMI freed to innovate to meet the needs of that evolving industry. With the stifling *per se* prohibitions of the Decree removed, BMI and other music industry stakeholders would be empowered to develop more

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<sup>115</sup> See [www.SESAC.com](http://www.SESAC.com) (“SESAC is an invitation-only Performing Rights Organization that represents the world’s top songwriters, composers and music publishers.”).

innovative services and licensing models.

### **C. Compliance with the Decree Is Economically Inefficient**

Unlike certain of its competitors, BMI cannot avoid antitrust liability simply by avoiding anticompetitive conduct. Instead, BMI must also consider the propriety of its actions under an outmoded contract that never contemplated, much less addressed, many of the issues BMI navigates in the current music licensing marketplace.<sup>116</sup> Unlike the general antitrust laws, the Decree is frozen in time and is unable to adapt to the questions posed by market changes and evolving technologies. As a result, BMI has been forced to expend substantial resources responding to DOJ civil investigative demands and defending litigation that does not turn on the legality of its conduct under the antitrust laws, but rather on the meaning of contractual language that was negotiated decades ago in a different legal and economic context. Assessment of the potential procompetitive or anticompetitive effects of its conduct is not required, and indeed, not even permitted in the inquiry.

#### *1. Fractional Licensing.*

The recent litigation with the DOJ over the permissibility of fractional licensing is illustrative. In 2014, BMI and ASCAP asked the Antitrust Division to open an investigation into the operation and effectiveness of their consent decrees.<sup>117</sup> However, this review transformed into an inquiry regarding whether, under the terms of their decrees, BMI and ASCAP were

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<sup>116</sup> *United States v. Broad. Music, Inc. (In re AEI Music Network, Inc.)*, 275 F.3d 168, 175 (2d Cir. 2001) (“Because consent decrees embody a compromise between parties who have waived their rights to litigation, ‘they should be construed basically as contracts.’” (citing *United States v. ITT Cont’l Baking Co.*, 420 U.S. 223, 236 (1975))).

<sup>117</sup> Statement of the Dep’t of Justice on the Closing of the Antitrust Division’s Review of the ASCAP and BMI Consent Decrees (Aug. 4, 2016) at 2, <https://www.justice.gov/atr/file/882101/download>.

permitted to license their affiliates' fractional interests in certain works.<sup>118</sup> In 2016, the DOJ concluded that the consent decrees required BMI and ASCAP to offer only “full-work” licenses.<sup>119</sup>

In response, BMI sought, and received, declaratory relief that the Decree did not prohibit fractional licensing.<sup>120</sup> The DOJ appealed to the Second Circuit, which affirmed that the Decree does not preclude BMI from licensing fractional interests in the right of public performance.<sup>121</sup> In so holding, the Second Circuit expressly stated that the DOJ's appeal turned not on the competitive effects of offering fractional licenses, but rather, “beg[an] and end[ed] with the language of the consent decree.”<sup>122</sup> Indeed, the court held that arguments regarding the pro- or anticompetitive effects of fractional licensing were “out of place.”<sup>123</sup> The fractional licensing review diverted the DOJ from the original purpose of its investigation—to evaluate whether the BMI and ASCAP consent decrees were necessary to fulfill the purposes for which they were intended or would benefit from modernization.

Certain industry stakeholders will likely attempt to use this review of the Decree to advocate that it be modified to require full-work licensing. However, BMI's right to fractionally

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<sup>118</sup> *Id.* at 3.

<sup>119</sup> *Id.*

<sup>120</sup> *United States v. Broad. Music, Inc.*, 207 F. Supp. 3d 374, 376 (S.D.N.Y. 2016).

<sup>121</sup> *United States v. Broad. Music, Inc.*, 720 F. App'x 14, 16–17 (2d Cir. 2017).

<sup>122</sup> *Id.* at 16; *see also United States v. Armour & Co.*, 402 U.S. 673, 682 (1971) (“[T]he scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it.”).

