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## Note: A Series of (Inseparable) Tubes? “New Media” Streaming and the Impact of *In re. Pandora Media, Related Decisions, and Performance Licensing in the Internet Era*

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**NOTE: A SERIES OF (INSEPARABLE)  
TUBES? “NEW MEDIA” STREAMING AND  
THE IMPACT OF *IN RE. PANDORA MEDIA*,  
RELATED DECISIONS, AND  
PERFORMANCE LICENSING IN THE  
INTERNET ERA**

ROSS COKER<sup>1</sup>

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I. INTRODUCTION

At numerous points throughout history, a development or human achievement has arrived, prospered, and evolved so quickly that the law and society generally find themselves hard-pressed to keep abreast of it. The automobile, the telephone, and various computer-based technologies—from the punch card-chomping, room-filling beast of the 1960s to the lithe smartphones that denizens of the 2010s carry—all share one thing in common: the tidal wave-sized body of new jurisprudence, legal questions, and regulation of commerce

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<sup>1</sup> J.D. Pepperdine University School of Law 2015. Auburn University, B.A. Political Science, 2012. Special thanks to my journal editor, writing instructors, and all other peers, friends, and professors who have offered any input or advice on this topic and Note. Thanks are also in order to Pandora and other streaming radio services, which not only served as the interesting subject matter for this discussion but also provided the background music while writing this Note.

relating to their use. The most recent participant in this group, and the subject of this Note, might be said without much exaggeration to be of comparable importance to some of the other inventions mentioned above: the advent of web-based streaming music, web radio, and collectively the arrival of “new media.”<sup>2</sup>

While consumers have responded to the advent of these services and inventions with rabid appetites,<sup>3</sup> the financial and regulatory fates of those providing the services are less certain. Some of this instability might certainly be attributed to the fledging financial model involved even without the question of regulation; like the monetization trials and tribulations of others, such as Facebook and Google, it is another new industry continuing to seek its proper footing.<sup>4</sup> Another facet of the industry’s meteoric rise to prominence, as well as its continued collision with rights-holders and those suspicious of the business model, is the new media streaming model’s effectiveness at combating so-called music “piracy.” The ability of such services to profit from this piracy trend is largely thanks to their unique service model, which aims to provide access to popular music and media at no cost to the consumer, providing an attractive, legal alternative to piracy that is still theoretically capable of adequately reimbursing the artists and rights-holders.<sup>5</sup> However, the problems inherent in

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<sup>2</sup> Author Andrew Stockment offers a concise and helpful definition of what web or streaming radio is within the text of the *Virginia Law Review*:

‘Internet radio’ refers to non-interactive audio webcasts. A webcast is the [I]nternet equivalent of a broadcast—the transmission of . . . digital audio . . . [I]nternet radio is the non-interactive streaming of music or other audio programming. It functions like traditional broadcast radio: the webcaster selects which songs the listener hears and listeners are not able to select the songs that are played.

Andrew Stockment, *Internet Radio: The Case for A Technology Neutral Royalty Standard*, 95 VA. L. REV. 2129, 2132 (2009) (citing WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT, 17–18 (2004)).

<sup>3</sup> See *infra* note 13.

<sup>4</sup> Contributing authors to a recent *Forbes* online report regarding Pandora’s stock valuation related to its profitability highlights some of the problems and questions facing it and similar online new media providers: A user base that outpaces profitability without new monetization strategies. Specific to Pandora, the authors point out that the burgeoning shift of user popularity from the desktop version of the site to the mobile version that can be installed on modern smartphones and listened to on the go requires a re-examination of the optimal advertising and licensing methods. Trefis Team, *Taking a Closer Look at Pandora’s Monetization Strategy*, FORBES (Jun. 14, 2012, 8:30 AM), <http://www.forbes.com/sites/greatspeculations/2012/06/14/taking-a-closer-look-at-pandoras-monetization-strategy/>; see generally *Pandora: Momentum Continues as Mobile Monetization Efforts Pay Off*, SEEKING ALPHA (Nov. 22, 2013, 6:49 PM), <http://seekingalpha.com/article/1858871-pandora-momentum-continues-as-mobile-monetization-efforts-pay-off>.

<sup>5</sup> Neil S. Tyler, *Music Piracy and Diminishing Revenues: How Compulsory Licensing for Interactive Webcasters Can Lead the Recording Industry Back to Prominence*, 161 U. PA. L. REV. 2101, 2106–16 (2013) (describing generally the effects that online music piracy has had on the music and radio industries, and how the rise of online services, including streaming services such as Pandora, offer new ways to combat piracy and maximize profits for artists and labels).

the last goal, as this Note aims to illustrate, are more complex than they might appear.

Specifically, this Note focuses on that side of the “new media” chronicle, the issues and progress, or perhaps regress, in antitrust law, organizations representing artists, and how revenue from businesses like Pandora should be shared. In doing so, this Note will examine how the use, and perhaps misuse, of old law and jurisprudence as it pertains to old-fashioned or “terrestrial” radio had played a part in the new media story and helped shape the current regulatory scheme, and what the use, or misuse, of that scheme might mean for provider, artist, label, and consumer alike. The titular case, *In re. Pandora Media*,<sup>6</sup> sets what the Author believes is a troublesome precedent in the standoff in which the streaming radio industry—here specifically Pandora Media, Inc. (Pandora)—finds itself. The question of who will, or who should, budge first begs the examination of all the players involved: The venerable American Society of Composers, Authors and Publishers (ASCAP) accompanied by the Department of Justice’s oversight using an evolving but century-old antitrust regime, and Pandora, who continues to strive for a more terrestrial, radio-like treatment of licensing and performance fees by leaning on that antitrust regime.<sup>7</sup>

Before beginning to follow the breadcrumbs that lead back to the origins of disputes among radio stations and ASCAP, this Note would be remiss to not first disassemble the burgeoning “new media” field of Internet streaming radio and other entertainment that has given rise to the question addressed. This examination includes how web radio burst onto the scene with Pandora among its first wave of major players, leading them eventually into a position to create the complex antitrust and licensing question. These points of discussion will comprise the background portion of this Note.<sup>8</sup>

This Note will then examine the lengthy thread of legal reasoning that leads us to the specific question addressed in this Note.<sup>9</sup> To do so, it is not necessary to look to the most recent iteration of the technology involved—though the legal questions at play do inexorably impact modern Internet and device usage, the roots of the jurisprudence involved can be traced as far back as the earlier decades of the twentieth century.<sup>10</sup>

Next, this Note will discuss the details and arguments presented in the titular case of *In re Pandora Media, Inc.*, drawing conclusions as to what the

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<sup>6</sup> *In re Pandora Media, Inc.*, 2013 WL 5211927, (S.D.N.Y. Sept. 17, 2013).

<sup>7</sup> *Id.* at \*1–3.

<sup>8</sup> See *infra* Part II and accompanying notes 13–23.

<sup>9</sup> See *infra* Part III and accompanying notes 24–39.

<sup>10</sup> See generally George L. Blum, Annotation, *Judicial Decisions Involving ASCAP*, 37 A.L.R. 6th 243 (2008) (describing comprehensively the history of litigation and regulation involving ASCAP, spanning from 1941 to 2013).

verdict and pending follow-up case might mean more immediately for Pandora and ASCAP, but also for the industry as a whole.<sup>11</sup> Specifically, this Note will adopt the position that the actions of both sides are impeding forward legal and business progress in the new media streaming radio area.<sup>12</sup> In doing so, this Note will argue that the antitrust regulation and blanket licensing agreement drawn upon by Pandora is artificially attempting to retain certain vestigial elements of the industry from terrestrial radio, including perhaps the acceptance of ASCAP's general licensing and reimbursement scheme as it relates to the performance right versus portion of revenue schemes of reimbursement.

Besides linking this argument to the specific cases passed down by the New York courts involving Pandora Inc., this Note will then apply the same argumentation to support the broader point that antitrust law and the courts' examination of its application to new media, and even the Internet generally, potentially stifles innovation and prevents the market from demonstrating the difference and fluidity of the Internet in adapting to new markets and negotiation platforms. To answer this problem, this Note will finally posit and argue that, although a precise regulatory solution might not be in sight, the market and surrounding interests in the areas of new media, the Internet, and copyright holders' interests provide enough kinetic energy to generate a mutually-acceptable new solution if the barricades of the current disputes and situations are lowered.

## II. FROM A TRICKLE TO A TORRENT: THE HISTORY AND RE-POSITIONING OF PANDORA AND WEB-BASED "NEW MEDIA"

After the advent of the Internet, the development of web locations providing access to audio and video files occurred rapidly. While at first there was very little online that would be accurately described as "radio," as early as the 1990s various web events, including simulcasts of other television events, concerts, and even talk radio, began to appear.<sup>13</sup> Pandora's own story began as something not at all resembling its current iteration, as a tech startup and idea for a music selection engine in the Silicon Valley in the 1990s.<sup>14</sup>

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<sup>11</sup> See *infra* Part IV and accompanying notes 40–78.

<sup>12</sup> See *infra* Part V and accompanying notes 79–102.

<sup>13</sup> Randy Alfred, This Day in Tech, WIRE (Jun. 24, 2009, 12:00 AM), [http://www.wired.com/thisdayintech/2009/06/dayintech\\_0624/](http://www.wired.com/thisdayintech/2009/06/dayintech_0624/).

