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The Music Industry: Drowning in the Stream

Jonathan Croskrey

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The Music Industry: Drowning in the Stream

Jonathan Croskrey

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I. INTRODUCTION

Today, the music industry generates nearly four billion dollars less in revenue than it did twenty years ago.¹ In 1999 and 2000, compact disc (CD) sales fueled the success of the music industry.² Today, streaming is king.³ Streaming helped fill the gap created by declining CD sales, yet streaming generates less revenue than CDs.⁴ Musicians, record labels, and publishers, are doing whatever they can to generate revenue and keep the music industry afloat. The most recent strategy comes in the form of a unified request to the Department of Justice (DOJ) to review two 1941 Consent Decrees.⁵

Any company that broadcasts music must obtain a public performance license.⁶ Performance rights organizations (PROs) issue public performance licenses on behalf of songwriters and music publishers.⁷ The American Society of Composers, Authors, and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) are the original and largest PROs.⁸ In 1941, the DOJ placed “Consent Decrees” on both ASCAP and BMI.⁹ The Consent Decrees dictate how ASCAP and BMI can license music in their repertoires as well as how much they can charge in licensing fees.¹⁰ The DOJ has reviewed and amended the Consent Decrees multiple times since 1941.¹¹ Currently, the DOJ is reviewing the Consent Decrees to assess whether they should be modified, removed entirely, or left unchanged.¹² This Comment discusses why the DOJ should amend the Consent Decrees, and examines the importance of the Consent Decrees, for both music users and music owners. Section I explains the basics of music licensing and discusses the current events that caused music owners to request a review of the

¹ *U.S. Sales Database*, THE RECORDING INDUSTRY ASSOCIATION OF AMERICA (RIAA), <https://www.riaa.com/u-s-sales-database/> (last visited Aug. 28, 2020). In 1999, music sales generated a revenue \$14.6 billion in the United States. *Id.* By 2015, revenue plummeted to \$6.7 billion. *Id.* In 2019, revenue climbed back to \$11.1 billion. *Id.*

² *Id.* CD sales generated \$12.8 billion and \$14.3 billion in 1999 and 2000, respectively, which comprised 90% of the revenue. *Id.*

³ *Id.* Today, CD sales only constitute 5.5%, or \$614.5 million, of the total revenue. *Id.*

⁴ MARK HALLORAN, ESQ., *THE MUSICIAN’S BUSINESS & LEGAL GUIDE* 68 (5th ed. 2017) (a song generates approximately half-of-one-cent per stream. CD’s sell for approximately \$12); Warren Cohen, *CD Prices on the Rise Again: Universal Promised \$12.98 CDs. So why is D12 almost \$20?*, ROLLING STONE (May 18, 2004), <https://www.rollingstone.com/music/music-news/cd-prices-on-the-rise-again-232601/>. *See also* DONALD S. PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 245 (9th ed. 2015) (income is down because consumers are moving from radio and television to online platforms).

⁵ *Antitrust Consent Decree Review—ASCAP and BMI 2019*, DEPARTMENT OF JUSTICE, <https://www.justice.gov/atr/antitrust-consent-decree-review-ascap-and-bmi-2019> (last updated Jan. 15, 2021).

⁶ *See infra* Section II.

⁷ *See id.*

⁸ *See id.*

⁹ *See id.*; *Antitrust Consent Decree Review—ASCAP and BMI 2019*, *supra* note 5.

¹⁰ A “repertoire” is the full catalog of songwriters and publishers registered to a particular PRO. PASSMAN, *supra* note 4, at 242. *See infra* Section II.

¹¹ *See Antitrust Consent Decree Review—ASCAP and BMI 2019*, *supra* note 5. The DOJ last amended the ASCAP Consent Decree in 2001 and last amended the BMI Consent Decree in 1994. *Id.*

¹² *See id.*

Consent Decrees.¹³ Section II gives a factual background on the history of the Consent Decrees, explores relevant case law, and explains the current interpretation of the Consent Decrees.¹⁴ Additionally, Section II examines the impact of new PROs and fractional licensing.¹⁵ Section III discusses how the public, small businesses, and entertainment companies would be either negatively or positively affected by the removal of the Consent Decrees.¹⁶

II. FACTUAL BACKGROUND OF COPYRIGHT AND MUSIC LICENSING

Complex legal concepts and practices comprise copyright, song ownership, and the distribution of music. This section aims to explain the several types of music royalties and some practices integral to the broadcasting of music. This will provide a foundation for discussing the Consent Decrees.

A. Copyright

The concept of protecting the expression of ideas is fixed in the Constitution.¹⁷ It is well-established that the Framers of the Constitution included Article 1, Section 8, Clause 8 to promote the dissemination of knowledge to benefit society.¹⁸ To foster the development of society, the Framers wanted authors to receive an economic incentive for creating and sharing their ideas.¹⁹ This economic incentive lets authors benefit from their work while improving society.²⁰ After a fixed period of time, an author's work enters the "public domain."²¹ Moving works into the public domain allows an author's creation to freely benefit society.²²

The Copyright Act of 1976 (Act) protects the authorship of original "works" fixed in a tangible format.²³ "Works of authorship include . . . musical

¹³ See *infra* Section I.

¹⁴ See *infra* Section II.

¹⁵ See *id.*

¹⁶ See *infra* Section III.

¹⁷ U.S. Const. art. 1, § 8, cl. 8. Congress has the power "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive right to their respective Writings and Discoveries." *Id.*

¹⁸ CRAIG JOYCE, TYLER T. OCHOA & MICHAEL CARROLL, COPYRIGHT LAW 20 (11th ed. 2020).

¹⁹ *Id.*

²⁰ *Id.*

²¹ 17 U.S.C. § 302(a). Copyright protection lasts for the life of the author plus 70 years after death. See 17 U.S.C. § 302(b). When a work has multiple authors, the 70 year period begins after the last surviving author passes. Rich Stim, *Welcome to the Public Domain*, STANFORD UNIVERSITY LIBRARIES, <https://fairuse.stanford.edu/overview/public-domain/welcome/> (last visited Oct. 20, 2019) ("The term 'public domain' refers to creative materials that are not protected by intellectual property laws such as copyright, trademark, or patent laws. The public owns these works, not an individual author or artist. Anyone can use a public domain work without permission [for free] . . ."). See also U.S. COPYRIGHT OFF., DEFINITIONS, <https://www.copyright.gov/help/faq-definitions.html> (last visited Feb. 29, 2020) (a work of authorship falls into the public domain when it is no longer protected by copyright).

²² 17 U.S.C. § 302(a).

²³ 17 U.S.C. § 102(a) (1976).

works, including any accompanying words; [and] sound recordings. . . .”²⁴ The owner of a copyright has the exclusive rights to reproduce the work, “prepare derivative[s],” “distribute copies,” perform the work publicly, and perform the “work publicly by means of a digital audio transmission.”²⁵ The copyright owner may waive these “exclusive rights.”²⁶ In the case of a joint work, permission from only one author is need for a third party to exploit the rights held by all of the joint work’s authors.²⁷

B. How PROs Work

In order to collect royalties and distribute musical works, “songwriters” work with music publishers.²⁸ Whenever broadcasters and licensees use musical works commercially, they owe royalties to the songwriters.²⁹ Publishers secure the commercial licenses and royalties.³⁰ Publishers also collect “performance royalties,” “mechanical royalties,” and “synchronization royalties.”³¹ Rather than collect performance royalties on their own, publishers register with PROs.³² PROs collect performance royalties, and then distribute them to the appropriate publishers and songwriters.³³

Songwriters must register with a PRO independently of publishers.³⁴ PROs credit half of a song to songwriters and half to the publishers.³⁵ “Songwriters are only allowed to join one [PRO], so they must register all of their works with that one [PRO]. For instance, if a songwriter joins BMI, then BMI exclusively represents that songwriter’s entire catalog.”³⁶ Publishers must also register with PROs.³⁷ When a publisher joins a PRO, that one PRO is responsible for collecting royalties for the publisher’s entire catalog.³⁸ Unlike songwriters,

²⁴ 17 U.S.C. § 102(a)(2), (7) (1976).

²⁵ 17 U.S.C. § 106(1)–(4), (6) (1976). Distribution includes public sale, rental, lease, or lending. 17 U.S.C. § 106(3) (1976).

²⁶ 17 U.S.C. § 106A(a)–(e) (1976).

²⁷ A joint work is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole. 17 U.S.C. § 101 (1976); *see supra* note 25.

²⁸ Songwriters are considered the authors of musical works and as such they hold the copyright to the works they create. *See* 17 U.S.C. § 102(a)(2). Music publishers handle the distribution and promotion of music. *Music Publishing 101*, TUNECORE, <https://www.tunecore.com/guides/music-publishing-101> (last visited Oct. 20, 2019). They also play a role in securing performance royalties from the PROs. *Id.* For definitions of musical work and sound recording, *see infra* text accompanying note 45.

²⁹ *See Music Publishing 101, supra* note 28.

³⁰ *Id.*

³¹ *See* EASY SONG LICENSING, *infra* note 49.

³² *See Music Publishing 101, supra* note 28.

³³ *Id.*

³⁴ *See* PASSMAN, *supra* note 4, at 242.

³⁵ *Id.*

³⁶ Heather McDonald, *How A Blanket License is Used in the Music Industry*, THE BALANCE CAREERS (Jan. 21, 2019), <https://www.thebalancecareers.com/blanket-license-in-the-music-industry-2460916>. *See also* PASSMAN, *supra* note 4, at 242.

³⁷ *See* PASSMAN, *supra* note 4, at 241.