<sup>123</sup> *Broad. Music, Inc.*, 720 F. App'x at 18 (“[A]lthough the relief . . . may be in keeping with the purposes of the antitrust laws, we do not believe that it is supported by the terms of the consent decree under which it is sought.” (citing *Armour*, 402 U.S. at 681, 683) (internal quotation marks omitted)).

license the compositions within its repertoire should not be altered.<sup>124</sup> Fractional licensing has been the prevailing industry practice for decades without any question of its legality under the antitrust laws. Efforts by some users to prohibit the regulated PROs from engaging in fractional licensing and to require them only to offer only “full work” licenses appear to be motivated by a desire to deal with only BMI and ASCAP and avoid taking licenses from unregulated PROs. However, the fact that licenses may be required from multiple PROs is the product of a competitive marketplace for licensing performance rights, and raises no antitrust concerns under the Sherman Act or legal basis for modifying the Decree to prohibit it. Indeed, a prohibition on fractional licensing would distort and undermine competition and innovation in a number of ways. Doing so would (1) reduce the number of compositions available to be licensed by regulated PROs because they would be prohibited from licensing split works (works represented by multiple licensors) if they did not have the right to license on behalf of all licensors; (2) increase transaction costs by forcing the industry to overhaul its current relationships and operations; (3) deter collaboration and innovation in the creation of new music works; and (4) reduce competition between PROs and undermine access to direct licensing alternatives.

## 2. *Selective Rights Withdrawal.*

Another example of how the Decree forces needless investment in analyzing and addressing issues that raise no material antitrust concerns is Pandora’s litigation against BMI and ASCAP over whether third-party publishers’ efforts to withdraw the right to license digital uses of their works was consistent with the BMI and ASCAP decrees. Those disputes created market uncertainty and inefficiencies that were amplified by the fact that BMI’s and ASCAP’s

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<sup>124</sup> *Id.* at 16–17 (“[S]ince the decree is silent on fractional licensing, BMI may (and perhaps must) offer [fractional licenses] unless a clear and unambiguous command of the decree would thereby be violated.”).

respective rate courts reached different conclusions on the same issue. The BMI court interpreted the Decree to impose an “all-out” rule, determining, “[w]hen BMI no longer is authorized by music publisher copyright holders to license their compositions to Pandora and New Media Services, those compositions are no longer eligible for inclusion in BMI’s repertory.”<sup>125</sup> However, the ASCAP court interpreted the virtually identical provision in the ASCAP consent decree as imposing an “all-in” rule, meaning that if a songwriter or publisher authorized ASCAP to license the public performance rights in its works to any music user, ASCAP was required to license the public performance rights in such works for all music uses, and any purported withdrawal of rights for any category would be ineffective.<sup>126</sup> In neither of those cases was there any consideration of whether rights withdrawal itself was beneficial or detrimental to competition. Rather, the sole focus was on the language of the respective decrees.

Absent the Decree, the legality of such practices would be subject to the rule of reason using an inquiry that evaluates the economic effects of BMI’s and other market participants’ actions.<sup>127</sup> Instead, in its day-to-day operations, BMI must constantly evaluate whether its own conduct and third parties’ business practices are permissible under the Decree or must be tempered to avoid the Decree’s *per se* prohibitions.<sup>128</sup>

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<sup>125</sup> Op. & Order at 2, *Broad. Music, Inc. v. Pandora Music, Inc.*, No. 13 Civ. 4037 (S.D.N.Y. Dec. 19, 2013) (ECF No. 74).

<sup>126</sup> Op. & Order at 16–17, *In re Petition of Pandora Media, Inc.*, No. 12 Civ. 8035 (S.D.N.Y. Sept. 17, 2013) (ECF No. 70).

<sup>127</sup> See *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (“[M]ost antitrust claims are analyzed under a ‘rule of reason,’ according to which the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraints history, nature, and effect.” (citation omitted)).