<sup>14</sup> Stephanie Clifford, Pandora's Long Strange Trip, INC., <http://www.inc.com/magazine/2007/1001/pandoras-long-strange-trip.html> (last updated Oct. 1, 2007). While not originally planned as a web radio service, Pandora's original innovation, which served as the inceptive core of its business—and notably still offers a unique experience to its present-day listeners—is the music selection algorithm known as the "music genome project." *Id.* This technology allowed Pandora to further distance its offerings from those in the world of terrestrial radio, allowing listeners to create a

Though most privy law students and other denizens of the twenty-first century probably need little or no introduction to the specific subject matter being discussed, the simply staggering rise and subsequent market dominance of new media and streaming is worth noting nonetheless.<sup>15</sup> Aside from the specific story of Pandora web radio discussed below, collectively the entire new media market for video and music has forever changed the way consumers pay for and receive digital content and entertainment.<sup>16</sup>

As Pandora's web radio model was eventually rolled out and the number of users began to exponentially pour in,<sup>17</sup> questions of profitability<sup>18</sup> and licensing also began to arrive on Pandora's doorstep.<sup>19</sup> Also influential in changing the company's approach and lobby was the news their current business model would be potentially weighed down further by the actions of the Copyright Royalty Board and SoundExchange, taking action that made online radio streaming of individual songs more expensive for the station than its

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"station" that would play all of their favorite artists or tracks across genres. *Id.*

<sup>15</sup> Subscription and streaming services experienced tremendous growth and accounted for 15% of record business revenue in 2012, according to RIAA statistics released Tuesday. That expansion helped digital revenue surge to 59% of total recorded music revenue from 51% last year but could not prevent total revenue from slipping 1% last year. Glenn Peoples, *Business Matters: Streaming, Subscriptions Rising, But Total Recorded-Music Revenues Down 1% in 2012: RIAA Report*, BILLBOARD (Mar. 26, 2013), <http://www.billboard.com/biz/articles/news/digital-and-mobile/1554501/business-matters-streaming-subscriptions-rising-but>.

<sup>16</sup> According to web-based news source *Tech Crunch*, "television is in trouble." Josh Constine, *100 Million Americans Watch Online Video Per Day, Up 43% Since 2010*, TECHCRUNCH (Feb. 9, 2012) <http://techcrunch.com/2012/02/09/100-million-american-watch-video/>. Some "105.1 million Americans now watch videos online each day, up 43% from 73.7 million in 2010." *Id.* Though these numbers refer to streaming video entertainment, including the delivery of television programs and movies, the comparison between the analog bulwark of cable and broadcast television and the new trend is directly applicable to the discussion of Pandora and its licensing woes brought on by its similar success.

<sup>17</sup> "Pandora launched in September 2005. After a quiet rollout to friends and family, the company had to double capacity three times in the first week. 'Nobody—nobody—had dreamed it would be as popular as it was . . .'" Clifford, *supra* note 10.

<sup>18</sup> Even today, perhaps shockingly to some who might be familiar on a personal level with the service, Pandora's business model still does not produce a profit. "Despite not turning an annual profit in its seven-year history, Pandora continues to survive by increasing its user base across multiple platforms. Since 2010, it has launched on over two hundred consumer electronic devices including [b]lu-[r]ay players, smartphones, and cars." Jasmine A. Braxton, *Lost in Translation: The Obstacles of Streaming Digital Media and the Future of Transnational Licensing*, 36 HASTINGS COMM. & ENT. L.J. 193, 201 (2014).

<sup>19</sup> Clifford, *supra* note 10.

[Pandora's] business model turned out . . . to be not so cool. Pandora offered listeners [ten] hours for free before requiring them to subscribe, but users easily could log in with different e-mail addresses and continue getting the free version . . . . Pandora scrapped the subscription model and decided to make money via advertisements on its site.

*Id.*

terrestrial counterparts.<sup>20</sup> While these actions and others generally related to the Digital Millennium Copyright Act (DMCA) began to weigh down the upward development and spread of web radio and other streaming media alike, the distinction of requiring a “performance license” for each play of a web radio song—dictating higher fees to be paid through to the rights-holders—is what set off the bulk of litigation and legal questions involving Pandora and the likes of ASCAP.<sup>21</sup>

Notably for the central argument to be discussed within this Note, it is perhaps clear that, to some degree, even from the start of legislation involving reimbursement of rights holders and web radio, different treatment of such web radio stations when it came to licensing might have arisen not purely from a difference in accountability and technology, but perhaps from a general mistrust and sense that the Internet stations posed a threat to the old guard of terrestrial radio.<sup>22</sup> Even if not specifically or explicitly endorsed by the courts, the wieldy regime of nearly a century’s worth of antitrust and licensing precedent involving the likes of ASCAP was born atop the towers of terrestrial radio, so perhaps, regardless of motivations, it should be little surprise that the courts saw fit to try to shoehorn those same precedents and standards onto the new, and markedly different, web radio era heralded by Pandora.<sup>23</sup>

### III. JUDICIAL BACKGROUND INVOLVING PANDORA AND ASCAP PRIOR TO *IN RE PANDORA*

Litigation involving ASCAP and distributors of media content has its origins long before the advent of Internet radio, indeed, even before the Internet itself, color television, and modern radio bands.<sup>24</sup> Unsurprisingly for an

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<sup>20</sup> *Id.*

<sup>21</sup> See Tyler, *supra* note 5, at 2118–27 (explaining the history of the DMCA and treatment of performance licensing for Internet radio, and arguing for a new category of license). For a general description of courts’ legal reasoning to arrive at the decision that performance of pieces contained within the repertoire or blanket license granted to radio stations by organizations including ASCAP, see HOWARD B. ABRAMS, *THE LAW OF COPYRIGHT* § 5:197.50 (2014).

<sup>22</sup> For one example supporting this possible motivating factor, consider the comments of Neil S. Tyler: “By creating a new digital public performance right for sound recordings and broadening the compulsory license structure to address the proliferation of webcasting and online music downloading, the DPRSRA recognized and attempted to respond to the perceived threat that the Internet presented to the music industry.” Tyler, *supra* note 5, at 2119 (citing AL KOHN & BOB KOHN, *KOHN ON MUSIC LICENSING* 1295–96 (3d ed. 2002)).

<sup>23</sup> *Id.*

<sup>24</sup> See generally Blum, *supra* note 8, at § 2 (listing all judicial decisions involving ASCAP).

In 1941, a consent decree was entered into between the government and ASCAP that required ASCAP to grant licenses to users in proportion to the amount of music used, and, in 1950, that decree was substantially amended to remedy certain deficiencies. Under the 1950 amended judgment, ASCAP was

organization of ASCAP's arguable importance, size, and influence, within not only the music and entertainment industry but collectively all of the other industries touched by that industry, the power and purpose of the licenses controlled and issued by ASCAP have drawn continuous and increasingly nuanced attention from the courts.<sup>25</sup>

Throughout the years, courts have addressed diverse and complex issues on nearly every conceivable legal front as it relates to the burgeoning licensing behemoth that is ASCAP. In the words of the American Law Reports collection addressing all of those cases, "The nature of the organization and practices of . . . ASCAP[] is revealed in the reports of cases to which it has been a party," referencing that level of diversity and complexity.<sup>26</sup>

In terms of the courts recognizing a need to sit up and take notice of what was and is transpiring with mass licensing and ASCAP to radio stations and other customers and applications, the judicial history stretches back as far as 1932, when the Supreme Court first had to recognize that what was then a still current and developing technology of the age—radio performances in the home—presented an interesting problem for both the development of copyright law as a whole, as well as the organizations that quickly began to emerge to respond to the market, including ASCAP.<sup>27</sup> Some of the language presented by the court in the opinion rings shockingly current for the issues faced in the instant case:

But[,] nothing in the [Copyright Act] circumscribes the meaning to be attributed to the term "performance," or prevents a single rendition of a copyrighted selection from resulting in more than one public performance for profit. While this may not have been possible before the development of radio broadcasting, the novelty of the means used does not lessen the duty of the courts to give full protection to the monopoly of public performance for profit which Congress has secured to the composer.<sup>28</sup>

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required to offer two types of licenses to the broadcasters: a "blanket" license and a "per program" license.

*Id.*

<sup>25</sup> The "blanket license" issued by ASCAP is the bread and butter of not only this case but also of ASCAP's function in general from the inception of the license to the present. See *Licensing Help*, ASCAP, <http://www.ascap.com/licensing/licensingfaq.aspx#general> (last visited Jan. 12, 2014) ("One of the greatest advantages of the ASCAP license is that it gives you the right to perform ANY or ALL of the millions of the musical works in our repertory. Whether your music is live, broadcast, transmitted[,] or played via CD's or videos, your ASCAP license covers your performances. And[,] with one license fee, ASCAP saves you the time, expense, and burden of contacting thousands of copyright owners.").

<sup>26</sup> Blum, *supra* note 8, at § 2.

<sup>27</sup> See generally, *Buck v. Jewell-La Salle Realty Co.*, 283 U.S. 191, 197 (1931).

<sup>28</sup> *Id.* at 196–97.