³⁸ *Id.* at 241–42.

who can only register with one PRO, publishers must register with every PRO.³⁹ Registering with every PRO allows publishers to claim their half of the royalties from every PRO, regardless of which PRO their affiliated songwriter joined.⁴⁰ This ensures that publishers can collect royalties on behalf of every songwriter in their catalog.⁴¹

C. Licensing and Royalties

Authors of works may license or sell their exclusive rights to third parties, which enables the third party to commercially exploit the work.⁴² Music licensing allows content creators to “place” music in movies, ads, and television shows.⁴³ The process of licensing music to content creators is called “music clearance.”⁴⁴ An important part of understanding music clearance requires knowing the difference between a “musical composition” and a “sound recording.”⁴⁵

When clearing a song to accompany an audiovisual work, for example, placing a song in a television show, the producer must obtain a “synchronization license” (synch).⁴⁶ The producer must receive permission to use both the musical composition rights and the master rights to fully clear a song and obtain a synch license.⁴⁷ Typically, multiple rights holders own the rights to a single musical composition, which requires the producer to obtain rights from every rights holder.⁴⁸ In addition to a synch license, the producer will also need “public performance licenses” from the PROs.⁴⁹ “Synch licensing fees are generally one-

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² 17 U.S.C. § 201(d)(1)–(2).

⁴³ See PASSMAN, *supra* note 4, at 241. A placement occurs whenever producers use a song and synch it to a moving image (e.g., commercials, television shows, moving projections, or movies). *Id.* at 265–71. For definition of synch, see *infra* text accompanying note 46.

⁴⁴ See PASSMAN, *supra* note 4, at 265–71.

⁴⁵ Entertainment at Dinsmore, *Music Licensing 101: A Guide for Filmmakers, Television Producers, Music Publishers, and Songwriters*, THE NATIONAL LAW REVIEW (Oct. 11, 2011), <https://www.natlawreview.com/article/music-licensing-101>. “A musical composition consists of the music (i.e., the melodic, harmonic and percussive components) along with the title and any lyrics.” *Id.* The songwriters typically own the rights to the musical composition, but music publishers can also own the composition rights. *Id.* A sound recording is the actual recording of the musical compositions. *Id.* The sound recording is fixed in a tangible format such as vinyl records, CDs, and digital formats. *Id.* The sound recording is known as a “master” and is almost always owned by record companies or publishers. See PASSMAN, *supra* note 4, at 74.

⁴⁶ See PASSMAN, *supra* note 4, at 265–71. “‘Audiovisual’ works are works that consist of a series of related images which are intrinsically intended to be shown by . . . electronic equipment, together with accompanying sounds . . . regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.” 17 U.S.C. § 101 (1976). This type of license is called a synchronization license because the licensee synchs the music to the moving image, for example a scene in TV show or movie. See PASSMAN, *supra* note 4, at 265–71

⁴⁷ See PASSMAN, *supra* note 4, at 265–71.

⁴⁸ *Id.* at 240–45.

⁴⁹ “A public performance license is an agreement between a music user and the owner of a copyrighted composition (song), that grants permission to play the song in public, online, or on radio. This permission is also called public performance rights, performance rights, and performing rights.” *What is a Public Performance License?*, EASY SONG LICENSING,

time, flat fees, negotiated directly between the contractual parties. The fees can range from nominal fees to tens of thousands of dollars depending upon the specific rights needed [and] the scope and budget of the program”⁵⁰

To fix a sound recording in a tangible format for distribution purposes, a licensee must obtain a mechanical license.⁵¹ “A mechanical license permits the licensee to manufacture, reproduce and distribute the musical composition in audio-only configurations referred to as ‘phonorecords’ in the Copyright Act (e.g., CD, vinyl LP, digital download, etc.).”⁵² The copyright owners receive a mechanical royalty from the licensee for every composition used.⁵³ Statute sets the mechanical which equals \$0.091 per composition, multiplied by the number of copies made and distributed.⁵⁴

As mentioned above, a master-use license must accompany a synch license.⁵⁵ A master license must also accompany a mechanical license.⁵⁶ A musician creates a new master every time he records a new sound recording of a musical composition.⁵⁷ Although multiple masters may exist for a specific musical composition, a licensee only needs to obtain the rights for the one master that she wants to use.⁵⁸

Per the Act, copyright owners have the exclusive right to perform their musical compositions publicly.⁵⁹ This right is referred to as the public performance right.⁶⁰ When television networks or radio stations want to broadcast musical compositions, they must obtain a public performance license from the PROs.⁶¹ The PROs negotiate with and issue blanket licenses to a venue

<https://www.easysonglicensing.com/pages/help/articles/music-licensing/what-is-a-public-performance-license.aspx> (last visited Jan. 1, 2020). See also PASSMAN, *supra* note 4, at 240–45.

⁵⁰ 17 U.S.C. § 115 (1976). See also Entertainment at Dinsmore, *Music Licensing 101: A Guide for Filmmakers, Television Producers, Music Publishers, and Songwriters*, THE NATIONAL LAW REVIEW (Oct. 11, 2011), <https://www.natlawreview.com/article/music-licensing-101>; PASSMAN, *supra* note 4, at 245–49.

⁵¹ 17 U.S.C. § 115(a)(1)(A). See also PASSMAN, *supra* note 4, at 245–49.

⁵² 17 U.S.C. § 115(a)(1)(A). See also PASSMAN, *supra* note 4, at 229, 250.

⁵³ See PASSMAN, *supra* note 4, at 250.

⁵⁴ *Mechanical License Royalty Rates*, COPYRIGHT ROYALTY BOARD (Sept. 2018), copyright.gov/licensing/m200a.pdf.

⁵⁵ See PASSMAN, *supra* note 4, at 265. There are narrow exceptions to this statement, but they are not relevant to this discussion.

⁵⁶ *Id.*

⁵⁷ *Id.* at 74. Roy Orbison composed “Pretty Woman” and created the original master recording of that song. See Ryan Book, *50 Years of Roy Orbison’s Oh, Pretty Woman: Covers from Al Green, Van Halen, John Mellencamp, More*, MUSIC TIMES (Aug. 29, 2014), <https://www.musictimes.com/articles/9431/20140829/50-years-roy-orbisons-oh-pretty-woman-covers-al-green.htm>. After Roy Orbison released *Pretty Woman*, other notable musicians such as Al Green and Van Halen recorded their own versions of “*Pretty Woman*.” *Id.* When Al Green and Van Halen recorded their versions, they each created a master, so in this example, each of the three musicians owns a separate master. *Id.*

⁵⁸ See Entertainment at Dinsmore, *supra* note 50.

⁵⁹ 17 U.S.C. § 106(4) (1976).

⁶⁰ See PASSMAN, *supra* note 4, at 240.

⁶¹ *Id.* at 241.

or broadcaster. That licensee may perform any song in the PROs' repertoires.⁶² A songwriter is entitled to a performance royalty anytime someone performs, whether by a live band or a broadcast, his song publicly.⁶³ Songwriters and publishers receive payments "based upon a formula involving the frequency and scope of usage of each musical composition."⁶⁴

D. GMR and Streaming Services

1. GMR

Every country has its own PRO.⁶⁵ There are four PROs in the United States: ASCAP, BMI, SESAC,⁶⁶ and Global Music Rights (GMR).⁶⁷ A group of composers founded ASCAP in 1914, and a group of radio broadcasters founded BMI in 1939.⁶⁸ By 1940, ASCAP and BMI represented virtually every musical composition in existence.⁶⁹ Songwriters and publishers register with PROs because it is practically impossible for them to track how often broadcasters perform their works.⁷⁰ Therefore, songwriters and publishers register with the PRO of their choice, and then authorize the PRO to grant performance licenses on their behalf.⁷¹ PROs only grant performance licenses.⁷² They do not provide synch or mechanical licenses.⁷³ Shortly after its conception, ASCAP created a blanket license, which PROs still utilize today.⁷⁴ Again, a blanket license allows a licensee to publicly perform every song in a PRO's repertoire without having to license each song.⁷⁵ It is important to note that the use of blanket licenses by ASCAP and BMI is akin to price fixing.⁷⁶

⁶² *Id.* at 243. Venues include "shopping malls, and retail stores, restaurants and bars, music venues, colleges, hotels, web sites, stadiums, sports teams, and airlines." *Id.* Examples of broadcasters include radio stations, television networks, and online streaming services. *Id.* The blanket license fee is calculated based on how many times the broadcaster performs a musical composition and the size of the broadcaster's audience. *Id.*

⁶³ *Id.*

⁶⁴ See Entertainment at Dinsmore, *supra* note 51.

⁶⁵ See PASSMAN, *supra* note 4, at 241. Some PROs represent territories rather than one specific country. *Id.* Some countries, such as the United States, have multiple PROs. *Id.*

⁶⁶ SESAC used to be known as Society of European Stage Authors and Composers, but now they are strictly recognized as SESAC. *Id.*

⁶⁷ *Id.*

⁶⁸ *The History of Broadcast Music Performance Rights*, NATIONAL RELIGIOUS BROADCASTERS MUSIC LICENSE COMMITTEE (NRBMLC), <http://www.nrbmlc.com/music-licensing/music-licensing-history/> (last visited Oct. 20, 2019).

⁶⁹ Alden-Rochelle, Inc. v. Am. Soc. of Composers, 80 F. Supp. 888, 894 (S.D.N.Y. 1948).

⁷⁰ *BMI and Performing Rights*, BMI, https://www.bmi.com/digital_licensing/more-information/business_using_music_bmi_and_performing_rights (last visited Oct. 20, 2019).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* Dramatic performance licenses must be obtained from the writers and publishers directly. *Id.*

⁷⁴ See *The History of Broadcast Music Performance Rights*, *supra* note 68.

⁷⁵ Alden-Rochelle, Inc. v. Am. Soc. of Composers, 80 F. Supp. 888, 891 (S.D.N.Y. 1948).

⁷⁶ *Id.* at 896. For definition of price fixing, see *Broad. Music, Inc. v. Columbia Broad. Sys. Inc.*, 441 U.S. 1 (1979), and *infra* text accompanying note 134.

