Comments on the ASCAP and BMI Consent Decrees

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Introduction

1. The Antitrust Division of the U.S. Department of Justice has requested comments on whether the ASCAP and BMI consent decrees, originally entered in 1941,[1] continue to promote competition or should be terminated or modified.[2] We explain in these comments why terminating the consent decrees would be pro-competitive and serve the public interest.
2. The ASCAP and BMI decrees are the product of the analog era of music distribution and performance. The music distribution system has changed dramatically since 1941. In the current digital era, where 75 percent of industry revenues come from streaming services and another 11 percent from digital downloads,[3] any benefits from the consent decrees are likely outweighed by the costs.
3. Major provisions of the consent decrees are inimical to competition. The consent decrees make it difficult or impossible for publishers to withdraw all or parts of their catalogues and directly negotiate with individual distributors. This would be a natural way for competition to develop. In addition, there is no reason to believe the price regulatory regime established by the consent decrees and administered by the antitrust rate courts produces rates that bear any resemblance to competitive rates.

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[1] The consent decrees were entered to settle lawsuits that were brought by the U.S. Department of Justice under Section 1 of the Sherman Act. Antitrust Consent Decree Review – ASCAP and BMI 2019, https://www.justice.gov/atr/antitrust-consent-decree-review-ascap-and-bmi-2019.

[2] The consent decrees involve the copyrights of the composers and songwriters in musical compositions. A separate set of copyrights are held by owners of sound recordings (i.e., labels, recording artists, and, as a consequence of the Music Modernization Act of 2018, recording production personnel). Because these comments are directed toward the consent decrees, our focus will be on the former copyrights.

[3] https://www.statista.com/statistics/186304/revenue-distribution-in-the-us-music-industry/

Performing Rights Organizations (PROs)

4. Distributors that publicly perform music, regardless of the method of delivery, must obtain licenses for musical composition performance rights, which compensate composers, songwriters, and publishers. Distributors typically obtain blanket licenses for the entire catalogue of works from ASCAP and BMI, the two predominant U.S. performing rights organizations (PROs) that account for most titles, and from SESAC and GMR, two smaller PROs that are not subject to consent decrees.
5. Songwriters, composers, and music publishers typically join a PRO and give that PRO the nonexclusive right to license their works collectively. In performing this function, PROs reduce the transactions costs that would otherwise be associated with music licensing, including negotiating with the many thousands of composers and music publishers that own copyrights and the many music distributors/users of those licenses; enforcing the license contracts against infringers; sampling and monitoring public performance; and collecting and distributing royalties. PROs further reduce transactions costs by granting blanket licenses to all of the works in their catalogues.
6. Although centralizing the licensing and other performance rights functions reduced transactions costs, it also allowed the PROs to acquire market power because the PROs represent the collective actions of thousands of songwriters, composers, and publishers who would otherwise be competing. This centralization, in turn, led to the Antitrust Division's original antitrust suits and the subsequent consent decrees under which ASCAP and BMI operate. The consent decrees require adjudication of disputes between the PROs and the music distributors/users by the federal district courts in New York, which has turned these "rate courts" into the de facto (as well as de jure) regulator of composer royalties. Ironically, the consent decrees also make it more difficult for songwriters, composers, and publishers to compete against each other.

Streaming and the 2014 DOJ Review

7. New streaming platforms, such as Pandora and Spotify, have reduced the transactions costs associated with music licensing for two reasons: First, these platforms are national or even global in scope—in contrast to the historically large number of geographically based radio stations and other local users. Second, the technology reduces the cost of monitoring which recordings and compositions are being performed. These changes have diminished the benefits of using a PRO as an intermediary. The reduced benefits from PROs explains why some publishers want to negotiate directly with the licensees, as has increasingly been happening
8. With the emergence of the new streaming platforms, publishers wanted to partially withdraw their catalogues from the PROs for the purpose of negotiating directly with these platforms. The removal of catalogues from PROs became a major issue leading up to and during the Pandora rate case that began in 2012, with the ASCAP rate court deciding that the ASCAP consent decree did not allow partial withdrawal of catalogues.[4]
9. In the aftermath of the Pandora rate court cases, ASCAP and BMI in 2014 requested that the Antitrust Division open a review of the consent decrees with the aim of modifying the decrees to permit partial withdrawal and to make other modifications. The Division subsequently did open a review.[5] That review could have been an opportunity to encourage a more competitive market, with more direct bargaining between rights holders and distributors. However, the Division concluded, in August 2016, that it would not modify the decrees so as to allow partial withdrawals or make any other changes.[6] The Antitrust Division's position seemed intended to reinforce the current system of collective licensing of performance rights. This position is not consistent with the emergence of a more