While much of the subsequent and even presently ongoing litigation surrounding ASCAP encompasses other issues, such as scope, antitrust, and various other sundries, a consistent theme is the courts wrestling with the issue of mass licensing flowing from the eventual cabal of Broadcast Music, Inc. (BMI) and ASCAP in North America, tempered by the arrival of new technologies and questions in the mediums used for continued broadcast and “public performance.”<sup>29</sup>

Yet another case presented on the long, strange road that ASCAP has travelled that bears heavy foreshadowing for the more modern issues faced by the organization can be found in *Columbia Broadcasting System, Inc. v. ASCAP* hailing from 1972.<sup>30</sup> In that case, the plaintiffs’ complaint generally was that the broadcasters chose to complain that:

[T]he availability of ASCAP’s blanket and per program licenses was not sufficient to satisfy the commands of the Sherman Antitrust Act, with CBS contending that these options “compel a broadcaster to pay for the right to use all copyrighted music in the ASCAP pool, even though it might want rights only as to some of those musical compositions.” That is, the plaintiff asserted that ASCAP is “using the leverage inherent in its copyright pool to insist that plaintiff pay royalties on a basis which does not bear any relationship to the amount of music performed.”<sup>31</sup>

Again, the commonalities between the decades-gone *Columbia* and the present *In re Pandora* and related litigation are readily apparent. Despite taking place in the 1970s, long before the Internet, Pandora, and the rise of “new media,” *Columbia* nonetheless raises some of the same familiar complaints or tensions that lurk beneath the surface of the instant case. Specifically, the same grievance that *Columbia* offered before the court regarding the inability of *Columbia* or its peers to effectively shop for meaningful rates, rather than pay a flat fee, did not accurately represent both the antitrust law and the needs of the market in the best way possible.<sup>32</sup> The parallels to Pandora’s interest in the present is obvious: both the convoluted and perhaps misapplied methods of calculating profits and cost for the blanket license, but, from a broader view, also the actions Pandora has taken in an attempt to maintain its business interests against the bulwark of ASCAP licensing, just as *Columbia* did in 1972.<sup>33</sup>

On the more recent stage is the tussle that comprised the better part of

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<sup>29</sup> See generally Blum, *supra* note 8.

<sup>30</sup> *Columbia Broad. Sys., Inc. v. Am. Soc. of Composers, Authors and Publishers*, 337 F. Supp. 394, (S.D.N.Y. 1972).

<sup>31</sup> Blum, *supra* note 8, at § 27 (quoting *Columbia Broad. Sys., Inc.*, 337 F. Supp. at 396).

<sup>32</sup> *Id.*

<sup>33</sup> See Tyler, *supra* note 5 and accompanying text.

Pandora's infancy along with its quickly-appearing peers, such as LastFM, Spotify, and other streaming services: The distinction between "interactive" and "non-interactive" services within the larger sphere of web-based streaming. This determination serves foremost as the determinative factor in the eyes of the courts for whether the old radio blanket license applied or whether individually song-based statutory royalties were due.<sup>34</sup> While the technologies involved in the various services are notably different and in some cases admittedly unprecedented—such as Pandora's advertised "DNA" algorithms that provide a constantly-refreshed station using musical qualities deduced from a song, artist, or album of the user's choice—another view of the court's unwillingness to initially view the use of Pandora as similar to terrestrial radio for purposes of licensing might be construed as a hesitancy to change the "old guard" of that regime for something more suited to the nuances of web radio.<sup>35</sup>

This theory finds support in the self-interests of record labels and other similar content providers who stand to gain the most from keeping music licensing "close to the chest." For them, physical media—not Internet and distribution—would define the parameters of licensing. Consider the thoughts of author Jasmine Braxton on the sum total that this conflict of interests has had on Pandora's financial and business fate and how that fate might serve as sufficient motivation for Pandora to strive for change and a leaner arrangement:

As a non[-]interactive webcaster, Pandora pays two types of performance royalties: statutory performance royalties for the sound recording and performance royalties for the underlying composition. . . . [S]tatutory performance royalties for digital music are paid to the nonprofit organization SoundExchange, which collects the royalties and disperses them back out to artists and record companies. Writers' royalties are paid out to the PROs ASCAP, BMI, and SESAC. Unlike satellite radio providers like Sirius, which pay a percentage of its revenue as performance royalties, Pandora pays a per-stream fee every time a song is played. This "willing buyer, willing seller" model is still based on the statutory rate[] but does not account for the internal performance of the company. As a result, Pandora paid out royalties of [60%, 50%, and 54%] of its revenue in fiscal years 2010, 2011, and 2012 respectively. Unfortunately, while Pandora is one of the first radio systems to fairly pay

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<sup>34</sup> *Arista Records, LLC v. Launch Media, Inc.*, 578 F.3d 148, 150 (2d Cir. 2009). The Second Circuit looked to the statutory definition of "interactive" and "non-interactive" to categorize the program and establish any liability. *Id.* "[A]n interactive service is defined as a service that 'enables a member of the public to receive a transmission of a program specially created for the recipient, or on request . . .'" *Id.* Otherwise, if a digital audio transmission is not interactive, its primary purpose is to "provide to the public such audio or other entertainment programming, . . . subject to a compulsory or statutory licensing fee." *Id.* at 151. Thus, the court had to determine if a webcasting service was interactive based on whether the user could receive a transmission specially created for him or her.

<sup>35</sup> *See infra* note 36.

record companies and artists, the payments are essentially killing the company.<sup>36</sup>

Myriad views and commentary exist in response to the call for a better alternative to the scheme described above.<sup>37</sup> All similarities between the other varieties of streaming and web-based media aside, however, the clear picture and circumstance in which the actions and opinion of *In re Pandora* are handed down is one that makes things difficult, if not impossible, for ideal measures of market success. Companies such as Pandora would likely fall back on the complexities of the ASCAP and BMI dispute as it interfaces between web and physical radio regulation, instead of allowing in the influences of market forces:

There are a few interactive webcasters, such as Rhapsody and Spotify, that have had relative success under the current digital performance right framework. However, the vast majority of popular music services offered to the general public today are non[-]interactive, due to the lower royalty rates owed to copyright owners and the presence of compulsory licensing for non[-]interactive webcasters. Creating a successful interactive webcasting service is not impossible under the current framework, but the increased costs associated with direct negotiations and the need to acquire streaming rights from a wide variety of copyright owners means that only a small number of entities are even capable of pursuing such a business plan.<sup>38</sup>

After one reaches an appreciation that this is the reality in which Pandora and similar new media companies have found themselves forced to participate in, the eventuality of a case such as *In re Pandora* that brings these discussions to the forefront and begs a solution or regulatory scheme is hardly surprising.<sup>39</sup>

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<sup>36</sup> Jasmine A. Braxton, *Lost in Translation: The Obstacles of Streaming Digital Media and the Future of Transnational Licensing*, 36 HASTINGS COMM. & ENT. L.J. 193, 199–200 (2014) (footnotes omitted).

<sup>37</sup> Braxton offers her own potential reform suggestions through examples of other streaming services on the multinational stage. While her focus is on that aspect of licensing versus streaming radio and ASCAP regulation, the discussion of market forces serving as the driving force behind the shape of reform is highly applicable:

Granting performance rights for audiovisual works such as film and television programs is not nearly as contentious as obtaining similar rights for music . . . [a]s owners of these works studios negotiate licenses directly with potential service providers, and, like record labels, prefer to charge high licensing fees upfront to compensate for lackluster physical sales. As a result Netflix may offer television series and film collections from a certain group of studios while growing competitor Amazon may host content from another handful of producers.

*Id.*

<sup>38</sup> Tyler, *supra* note 5, at 2122–23.

<sup>39</sup> While Pandora has doubtless established a fervent user base for itself with its current business model and interface utilizing seeded web radio stations, the market presence of companies such as Pandora as opposed to other related but not identical services, such as Spotify, can accurately be said to be the product of the current regulatory scheme more than market forces and demand: “Based

IV. THE TITULAR DECISION, *IN RE PANDORA*, AND SUBSEQUENT COURT ACTIONS

The opinion, delivered by District Court Judge Denise Cote, began with background information immediately prior to the case. Judge Cote described how Pandora sought a blanket license in 2010 from ASCAP, effective upon January 1, 2011.<sup>40</sup> The judge went on to describe in rough terms the agreement comprising the blanket license and noting generally Pandora's asserted cause of action that it should be allowed to continue to play all songs initially contained in the license, notwithstanding action taken on behalf of several of the groups of artists within the blanket who later moved that performance rights for their pieces be excluded from performance on "new media" including Pandora.<sup>41</sup>

By way of giving further facts and background, the court also examined the history of licensing between Pandora and ASCAP specifically prior to this ruling.<sup>42</sup> The court described the original 2005 agreement into which the parties entered.<sup>43</sup> The court noted Pandora withdrew from this original agreement pending a change in the antitrust ruling affecting ASCAP, upon which Pandora

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upon the current tripartite structure of the DMCA, it is extremely advantageous for an Internet radio provider to qualify for the non[-]interactive webcasting compulsory license and forego the high transaction costs of negotiating directly with sound recording copyright owners for the right to offer music to consumers." *Id.*

<sup>40</sup> *In re Pandora Media, Inc.*, 2013 WL 5211927, \*1 (S.D.N.Y. Sept. 17, 2013). The general litigation against ASCAP by the United States in cases such as *United States v. American Society of Composers, Authors & Publishers*, 616 F. Supp. 2d 447 (S.D.N.Y. 2009), addressed more broadly the fairness of such a blanket license. Though the "new media" medium in question in the aforementioned case was Internet streaming video service, the opinion still contains useful commentary on what the courts might consider a fair application of blanket license to disputes involving new media. Senior District Court Judge Conner stated in conclusion regarding the revenue fee agreement for the blanket license:

Even considering that the fees paid to ASCAP will represent only about one-half of the total fees that YouTube pays to music performing rights societies, the contemplated interim fees are clearly reasonable, even conservative, in comparison to those called for in other licenses for the performance of copyrighted content on the Internet.

*Id.* at 455. To some readers, including the Author, this might seem to suggest, along with other material discussed in this Note, that courts are more willing to allow compensation to rights-holders either through an organization or directly to be judged for "fairness" by looking to prior agreements, both in new media and without—in the case of Pandora and terrestrial radio. *Id.*

<sup>41</sup> *In re Pandora Media, Inc.*, 2013 WL 5211927 at \*1–2. Notably, the first and subsequent publishers to request that new media performance of their licenses be excluded from the blanket resulted in direct renegotiation efforts between EMI (now known as Sony/EMI), Warner Brothers Group, Universal Music Publishing Group, and BMG. Though Pandora sought the summary judgment later granted by the New York court, the fact that Pandora willingly was able to engage each of the publishers in individual negotiations might give some room to speculate about the nature of the ideal level of regulation both without ASCAP's monopoly as well as Pandora's reliance on previous antitrust rulings. *See id.* at \*3.