Paul Heinecke, a German immigrant, founded SESAC in 1931, and Irving Azoff founded GMR in 2013.⁷⁷ The Consent Decrees do not include SESAC and GMR.⁷⁸ Azoff's founding of GMR inadvertently holds some responsibility for the DOJ's review of the Consent Decrees. ASCAP and BMI are limited in how they can license the music in their repertoires; ASCAP and BMI must provide "100% licenses" to broadcasters.⁷⁹ SESAC and GMR do not have to provide 100% licenses.⁸⁰ The lack of oversight placed on SESAC and GMR allows them to charge higher fees than the other PROs, which allows their songwriters to receive larger royalties.⁸¹ ASCAP and BMI are losing market share because songwriters are leaving to join GMR.⁸²

2. Streaming Services

Consumers began purchasing fewer and fewer CDs when home computers with internet connections became commonplace.⁸³ The music industry's United States revenue dropped from \$14.6 billion in 1999 to \$6.7 billion in 2015 because companies like Napster made it possible for consumers to download music for free illegally.⁸⁴ The introduction of iTunes and digital music downloads helped reduce this downward trend, but legal digital downloads merely slowed the hemorrhaging.⁸⁵

Digital downloads revolutionized the music industry, but digital download sales slumped in recent years.⁸⁶ Digital download sales peaked in 2013 at \$2.8 billion, which accounted for 40% of all revenue.⁸⁷ As of 2019, digital downloads brought in \$809 million, which represented 7% of all revenue.⁸⁸

⁷⁷ See PASSMAN, *supra* note 4, at 241.

⁷⁸ *Id.* at 249.

⁷⁹ *United States v. Broad. Music, Inc.*, 720 F. App'x 14, 16 (2d Cir. 2017). This is also known as a full license. *Id.*

⁸⁰ See *infra* Section II.

⁸¹ See *id.*

⁸² *GMR Licensing: Fines, Costs, and Options*, CLOUD COVER MUSIC (Oct. 19, 2019), <https://cloudcovermusic.com/music-licensing-guide/gmr/>. At the time this article was written, GMR's roster only included seventy-four songwriters. *Id.* However, this number is growing steadily, and those seventy-four songwriters represent some of the music industry's most popular artists. *Id.* Some of the artists include Bruno Mars, Drake, Bruce Springsteen, Harry Styles, and Leon Bridges. *Id.*

⁸³ Jonathan Berr, *After Napster, the Music Industry Winds Up Humming*, CBS NEWS: MONEYWATCH (Feb. 12, 2016, 5:15 AM), <https://www.cbsnews.com/news/after-napster-the-music-industry-winds-up-humming/>.

⁸⁴ See *U.S. Sales Database*, *supra* note 1. Napster was a peer-to-peer network that allowed users to freely share digital MP3 files over the internet. *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1011 (9th Cir. 2001).

⁸⁵ *A&M Records*, 239 F.3d at 1011. "A Digital download, which is also called a DPD (standing for digital phonorecords delivery), is a transmission to the consumer (via Internet, satellite, cell phone . . .) that allows the buyer to download music for later use. In essence, it's the sale of a record electronically . . ." See PASSMAN, *supra* note 4, at 146.

⁸⁶ See *U.S. Sales Database*, *supra* note 1.

⁸⁷ *Id.*

⁸⁸ *Id.*

The new cash cow for the music industry comes in the form of digital streaming services (streaming).⁸⁹ Technology companies introduced subscription streaming services and ad-supported streaming services in the early 2000's, and have been gaining popularity ever since.⁹⁰ The popularity of streaming propelled the music industry out of its revenue slump.⁹¹ While revenue from physical sales and digital downloads is down, streaming replaced that source of income.⁹² In 2018, streaming revenue comprised 80% of the music industry's revenue, which equates to \$8.8 billion.⁹³

Streaming may be helping the music industry recover, but there are complexities to streaming that cause songwriters to earn less from streaming than they do from CD sales and digital downloads.⁹⁴ Performance royalties from the streaming of a single song generates roughly .0005¢ whereas the physical sale or digital download of one song generates either: (1) 9.1¢ in mechanical royalties for songs longer than five minutes, or for songs shorter than five minutes, (2) 1.75¢ per minute in mechanical royalties.⁹⁵

The law does not require most websites that broadcast music to obtain performance licenses from the PROs.⁹⁶ Users upload audio-visual content to their pages, which can be broadcasted to hundreds of millions of people.⁹⁷ Because the

⁸⁹ *Id.* See also PASSMAN, *supra* note 4, at 70. Streaming allows music users to listen to music on their phones, tablets, and computers via the internet—no download or purchase of the music is required. *Id.*

⁹⁰ See *U.S. Sales Database*, *supra* note 1; see also, PASSMAN, *supra* note 4, at 147–150. Subscription streaming services allow users to pay a monthly subscription fee that allows them to stream the subscription service's entire catalog as many times as they want without commercials. Mark Harris, *What is Streaming?*, LIFEWIRE, <https://www.lifewire.com/what-is-streaming-music-2438445> (last updated March 9, 2020). Some of the subscription services, such as Pandora and Spotify, have a no-charge version that allows users to stream music with commercial interruptions. *Everything You Need to Know About Streaming Music Services*, CHELSEA AUDIO VIDEO (April 15, 2020), <https://www.chelseaaudiovideo.com/blog/streaming>. Other restrictions of the no-charge versions include limited access to catalogs, limited number of "skips," and only allowing users to stream on certain devices (e.g. Spotify's no charge version can only be streamed on computers and not smart phones). *Id.* Just like the no-charge versions of Pandora and Spotify, ad-supported streaming services allow users to stream music via the internet; however, instead of paying a monthly fee, users listen to intermittent paid-advertisements, which generates revenue for the ad-supported streaming services. Harris, *supra*. The most popular streaming services are YouTube, Pandora, Spotify, Apple Music, and Tidal. *Everything You Need to Know About Streaming Music Services*, *supra*.

⁹¹ See *U.S. Sales Database*, *supra* note 1.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ See *Mechanical License Royalty Rates*, *supra* note 54.

⁹⁵ *Id.* See also PASSMAN, *supra* note 4, at 231.

⁹⁶ There are many websites and apps that allow their users to upload video content. A non-exhaustive list of these websites and apps includes Facebook, Instagram, and YouTube. Music often accompanies the video content. See *A Checklist for Using Music in Film or other Audio-Video Content*, THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS (ASCAP), <https://www.ascap.com/help/career-development/a-checklist-for-using-music-in-film> (last visited October 20, 2019).

⁹⁷ Amy X. Wang, *Facebook is Finally Putting Music Back Into Social Networking*, ROLLING STONE (June 5, 2018, 9:08 PM), <https://www.rollingstone.com/music/music-news/facebook-is-finally-putting-music-back-into-social-networking-629164/>. Facebook has 2.2 billion users,

law does not require these websites to obtain performance licenses, songwriters and publishers lose out on millions of dollars in performance royalties.⁹⁸

Publishers realize that streaming is the future of the music industry.⁹⁹ ASCAP and BMI want to increase the licensing fees that they currently charge streaming services; however the Consent Decrees prevent them from doing so.¹⁰⁰ Attempting to find a loophole in the Consent Decrees, music publishers tried to remove streaming rights from the PROs in a practice called “fractional licensing.”¹⁰¹ This would have allowed publishers to license their music directly to streaming services for a much higher fee.¹⁰² However, the DOJ used the Consent Decrees to bar fractional licensing.¹⁰³ ASCAP, BMI, and publishers have their hands tied; they cannot adapt to the changing environment of the music industry, while streaming services benefit from low statutory rates and GMR sets its own rates without oversight.¹⁰⁴

III. CONSENT DECREES

A. Origins

Parties of a complaint agree to a consent decree as a way of resolving lawsuits without a defendant having to admit liability or guilt.¹⁰⁵ Prior to 1979, the DOJ only offered perpetual licenses, which could be amended if necessary.¹⁰⁶ As business practices began to change with modern technology, it became apparent that consent decrees could prevent businesses from adapting and competing in a changing world.¹⁰⁷ In 1979, the DOJ began installing sunset provisions in all new consent decrees.¹⁰⁸

By the 1940’s, ASCAP and BMI controlled almost every musical work that had not fallen into the public domain.¹⁰⁹ The Consent Decrees, which ASCAP and BMI “originally entered in 1941, are the products of [independent] lawsuits brought by the United States against ASCAP and BMI under Section 1 of the Sherman Act, 15 U.S.C. § 1, to address competitive concerns arising from

which dwarves subscriber numbers of Spotify and Apple music who have 160 million users and 40 million users respectively. *Id.*

⁹⁸ See PASSMAN, *supra* note 4, at 349–50.

⁹⁹ See *id.* at 70, 148.

¹⁰⁰ See *infra* note 181.

¹⁰¹ *In re Pandora Media, Inc.*, 6 F. Supp. 3d 317, 337 (S.D.N.Y. 2014).

¹⁰² *Id.*

¹⁰³ *Id.* at 372.

¹⁰⁴ See *Radio Music License Com., Inc. v. Glob. Music Rights, LLC*, No. 16-6076, 2019 U.S. Dist. LEXIS 55102, at *8 (2019).

¹⁰⁵ Brontë Lawson Turk, “*It’s Been a Hard Day’s Night*” for Songwriters: Why the ASCAP and BMI Consent Decrees Must Undergo Reform, 26 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 493, 496 (2016).

¹⁰⁶ DEP’T OF JUSTICE ANTITRUST DIV., ANTITRUST DIVISION MANUAL, III-149 (5th ed. 2015), <http://www.justice.gov/atr/file/761166/download> (last visited Feb. 29, 2020).

¹⁰⁷ See *In Re Pandora Media, Inc.* at 363–70.