[4] In Re Petition of Pandora Media, Inc.: Related to *United States of America v. American Society of Composers, Authors, and Publishers*, 12 Civ. 8035 (DLC) 41 Civ. 1395 (DLC), 2013 WL 5211927 (S.D.N.Y. Sept. 17, 2013), aff'd, Pandora Media, Inc. v. Am. Soc'y of Composers, Authors & Publishers, 785 F.3d (2d Cir. 2015). *See Also* Broad. Music, Inc. v. Pandora Media, Inc., 13 Civ. 4037 (LLS), 64 Civ. 3787 (LLS) 2013 WL 6697788 (S.D.N.Y. Dec. 19, 2013).
[5] Antitrust Consent Decree Review – ASCAP and BMI 2014, https://www.justice.gov/atr/ascap-bmi-decree-review.
[6] Statement of Department of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees, August 4, 2016, https://www.justice.gov/atr/file/882101/download.

competitive market, which entails direct bargaining between the rights holders and distributors.

Rate Regulation

10. The current system of collective licensing of rights and the granting of blanket licenses by the major PROs reduces transaction costs. However, this collective licensing regime also provides the primary rational for price regulation (by the rate courts). The option of going to a rate court is a disincentive to direct bargaining between composers/publishers and distributors and distorts any bargaining that does occur.
11. Determining market-based royalty rates by a rate court presents difficult challenges. Basing royalty rates on costs (as is usually done in traditional public utility rate regulation) is likely not possible, as musical works are classic examples of information goods that are characterized by large first-copy sunk costs and very low—even zero—costs of reproduction. Optimal prices would instead likely be based on demand characteristics. Indeed, the antitrust rate courts do not appear to attempt to base royalty rates on costs. Instead, they determine rates based on contemporaneous and historic rates, which in turn are influenced by the regulated rates and the prospect of a court proceeding if negotiations fail; this is clearly a circular process. It is thus unlikely that the regulatory processes of the antitrust rate courts have yielded the efficient results that a competitive marketplace would be expected to achieve.
12. The market for music licenses is different from other rate-regulated industries, such as water, electricity, and natural gas distribution, which have certain characteristics of natural monopolies. In general, economic studies have shown that rate regulation of an otherwise competitive industry rarely, if ever, improves economic welfare, and that it should be reserved for situations where a competitive market is not possible.[7]

[7] See, e.g., Paul L. Joskow and Nancy L. Rose, The Effects of Economic Regulation, in Handbook of Industrial Organization, Vol. 2, pp. 1449-1506 (Richard Schmalansee and Robert D. Willig, eds., 1989).

Toward More Competition

13. Thus, the challenge is to move away from collective licensing and price regulation and toward direct bargaining between composers/publishers and music distribution services while retaining, to the extent possible, the transaction cost reduction and administrative services that the PROs provide.
14. Developments across the industry of music licensing indicate that the goal of a more competitive market is attainable. Pandora has negotiated contracts for composition public performance rights with the major publishers. Spotify is pursuing licensing content directly from creators.[8] The smaller PROs—SESAC and GMR—are not subject to the antitrust consent decree and therefore are unregulated.
15. New companies that act as agents for rights holders are springing up. For example, Merlin represents thousands of independent record labels, and numerous aggregators represent individual artists in negotiations with streaming services. Kobalt has developed a digital rights management platform that helps artists and publishers collect royalties from streaming services. Kobalt collects royalties directly for 8,000 artists, including Paul McCartney (who is also a member of ASCAP), and 500 publishers, including Disney. In the digital era, the monitoring and other PRO-like functions that are important to rights holders are easier to accomplish and require less scale than were needed in the pre-digital world.
16. The 2014 ASCAP and BMI consent decree review raised the issue of whether the PROs were engaged in "full-work" or "fractional" licensing, which is important because most musical works have more than one copyright holder.[9] Under full-work (or 100-percent) licensing, any fractional owner can grant a nonexclusive license to a music user/distributor without the permission of the other owners, so long as the fractional owner notifies and pays the other owners their pro rata share of the proceeds. By contrast, under fractional licensing, to avoid infringement each licensee would be required to obtain a license from each fractional owner. In economic terms, the benefit of a full-work license is that it minimizes transactions

[8] https://www.billboard.com/articles/business/8467283/spotify-daniel-ek-direct-licensing-artists-not-label-earnings-call

[9] 2016 Statement, at 3.

costs. There is no need for licensees to negotiate with every fractional owner, some of whom may be difficult to find. An inability to negotiate a license with even a small fractional owner would make the work unusable.

17. Whether ASCAP and BMI currently offer full-work or fractional licenses is the subject of dispute.[10] By itself, this confusion in the definition of the property right is an impediment to the development of more competition. As between the two types of licenses, full-work licenses are more conducive to the transition to competition, because they minimize transaction costs. The pro-competitive policy is to encourage partial withdrawal from PROs (which would happen in the absence of the consent decrees) combined with full-work licenses.