<sup>42</sup> *Id.* at \*2.

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

filed for the new agreement here at issue under the new terms.<sup>44</sup>

Pandora's petition filed for purposes of determining reasonable licensing fees contains its own summary of the problem as it affects the entity at this point in the description:

The EMI and Sony New Media [r]ights [w]ithdrawals have important ramifications for Pandora. Of course, it has created an urgent need on Pandora's part to negotiate direct licenses with the EMI and Sony. That is because, as a practical matter, Pandora cannot effectively operate the kind of comprehensive [I]nternet radio offering which it currently delivers to its end users without access to the huge catalogs of EMI and Sony. Beyond the foregoing, it is critical to Pandora that its ASCAP fees be diminished by a factor commensurate with Pandora's payment obligations to EMI, Sony[,] and any other publisher that may withdraw catalog from ASCAP (collectively the "[w]ithdrawing [p]ublishers"). Pandora has made specific proposals to ASCAP for how such commensurate reductions could be calculated during the parties' negotiations after EMI's New Media Rights Withdrawal was announced. ASCAP, nevertheless, has not made any meaningful or reasonable proposal to address this issue.<sup>45</sup>

Judge Cote explained in brief the already-discussed antitrust law affecting ASCAP, how the most recent revision called AFJ2 affected that law, and how by result a new blanket license became a more appealing option for Pandora following AFJ2:

Since 1941, ASCAP has been operating under a consent decree stemming from a Department of Justice antitrust lawsuit that alleged monopolization of performance rights licenses. Since then, ASCAP has been governed by this consent decree, which has been modified from time to time. The most recent version of the consent decree was issued in 2001 and is known as the Second Amended Final Judgment ("AFJ2").<sup>46</sup>

The court then explained how this newest revision affected ASCAP's operations and licensing, notably focusing on how AFJ2 provided that the "rate court"—District Court for the Southern District of New York—was to govern the determination of what is a "reasonable fee" for the blanket license.<sup>47</sup> The court went on to add a few more details regarding AFJ2 and how it affected the various types of licenses:

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<sup>44</sup> *Id.*

<sup>45</sup> Petition of Pandora Media, Inc. for the Determination of Reasonable License Fees, *In re* Petition of Pandora Media, Inc., 2013 WL 5211927 (S.D.N.Y. Sept. 17, 2013) (No. 12 CV 8035), 2012 WL 5388715.

<sup>46</sup> *In re Pandora Media, Inc.*, 2013 WL 5211927, at \*1.

<sup>47</sup> *Id.* Consider also the point raised in this Note in note 15 and the accompanying text. Here, as in the referenced case, it seems that the court's standard of reasonability is founded squarely—and perhaps primarily—on previous decisions, including those which bear ASCAP's peers as parties.

AFJ2 also sets out the characteristics of the licenses ASCAP issues. The AFJ2 defines four types of licenses: blanket licenses, per-program licenses, per-segment licenses, and through-to-the-audience licenses. Three of the provisions create categories of licenses, which are distinguished in how user fees to ASCAP are calculated. Importantly, these license categories do not affect the scope of the ASCAP music repertory available to a licensee. All of the license types contemplate that the user will have access to ASCAP's entire repertory.<sup>48</sup>

The court also noted the AFJ2 ruling provided ASCAP shall not be allowed to discriminate in regards to pricing for similarly situated licensees.<sup>49</sup>

The court then began to describe the actions that took place after the renegotiation of licensing between Pandora and ASCAP, followed by the attempted withholding of performance rights from the blanket license by artist groups, such as EMI.<sup>50</sup> After giving the legal standard under which summary judgment might have been granted in the case, the court then proceeded with its substantive analysis, consisting mostly of questions of definition under the language of the AFJ2 ruling.<sup>51</sup>

The court stated the key issue in its determination was “determining the proper meaning of the term ‘works in the ASCAP repertory’ in AFJ2”—as all licenses, by language of the AFJ2 ruling, purported to offer the licensee access to the “full repertory” of music therein.<sup>52</sup> The court cited further language from the AFJ2 ruling which in its view made amply clear that the grant of right to play all music in the repertory was not limited by re-negotiation between a rights-holder and ASCAP after the date of the license application, and that the question more narrowly was then what comprised the “atomic unit” of the repertory granted under the license:

[T]he question is whether AFJ2 conceives of the atomic unit of the “ASCAP repertory” in terms of musical compositions, or in terms of ASCAP's right to

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<sup>48</sup> *Id.* (citations omitted) (internal quotation marks omitted). The three types of licenses mentioned by the court above do not affect the question at issue in *In re Pandora*, rather they dictate the type of blanket license, the choice among which would be largely dictated by the use of the media, such as a web show segment in place of web radio. In the case cited by the Southern District of New York court, *Broadcast Music, Inc. v. DMX Inc.*, 683 F.3d 32, 36 (2d Cir. 2012), the court there references the various types of license which ASCAP might potentially issue: (1) “blanket licenses,” such as the one at dispute in the instant case, (2) “per-program licenses,” which envision an arrangement where the broadcasts are separated by program but the use is unlimited, (3) “per-segment license,” similar to the previous but based upon use within segmented portions of the licensee's activity with a single industry, and finally (4) “through-to-the-audience license,” meaning a license for use of music in a sort of content “object” that might be transmitted from one music user to another. *Id.* at 43–44.

<sup>49</sup> *In re Pandora Media, Inc.*, 2013 WL 5211927, at \*2.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at \*3–5.

<sup>52</sup> *Id.* at \*5.

license musical compositions to particular types of purchasers. The parties disagree on this question:

. . . . ASCAP argues that “‘ASCAP repertory’ refers only to the rights in musical works that ASCAP has been granted by its members as of a particular moment in time.” Pandora argues that “‘ASCAP repertory’ is a “defined term[ ] articulated in terms of ‘works’ or ‘compositions,’ as opposed to in terms of a gerrymandered parcel of ‘rights.’” Pandora is correct.<sup>53</sup>

The court stated several principles, which it asserted supported the conclusion that Pandora’s view of the ASCAP repertory was more accurate.<sup>54</sup> First, the court reasoned, “in interpreting the meaning of terms in a consent decree, plain meaning [took] precedence over imputed purpose.”<sup>55</sup> Further, the court fell back upon a broader Supreme Court ruling, which emphasized that courts “should be reluctant to look beyond text to purpose,” as the decree itself contained no such purpose, but rather the text of the decree most concisely embodied the intended purpose of the parties entering into the decree.<sup>56</sup>

The court’s heavy reliance on originalism principles of law and its textual interpretations are important for the reasons stemming from the contrast of the court’s reasoning in *In re Pandora* and a closely-related ruling.<sup>57</sup> They are also important for providing insight as to the possibility that courts are still a bit unwilling to alter the longstanding—modified, but unmoved—antitrust rulings and body of other substantive law that support ASCAP’s business model and allow for fairly straightforward and conclusory opinions, such as the one seen in *In re Pandora*.

Unsurprisingly, ASCAP responded negatively against the ultimate outcome of the initial *In re Pandora* ruling, stating that it was optimistic the upcoming rights determination ruling to be held in December of 2013 would uphold its “fundamental position” that any license should offer “fair pay for [its] hard work.”<sup>58</sup> ASCAP also issued a statement speaking specifically to the new media rights withdrawal issue determined in *In re Pandora*, including a statement by ASCAP’s CEO John LoFrumento, who opined:

ASCAP’s more than 470,000 songwriter, composer[,] and music publisher members make their living creating the music without which Pandora would

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

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

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* (citing *United States v. Armour & Co.*, 402 U.S. 673, 681–82 (1971)).

<sup>57</sup> See *infra* notes 54–55 and accompanying text.

<sup>58</sup> Jonathan Stempel & Sakthi Prasad, *Internet Radio Service Pandora Prevails In License Dispute: In re Petition of Pandora*, WESTLAW J. COMPUTER & INTERNET (Thomson Reuters, Wayne, Pa.), Oct. 3, 2013, at 11.

have no business. The [c]ourt's decision to grant summary judgment on this matter has no impact on our fundamental position in this case . . . . ASCAP looks forward to the December 4th trial, where ASCAP will demonstrate the true value of songwriters' and composers' performance rights, a value that Pandora's music streaming competitors have recognized by negotiating rather than litigating with creators of music.<sup>59</sup>

Pandora and the courts have seen further mass licensing contractual action that speaks to the future of the *In re Pandora* decision, as well as new media licensing generally, in the form of *Broadcast Music, Inc. v. Pandora Media, Inc.*<sup>60</sup> In this more recent decision, Judge Stanton of the Southern District of New York used many of the same terms and familiar language from the *In re Pandora* decision decided in the same district, and the basis of the case indubitably factually resembled *In re Pandora* very closely.<sup>61</sup> However, a different and significant conclusion was reached in *BMI*. So significant is the result in this case, as well as *In re Pandora*, that media sources affiliated more with the reporting of music news rather than legal developments have taken notice, including *Spin* magazine, which offered this concise remark on the *BMI* ruling:

[A] federal judge honored Pandora's request for a court order against such practices, ruling that the original deal with ASCAP superseded all attempts to secure more favorable rates — essentially, that every artist's catalog is worth the same, be they unheard of or famous.<sup>62</sup> But[,] Pandora also went up against [] another massive music publishing umbrella: Broadcast Music, Inc. (BMI). And[,] in a decision filed on Thursday, December 19, [2013,] Pandora lost.