¹⁰⁸ *Id.*

¹⁰⁹ See *Alden-Rochelle, Inc. v. Am. Soc. of Composers*, 80 F. Supp. 888, 894 (S.D.N.Y. 1948).

market power each organization acquired. . . .”¹¹⁰ ASCAP entered a perpetual decree, which stipulated that:

ASCAP could not obtain from composers and publishers of music the exclusive right to license performances of their works; it could not seek payments for programs that did not contain ASCAP music; it was required to offer radio broadcasters meaningful per program licenses and network licenses[, as an alternative to only offering blanket licenses]; it could not discriminate between users who were “similarly situated”; and it was required to distribute royalties to its members in a “fair and non-discriminatory manner.”¹¹¹

Shortly thereafter, BMI agreed to a nearly identical decree.¹¹²

B. Amendments and Case Law

The DOJ amended the ASCAP Consent Decree for the first time in 1950.¹¹³ The popularity of the television grew prior to this amendment.¹¹⁴ Television’s rise in popularity created a necessity for the PROs to enter into licensing deals with television stations.¹¹⁵ The invention of “talkies” also changed how movie theaters performed music at movie theaters.¹¹⁶ During the era of silent films, a piano player performed live music as the movie played.¹¹⁷ This practice of playing live music meant that movie theaters and PROs did not know when or which musical compositions would be played during a silent film.¹¹⁸ ASCAP provided blanket licenses to movie theaters to ensure that the theaters did not violate copyright law.¹¹⁹ When talkies became prevalent, movie studios hired

¹¹⁰ See *supra* note 5. The Sherman Antitrust Act is a federal statute, first passed in 1890, that prohibits anticompetitive activities in the marketplace. Legal Information Institute, *Sherman Antitrust Act*, CORNELL LAW SCHOOL, https://www.law.cornell.edu/wex/sherman_antitrust_act. “The Sherman Act was amended by the Clayton Act in 1914. The Sherman Act is codified in 15 U.S.C. §§ 1–38.” *Id.* The Sherman Antitrust Act provides that: “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.” 15 U.S.C. §§ 1–2 (1890).

¹¹¹ *The History of Broadcast Music Performance Rights*, *supra* note 68.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* When movies were first invented they did not have sound until talkies were invented. *Id.* “Talkies and talking pictures are informal terms for films incorporating synchronized audible dialogue The terms were widely used in the late 1920’s and early 1930’s to distinguish sound from silent films.” (italics omitted). See *Talkie (Definition)*, WONDERFUL CINEMA, <https://wonderfulcinema.com/talkie-definition/>.

¹¹⁷ See *The History of Broadcast Music Performance Rights*, *supra* note 68.

¹¹⁸ See *Alden-Rochelle, Inc. v. Am. Soc. of Composers*, 80 F. Supp. 888, 891–92 (S.D.N.Y. 1948).

¹¹⁹ *Id.*

composers to write and record music for their movies.¹²⁰ The composers granted the movie studios all of the rights necessary to use the music in their films, except for public performance rights.¹²¹ At the time, ASCAP forbade its writers from directly licensing public performance rights to movie studios.¹²² This forced movie theaters to obtain public performance licenses from ASCAP.¹²³ Due to these practices, movie theater owners sued ASCAP for violations of the Sherman Antitrust Act.¹²⁴ The court found that ASCAP violated the Sherman Antitrust Act and provided injunctive relief for the plaintiffs.¹²⁵

Furthermore, the original 1941 ASCAP Consent Decree “prohibited ASCAP from entering into ‘exclusive’ arrangements with composers and publishers.”¹²⁶ Despite agreeing to not enter into agreements that prevented writers from directly licensing their songs, ASCAP created a series of rights in its agreements that gave ASCAP the exclusive right to negotiate performance licenses for its members.¹²⁷

Taking all of these events and lawsuits into considerations, the DOJ amended ASCAP’s Consent Decree in 1950.¹²⁸ The amended Consent Decree required ASCAP to negotiate licenses with movie theaters, removed terms that created exclusive agreements, bolstered broadcasters’ rights, and established a rate court.¹²⁹ When negotiations break down, PROs and licensees use the rate courts when the two parties cannot agree on a licensing fee.¹³⁰ The PROs “may not insist on the blanket license, and the fee for the per-program license, which is based on the revenues for the program on which ASCAP music is played, must offer the applicant a genuine economic choice between the per-program license and . . . a blanket license.”¹³¹ If a PRO and a licensee cannot agree to a licensing fee within 60 days, then the licensee may apply to the Southern District of New York to determine what the licensing fee should be.¹³²

¹²⁰ *Id.*

¹²¹ *Id.* at 893.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 898–99.

¹²⁶ See *The History of Broadcast Music Performance Rights*, *supra* note 68. Before the DOJ put the Consent Decrees in place, ASCAP and BMI “acquired the exclusive right to negotiate members’ public performance rights, and forbade their members from entering into direct licensing arrangements.” U.S. COPYRIGHT OFF., *COPYRIGHT AND THE MUSIC MARKETPLACE: A REPORT OF THE REGISTER OF COPYRIGHTS*, at 35–36 (Feb. 2015), <https://www.copyright.gov/docs/musiclicensingstudy/copyright-and-the-music-marketplace.pdf>. Stated differently, ASCAP’s members could not negotiate public performance licenses on their own behalf. Instead only ASCAP could negotiate public performance licenses for its members. See also *Alden-Rochelle, Inc. v. Am. Soc. of Composers*, 80 F. Supp. 888, 891 (S.D.N.Y. 1948) (rather than let a PRO negotiate licensing deals on behalf of a songwriter, the songwriter can directly negotiate his own licensing deals with licensees).

¹²⁷ See *COPYRIGHT AND THE MUSIC MARKETPLACE* *supra* note 126, at 35–36.

¹²⁸ *Id.* at 36.

¹²⁹ *Id.*

¹³⁰ *Id.* at 41.

¹³¹ *Broad. Music, Inc. v. Columbia Broad. Sys. Inc.*, 441 U.S. 1, 11 (1979).

Since the 1950 amendment, television networks filed several lawsuits against the PROs over their use of blanket licenses.¹³³ In a 1975 complaint filed by Columbia Broadcast Systems (CBS) against ASCAP and BMI, CBS claimed that issuing blanket licenses violated antitrust laws, *per se*, and engaged in “price fixing.”¹³⁴ The court found that blanket licenses issued by ASCAP and BMI neither restrained trade nor stifled competition.¹³⁵ The blanket licenses developed from needs of the marketplace; tens of thousands of publishers and composers and millions of compositions require licenses.¹³⁶ “Most users want unplanned, rapid, and indemnified access to any and all of the repertory of compositions, and the owners want a reliable method of collecting for the use of their copyrights.”¹³⁷ Individually licensing each composition for each use would be more expensive, and enforcing copyright protections for each composition would be burdensome.¹³⁸ Even Congress, through the Copyright Act, approved the use of blanket licenses.¹³⁹ Furthermore, CBS and other licensees do not have to utilize

¹³² *Id.* at 11–12.

If the PRO and licensee are unable to agree on a fee, either party may apply for a determination of a reasonable fee by the applicable rate court. [R]ate disputes are handled by the federal district judge in the Southern District of New York who has been assigned ongoing responsibility for administration of the relevant consent decree. In a rate court proceeding, the PRO has the burden of proving that the royalty rate it seeks is “reasonable,” and if the court determines that the proposed rate is not reasonable, it will determine a reasonable rate itself. In determining a reasonable fee, the rate court is tasked with assessing the fair market value of the license, i.e., ‘what a license applicant would pay in an arm’s length transaction.’ But antitrust concerns also play a direct role: according to the Second Circuit, the rate courts are also obligated to ‘take into account the fact that the PRO, as a monopolist, exercises disproportionate power over the market for music rights.’ Since negotiations between PROs and potential licensees – as well as rate court proceedings – can be lengthy, an applicant or a PRO may apply to the rate court to fix an interim rate, pending final determination of the applicable rate. Under the two decrees, such interim fees are supposed to be set by the court within three to four months. Once the rate court fixes the interim rate, the licensee must pay the interim fee retroactively to the date of its license application. Final royalty rates are also applied retroactively.

See also COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 126, at 41–42.

¹³³ See also COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 126.

¹³⁴ Price fixing involves two or more competitors who come together to set a single market price for goods in commerce. See *Broad. Music, Inc.*, 441 U.S. at 8.

[C]ertain agreements or practice are so plainly anticompetitive and so often lack any redeeming virtue, that they are conclusively presumed illegal without further examination under the rule of reason generally applied in the Sherman Act cases. This *per se* rule is a valid and useful tool of antitrust policy and enforcement. And agreements among competitors to fix prices on their individual goods or services are among those concerted activities that the Court has held to be within the *per se* category.

Id.

¹³⁵ *Id.* at 20–21.

¹³⁶ *Id.* at 20.

¹³⁷ *Id.*

¹³⁸ *Id.*

blanket licenses offered by the PROs because licensees can obtain direct licenses from music owners.¹⁴⁰ Licensees challenge the legality of blanket licenses on a rather routine basis, but the courts continue to uphold their legality.¹⁴¹ The DOJ last amended ASCAP's Consent Decree on June 11, 2001.¹⁴² The DOJ amended BMI's Consent Decree most recently on November 18, 1994.¹⁴³

C. Fractional Licensing

Per the Consent Decrees, ASCAP and BMI must provide 100% licenses.¹⁴⁴ Multiple songwriters co-write a vast number of songs.¹⁴⁵ Oftentimes, a single PRO represents only one of the co-writers.¹⁴⁶ Even though a PRO might only represent one of the co-songwriters, the 100% licensing requirement mandates that ASCAP and BMI provide rights to the entire song, not just the portion they represent.¹⁴⁷ As a 100% licensing condition, ASCAP and BMI must share the royalties earned from co-written songs with the other PRO(s), who then distribute the royalties to the other songwriters.¹⁴⁸ The DOJ requires full licensing to promote efficiency for licensees and licensors.¹⁴⁹

¹³⁹ *Id.* at 15.

Congress created a compulsory blanket license for secondary transmissions by cable television systems and provided that “notwithstanding any provisions of the antitrust laws, . . . any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf.

Id.

¹⁴⁰ *Id.* at 12.

¹⁴¹ *Nat'l Cable Television Ass'n v. Broad. Music, Inc.*, 772 F. Supp. 614, 618 (D.D.C. 1991). *See Buffalo Broad. Co. v. ASCAP*, 744 F.2d 917 (2d Cir. 1984) (holding that the blanket license was not an unlawful restraint of trade because the PROs offered a per-program license).