<sup>128</sup> *Per se* prohibitions on vertical restraints ended with the Supreme Court’s decision in *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885–87 (2007).

For example, rights owners outside the United States are often permitted to convey limited public performance rights in their works, allowing the PRO to license the works to some categories of users, while retaining the rights for other categories of users for themselves or other licensing entities. This raises a question about the requirements of the Decree, and what conditions, if any, BMI must place on the dealings between such foreign PROs and their affiliates if BMI is to license those works in the United States under reciprocal agreements.

Given the costs of testing the interpretation of the Decree and the penalties for violating it, BMI is disincentivized from engaging in innovative and procompetitive activity because of the ever present risk that it will be challenged as contrary to the Decree. Furthermore, the fact that BMI may potentially find itself in violation of its Decree through the actions of third parties it cannot control (such as music publishers, songwriters, and foreign PROs) magnifies the chilling effect of the Decree on BMI's conduct and leads to greater market inefficiency.<sup>129</sup>

#### **IV. MODIFICATION OF THE DECREE**

##### **A. The Music Licensing Marketplace Needs a Free Market, Not Perpetual Regulation, to Innovate and Grow**

Maintaining the Decree in perpetuity is antithetical to the DOJ's long-established policy against perpetual consent decrees, and is against the public interest. The DOJ's policy is that all legacy decrees presumptively should be terminated.<sup>130</sup>

The limited circumstances in which the DOJ will consider maintaining a consent

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<sup>129</sup> See S. Borenstein, M. Busse & R. Kellogg, *Principal-agent incentives, excess caution, and market inefficiency: Evidence from utility regulation* (May 2009), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.516.4561&rep=rep1&type=pdf> (explaining how agents may be punished for events out of their control and may therefore pursue overly cautious behavior, leading to greater market inefficiency).

<sup>130</sup> U.S. Dep't of Justice Antitrust Division Manual § III-149 to III-150.

decree—where there is a pattern of noncompliance or longstanding reliance by industry participants on the decree<sup>131</sup>—do not apply to BMI. First, in the 77-year period during which it has operated under a DOJ antitrust consent decree, BMI has never once been subject to an enforcement action, much less been found to have violated the Decree. Indeed, the Decree was not put in place to correct anticompetitive conduct by BMI. Rather, it was considered a “friendly” counterpart to the DOJ’s investigation of ASCAP and ASCAP’s resulting decree.<sup>132</sup>

Second, stakeholders in the music licensing marketplace do not need the protections of the Decree to succeed. The automatic license and rate court provisions were implemented in 1994 at the request of BMI—not the DOJ or the music users. The radio and television industries licensed BMI’s works and thrived for decades prior to the addition of these provisions. This is evidence that music users have flourished and can successfully operate in a non-regulated licensing regime. There is no reason to believe that newer media services, such as digital streaming, could not similarly succeed.

Indeed, many digital services already engage in direct, bilateral market negotiations with music publishers and other licensors for a number of rights, including synchronization and lyrics. Digital interactive subscription services have launched and grown their businesses without these protections when negotiating licenses for the analogous rights to digital performances of sound recordings.<sup>133</sup> Nonetheless, they have secured countless direct licenses with major record

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<sup>131</sup> *Id.* § III–149.

<sup>132</sup> See Morrison Memo, *supra* note 3, at 1.

<sup>133</sup> See *Sound Exchange v. Copyright Royalty Bd. & Librarian of Congress*, 2018 WL 4440299, at \*7 (D.C. Cir. Sept. 18, 2018) (“Whereas noninteractive webcasters can make use of the statutory license, interactive services must negotiate licensing agreements with copyright holders in the market.” (citing 17 U.S.C. §§ 114(d)(2)(A)(i), (f)(2)(A))); *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 574

labels<sup>134</sup> and enjoyed remarkable success.