The issues were exactly the same, as seen in court documents obtained by [Spin]. Certain publishers within BMI wanted to get more money for their music, and the radio provider wanted to quash that. But[,] this judge shot Pandora down, citing contractual details between BMI and the people in its stable. While ASCAP's agreement with its publishers [did not] allow for withdrawal, it turns out BMI's [did] — seemingly with [that] exact scenario in mind.<sup>63</sup>

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<sup>59</sup> *Update On New Media Rights Withdrawal*, ASCAP (last visited Nov. 24, 2013), <http://www.ascap.com/members/governingdocuments/rights-withdrawal.aspx>.

<sup>60</sup> 2013 WL 6697788, at \*1 (S.D.N.Y. Dec. 19, 2013).

<sup>61</sup> While the exact nature and history of Broadcast Music, Incorporated (BMI) is rich enough for its own discussion, the similarities between it and ASCAP are immense: both are licensing industries for composers and performers; both deal in mass licenses that allow the licensee to offer public or other performance of the media contained in their catalogue; and both have substantial history, originating in the early parts of the twentieth century and growing exponentially from there. *See About, BROADCAST MUSIC, INC.*, <http://www.bmi.com/about> (last visited Jan. 12, 2014).

<sup>62</sup> Referencing *In re Pandora*. *See supra* text accompanying note 18.

<sup>63</sup> Chris Martins, *Pandora Loses Case Against BMI, Will Have to Pay More for Music*, SPIN

The remarks by *Spin* magazine effectively summarize the result of this case, but the judge's precise language is worth examining further. Both decisions break down the history and context of the mass license ability granted to and used by the organizations through similar antitrust history.<sup>64</sup> Notably, Judge Stanton emphasized that, while the nature of the mass license issued by BMI and held by Pandora is undisputed, he took a different perspective on the grant, or withholding, of the "new media" rights so important to companies such as Pandora.<sup>65</sup> The difference between the cases first becomes apparent in light of the initial question, which was presented similarly in both cases. The inquiry raised the issue of whether a withdrawal of the new media rights by certain publishers or rights holders from the collective licensing agencies—ASCAP or, in this case, BMI—affects the antitrust-created blanket license granted to Pandora immediately, or if the selfsame antitrust created blanket license permits Pandora to continue to broadcast the entire library as of the date of the last issuance.<sup>66</sup>

Judge Stanton held that the answer to that question, unlike the finding in *In re Pandora*, is that once the rights holders remove the license from their individual bodies of work from BMI, those works are immediately no longer part of the "repertory" as it was licensed to Pandora, and copyright common law and case precedent prevents BMI from offering the same blanket license that would include the new media rights from that moment forward. In the words of Judge Stanton himself:

[T]he BMI [c]onsent [d]ecree requires BMI to offer Pandora a license to perform all of the compositions in its repertory. When BMI no longer is authorized by music publisher copyright holders to license their compositions to Pandora and [n]ew [m]edia [s]ervices, those compositions are no longer eligible for inclusion in BMI's repertory. BMI can no longer license them to Pandora or any other applicant.<sup>67</sup>

Insomuch as the facts of the cases are nearly identical, a more in-depth examination of how the judges differed as to the immediate effect of the rights

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(Dec. 19, 2013, 8:03 PM), <http://www.spin.com/articles/pandora-bmi-court-licensing-publishing-artists/>.

<sup>64</sup> BMI's ability to license the public performance rights of its musical repertory is governed by the [c]onsent [d]ecree settling this antitrust suit brought by the United States. An amendment to the BMI [c]onsent [d]ecree establishes this [c]ourt as a "rate court," which sets fees for licenses when BMI and applicants cannot agree on a reasonable fee. BMI Consent Decree Art. XIII. The [d]ecree also imposes certain conditions and requirements on BMI's issuance of licenses.

*Broad. Music, Inc. v. Pandora Media, Inc.*, 2013 WL 6697788, at \*1 (S.D.N.Y. Dec. 19, 2013).

<sup>65</sup> *Id.* at \*3–4.

<sup>66</sup> See *supra* text accompanying notes 27, 29.

<sup>67</sup> *Broadcast Music, Inc.*, 2013 WL 6697788, at \*1.

holders electing to remove their new media rights from Pandora is crucial not only from the perspective of understanding the case itself, but also the broader question that this Note has already attempted to pose regarding the future of new media and the ASCAP/BMI style of licensure.

Just as ASCAP must operate under the pre-established regulations of antitrust rulings, BMI too must abide by similar restrictions—referred to as the BMI consent decree—when licensing public performance rights of the property of its members.<sup>68</sup> The opinion cited specific portions of BMI’s consent decree in support of its argument: that the decree supported the nullification of the agreed-upon terms when the consent decree was issued, if the terms changed in the form of the withdrawal of the new media rights.<sup>69</sup> In pertinent part, Judge Stanton held that:

Under Section XIV of the BMI [c]onsent [d]ecree, when an applicant requests a license for “any, some[,] or all of the compositions in defendant’s repertory,” BMI must grant a license for performance of the requested compositions . . . . By placing a composition in the BMI repertory, the affiliate routinely authorizes its inclusion in blanket licenses of BMI’s whole repertory to all applicants.

But[,] if the withdrawal of its authority to do so by some affiliates with respect to compositions for which they own or administer the copyrights is within those affiliates’ rights, BMI cannot offer [n]ew [m]edia licensing rights for those compositions to [n]ew [m]edia applicants, including Pandora. If BMI cannot offer those compositions to [n]ew [m]edia applicants, their availability does not meet the standards of the BMI [c]onsent [d]ecree, and they cannot be held in BMI’s repertory. [Because] they are not in BMI’s repertory, BMI cannot deal in or license those compositions to anyone.<sup>70</sup>

As presumed in this portion of the ruling, the court predicated its findings on a singular reading of the term “repertory,” and more specifically a reading of the works within that repertory as either a singular inseparable unit or alternatively something more akin to the “bundle of rights” analogy—a bundle

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<sup>68</sup> BMI’s ability to license the public performance rights of its musical repertory is governed by the [c]onsent [d]ecree settling this antitrust suit brought by the United States. An amendment to the BMI [c]onsent [d]ecree establishes this [c]ourt as a “rate court,” which sets fees for licenses when BMI and applicants cannot agree on a reasonable fee.

*Broad. Music, Inc.*, 2013 WL 6697788, at \*1. Though it is not the same set of rulings and regulations, illuminative to understanding the BMI consent decree are the notes and commentary within this Note referencing the already-discussed ASCAP antitrust regulation scheme and the most recent iteration thereof known as AFJ2. See *Buck v. Jewell-La Salle Realty Co.*, 283 U.S. 191, 196–97. See generally Blum, *supra* note 8.

<sup>69</sup> *Broad. Music, Inc.*, 2013 WL 6697788, at \*1–2.

<sup>70</sup> *Id.* at \*3–4.

of which new media performance is one of the rights.<sup>71</sup> The *In re Pandora* decision contains language already referenced that quite clearly finds within the bounds of that opinion and antitrust rulings relating to ASCAP that the “works” there disputed were made up of “musical compositions and not rights with respect to those compositions.”<sup>72</sup> For emphasis in this different reading, compare the following two passages referencing the nature of the licensure understanding: first, from the language of *In re Pandora*:

In ordinary usage[,] the word “work” in the musical context means a composition and not a right in a composition . . . . The term “works” in AFJ2 has its origin in [c]opyright law, and it is clear from [c]opyright caselaw that works means “compositions” in that context. And[,] “where contracting parties use terms and concepts that are firmly rooted in federal law, and where there are no explicit signals to the contrary, we can presume that the prevailing federal definition controls.”<sup>73</sup>

and, second, to the comparable language in the *BMI* decision:

It is the BMI [c]onsent [d]ecree (and the antitrust law) which restrict BMI from carrying in its repertory compositions which it can no longer offer to the [n]ew [m]edia [s]ervices, who were up until recently accepted as legitimate, qualified, licensed[,] and performing those works. BMI’s repertory consists of compositions whose performance BMI “has the right to license or sublicense”; it “shall upon the request of any unlicensed broadcaster, license the rights publicly to perform its repertory.” BMI Consent Decree Arts. II(C); VII(B). When portions of that right are withdrawn, the affected compositions are no longer eligible for membership in BMI’s repertory, and it cannot include them in a blanket license or license them at all.<sup>74</sup>

When taken in light of the above, the court’s finding contains the presumption that the consent decree issued for antitrust purposes against BMI contains in its language terms that indicate the rights within a single work may indeed be separated, though presumably without the effect of such language from the consent decree, the common law and copyright law discussed by the court in *In re Pandora* would otherwise govern.<sup>75</sup> The reading of the term

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<sup>71</sup> *Id.*

<sup>72</sup> *In re Pandora Media, Inc.*, 2013 WL 5211927, at \*6.

<sup>73</sup> *Id.*

<sup>74</sup> *Broad. Music, Inc.*, 2013 WL 6697788, at \*4.

<sup>75</sup> See *supra* note 46 and accompanying text. Copyright law as it would apply to the specific intersection with antitrust law as applied throughout decades past to ASCAP as well as BMI is a robust body of law to say the least, and a full explanation or examination thereof is substantially beyond the scope of this Note. However, even from the directly cited portions of the ASCAP decision, it is apparent that differing views of what are in essence virtually identical licensing are at play, and the “winning” view from between the two might have substantially differing, and yet crucial, impacts on the future of new media for Pandora and others in the future.