¹⁴² *See Antitrust Consent Decree Review—ASCAP and BMI 2019*, *supra* note 5.

¹⁴³ *Id.*

¹⁴⁴ David Oxenrod, *RMLC Files Antitrust Lawsuit Against GMR And Seeks to Enjoin New Music License Fees on Radio Stations* (Nov. 26, 2016), <https://www.broadcastlawblog.com/2016/11/articles/rmlc-files-antitrust-lawsuit-against-gmr-and-seeks-to-enjoin-new-music-license-fees-on-radio-stations/>.

¹⁴⁵ *See Copyright and the Music Marketplace*, *supra* note 126, at 19.

¹⁴⁶ *Id.*

¹⁴⁷ *See Passman*, *supra* note 4, at 249. For example, if a song has multiple authors, one author could be registered with ASCAP and one author could be registered with SESAC. *Id.* As long as a licensee obtains a license from ASCAP, the licensee does not need a license from SESAC. *Id.* ASCAP is required to provide a full license, which means ASCAP would have to share their licensing fees with SESAC so that the authors registered with SESAC receive their share of royalties. *Id.* Because SESAC is not subject to the consent decrees, they do not have to share their licensing fees with ASCAP. *Id.* As a result, SESAC can provide a license for just the fraction of the song that they own, unlike ASCAP who must provide the rights for the entire song. *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* The DOJ highlighted “that there is no public database that completely lists the ownership of the rights to musical compositions, so a user could never know if it has all the necessary rights to any song or if it needed to get rights to some other part of that song elsewhere before it could play that composition.”

Full licensing promotes efficiency, but BMI supports and encourages fractional licensing.¹⁵⁰ BMI released a statement on its website that warns its members about how dangerous full licensing is.¹⁵¹ The warning states:

[One hundred percent] licensing would allow any one co-owner of a work to license 100% of the work without needing the permission of the other co-owners. Essentially, your writing partner could have 100% control over the licensing of your song, without your say, subject only to an obligation to you for your share of licensing revenues. . . .

[Co-songwriters] would be impacted if [they] collaborate and co-write a song with an ASCAP writer – both creatively and financially. In a 100% licensing world, if a music user decides to license your co-written song from ASCAP and not BMI:

- ASCAP could license your co-written works at ASCAP’s own rate, not BMI’s.
- ASCAP could reduce your payment by its own overhead rate even before it enters BMI’s distribution system.
- You could be subject to ASCAP’s distribution methodology, not BMI’s.
- Your distributions could be delayed by this process.¹⁵²

A large portion of BMI’s warning focuses on the lack of control that co-authors have over their works.¹⁵³ However, even if the Consent Decrees did not

Id. While it is widely accepted that the Consent Decrees require full licensing, the Second Circuit found in favor of the PROs and ruled that the Consent Decrees do not require full licensing. *United States v. Broad. Music, Inc.*, 720 F. App’x 14, 18 (2d Cir. 2017). In *U.S. v. BMI*, the DOJ argued that BMI’s Consent Decree required full licensing because of language that requires BMI to license “the compositions in [its] repertory,” and that BMI’s repertory includes “compositions, the right of the public performance of which [BMI] has or hereafter shall have the right to license or sublicense.” *Id.* at 17. By providing a license, the licensee should have the immediate right to publicly perform the compositions in the repertoire without infringing on the rights of joint-authors. *Id.* The court rejected this argument and said, “the blanket license itself does not necessarily confer a right of immediate public performance: the license covers all the rights held by the PRO regardless of whether those rights are valid or invalid, exclusive or shared, complete or incomplete.” *Id.* The court also points out that BMI’s Consent Decree does not address the issue of fractional versus full licensing and if the DOJ wanted to prevent fractional licensing, it could have used explicit language in the consent decree to limit fractional licensing. *Id.* at 16–17. Finally, before ending the opinion, the court recommended that the DOJ should amend BMI’s Consent Decree. *Id.* at 18 (“If the DOJ decides that the consent decree . . . raises unresolved competitive concerns, it is free to move to amend the decree or sue under the Sherman Act in a separate proceeding”).

¹⁵⁰ Christopher Coble, *Music Trademarks: What Is Fractional Licensing?*, FINDLAW (Jan. 3, 2018 2:56 PM), https://blogs.findlaw.com/celebrity_justice/2018/01/music-trademarks-what-is-fractional-licensing.html.

¹⁵¹ *BMI Members Say “No” to 100% Licensing*, BMI, https://www.bmi.com/advocacy/doj_letter (last visited Jan. 12, 2020).

¹⁵² *Id.*

¹⁵³ *Id.*

require 100% licensing, a single co-author of a joint work can authorize the use of the joint work without permission from the other co-author(s).¹⁵⁴ The Copyright Act gives each co-songwriter the right to distribute and publicly perform co-written songs, without the permission of the other songwriter(s).¹⁵⁵ So even if the Consent Decrees did not require 100% licensing, a co-authored song represented by two PROs could be broadcasted legally after obtaining a performance license from just one PRO.¹⁵⁶ Under only one exception, a co-songwriter can license a joint work only if he issues a non-exclusive license.¹⁵⁷ Therefore, BMI's statement that co-owners would have no control over their joint works if the Consent Decrees permit fractional licensing is unfounded.

D. Impact of New Media and GMR

1. New Media

Just as talkies and television led to an amendment of the Consent Decrees in 1950, "new media" changed the way consumers listen to music.¹⁵⁸ This change in consumer behavior caused the PROs to increase the price they charge for

¹⁵⁴ 17 U.S.C. §§ 106(1)–(6), 201(a), (c) (1976).

¹⁵⁵ See 17 U.S.C. §§ 106, 201. Sections 106 of the Copyright Act provides:

The owner of copyright under this title has the exclusive rights to do and to authorize any of the following: . . . (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending; (4) in the case of . . . musical works . . . to perform the copyrighted work publicly; (6) in the case of sound recordings, to perform the copyrighted work publicly by means of digital audio transmission.

Section 201 of the Copyright Act provides:

(a) Initial Ownership - Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are co-owners of copyright in the work. (c) Contributions to Collective Works – Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution.

¹⁵⁶ See *Copyright and the Music Marketplace*, *supra* note 126, at 25.

¹⁵⁷ An exclusive license assigns all rights in the composition to the licensee for a fixed period of time, during which no other entity can use the composition. Alternatively, a non-exclusive license grants the licensee limited use of the composition while allowing other entities to also use the composition. Kent Klavens, *Legal Problems with Co-Writers*, WIXEN MUSIC PUB., INC. (1989), <http://www.wixenmusic.com/publishing-101/legal-problems-with-co-writers/>; *Copyright Ownership: The Joint Authorship Doctrine*, <https://corporate.findlaw.com/intellectual-property/copyright-ownership-the-joint-authorship-doctrine.html> (last updated June 8, 2017).

¹⁵⁸ New media is defined as "products and services that provide information or entertainment using computers or the internet, and not by traditional methods such as television and newspapers." *New Media*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/new-media> (last visited Jan. 12, 2020). New media incorporates streaming services discussed in Section I and note 105. See also Sean Cole, *The Impact of Technology and Social Media on the Music Industry*, ECONSULTANCY (Sept. 9, 2019), <https://econsultancy.com/the-impact-of-technology-and-social-media-on-the-music-industry/>; Jem Aswad, *ASCAP, BMI Submit Final Arguments to DOJ to Modernize 'Outdated' Consent Decrees*, VARIETY (Aug. 9, 2019, 1:54 PM), <https://variety.com/2019/biz/news/ascap-bmi-final-arguments-to-doj-outdated-consent-decrees-1203298222/>.

streaming rights.¹⁵⁹ Three of the largest music publishers in the world, Universal Music Publishing Group (UMPG), Sony/ATV Music Publishing (Sony/ATV), and EMI Music Publishing (EMI), removed their new media rights from ASCAP “while retaining membership in that group.”¹⁶⁰ Broadcasters have met the PROs’ and publishers’ attempts to increase revenue from new media sources with lawsuits.¹⁶¹

On September 6, 2011, Pandora and ASCAP entered into an interim licensing deal.¹⁶² While negotiating a licensing rate, EMI announced that it would be removing its new media rights from ASCAP.¹⁶³ Pandora immediately executed a licensing agreement with EMI.¹⁶⁴ “Pandora agreed to a license that provided EMI with a pro-rata share of 1.85% of Pandora’s revenues.”¹⁶⁵ The agreement also included a “most favored nation” (MFN) clause.¹⁶⁶ The MFN clause stipulated that if Pandora subsequently negotiated a lower rate with a publisher equal in size to EMI, then EMI would have received the same lower rate.¹⁶⁷ Conversely, if Pandora negotiated a higher rate, then EMI would have received the same higher rate as well.¹⁶⁸

Prior to EMI’s withdrawal of its new media rights, ASCAP changed its policies “to permit its members to selectively withdraw from ASCAP the right to license works to new media entities.”¹⁶⁹ Following EMI’s deal with Pandora, Sony/ATV withdrew its new media rights from ASCAP.¹⁷⁰ After more than a year of aggressive negotiations, Pandora agreed to pay Sony/ATV a pro-rata fee of 5%, which was 25% more than the industry standard of 4%.¹⁷¹ Finally, UMPG withdrew their new media rights from ASCAP, too.¹⁷² UMPG had so much leverage that it signed a deal with Pandora with a 7.5% licensing rate.¹⁷³ This rate benefitted UMPG, but it would have also raised EMI’s rate to 7.5% per EMI’s MFN clause.¹⁷⁴

¹⁵⁹ *Pandora Wins Lawsuit Against ASCAP and Music Publishers in Royalties Appeal*, THE GUARDIAN, , <https://www.theguardian.com/business/2015/may/06/pandora-music-royalties-lawsuit> (last visited Jan. 12, 2020).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *In re Pandora Media, Inc.*, 6 F. Supp. 3d 317, 339 (S.D.N.Y. 2014).

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 187.

¹⁶⁵ *Id.* at 340.