In 2016, streaming revenues reportedly increased 60%, reaching \$4.6 billion.<sup>135</sup> In 2017, 35.3 million Americans reportedly paid for a streaming audio subscription service such as Spotify, Apple Music, or Pandora, a 55.5% increase from the previous year.<sup>136</sup> This number jumped to over 50 million as of the end of 2018.<sup>137</sup> Spotify, in particular, has seen its revenues grow from €1.94 billion in 2015 to €2.95 billion in 2016 to €4.09 billion in 2017.<sup>138</sup> In 2018, Spotify announced that it had 75 million paying subscribers worldwide, a 45% increase over the previous year.<sup>139</sup> The growth of these digital interactive subscription services, and their ability to enter into direct licenses with music publishers as and when they choose to, demonstrates that the Decree is unnecessary to protect competition or nurture the development of innovative forms of music distribution.

Nevertheless, some market participants argue that the music licensing marketplace has “grown up” around and in reliance upon the Decree—in particular the automatic license and rate

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F.3d 748, 758 (D.C. Cir. 2009) (“[A]n interactive music service is not viable unless it can provide music from each of the four major record labels.”).

<sup>134</sup> For example, Spotify has negotiated direct licensing agreements with the record label affiliates of UMPG, Sony/ATV, Warner Music Group, and Merlin BV, an international music collective representing the rights of independent record labels. Spotify, 2018 Registration Statement, at 123 (Mar. 23, 2018). Spotify has also secured direct license agreements with independent labels and aggregators such as CD Baby and TuneCore. *Id.* at 124.

<sup>135</sup> *Id.* at 2.

<sup>136</sup> B. Adgate, *Media Disruption Is Accelerating*, FORBES (May 7, 2018), <https://www.forbes.com/sites/bradadgate/2018/05/07/media-disruption-is-accelerating/#144354df5110>.

<sup>137</sup> R. Lewis, *Paid subscriptions to music streaming services hit new high of 50 million in 2018 RIAA report says*, L.A. TIMES (Feb. 28, 2019), <https://www.latimes.com/entertainment/music/la-et-ms-riaa-music-industry-year-end-report-20190228-story.html>.

<sup>138</sup> Spotify, *supra* note 134, at 11.

<sup>139</sup> Adgate, *supra* note 136.



court mechanisms—and that removing them would jeopardize the continued health and viability of the industry. Although the mantra is oft-repeated, music users have pointed to no concrete manner in which industry participants have developed their businesses in reliance on the Decree such that they could not adjust to a change in the licensing landscape. Indeed, the emergence of GMR and growth of SESAC are forcing these changes, regardless of whether the Decree is modified.

Furthermore, maintaining a consent decree for fear that its absence may disrupt certain stakeholders risks locking in inefficient or obsolete business models. It may even encourage inefficient investments by firms relying on a regulatory framework that prevents disruption to their business models. For such investors, this is obviously quite valuable. Any change in the market may require certain users to invest in areas that they previously had not and may negatively or positively impact their profitability. However, no industry has a guarantee of non-disruption. The antitrust laws are not designed to pick winners and losers or to support any specific business model. Rather, antitrust law is designed to let the market decide which business models succeed based on innovation and competition, not perpetual regulation.

A case in point is the concern often raised by broadcasters about “music in the can,” a reference to their asserted inability to control the music used in third-party programming.<sup>140</sup> Broadcasters have always been free to require producers to license performance rights at the source, just as they do for all other rights that must be licensed to broadcast the programs. The Decree sought to encourage alternatives, requiring BMI to offer a through-to-the-audience license to any program producer that would cover the “downstream” performance of the program

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<sup>140</sup> See, e.g., *Meredith Corp. v. SESAC LLC*, 1 F. Supp. 3d 180, 188 (S.D.N.Y. 2014).

on an identified set of stations.<sup>141</sup> However, industry participants, free to license and clear the music in their programming at the source, apparently have preferred the efficiencies of the blanket license. For example, many BMI licensees own the rights to a significant portion of the works used in their programming, but still take a blanket license from BMI. For many, BMI's blanket license (together with licenses from the other domestic PROs) has been an efficient way to license the rights for all of the "music in the can."