“works” and the potential for rights contained within them seen in the *BMI* case is particularly surprising given that the *ASCAP* decision, which again went to bat with facts appreciably similar in every regard save the specific antitrust ruling that applied, was not indirect when it came to digging deep for the legal justification for its view, even far beyond the language of the AFJ2 antitrust ruling that binds ASCAP:

Section 102 of the Copyright Act refers to “works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” This . . . is inconsistent with a reading of works that defines the word in terms of “rights.” And[,] the Supreme Court has referred to a “work” as the “translat[ion][of] an idea into a fixed, tangible expression.” Compositions, but not rights in compositions, are able to be “fixed” in “tangible medium[s] of expression.”

. . . .

Because “works” in AFJ2 means “composition[s]” and not “rights in compositions”, and because it is undisputed that the terms of ASCAP’s [c]ompendium [m]odification of April 2011 permit ASCAP to retain the right to license the works of the withdrawing publishers for non-[n]ew [m]edia purposes, those compositions remain “works in the ASCAP repertory” . . . . In fact, ASCAP retains the right under the “Standard Services” agreement to license the works of withdrawing publishers even to certain smaller [n]ew [m]edia licensees. Thus, the works remain in every facet of the ASCAP repertory.<sup>76</sup>

While a nuanced view of the differences in language from the AFJ2 ruling to the *BMI* consent decree is hardly surprising, from the perspective of new media companies including Pandora, it might appear more than a bit troubling that a court would be willing to ignore the larger tenants of copyright law and Supreme Court precedent included in the *ASCAP In re Pandora* decision in favor of the rather blunt analysis seen in *BMI* that at least appears to throw more fuel upon the fire of an already-convoluted area of law. In the long run, such an unwillingness to truly dig deep and reexamine the precedent and foundation of both the antitrust regulations and all the attached trappings, such as calculation of reasonable fees, seems to be the less beneficial choice all around from both a clarity of law perspective, as well as an economic perspective from enterprises such as Pandora who might stand to gain from forcing a “shakedown” of both ASCAP as well as *BMI*’s interests and the law that surrounds them. Specifically, a result that might be called such a shakedown could be argued to catalyze more effective compensation for and presentation of new media

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<sup>76</sup> *In re Pandora*, 2013 WL 5211927, at \*6–7 (alterations in original) (citations omitted).

through avenues such as Internet streaming in the twenty-first century.<sup>77</sup>

Harkening back for a moment to the historical examination of the tensions between market forces and the perceived necessity for an institution such as ASCAP, this stretch of logic by the court might indeed to some be the “straw that broke the camel’s back” in terms of once again rendering untenable the balancing act between static antitrust law that prevents shady dealings between different licensees, and, on the other side, the market forces and dynamic influence of new technologies and outlets.<sup>78</sup> Those new technologies and outlets certainly can be said to be as broad as the Internet and new media streaming—indeed, anything in the general field that serves to not call into question the merits of relying upon radio-based decrees for fair dealings.

V. ARGUMENT: THE CURRENT AFTERMATH AND APPLICATION OF *IN RE*  
PANDORA AND RELATED JURISPRUDENCE, DECREES, AND LAW RESULTS IN AN  
UNTENABLE RESTRICTION ON THE MARKET INFLUENCES OF THE INTERNET AND  
“NEW MEDIA” SUCH AS PANDORA.

After examining the judicial history and different interests that intersect where the problems and tensions highlighted by these cases end up, it seems readily apparent that the current arrangement among artists and the groups, such as ASCAP and BMI, is far from ideal. Pandora, along with other similarly situated businesses, finds itself in the middle of appreciating certain terms of the antitrust regime—which itself might be argued to be out of place—yet also potentially benefitting rather immensely from a new system shaped by the forces of the market—if the antitrust arrangement were ever pulled away to allow such a reshaping.

Notably, however, the interests of Pandora and its peers as described in

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<sup>77</sup> This argument is effectively echoed in many other discussions of the intersection of the Internet’s diverse services and avenues for media delivery, and the more antiquated laws that are applied to those avenues. *See also supra* notes 17 and 18.

<sup>78</sup> While the Author does not attempt to disguise the stance that the current system upheld and discussed by the courts cannot and should not be continued in its current form, it is worth taking a step back before launching into a verbose argument for change and recognizing that calling for new policy in place of current policy that might be less than ideal is far easier than exactly contemplating such policy. The argument presented in this Note will, of course, attempt to be precise in describing how the artists’ hard work might still be duly compensated through whatever system serves to best take the place of the current regime. In sum, Syracuse Law author Blaine Bassett concisely describes the tension of analysis in this area: “It is easy to make predictions, to paint pictures of a rosy future. It is easy to say what the law should do. But, of course, the rule of law demands that courts do much more than make sheer policy judgments. Even if it is good policy for the courts to shake things up and plunge the industry deeper into the revolution, the question remains as to how such judgments can legitimately be made. This question is clearly a more difficult one.” Blaine Bassett, *The Inevitable Television Revolution: The Technology Is Ready, the Business Is Lagging, and the Law Can Help*, 29 SYRACUSE J. SCI. & TECH. L. 1, 46 (2013) (emphasis omitted).

this way is not the only perspective causing onlookers to cry out that something new is overdue. Even those working in and around the music industry—the stalwarts of the classic negotiation table and record deal—are asking that the courts or someone allow for a new way of doing things with the Internet and new streaming media. Some of the strongest words recently uttered about the arrangement came from the mouth of Martin N. Bandier, the chairman of behemoth music publisher Sony/ATV, referring to the larger arrangement of ASCAP, BMI, and the way that licensing fees and royalties are split: “It’s a godawful [sic] system that just [does not] work.”<sup>79</sup> His frustration, as the article aptly frames, stems from the same outdated tug-of-war view of the current arrangement that many, including this Note, have likened to the courts or system at large attempting to use old systems and practices to fit an obviously new and different model, no matter the cost. As the same New York Times article describes, “As the music industry races toward a future of digital streams and smartphone apps, its latest crisis centers on a regulatory plan that has been in place since ‘Chattanooga Choo Choo’ was a hit.”<sup>80</sup> More specifically, the article frames well the same historical context that this Note examined in part and how such a context leads to potential special interests that do not reflect the current reality of the market forces and demand:

This system has hummed along for decades. But[,] with the rise of Internet radio, publishers have complained that the rules are antiquated and unfair. They point to the disparity in the way Pandora compensates the two sides of the music business: Last year, Pandora paid 49% of its revenue, or about \$313 million, to record companies[] but only 4[%], or about \$26 million, to publishers.<sup>81</sup>

Even with such vitriolic commentary on the state of the current system, however, the potentially contemplated replacements for the current system find themselves in the realm of the theoretical more than a practical policy or exact ruling suggestion.<sup>82</sup> Of course, many would focus on the one constant among

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<sup>79</sup> Ben Sisaro, *Pandora Suit May Upend Century-Old Royalty Plan*, N.Y. TIMES, Feb. 13, 2014, available at [http://www.nytimes.com/2014/02/14/business/media/pandora-suit-may-upend-century-old-royalty-plan.html?\\_r=0](http://www.nytimes.com/2014/02/14/business/media/pandora-suit-may-upend-century-old-royalty-plan.html?_r=0).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> Of course, as raised earlier in this Note, the unfocused desire on behalf of the record companies to force direct negotiation, thereby allowing for both the likes of Pandora and the publishers to determine what fee or royalty arrangement is enough outside of the bounds or protection of the antitrust consent decrees, is the very action that prompted the *In re Pandora* litigation. From the *New York Times* commentary:

Music executives argue that the problem is rooted in the Justice Department’s oversight of [ASCAP] and BMI. Under the consent decrees, the performing rights groups are not permitted to reuse licenses to any outlet that applies for them, and rate negotiations can drag on for years. To get around this, some

those arguments and litigation-prompting actions, which is the desire for those parties who feel slighted to simply engage in old-fashioned bargaining table negotiation with the likes of Pandora, with the music that the consumer eventually expects to hear through their computers and smartphones as the bargaining chip. Indeed, few might disagree with the sort of pure free-enterprise picture such an alternative paints, but, obviously, there are other concerns.<sup>83</sup> As for ASCAP's own perspective on the current situation, some insight is offered into the way that the organization perceives Pandora's actions from a recent interview that *Billboard* magazine conducted with ASCAP Nashville membership co-heads Michael Martin and LeAnn Phelan:

[Interviewer]: The problem is basically that if you go to the store and buy a carrot, [it is] physical, it came from some place, [you are] gonna [sic] pay for that. When you bought a record years ago, you could hang on to the record and you understood that it came from someplace and [you are] paying for it. But[,] now we only hang on to the device. We no longer hang on to the original song.

[LeAnn Phelan]: Yeah, the song is just this magical thing. But[,] the difference would be like this: If I wanted to buy a carrot and you were selling the carrot and you said this carrot is worth [ten] cents, and I say, "I [do not] really want to pay that, let's go to court and figure out how much the carrot is worth," I still get to take the carrot home and eat it while [we are] figuring out the price of it. Pandora and all these people, they still get to use music even though the price is [being contested].

[Michael Martin]: And [we have] been a part of some of these careers when no one knew them. And[,] they were still getting paid an advance. Nobody thinks about that. How do you factor that in?<sup>84</sup>

While one perspective on ASCAP's interest in this is of course the one projected by the organization itself—the noble cause of protecting the individual composer or artist—some other outside observers to the situation feel less

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big publishers have tried to change their ties with [ASCAP] and BMI, forcing digital outlets like Pandora to *negotiate directly*. Pandora cried foul in its federal lawsuit . . .

*Id.* (emphasis added).

<sup>83</sup> The antitrust determination and discussion of ASCAP and its peers, outdated as some are obviously beginning to see it, nonetheless occupies space in a sort of "rarified air" of those services that are almost etched in stone as the "necessary evil" that should not be provided by the government, and yet cannot exist in the private sector without this sort of heavy-handed oversight to maintain status quo. In a largely unrelated, recently certiorari-granted Supreme Court case regarding the Aereo streaming media service, the lower court mentioned ASCAP and BMI in this exact context and conclusion. See *Am. Broad. Companies, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014).

