Hugh C. Hansen, Professor of Law, Director of IP Institute, Fordham Law School, respectfully submits the following comments in response to the request of the Antitrust Division of the U.S. Department of Justice (DOJ) for public comment in its review of the consent decrees governing the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI).

What follows is a brief discussion of several aspects of the effort to change the ASCAP and BMI consent decrees. It is not intended to be comprehensive. Rather, it discusses six points that hopefully are helpful in understanding the consent-decree situation.

1. There is no doubt that ASCAP and BMI over the years provide many things of value to their members and the public. Nevertheless, it is difficult to determine what specific complaints they have about the consent decrees.

   They certainly complain broadly. The letter ASCAP urges their members to send to the DOJ claims that "antiquated [consent] decrees severely disadvantage the majority of America's songwriters, composers and music publishers and make it impossible for us to earn fair value for our music in today's music marketplace."

   Sign Our Letter: Tell the DOJ to Modernize the Consent Decrees, ASCAP, https://www.ascap.com/advocacy/doj-comments-votervoice-petition (last visited Aug. 8, 2019).

   First, the consent decrees are not antiquated. ASCAP's decree was revised in 2001 under the knowledgeable supervision of Judge William Conner. *See generally* United States v. Am. Soc'y of Composers, Authors, Publishers, No. 41-1395(WCC), 2001 WL 1589999 (S.D.N.Y. June 11, 2001). Judge Conner had been a long-time IP practitioner and president of the organization now called the New York Intellectual Property Law Association. As a judge in 2004, he approved a new deal for ASCAP's licensing of songs to radio stations that was estimated in just seven years to have increased payments to composers and publishers by $1.7 billion. *See* Douglas Martin, *William Conner, 89, Dies; Judge Expert in Patent Law*, N.Y. TIMES, July 20, 2009, at A16. Undoubtedly, the increase is a lot more now.

   Second, ASCAP and BMI do not explain specifically how the decrees "severely disadvantage" America's music creators and publishers and "make it impossible to earn fair value" in today's music marketplace. No specific provisions in the consent decrees are mentioned in this regard.

2. It is safe to assume that there is some serious injury. The question is: what is causing it?

   One view is that the two S.D.N.Y. district court judges who resolve rate disputes set license fees below market value. If so, why had that not occurred over many years of

judge-rate supervision, including the many years that Judge Conner was the ASCAP judge?

Have the two recent ASCAP and BMI judges created this issue? Those two district court judges have good reputations. Have they been overly sympathetic to licensees? If the judges have based their determinations in the normal manner on the facts and merits of each case, it should not change with the new judge rotation system.

However, if the determinations are tied to these judges' unusual views or approaches, the new rotation of judges should correct the situation. And there would be less need to seek changes to the consent decrees.

Is the existence of a rate proceeding enough by itself to cause financial damages to songwriters? Again, why was this not a problem in the past?

3. Are more users seeking lower-rate determinations now than in the past? If so, why?

   Could it be that unauthorized use of copyrighted works by consumers reduced the value of licensed works, thereby causing licensees to seek lower rates? If so, this condition will not change in the foreseeable future, regardless of what is done with the consent decrees.

   Have there been more rate court proceedings because the recent rate judges were unusually predisposed to user positions? If this is the case, the quantity of determinations should decline with the implementation of the rotation system.

4. It seems strange that the other PROs (SESAC, GMR, PRO Music Rights, et al.) can collectively license music without any of the restrictions that ASCAP and BMI have. Seems like unfair competition. Maybe it's not. But maybe the DOJ should consider leveling the playing field.

5. In their open letter, ASCAP and BMI seek to reassure us that, without the consent decrees, antitrust laws

   > "would continue to exist in a post-decree world and govern current parties as well as any future market entrants. We don't need to create or rewrite legislation to accomplish what antitrust laws already effectively oversee. PROs and licensees all have the same goal of keeping music flowing to the public."

   It is perhaps helpful to remember that when ASCAP was the sole licensing society governing popular music, restrained solely by the same antitrust laws, it charged radio stations so much that it in fact stopped the music flowing to the public. It charged radio stations so much, stations stopped playing ASCAP's music altogether (leaving their listeners mostly with non-ASCAP country and jazz). This caused the National Association of Broadcasters to create their own collective licensing society, Broadcast

Music, Inc., ironically a cohort in these proceedings. And the Department of Justice sued ASCAP for antitrust violations.

6. Perhaps the most interesting suggestion regarding consent-decree change is a proposed two-year sunset provision. What is the purpose of sunsetting the decrees? No one would want the status quo to remain without the consent decrees. It is well accepted that eliminating the decrees would create chaos.

   The main purpose of the sunset provision seems to be to create pressure on Congress. It would have two years to make change in copyright and/or antitrust law to avoid chaos. It is not clear that the political will exists to legislate in these areas. Even if Congress does try, it would be very difficult to achieve any legislative solution. Moreover, there is no guarantee the result would be what ASCAP and BMI would want.

   With regard to intellectual property law, Congress can be counted on to do three things:

   (1) Nothing.
   (2) Codify caselaw. *E.g.,* 17 U.S.C. § 107 (fair use).
   (3) Codify an industry solution. *E.g.*, 17 U.S.C. § 111 (cable and broadcast).

   Even then, congressional rules militate against enacting legislation if a minority is opposed. Sometimes even one legislator can torpedo a bill. And there will be at least a minority in Congress who will be opposed to any legislation benefitting ASCAP and BMI financially.

   Moreover, outside of Congress we can expect very strong opposition from those generally opposed to copyright and IP, and many others.

   For instance, there has been strong opposition to the proposed CASE Act small claims court, despite the provision that any defendant can choose to opt out of the litigation. And probably 100% would. *See, e.g.*, Meredith Filak Rose, *The CASE ACT: Small Claims, Big Risks*, PUB. KNOWLEDGE (Nov. 7, 2017), https://www.publicknowledge.org/news-blog/blogs/the-case-act-small-claims-big-risks.

   Opponents of change to the consent decrees have already decried the "collusion" of ASCAP and BMI in their submission to the DOJ's review. George Landrith et al., *Coalition Letter to DOJ—Re: Antitrust Consent Decrees with the Two Largest Music Collectives*, FRONTIERS FREEDOM (Aug. 7, 2019), https://www.ff.org/coalition-letter-to-doj/.

   This doesn't even take into account the sometimes-dramatic effect of social media. That it can be an immense influence on Congress has already been shown regarding SOPA and PIPA. Last minute social media outcry caused the votes to enact to be killed or "indefinitely postponed." *See* Jonathan Weisman, *Antipiracy Bills Delayed After an Online Firestorm*, N.Y. TIMES, Jan. 21, 2012, at B6. There is no reason to believe that Congress would react differently to social media in this scenario.

Conclusion

1. There is undoubtedly a situation that needs to be addressed in some way.
2. However, both ASCAP and BMI boast that they are breaking revenue records. *See* Press Release, ASCAP, ASCAP Annual Revenue and Distributions Continue to Break Records: 2018 Revenue Tops $1.227 Billion; Distributions Hit $1.109 Billion (May 1, 2019), https://www.ascap.com/press/2019/05/05-01-financials-release; Press Release, BMI, BMI Sets Revenue Records with $1.199 Billion (Sept. 12, 2018), https://www.bmi.com/press/releases/Revenue_2018_Final_Draft.docx.
3. Proceeding legally and legislatively full speed ahead is risky. It might end up being difficult to put Humpty back together again.
4. Watchful waiting is probably the best way to proceed for now.

Respectfully submitted,

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