¹⁶⁶ An MFN clause stipulates “that no other relevant party will receive ‘better’ . . . term from the party making the commitment.” Bob Tarantino, *I Want What She’s Getting – Favored Nations Clauses in Entertainment Contracts*, ENT. MEDIA L. SIGNAL (Feb. 22, 2015), <http://www.entertainmentmedialawsignal.com/i-want-what-shes-getting-favored-nations-clauses-in-entertainment-contracts>.

¹⁶⁷ *See In re Pandora Media, Inc.* at 340.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 331.

¹⁷⁰ *Id.* at 342.

¹⁷¹ *Id.* at 346.

¹⁷² *Id.* at 347.

¹⁷³ *Id.* at 350.

¹⁷⁴ *Id.* at 340.

Unable to agree on a licensing fee with ASCAP, Pandora applied to the rate court and sought relief to invalidate ASCAP's policy allowing publishers to withdraw their new media rights.¹⁷⁵ The court found that partially withdrawing new media rights violated the Consent Decrees.¹⁷⁶ This ruling invalidated the new media licenses Pandora received from UMPG, Sony/ATV, and EMI.¹⁷⁷ Additionally, the rate court decided ASCAP could reasonably charge Pandora a licensing fee of 1.85%.¹⁷⁸ ASCAP presented the licensing agreements between Pandora and UMPG, Sony/ATV, and EMI as proof a higher rate would be reasonable, but the rate court settled on 1.85% because EMI and Pandora approved, and ASCAP previously agreed to a 1.85% licensing fee.¹⁷⁹

Not only have publishers and PROs been fighting with new media companies about what rights to include in their licenses, but they have also been at odds over how to calculate royalty rates.¹⁸⁰ In *United States v. ASCAP*, 616 F. Supp. 2d 447 (S.D.N.Y. 2009), the rate court settled a disagreement between ASCAP and YouTube.¹⁸¹ ASCAP argued its proposed fee was reasonable because music videos or videos scored with music made up 88% of the most popular videos on YouTube.¹⁸² YouTube argued that ASCAP calculated its proposed fee based on all videos uploaded to YouTube instead of videos actually viewed by an audience.¹⁸³ The court in *U.S. v. ASCAP* struggled to set a rate because YouTube had multiple revenue streams.¹⁸⁴ To settle the dispute, the court relied on a formula created in *United States v. ASCAP in re AOL, RealNetworks and Yahoo! Inc.*, 559 F. Supp. 2d 332 (S.D.N.Y. 2008).¹⁸⁵ The

¹⁷⁵ *Id.* at 342.

¹⁷⁶ *Id.* at 351. While publishers could not partially remove of their rights, they were still free to end their membership with the PROs. *Id.*

¹⁷⁷ *Id.* at 351.

¹⁷⁸ *Id.* at 355.

¹⁷⁹ *Id.* at 355.

¹⁸⁰ *United States v. ASCAP*, 616 F. Supp. 2d 447, 448 (S.D.N.Y. 2009). When negotiating a deal with YouTube, ASCAP proposed a fee of \$12 million for the period of 2005 through 2008 while YouTube suggested a fee of \$79,500. *Id.* at 451.

¹⁸¹ *Id.* at 448.

¹⁸² *Id.* at 449.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 449–50. Not every video on YouTube incorporated music and YouTube received revenue from many territories outside of the United States that ASCAP and BMI do not represent. *Id.* At the time, YouTube only placed ads on 4% of its videos and allowed the other 96% of its videos to be streamed for free. *Id.* at 451. ASCAP wanted to base its fee on all the videos, but YouTube only wanted the monetized videos to be part of the equation. *Id.*

¹⁸⁵ *Id.* at 451 (citing *United States v. ASCAP in re AOL, RealNetworks and Yahoo! Inc.*, 559 F. Supp. 2d 332 (S.D.N.Y. 2008)). In *in re AOL*, et al., ASCAP proposed and the Court accepted as reasonable in principle a formula for determining reasonable license fees which began with the licensee's total revenue from the licensed service and reduced it by a music-use-adjustment factor designed to reflect the extent to which users are attracted to that service by the performance of music thereon. *Id.* Stated differently, ASCAP wanted to base its fee on the licensee's total revenues, not just revenues from music streams or videos scored with music. The Court found that a music-use-adjustment fraction whose numerator is the time visitors to a website spent streaming music and whose denominator is the total time they spent on the website was a fair measure of the importance of music in attracting visitors to the website and thus generating

court applied this formula to calculate YouTube’s estimated U.S. revenues for 2005 throughout 2008 and set a 2.5% fee, which came out to \$1.425 million.¹⁸⁶

2. GMR

In 2013, Irving Azoff founded GMR, the first new American PRO in nearly seventy-five years.¹⁸⁷ Unlike ASCAP and BMI, GMR is “invite-only” the DOJ does not regulate it with a Consent Decree.¹⁸⁸ Since its inception, GMR attracted a large portion of the music industry’s top artists and aggressively pursued public performance licenses.¹⁸⁹ GMR’s rates can be more than four times as much as ASCAP’s rates.¹⁹⁰

GMR’s aggressive rate setting has resulted in multiple lawsuits involving GMR and broadcasters.¹⁹¹ The lack of oversight allows GMR to provide fractional licenses.¹⁹² GMR also requires licensees to obtain blanket licenses.¹⁹³ For these reasons, Radio Music License Committee (RMLC)¹⁹⁴ filed an antitrust lawsuit against GMR in 2017.¹⁹⁵ In the complaint, RMLC alleged that GMR requested supra-competitive rates three times higher than the industry standard.¹⁹⁶

revenue for the website proprietor. *Id.* ASCAP wanted to forgo this formula because it would result in lower fees. *Id.*

¹⁸⁶ *Id.* at 452–53. This factor was based on how long each YouTube user spent streaming videos with music content as compared to streaming videos without music. *Id.*

¹⁸⁷ Steve Kurutz, *Irving Azoff*, ALL MUSIC (Feb. 1, 2020, 5:20 PM), <https://www.allmusic.com/artist/irving-azoff-mn0001738386>. Azoff began his career in the music industry in the 70’s, starting as an artist manager before creating his own agency, Front Line Management. *Id.* From Front Line Management, Azoff became the head of a major record label, MCA Records. *Id.* After his success at MCA Records, Azoff became the head of Live Nation Entertainment. *Irving Azoff*, VARIETY, <https://variety.com/exec/irving-azoff/> (last visited Feb. 1, 2020, 5:22 PM).

¹⁸⁸ See PASSMAN, *supra* note 4, at 241.

¹⁸⁹ See *GMR Licensing: Fines, Costs, and Options*, *supra* note 82; see also *Radio Music License Com., Inc. v. Glob. Music Rights, LLC*, 2019 U.S. Dist. LEXIS 55102, at *5–6 (E.D. Pa. 2019).

¹⁹⁰ For an example and comparison of ASCAP and GMR’s rates, see *Running USA Music Licensing*, RUNNING USA, https://www.runningusa.org/RUSA/Membership/Music_Licensing/RUSA/Membership/Licensing/Music.aspx (last visited Mar. 1, 2020). For a running event with 30,000 or more people ASCAP charges \$600, whereas, for the same size event, GMR charges \$2,575. *Id.*

¹⁹¹ *Radio Music License Com.*, U.S. Dist. LEXIS 55102, at *11–12.

¹⁹² *Id.*

¹⁹³ *FAQ: What is a Blanket License?*, GLOBAL MUSIC RIGHTS, <https://globalmusicrights.com/FAQ> (last visited Mar. 1, 2020).

¹⁹⁴ “RMLC is a ‘trade association’ that represents its members in negotiations for licenses to publicly perform copyrighted musical compositions . . . RMLC negotiations on behalf of its members with performing rights organizations (‘PROs’) for mutually acceptable license terms, rates, and fees, as well as alternative forms of licensure to suit the needs of particular members . . . RMLC’s membership comprises about 3,000 owners of 10,000 commercial terrestrial radio stations across the United States . . . RMLC’s members generate ‘over 90% of the billions of dollars of annual revenue generated by the terrestrial radio industry in the United States.’” *Radio Music License Comm., Inc. v. Global Music Rights, LLC*, 2017 U.S. Dist. LEXIS 196980, at *2–3 (E.D. Pa. 2017) (internal quotations and citations omitted).

¹⁹⁵ *Radio Music License Com.*, at *2–3.

¹⁹⁶ *Id.* at *4.

In its complaint, RMLC also alleged GMR admitted it did not represent all the rights to most of the songs in its repertoire.¹⁹⁷ GMR mostly represents only a fraction of each song in its repertoire because co-writers affiliated with other PROs wrote most of the songs.¹⁹⁸ Even though GMR only owns a fraction of the rights to the songs in its repertoire, GMR forced RMLC to obtain a public performance license from all four PROs because GMR does not provide 100% licenses.¹⁹⁹

The lawsuit between RMLC and GMR is still pending, but if GMR wins it will have precedent supporting it. This precedent would allow GMR to continue demanding much higher licensing fees than ASCAP and BMI. If the court allows GMR to provide fractional licenses, then radio stations, other broadcasters, venues, and small businesses will have to pay royalties twice, instead of once, under an ASCAP or BMI public performance license.²⁰⁰

IV. The DOJ's Decision

A. Impact of Removing the Consent Decrees

The DOJ placed the Consent Decrees on ASCAP and BMI because of their anticompetitive behavior. While the music industry has changed over the past seven decades, the Consent Decrees remain just as important now as they were in the 1940's. ASCAP, BMI, songwriters, publishers, and all of those who benefit from royalties and public performances would like to remove the Consent Decrees. The PROs and songwriters would benefit from removing the Consent Decrees, but licensees, especially small businesses, would face economic hardship. Based on the historical behaviors of PROs, removing the Consent Decrees would allow the PROs to charge exorbitant fees most small business, and even some broadcasters and new media companies, could not afford.