<sup>84</sup> Tom Roland, 'The Ellis Island of Music Row': ASCAP Nashville's Michael Martin and LeAnn Phelan on 100 Years (Q&A), BILLBOARD (Feb. 11, 2014, 4:28 PM), <http://www.billboard.com/biz/articles/news/legal-and-management/5901228/the-ellis-island-of-music-row-ascap-nashvilles>.

generously about ASCAP's position under the current scheme and their actions against Pandora. For example, Mike Masnick, writing on behalf of *Techdirt*, takes a less than charitable view of ASCAP's true interests under its regulatory umbrella and directly accuses it of collusion behind its consent decree shield:

[During] the last few years, [we have] been covering the incredible and bizarre legal fight between ASCAP and Pandora, which has seen ASCAP stoop to amazing lows. You can read some of the basic background in some of our previous posts. A key part of this was that the major labels, key members of ASCAP, suddenly started “dropping out” of ASCAP in order to do licensing directly. At first we thought this was a sign of how the labels might be realizing that ASCAP was obsolete and out of touch, but it has since become clear that these “removals” were all something of a scam to force Pandora into higher rates.

What happened was that ASCAP and Pandora had first negotiated a higher rate than Pandora had agreed to in the past—reaching a handshake agreement. However, before that agreement could be finalized, these labels started “withdrawing” from ASCAP in order to negotiate directly. . . [w]ith its back to the wall, Pandora was forced to agree to much, much higher rates with those labels who had “withdrawn” their songs—and then those labels magically put their songs back in ASCAP. . . and then ASCAP claimed that those newly “negotiated” deals represented “true market” deals, and argued that in an open market, it deserved those kinds of crazy high royalty rates. Pandora pointed out that this pretty clearly violated the antitrust decree against ASCAP—an argument that Pandora won in the first round.

. . . [T]he “withdrawals” were never actually about the labels withdrawing their music from ASCAP, but what certainly looks like collusion [].<sup>85</sup>

The question as phrased by the ASCAP executive's response—how to “factor . . . in”<sup>86</sup> the value of the intellectual property by any other means if not the present arrangement—is indeed the same question being asked by all sides but, perhaps, with different contemplated answers. In that sense, the true motivations of ASCAP, BMI, and other similarly-situated players are not necessarily germane to the context of this Note—even if their righteous anger is instead, as argued by some, simple cronyism and collusion.<sup>87</sup> So, what then is

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<sup>85</sup> Mike Masnick, *Surprise: ASCAP and Music Labels Colluded To Screw Pandora*, TECHDIRT (Feb. 12, 2014, 8:59 AM), <http://www.techdirt.com/articles/20140209/01061226149/details-come-out-about-how-ascap-colluded-with-labels-to-screw-pandora.shtml>.

<sup>86</sup> Roland, *supra* note 80.

<sup>87</sup> Despite the reduced relevance of its motivations, the case made for the depth of the self-interest in the actions taken by ASCAP leading to the *In re Pandora* litigation is presented pretty compellingly by Mike Masnick in the previously-referenced *Techdirt* commentary. The author points out not only the surface-level facts that might be perceived in a way that results in conclusory cries of collusion and corruption, but also includes some rather suspect and volatile remarks to that effect from the deposition taken in the *In re Pandora* case from ASCAP president Paul Williams:

the next step? How might the courts, the industry, or the artist arrive at the exact value of these digital “carrots?”

The first solution that this Note will posit is one that can be most aptly categorized under the language of author Blaine Bassett of the *Syracuse Journal of Science & Technology*: “the shake-up” solution.<sup>88</sup> Speaking in the context of television and the tribulations similar to the Pandora streaming media issues that it has suffered when clashing with the new era of the Internet, Bassett states:

A revolution is happening in the . . . industry. It is ongoing—it has been building for years as technology has advanced and consumer demand has evolved, and it will continue to build for years to come. At the end of the revolution, [it] will hardly be recognizable as the institution it once was. The assumptions upon which it was built . . . are crumbling and will continue to crumble until they are another relic of the industry like the cathode ray tube. As technology continues to advance and old business models continue to deteriorate, the law should encourage experimentation in the industry. This may be done simply by declining to protect business models that no longer work—despite the money and power behind those models. Declining such protection will serve to “shake up” the industry in a way that will encourage experimentation, hard trade-offs, and innovation.<sup>89</sup>

Though here the author is discussing the television and broadcast industry, instead of the radio and streaming media areas at play, the solution and tone are very applicable. Just as Bassett points out that regardless of the ultimate solution in terms of regulation or judicial (in)action, the first step must be “shaking up” the current system by no longer relying upon the schemes that

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[Potential collusion] [be]comes clear in Paul Williams’ deposition. Given that all these major labels were apparently “withdrawing” all of their digital rights, you might think (1) that ASCAP would be upset since it was losing all its key labels and (2) that Williams might look at reducing the cost of his licenses, [because] apparently they would no longer have all these important songs. Not so. From the trial transcript, [here is] Pandora’s lawyer explaining how Williams responded when they asked him about it at his deposition:

‘Did you ever consider that ASCAP could charge a lower price and try to get more people to use the works left in ASCAP rather than have users use the higher priced EMI repertoire?’

‘Answer: Never once did that occur to me.’

In other words, it was all about raising the rates. It was not about competition.

On top of that, it details how, even as these labels were “withdrawing,” representatives from those very same labels/publishers still sat on ASCAP’s board . . . more evidence has come out during the case, showing that this was all part of the plan between the labels and ASCAP.

Masnick, *supra* note 81.

<sup>88</sup> Blaine Bassett, *The Inevitable Television Revolution: The Technology Is Ready, the Business Is Lagging, and the Law Can Help*, 29 SYRACUSE J. SCI. & TECH. L. REP. 1 (2013).

<sup>89</sup> *Id.* at 49–50.

“protect business models that no longer work.”<sup>90</sup> While in the exact context of Bassett’s commentary this model was the television broadcast and advertising model, the reasoning can easily and timely be applied to the issues of the consent decrees at play in ASCAP and BMI’s protected role in the streaming and terrestrial radio model.<sup>91</sup>

After moving past the separate consideration of what ASCAP’s true motivations might have been for their role in the instant dispute and, for that matter, the comparable motivations of Pandora in its actions, the question is to ask what the best immediate action might be to instigate that “shaking up” of the current model and allow market or other forces to shape some solution that better matches the rapidly shifting world of the Internet and the new media delivery systems that fill it.

In terms of what those first steps might resemble, the good news is that there is some certain amount of common ground, as well as economic and other tautologies, that might be used effectively to the ultimate end. Writing in the *San Francisco Classical Voice*, authors Stephanie Jones and Michael Zwiebach discuss the bigger-picture implications of the Pandora issue. This discussion includes their vision of this future, centering primarily on the idea that economic and exposure appeal to artists and musicians is unchanging and will remain despite economic squabbles, ensuring that the model finds some eventual outlet for monetization of the same. Michael Aczon, an entertainment lawyer and educator interviewed in the article, pointed out that “[t]he issue of fair compensation is part of the teething troubles of Internet radio,” but, despite those obvious troubles, “[s]omehow the tech industry, the finance industry, and the music industry have to work cooperatively . . . and [there is] going to be a business model that will reward [creators].”<sup>92</sup> The article expands on Aczon’s comments by illustrating how the appeal and constant presence of the Internet and new outlets for users and sales cannot be ignored by regulators and labels alike, even if they find themselves at odds with the current version:

The good news is that Pandora, which has shown no interest in expanding its core product, does actually need people to create the music. It probably [will not] settle on a model that discourages musicians over the long haul. The service still thinks of itself as a gateway for musicians who will have a better

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<sup>90</sup> *Id.*

<sup>91</sup> The precise parallel or equivalent to the outdated model that Bassett references in his discussion about the television industry might not simply be the existence of the consent decrees and antitrust regulation, or protection, afforded ASCAP and BMI, but even more exactly the calculations and models used by the court from those decrees to fix and determine what is “fair” compensation among the mass licenses granted. See *supra* note 36 and accompanying text.

<sup>92</sup> Stephanie Jones & Michael Zwiebach, *The Pandora Problem: Royalty, Streamed or Short-Changed*, SAN FRANCISCO CLASSICAL VOICE, <https://www.sfcv.org/article/the-pandora-problem-royalty-streamed-or-short-changed> (last visited Feb. 22, 2014).

future because of the Internet. There is some research beginning to emerge that supports the idea that active Internet music users actually also are the music industry's best customers.

Internet streaming is a way to broaden the base: More songs being played, means more musicians being paid.<sup>93</sup>

While admittedly the above commentary and observations about the industry at large do little to offer a precise regulatory scheme or workable changes to the current arrangement and all the “moving parts” of the antitrust considerations, Pandora's actions, and the necessity of organizations like ASCAP and BMI to protect composers and artists' interests in this day and age, do highlight how the log jam that currently exists would find new common ground if even a small step were taken to allow for the “shaking-up process” to begin.

Some more specific propositions as to altering the current regulatory scheme in the broader sense of the copyright law at play have been proposed. One such option is raised effectively by author Peter DiCola in his *Boston Law Review* article addressing the option of shifting towards a “copyright equality” motivation in distribution and treatment of royalties and obligations.<sup>94</sup> While the specific proposals included in this option do not necessarily address or change the antitrust considerations that motivate the continued oversight of ASCAP from the government side, the discussion still includes some options and views of the Internet as a medium that might serve as an instrument for allowing subsequent actions against or involving the antitrust questions and even the larger question of the continued necessity of organizations like ASCAP in their current form.<sup>95</sup>

DiCola summarized the form of this doctrine in his concise summary:

The rise of new methods of distribution in the absence of a coherent regulatory scheme across music distribution technologies has produced discrimination and inefficiency. Policymakers should recognize that copyright is just as much concerned with communications regulation as it is with the provision of incentives for creation . . . . This ends up affecting not only how people listen to music[] but also what music reaches them, given the vast differences in the

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<sup>93</sup> *Id.*

<sup>94</sup> Peter DiCola, *Copyright Equality: Free Speech, Efficiency, and Regulatory Parity in Distribution*, 93 B.U. L. REV. 1837, 1902 (2013).