The Importance of Accurate Ownership Data

18. Improving the functioning of the marketplace in music properties requires accurate identification of those properties and the associated property rights. The need for a comprehensive database of music ownership information is generally recognized, and a number of important efforts are underway.[11] However, the incentive to develop such databases is weakened substantially by the current PRO-based system in which licensees typically purchase blanket licenses from ASCAP and BMI as well as from the smaller PROs. In this world, the music services collectively have licenses for virtually everything, and the risk of infringement is therefore small. This reduces the benefits of accurate ownership information and the incentive to devote the resources to developing that information.
19. The incentives for a copyright owner to include its ownership information in a centralized database are mixed. There may be strategic reasons—to strengthen a copyright owner's bargaining power vis-à-vis a music distributor—for a copyright owner to withhold its

[10] Under common law, the default is that owners are joint tenants in common, which is equivalent to a full-work license. Frequently, however, the owners contract around this default to create fractional licenses. When a music user/distributor obtains blanket licenses from all of the PROs, this is usually a de facto solution to the fractional license issue, since all of the fractional owners are likely to have joined one of the PROs.

[11] Included in these efforts is an ASCAP-BMI database (https://www.ascap.com/press/2017/07-26-ascap-bmi-database). In addition, The Music Modernization Act of 2018 (Pub.L. 115–264) mandates the creation of a collective entity that would create a music ownership database of mechanical rights for the purpose of distributing royalties. However, this entity has not yet come into existence, so it is too early to tell how its efforts will fit into the larger need for a comprehensive database.

information. So as to strengthen the incentives for copyright holders to contribute their information to the database, copyright law could be modified to create a "safe harbor" with respect to potential infringement by music distributors:[12] If a music distributor could show that it made a good-faith effort to determine the ownership of a piece of music by searching the centralized database and was unable to find the requisite ownership information, then the distributor should not be subsequently liable for infringement by the copyright owner.[13] Again, this provision is important, so as to encourage the development of a comprehensive centralized database that in turn is important for developing a competitive marketplace for music.

20. With the availability of a centralized comprehensive database, the market would likely develop various license bundles, of varying sizes and characteristics and offered by separate suppliers or aggregators (including music publishers), so as to meet the varying needs of music distributors. If this occurs, the utility of blanket licenses would be diminished, although they might still be available. In turn, the perceived need for collective licensing and the concomitant necessity for rate courts could diminish.[14]
21. Smaller venues, such as bars and restaurants, might still want some form of a blanket license provided by a PRO or other digital rights management companies. However, this class of distributors likely does not need access to the entire catalogue of recorded music.

Concluding Comments

22. The logic of these arguments points in the direction of eliminating the consent decrees, so as to encourage more direct bargaining and negotiations—and thus competition—among the parties. There is some risk that, in the absence of an already developed centralized comprehensive database, the competitive forces that were described above may not develop. At the same time, however, the continued reliance on collective licensing and

[12] This idea is put forward in Thomas M. Lenard & Lawrence J. White, "Moving Music Licensing into the Digital Era: More Competition and Less Regulation," UCLA Entertainment Law Review, Vol. 23(1), 2016, pp. 133-156.
[13] The listing of the ownership information in the centralized database, however, should not imply that the owner is willing to grant a license.
[14] We recognize that the Music Modernization Act of 2018 goes in the opposite direction, by creating a compulsory mechanical license for digital music distributors. We consider this an unfortunate direction for public policy; see Thomas M. Lenard & Lawrence J. White, "The Same Old Song," Regulation, Vol. 41, No. 2 Summer 2018, pp. 30-35.

blanket licenses reduces the incentives to develop a centralized database. This is a chicken-and-egg problem. A potential solution is for the Antitrust Division to announce its commitment to terminate the decrees within a period that is sufficient to expect that a comprehensive centralized database will be in existence or that the parties will figure out some way around that problem.

23. Another perceived risk might be that the elimination of the decrees may open the door to private suits against the existing—and any subsequently created—PROs. Private suits may be filed on the grounds that PROs are the vehicles for price-fixing among otherwise competing composers. However, the U.S. Supreme Court (in *BMI v. CBS*[15]) in 1979 decided that these types of arrangements were not *per se* violations of the Sherman Act and should be considered under a rule-of-reason analysis—under which they were found to be legal. Since economic understanding of the potential benefits from such arrangements has (if anything) expanded since 1979, it seems likely that current federal courts would be unsympathetic to such suits.
24. Streaming services and digital downloads are a rapidly growing share of music industry revenues today. Music distribution has changed significantly between 1941 and 2019. The ASCAP and BMI consent decrees may hinder rather than help pro-competitive policy goals in the creation and distribution of cloud-based media content in the near future. The Antitrust Division would serve the public interest by terminating the decrees, with careful review of the process of transition and the development of comprehensive music ownership databases.

[15] *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979).