After the DOJ announced that it would be reviewing the Consent Decrees, it sought public comment on the benefits and drawbacks. Nearly 900 businesses, restaurants, theaters, venues, musicians, new media companies, PROs, music libraries, and others provided comments. All the businesses, otherwise known as licensees, vehemently objected removing or even amending the Consent Decrees. The licensees point out that ASCAP and BMI control 90% "of the music licensing business."²⁰¹ Most licensees are small businesses possessing neither the understanding nor the means to directly license music from music publishers or negotiate with the PROs and publishers.²⁰² With the Consent Decrees in place,

¹⁹⁷ *Radio Music License Com., Inc. v. Glob. Music Rights, LLC*, 2019 U.S. Dist. LEXIS 55102, at *11–13 (E.D. Pa. 2019).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ See PASSMAN, *supra* note 4, at 249.

²⁰¹ Joseph Hoover, *Antitrust Consent Decree Review Public Comments—ASCAP and BMI 2019*, APPALACHIAN BREWING COMPANY, Public Comment 34 at 1 (Aug. 9, 2019, 2:35 PM), <https://media.justice.gov/vod/atr/ascapbmi2019/pc-034.pdf>.

²⁰² *Id.* ASCAP generates over one billion dollars in revenue per year, allowing them to hire experts in the music licensing business. ASCAP, *Antitrust Consent Decree Review Public Comments—ASCAP and BMI 2019*, Public Comment 43 at 17 (Aug. 9, 2019), <https://media.justice.gov/vod/atr/ascapbmi2019/pc-043.pdf>.

ASCAP and BMI have a nearly comprehensive database available to the public and are a one-stop-shop covering most of a business's public performance licensing needs.²⁰³ The database and one-stop-shopping allow less educated businesses to operate and comply with copyright legislation affordably.

ASCAP and BMI are unable to gouge businesses due to the restrictive nature of the Consent Decrees, but this does not stop them from harassing businesses over public performance licenses.²⁰⁴ When ASCAP and BMI learned that Appalachian Brewing Company did not have a public performance license, "both ASCAP and BMI threaten[ed] litigation that they claim[ed would] force our business to close if we [did] not license with them. They made daily calls harassing our staff until we became licensed."²⁰⁵ If the DOJ removes the Consent Decrees, this all-too-common practice will only worsen. Fortunately for Appalachian Brewing Company, and many others like them, the Consent Decrees forced ASCAP and BMI to provide reasonable rates small businesses can afford.

Licensees also benefit greatly from the full licensing requirement. Most songs are written by multiple songwriters, which results in ASCAP and BMI representing most songs, oftentimes along with SESAC and GMR. If one songwriter grants permission to a licensee to publicly perform a work, the licensee does not need permission from the other authors.²⁰⁶ With the full licensing requirement in place, businesses can often get away with only obtaining one license, either from ASCAP or BMI.²⁰⁷ Even without the full licensing requirement in the Consent Decrees, businesses seeking a public performance license would only need permission from one songwriter to perform a co-written song publicly. The songwriter who grants a public performance license must disperse the royalties he receives to his fellow co-writers.²⁰⁸ By working with the PROs, songwriters avoid the hassle of tracking their royalty payments and distributing said royalties to co-writers. If the DOJ removes the Consent Decrees, ASCAP and BMI will harass businesses more than they already do. Furthermore, removing the Consent Decrees, and thus removing the full licensing requirement, would allow songwriters and publishers to "double-dip."²⁰⁹ Without the full licensing requirement, PROs will force licensees will be forced to obtain public performance licenses from ASCAP, BMI, SESAC, and GMR. This will raise the cost of performing music, especially if the rate courts cannot restrain the PROs.

²⁰³ *ACE Repertory*, ASCAP, ascap.com/repertory (last visited Mar. 1, 2020); *see also BMI Repertoire*, BMI, repertoire.bmi.com/StartPage.aspx (last visited Mar. 1, 2020).

²⁰⁴ *See* Hoover, *supra* note 201.

²⁰⁵ *Id.*

²⁰⁶ *See Music Publishing 101*, *supra* note 28.

²⁰⁷ 17 U.S.C. § 302(a). With some forethought and planning, a business can safely perform music with only one public performance license, but it is much better to obtain a license from all four PROs.

²⁰⁸ *See* Klavens, *supra* note 157.

²⁰⁹ Double-dipping allows composers and publishers to be paid multiple times for a single use. Kenneth Steinthal, J. Blake Cunningham, David Mattern & Bruce Sokler, *Antitrust Consent Decree Review Public Comments – ASCAP and BMI 2019*, INTERNET AND TELEVISION ASSOCIATION AND NETFLIX, INC., Public Comment 360 at 13 (Aug. 9, 2019), <https://media.justice.gov/vod/atr/ascapbmi2019/pc-360.pdf>.

Small businesses would not be the only companies affected by the removal of the Consent Decrees. Radio stations and television networks would undoubtedly be greatly impacted, but new media companies, such as Spotify and Pandora, would be affected the most. If the DOJ removes the rate courts, ASCAP and BMI could charge the radio stations and televisions networks whatever they deem fair. ASCAP and BMI already believe that they should be able to charge radio stations and television networks rates in the tens of millions of dollars.²¹⁰ PROs try to justify these rates by arguing that licensing fees should be calculated using a company’s total revenues, and not based solely on revenue streams that use music.²¹¹ If the DOJ removes the Consent Decrees, ASCAP and BMI would again ask for multi-million dollar deals. If ASCAP and BMI even bother to rationalize these rates, they will justify their actions by saying that, “the companies make ‘x’ amount of dollars, so they can afford multi-million dollar licenses.” In fact, ASCAP’s public comment already alludes to this.²¹²

Spotify, Pandora, and other new media companies would be impacted more than radio stations and television networks because new media companies generate more individual performances of music than any other business model.²¹³ Not only do the new media companies play more music, but they also generate more revenue.²¹⁴ The PROs and publishers already try to exploit new media companies, but the Consent Decrees prevent the PROs from doing so.²¹⁵ With the Consent Decrees no longer in place, new media companies would be defenseless. Their only options will be to agree to the PROs’ new rates, license directly with publishers or go out of business.²¹⁶

Removing the Consent Decrees would not only negatively impact licensees, but it would also hurt consumers, songwriters, publishers, record labels,

²¹⁰ See *supra* text accompanying note 181.

²¹¹ See *supra* text accompanying note 186.

²¹² See *Antitrust Consent Decree*, *supra* note 202, at 14–17.

²¹³ In 2018, the number of paid streaming subscribers increased from 176 million to 255 million. *IFPI Global Music Report 2019*, INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY, <https://www.ifpi.org/news/IFPI-GLOBAL-MUSIC-REPORT-2019&lang=en> (last visited Mar. 1, 2020).

Trends also show that only 39% of 16–19 year-olds listen to music on the radio compared to 59% that watch music videos on YouTube. *Id.*

²¹⁴ See *ASACP*, *supra* note 202, at 17.

Company	2018 Revenues	Cash Reserves
Apple	\$265.595 billion	\$25.913 billion
Amazon	\$232.887 billion	\$31.750 billion
Alphabet	\$136.819 billion	\$16.701 billion
Comcast/NBCU	\$94.507 billion	\$3.814 billion
Netflix	\$15.794 billion	\$3.794 billion
Viacom	\$12.943 billion	\$1.557 billion
Spotify	£5.259 billion	£891 million

²¹⁵ See *supra* text accompanying note 181; *In re Pandora Media, Inc.*, 6 F. Supp. 3d 317, 340, 346–47, 350 (S.D.N.Y. 2014).

²¹⁶ If the DOJ removes the Consent Decrees, licensees could also file antitrust lawsuits against the PROs, but that would bring us right back to the present situation.

and even the PROs. If small businesses and broadcasters must pay higher rates for public performance licenses or obtain multiple licenses, the businesses and broadcasters will raise the prices of their goods and services. Businesses will not absorb the cost. Instead, they will raise the prices that they charge their customers. Restaurants will have to raise the price of their food and beverages. Broadcasters will charge advertisers more money, and so on. Small business and small radio stations could go out of business, which would result in fewer licensees for the PROs and fewer royalties for publishers and composers. Many broadcasters would most likely use less music and obtain direct licenses only for the music that they use, resulting in fewer royalties.

Removal of the Consent Decrees would also increase piracy. Streaming has led to a decrease in “digital piracy,” which has increased revenue for the music industry.²¹⁷ Spotify, Pandora, YouTube, and other new media companies will most likely lose customers if they raise their subscription prices or interrupt streaming with more ads. The customers that the streaming sites lose will not go through other legal avenues to listen to music, instead, they will begin pirating music again. This would inevitably lead to a decline in revenue for the music industry.²¹⁸

B. How the DOJ Should Proceed

There is no doubt that the music industry and the way people listen to music has changed since 1941; however, the Consent Decrees are just as important now as they were 80 years ago. ASCAP, BMI, music publishers, songwriters, and other entitled parties urge the DOJ to implement a “Transitional Decree” that “would operate during [an] interim ‘sunset period’ and enable an orderly transition to a free market.”²¹⁹ ASCAP’s proposed Transitional Decree

²¹⁷ Digital piracy is “the practice of illegally copying and selling digital music, video, computer software, etc.” *Digital Piracy*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/digital-piracy> (last visited Jan. 12, 2020); *2019 Intellectual Property and Youth Scoreboard*, EUROPEAN UNION INTELLECTUAL PROPERTY OFF. (Oct. 2019), https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/IP_youth_scoreboard_study_2019/IP_youth_scoreboard_study_2019_en.pdf. A recent study from the European Union has shown that 97% of fifteen to twenty-four year-olds stream music. *Id.* Of those fifteen to twenty-four year-olds, 56% of them were illegally pirating music in 2016. *Id.* In 2019, that number dropped 17%. *Id.* The teenagers surveyed said that a lack of access to content was their main motivation for downloading music. *Id.* With so many streaming services available today, people have a legal way to access the music they love. *Id.* In a similar study performed in the United Kingdom, digital piracy of music has fallen from 18% in 2013 to 10% in 2018. Russell Feldman, *The number of Britons that are illegally downloading music is decreasing, according to new custom research from YouGov*, YOUGOV.CO.UK (Aug. 2, 2018, 3:11 AM), <https://yougov.co.uk/topics/arts/articles-reports/2018/08/02/number-britons-illegally-downloading-music-falls>. Like the EU study, those surveyed in the UK said that ease of access led them to stop pirating music. Short cite for independent. *Id.* However, 44% of those surveyed indicated that they would pirate music if they could not easily stream music. *Id.*

²¹⁸ See *supra* text accompanying note 217.