<sup>95</sup> Even those very close to other stalwart organizations working in the music industry are beginning to question the continued necessity of keeping around the likes of ASCAP and BMI in their current regulatory form. Rick Carnes, a songwriter and president of the Songwriters Guild of America, had the following to say regarding the organizations in the previously-cited *New York Times* article: “[The current position of ASCAP and BMI] is a horse-and-buggy consent decree in a digital environment. [There is] no way that works now.” See Sisaro, *supra* note 75.

catalogs of songs that different media play. . . . The lack of regulatory parity can be remedied in part by requiring traditional radio stations to pay royalties to sound recording copyright owners.<sup>96</sup>

While DiCola discussed a specific portion of copyright law that does not apply in full to the more specific antitrust and negation/market collision at play in the instant dispute, the reasoning, as well as the predicated facts, presents a workable comparison for the purposes of this argument. DiCola showed how the current disparity in the treatment of new media and older formats can be eliminated by “pulling” the treatment of the older mediums up to the same level desired for new media, and, though some other more precise doctrines of copyright law are invoked in his argument, the premise still supports the conclusion that allowing more consistency and openness in the intersection of the market and a regulatory scheme benefits all parties involved.<sup>97</sup>

Another way of examining how DiCola’s argument can be conceptualized to apply to the problem of antitrust, consent decrees, and streaming new media is to consider the very specific problem of the consent decrees and the calculation of fair pricing discussed earlier in this Note.<sup>98</sup> Atop the already-precarious perch of the consent decree and latest version of the antitrust enforcement, the Internet calculations for radio as applied to new media are arguably being pulled *backwards* in time based on this nearly century-old scheme for valuation and calculation. Again, while this consideration—and to some extent DiCola’s argument as it may conceivably be applied to the *In re Pandora* problem as a potential soluble scheme—does not perhaps provide so broad an answer as to settle regulatory concerns that would “require” that the presence of ASCAP, BMI, and their equivalents remain in the private sector strung up with the strings of antitrust rulings and enforcement, attempting to “shake-up” at least the way that performance and other rights are calculated and negotiated in new media and online streaming radio seems to be the most attractive option for all sides.

Again, this Note does not presume to be so broad in its consideration as to truly approach the question of necessity for antitrust enforcement against the likes of ASCAP and BMI—many other learned sources have opined as to the economic effects and necessary calculations generally necessary in response to new industries and challenges in that area of law.<sup>99</sup> Instead, the hope of the

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<sup>96</sup> See DiCola, *supra* note 94, at 1902–03.

<sup>97</sup> “The question of default versus mandatory rules raises the issue of direct payment. A major advantage of bringing traditional radio and on-demand streaming into the § 114 statutory licensing scheme is that the scheme provides for direct payment to artists.” *Id.* at 1900.

<sup>98</sup> See *supra* note 36 and accompanying text.

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Reliance on economic evidence has proved troublesome in antitrust analysis . . . the

Author is simply to have drawn attention and focus through the emerging dispute—arguably, stalemate—epitomized by *In re Pandora* between the current legal and judicial enforcement and regulation interests, and technology and emerging new media markets.

To summarize and emphasize this point: It is fair to say that any potential “shake-up” would likely benefit the industry and consumer. Furthermore, it might catalyze the world of legal discussion and prediction as well by prompting questions such as the relevance of antitrust law to this area contrasted against market forces, demand, and the ability to negotiate and pay for intellectual property in manner resulting in a neat and profitable model that still ultimately benefits the consumer. As *In re Pandora* and the rapidly-growing body of discussion surrounding it have shown, the best starting place to do that is to reconcile the different interests and nature of “new media” and web radio with the current, arguably outdated or nonresponsive regime.<sup>100</sup>

This Note has thus far referenced the alleged and demonstrated interests of those participating in enforcement, the companies such as Pandora, commentators, and labels in actualizing some sort of reform. Another insight from an artist, however, seems an apropos way to underscore the final notes of the discussion. Songwriter and musician Burt Bacharach shared his feelings on this topic in a *Wall Street Journal* editorial, stating clearly that he feels that online and mobile services such as Pandora offer immense and exciting

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influx of economic theory in mergers analysis has unduly complicated the process and, at times, led to counterintuitive results . . . perhaps most important[ly], lower courts are using economic theory to fill the gaps in the evidentiary record, and, at times, are accepting as true theoretical propositions that are contrary to the actual proof in a given case.

Edward D. Cavanagh, *Antitrust Law and Economic Theory: Finding A Balance*, 45 LOY. U. CHI. L.J. 123, 148–49 (2013).

Commenters and witnesses largely agree that antitrust analysis has sufficient grounding in sound economic analysis, openness to new economic learning, and flexibility to enable the courts and the antitrust agencies properly to assess competitive issues in new economy industries. Most importantly, commenters noted, the economic principles on which antitrust is based do not require revision for application to those industries. As one economist noted, basic economic principles do not become “outdated” simply because industries become highly dynamic.

ANTITRUST MODERNIZATION COMMISSION, LAW AND THE NEW ECONOMY, REPORT AND RECOMMENDATIONS, 31 (Apr. 2, 2007) available at [http://govinfo.library.unt.edu/amc/report\\_recommendation/chapter1.pdf](http://govinfo.library.unt.edu/amc/report_recommendation/chapter1.pdf).

<sup>100</sup> Practically, this sort of reform or reexamination might take shape in terms of insight or discussion regarding the dollar amounts and measurable effects on the artists themselves—“the buck stops here” sort of discussion. As referenced earlier in this Note, some commentators have already been speaking out in these terms in the context of artists’ and labels’ desire to continue participating in new media and web radio but with dissatisfaction with how the current regulatory scheme works for them. See *supra* note 74 and accompanying text.

possibilities for artists such as himself, but that the current scheme is simply untenable.<sup>101</sup> Specifically, Mr. Bacharach cries foul as to the interaction between the regulatory scheme and ASCAP/BMI, not the businesses or their practices:

Today, many songwriters are being denied fair compensation as a result of antiquated regulations that were conceived over [seventy] years ago for a different world. Songwriters are especially disadvantaged because we are governed by outdated settlements between the Justice Department and . . . [ASCAP], and . . . BMI.

As music embraces the digital transition, it seems obvious that the anachronistic way songwriters and composers are remunerated should evolve, too. This is especially necessary in the wake of recent court interpretations of the consent decrees that perpetuate the devaluation of our work.

As songwriters, we want these new digital services to succeed. But[,] . . . I am not sure a young writer can survive in the online and mobile world restrained by a compensation regime that [could not] fathom “streams” that come from “clouds.” We live in a free-market economy and should be able to negotiate rates that sustain a marketplace where both services and creators can thrive.<sup>102</sup>

## VI. CONCLUSION

What sort of further legal action and future awaits Pandora or other similar streaming media companies remains to be seen. Certainly other cases will inevitably rise to the surface, pitting the interests of companies using the Internet and new means of raising money through works of artists against the companies that represent those artists. And, given the outcome of the cases and decisions discussed within this Note, it would appear that the likely players will continue to include ASCAP and BMI, among others serving similar roles. Still, as the very complexities that caused those two organizations to sit up and take notice of companies like Pandora in the first place tend to show, as the Internet and the media channels found within it continue to change and evolve at a high rate, it seems as if it will become increasingly difficult for the courts to continue to hand down the same rulings again and again with slight modifications that dictate the way in which those companies must pay for permission to sell performances of music and other properties.

However, one thing can be said for certain, and that is, while perhaps the duel between the camps of ASCAP and BMI and companies such as Pandora might be a roadblock on the road of media distribution progress, the winner

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<sup>101</sup> Burt Bacharach, *What the Songwriting World Needs Now*, WALL ST. J., Jan. 22, 2014, <http://online.wsj.com/news/articles/SB10001424052702304603704579325053186123012>.

<sup>102</sup> *Id.*

continues to be the consumer. High-quality music is easier than ever to obtain through online channels and even for free on websites such as YouTube for the low price of enduring an advertisement. While the “tubes”<sup>103</sup> of the Internet might perhaps be loosened or straightened to allow for more accurate and precise—but fair—payment to the artists, and without loosening the reigns of antitrust interest, the age in which we live still is a delight for media and music consumers of all types, and for the artists and rights-holders as well.

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<sup>103</sup> The titular reference of this Note to the Internet as “tubes” references a once infamous incident involving political discourse and the Internet that rapidly spread through the same online avenues it was referencing and became equal parts joke and Internet fad. The specific nomenclature in question originates from a distinctive analogy made by then Alaska Senator Ted Stevens discussing the cons of net neutrality legislation, during which he likened the Internet not only to a “series of tubes,” but also clarified that the Internet is *not* “like a big truck.” Alex Curtis, *Senator Stevens Speaks on Net Neutrality*, PUBLIC KNOWLEDGE (Jun. 28, 2006), <https://www.publicknowledge.org/news-blog/blogs/senator-stevens-speaks-net-neutrality>. The Author of this Note can only hope that the parties and interests deliberating the future of royalty payment schemes and licensing contemplated in this Note will dissect and explain the complexities of new media with such irreplaceable panache and clarity.