The fact that some stakeholders in the music licensing marketplace have preferred historically to rely on the ease of the blanket license rather than enter into individual license negotiations or require their programmers to license at the source does not justify perpetually regulating BMI. The "music in the can" issue was not created by the PROs and the Decree is not the solution.<sup>142</sup>

Rather, the solution to these concerns is in these music users' own hands. They have the ability to place licensing obligations on content creators and obviate their supposed reliance on a BMI blanket license. As noted above, other music users, such as Netflix, are already licensing programming at the source. There is no reason why broadcasters cannot ask their programmers to do the same. Their failure to do so speaks to the value of the BMI license and not to any anticompetitive conduct by BMI that would require it to be subject to a perpetual consent decree.

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<sup>141</sup> Decree § IX(B).

<sup>142</sup> *Columbia Broad. Sys., Inc. v. Am. Soc'y of Composers, Authors & Publishers*, 620 F.2d 930, 938 (2d Cir. 1980) (approving the district court's rejection of the music in the can argument "on the ground that it is not a consequence of the blanket license"). The Second Circuit found, "[i]f CBS would be vulnerable to a 'hold-up' when it tries to acquire performance rights for music on a feature film it wishes to rerun, that is a consequence of CBS's failure to acquire rerun performance rights at the time it acquired the film. At that time CBS accepted the risk that it would one day have to purchase performance rights for reruns, either as part of the purchase price for a blanket license or at a separate license obtained directly from the copyright owner." *Id.*

## V. PROPOSED MODIFICATIONS

To allay the concerns of industry stakeholders, BMI is willing to agree to modify the Decree to maintain certain provisions during a limited period (the “Modified Decree”) to facilitate the adjustment and ease the transition of stakeholders in the music licensing marketplace. Assuming the Decree is modified to incorporate a sunset clause, these provisions are intended to smooth the industry’s evolution to a free market. BMI maintains its position that these provisions are not necessary for the continued existence of the industry. However, their maintenance during the transition period should satisfy the concerns of industry stakeholders who have come to rely upon their presence. In response to similar concerns, the DOJ has previously supported providing for a reasonable transition period before terminating a Decree in order to give market participants an opportunity to prepare for post-decree business activities.<sup>143</sup>

### A. Automatic Licensing Subject to Payment of an Interim Fee

The Modified Decree should retain automatic licensing with the immediate right of public performance in all works in the BMI repertoire. However, BMI believes that this right should be contingent on a fairer, more efficient, and less costly mechanism for the payment of interim fees.

The Decree currently provides no recourse for songwriters, composers, or music publishers to receive compensation for the performance of their works prior to the setting of an interim rate. Under the Decree, if a royalty rate cannot be negotiated, as is frequently the case, BMI must commence an interim fee rate court proceeding to establish an interim rate or forego

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<sup>143</sup> See Br. of Pl. in Supp. of Joint Mot. to Modify the 1956 Final Judgment & Resp. to Public Comments at 39, *United States v. Int’l Bus. Machs. Corp.*, No. 72-344 (S.D.N.Y. Nov. 13, 1994) (“A phase-out period protects IBM and competitors by affording opportunities to enter into new contracts and make plans in anticipation of a post-decree marketplace.”)

payment until a final fee is set. The vast majority of music users are too small to justify the cost of interim litigation, and many exit the business before BMI can collect. In these circumstances, BMI finds itself having no effective remedy at all.