²¹⁹ See *ACE Repertory*, *supra* note 203, at 6. A sunset provision is “[a] condition or provision in a law that designates a certain point in time when that specific law will no longer be in effect. The law will no longer have any effect at that point, unless the governing powers reinstate the law

would retain some of the current Consent Decree's restrictions, while lifting others.²²⁰ Under the Consent Decrees, ASCAP and BMI can only provide public performance licenses for their members, but under the Transitional Decree, ASCAP requests the ability to negotiate other rights, such as mechanical and synchronization licenses.²²¹ Peermusic also encourages the DOJ to allow publishers to partially withdraw their digital streaming rights from the PROs, without removing their entire catalog from the PROs' repertoires.²²²

ASCAP and the other music companies make compelling arguments for removing the Consent Decrees, but the DOJ should merely amend the Consent Decrees. As mentioned previously, removing the Consent Decrees would allow the PROs to force licensees to pay exorbitant fees, which would ultimately hurt businesses and the music industry. However, consumers are no longer purchasing copies of music and are, instead, utilizing streaming services in record numbers.

Streaming did not exist when the DOJ last amended the Consent Decrees. Because streaming is so prevalent now, the DOJ should allow the PROs to increase the rates they are currently charging new media companies. The DOJ should also allow the PROs to charge all licensees a slightly higher rate. The rate for all licensees should only be allowed to increase by a small, single-digit percentage.

Spotify, Pandora, Apple Music, etc., are seeing record numbers of users and streams, but many new media companies have not yet turned a profit.²²³

or extend the sunset provision before the expiration point." *Sunset Provision*, BUSINESSDICTIONARY.COM, <http://www.businessdictionary.com/definition/sunset-provision.html> (last visited Feb 1, 2020).

²²⁰ See *ACE Repertory*, *supra* note 203, at 28–31. The Transitional Decree would retain the following restrictions: non-exclusive licensing, the rate court, and alternatives to blanket licenses, such as per broadcast licenses. *Id.*

²²¹ *Id.* at 33. ASCAP also proposed that the following restrictions be lifted: the inability to collect royalties for performances outside of the United States, licenses limited to five years, an injunction against granting licenses to movie theaters, and the requirement to grant membership to any composer or publisher who asks to join ASCAP. *Id.* at 33–40.

²²² PEERMUSIC, *Antitrust Consent Decree Review Public Comments—ASCAP and BMI 2019*, Public Comment 596 at 1–5, <https://media.justice.gov/vod/atr/ascapbmi2019/pc-594.pdf> (last visited Mar. 4, 2020). Peermusic is a music publisher. *Id.*

²²³ David Touve, *\$0.0000955: The Value of a Spin, per Listener, to Songwriters on US Radio in 2014*, ROCKONOMIC (June 22, 2015), <https://rockonomic.com/0-0000955-the-value-of-a-spin-per-listener-to-songwriters-on-us-radio-in-2014-bb232821d46f>. Even though there are millions of people streaming music, this does not mean that more people are listening to music. A radio station can reach thousands to millions of people per broadcast of a song, whereas streaming services only reach one person per stream. When you break down the disbursement of radio royalties per listener, rather than per broadcast, the average royalty payment is \$0.000219. Dmitry Pastukhov, *What Music Streaming Services Pay Per Stream (And Why It Actually Doesn't Matter)*, SOUNDCHARTS BLOG (June 26, 2019) <https://soundcharts.com/blog/music-streaming-rates-payouts>. Spotify pays an average royalty of \$0.00318 per listener. *Id.* So, while it may not seem like streaming services are paying much per stream, they pay similar royalties per listener. *Id.* The argument can also be made that lower rates for radio could be justified because radio promoted the music, which leads to listeners going out and buying CDs or digital downloads. And now, consumers are not using streaming as a way to discover music before purchasing CDs or digital downloads and instead only stream music, which cuts out the royalties from physical and digital sales. *Pandora Reports Q4 2017 Financial Results*, PANDORA (Feb. 21, 2018),

Apple Music and Amazon are only able to make a profit because they sell devices and other goods, unlike Spotify and Pandora, who only offer streaming services. While Apple and Amazon make a profit, they should not be required to pay higher rates for streaming music when most of their revenue is generated from non-streaming products.

The music industry continues to fight and clamor to charge streaming services more money, but this is a classic trope. Every time a new way to distribute and consume music is created, the publishers and PROs fight to make as much as they can from the new technology.²²⁴ Just as the music industry and Apple came to a fair agreement after the creation of iTunes, the DOJ should keep the Consent Decrees in place and allow the rate courts to facilitate an agreed upon mutually beneficial rate for the PROs, publishers, and new media companies.

The DOJ should keep all other restrictions in place, except for territorial restrictions. Allowing ASCAP and BMI to collect royalties worldwide would allow them to generate more revenue without increasing rates. The DOJ should not give PROs the ability to negotiate or collect on synchronization and mechanical licenses. The DOJ put the Consent Decrees in place to protect consumers and prevent the PROs from having too much control. By granting the PROs more rights, they would have even more control over the music industry and engage in even more anti-competitive behavior.

Even though the DOJ should only allow PROs to operate under strict scrutiny, ASCAP and BMI do serve a vital role. By allowing two PROs with a near monopoly to exist, broadcasters and licensees, especially small businesses, can legally broadcast music. Without ASCAP and BMI, songwriters and publishers would undoubtedly lose out on millions of dollars in royalties. Many businesses would be susceptible to costly lawsuits for copyright infringement.

A major concern for ASCAP and BMI is the ability to compete with GMR. This is a valid concern. GMR's selective roster is growing quickly and gaining market share, all while being able to bully licensees into ridiculous rates. To help ASCAP and BMI compete with GMR, the DOJ should file a lawsuit against GMR for anticompetitive behavior and only allow them to operate under a consent decree. This would allow ASCAP and BMI to compete with GMR, and give composers, publishers, and licensees more options when selecting a PRO to join.

<http://investor.siriusxm.com/investor-overview/press-releases/press-release-details/2018/Pandora-Reports-Q4-2017-Financial-Results/default.aspx>. In one fiscal quarter of 2018, Pandora had a net loss of \$131.7 million and lost \$132.3 million in quarter one of 2017. *Id.*

²²⁴ See PASSMAN, *supra* note 4, at 145–149. When the iPod and iTunes were released by Apple, the music industry fought Apple for greater royalties. *Id.* At first, Apple was only paying a one cent per download, but Apple and the music industry settled on nine cents per download. *Id.* See also *Mechanical License Royalty Rates*, *supra* note 54.

C. Alternative Solution

Perhaps the best solution should fall in the hands of the legislature. As mentioned previously, the PROs serve an important function, which the DOJ recognized when it first sued ASCAP in the 1940's for anti-trust violations. The importance of the PROs increased following the creation of the internet and streaming. The legislature should amend the Sherman Antitrust Act and the Copyright Act of 1976 to accommodate PROs. This would not be the first-time Congress amended laws to account for the changes created by the internet.²²⁵

With music sales in decline, public performance royalties are becoming more important every year. Publishers, PROs, and songwriters are trying to adapt to this new environment. With the success of GMR, more songwriters will inevitably move their catalog to GMR. GMR's success will eventually lead to the creation of new PROs, especially in the current climate of the music industry. GMR has been a maverick in the music industry. The creation of even one more PRO not bound by a consent decree could create multiplied costs and complexities in addition to an already expensive and complicated field. However, the creation of more PROs could result in ASCAP and BMI losing their monopoly status.

The Consent Decrees served their purpose, but it is time for new legislation that considers both the importance of PROs and streaming services. A transitional decree could keep the current Consent Decrees in place while legislation passes new laws. If the legislature takes up this task, it should retain the 100% licensing requirement from the Decrees, set a statutory rate for public performance licenses, and allow PROs to collect foreign royalties. The 100% licensing requirement would make licensing easier, cheaper, and less complicated for licensees. A statutory rate could be broken down into rates for each type of public performance (e.g., a different rate for television, streaming, and venues) and would eliminate the need of the rate court. Allowing PROs to collect foreign royalties would increase revenue without significantly raising the current domestic rates of public performance licenses. Legislation legalizing PROs would also prevent new PROs, that are not subject to a consent decree, from having an advantage over ASCAP and BMI.

²²⁵ *The Digital Millennium Copyright Act of 1998: U.S. Copyright Office Summary*, U.S. COPYRIGHT OFF. (Dec. 1998), <https://www.copyright.gov/legislation/dmca.pdf>. In 1998, Congress amended the Copyright Act of 1976 with the Digital Millennium Copyright Act. *Id.* Congress passed the Music Modernization Act (MMA) in 2018, which changed the way songwriters receive streaming royalties and created database of songwriters. THE MUSIC MODERNIZATION ACT, U.S. COPYRIGHT OFF., <https://www.copyright.gov/music-modernization/> (last visited Mar. 2, 2020). The database will make it easier for licensees to pay royalties and discover who owns rights in which songs. *Id.*

V. CONCLUSION

The DOJ took on a challenging and multifaceted task when it decided to review the Consent Decrees. While it may be daunting, it is necessary. The music industry has changed significantly since 2001 and has changed even more so since 1941, but the Consent Decrees are just as important now as they were eighty years ago. The DOJ should keep most of the restrictions in place while allowing ASCAP and BMI to increase their licensing fees and collect royalties worldwide. Amending the Consent Decrees with these changes will protect consumers and licensees while allowing songwriters to make a better living and receive fair wages for their work.