As a result, prior to reaching a final rate, BMI (absent a voluntary agreement with users setting interim fees) subsidizes entire classes of music users. This is especially problematic in nascent industries, where music users come and go. A significant number of these users go bankrupt or close down their businesses before entering into a final license agreement that would require them to pay fees. Although their business models ultimately may be unsuccessful, they can still attract significant listeners away from other music services that pay license fees and would have compensated songwriters and publishers for those performances. Instead, BMI and, more importantly, its songwriters and publishers, are left uncompensated in this scenario. The lack of an effective interim royalty mechanism has already cost BMI and its members significant owed royalties. At the advent of digital streaming, many users launched services that went out of business, leaving BMI to fight over the crumbs in bankruptcy court. The Rdio digital music service is perhaps the most notable example. At the time of Rdio's bankruptcy filing, BMI was owed over \$1 million in fees, but had received none due to the lack of an interim fee mechanism. It collected just over \$200,000.

The Modified Decree should include interim fee provisions that ensure users pay immediately upon receiving an automatic license. This can be accomplished by (1) requiring music users to report certain identifying information with their applications and respond to BMI's requests for additional information, which are necessary to determine the nature and scope of the license requested and a reasonable rate therefor; and (2) creating a more efficient, automatic process for setting interim fees. The Modified Decree should allow BMI to make a

written request for additional information from a license applicant within 30 days of its receipt of a written application for a license. BMI would then have 90 days from the receipt of this information to provide the applicant the fee it deems reasonable for the license requested. The Modified Decree should also allow the applicant to perform compositions in BMI's repertoire pending the completion of reasonable fee negotiations or proceedings, provided the applicant pays BMI an interim fee.

Setting the interim fees could be a simple, almost automatic, process. If the applicant previously licensed compositions in BMI's repertoire, this interim fee would be the applicant's previous rate. If the applicant did not previously license compositions in BMI's repertoire, and, in BMI's reasonable opinion, is a member of an industry for which there is a prevailing rate for the use of BMI's repertoire, this interim fee would be set at that prevailing rate. If the applicant did not previously license compositions in BMI's repertoire, and, in BMI's reasonable opinion, is not a member of an industry for which there is a prevailing market rate for the use of BMI's repertoire, BMI would use a reasonable interim fee no less than a specified minimum fee amount or formula.<sup>144</sup> This construct would prevent free-riding by entire segments of music users and also provide an incentive for them to come to the negotiating table to reach a final rate.

#### **B. Continued Access to the Rate Court**

The Modified Decree should also maintain the rate court process for resolution of rate disputes, as recently reformed per the Music Modernization Act.

The rate court was not added to the Decree until 1994. As mentioned above, entire industries were able to license BMI's repertoire and thrive for decades prior to this date. There is

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<sup>144</sup> Both BMI and the applicant should have the right to apply to the rate court to set the interim fee upon a showing of good cause that the default fee is unwarranted.

no reason to believe that modern users could not flourish without it. Additionally, it is the express position of the DOJ that, by agreeing to the 1994 amendments to the Decree, it did not intend that “judicial rate setting should become a substitute for competitive rate setting.”<sup>145</sup>

To the extent that music users claim that they are reliant on the rate court procedure, maintaining this mechanism for a transitional period will allow them to adjust their business models and licensing practices to succeed in a free-market environment. However, it is BMI’s position that the rate court should end when the Decree terminates.

### **C. Alternatives to the Traditional Blanket License**

The Modified Decree should maintain provisions relating to direct licensing, the per-program license, and the adjustable fee blanket license as alternatives to the traditional blanket license. BMI will continue to offer these and other forms of licenses whether or not it is required by the Decree, both to meet the demands of the market and as required under the general antitrust laws

### **D. Other Modifications**

The provisions of the Decree outlined above are those that BMI and other industry participants believe should be preserved at this time. The list of provisions that BMI would support preserving during the transition period may or may not change as we continue to engage with the DOJ, as well as with music users and music publishers, in an effort to obtain industry-wide consensus. For example, BMI’s current proposal does not contemplate selective withdrawal of rights by music publishers, but we are continuing to study the issue and consult with industry stakeholders.

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<sup>145</sup> Mem. of the United States at 10, *United States v. Broad. Music, Inc.*, 64 Civ. 3787 (S.D.N.Y. June 30, 1994).