Comments of the International Center for Law and Economics on the Department of Justice Antitrust Consent Decree Review: ASCAP and BMI 2019

Submitted by email August 9, 2019, to ATR.MEP.Information@usdoj.gov

Authored by:

Geoffrey A. Manne (President & Founder, International Center for Law & Economics)
Julian Morris (Executive Director, International Center for Law & Economics)
Kristian Stout (Associate Director, International Center for Law & Economics)

Introduction

These comments seek to address the questions raised by the Department of Justice in its current review of the ASCAP and BMI consent decrees. The comments begin with a rehearsal of the origin, purpose and effect of the consent decrees and the copyright environment into which they were enacted. This leads to a discussion of the problems that have resulted from the decrees, particularly with respect to the effects on songwriters and smaller publishers. We conclude that the PRO consent decrees should be terminated.

I. Revisiting the origin, purpose and effect of the PRO consent decrees

It's possible that the consent decrees once served an important competitive purpose, but that no longer seems to be the case. To understand why, it is worth reviewing the history that led to the copyright law environment in which the consent decrees were adopted and with which they are indelibly linked, and how the interaction between copyright and antitrust plays out in the music markets they regulate. To foreshadow:

> The current legal landscape for music copyrights clearly has resulted from a process of accretion. As technology changed, new rights were added, new copyright interests created, and even more rights added. However, if one were to devise a system for the efficient allocation of rights, one would not pick the current allocation. As has been noted by law and economics scholars, ***"[p]olitics leads to bargains and compromises that violate the requirements of economic efficiency." The current state of copyright in the music industry has led to a situation in which the industry cannot embrace new business models*** in large part because of the inability to satisfy the different constituencies of the vested industry players. At the same time, millions of users have rejected the notion that there is anything wrong with copying creative works without paying for them. These users have turned to file sharing systems and are, in some ways, understandably enraged when the music industry seeks to use copyright law to shut off the supply of "free" music.[1]

But even this characterization of the music licensing governance morass is incomplete. While it is surely the case that "the inability to satisfy the different constituencies of the vested industry players" contributes to the problems endemic to the music licensing regime, it is at best incomplete to lay the blame at the feet of

---

[1] Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673, 702 (2003) (citations omitted) (emphasis added).

the participants currently operating within the constraints imposed by Congress, the courts, and the Department of Justice. "Satisfy[ing] . . . vested interests" sounds ominous, but, put less pejoratively, navigating the demands of contract counterparties and competing and complementary interests with divergent incentives is an issue in every complex commercial arrangement. What makes the problems of music licensing uniquely problematic is the ossifying effect of the combined overhang of copyright law, antitrust regulation, and the ongoing efforts by Congress, the courts, and the DOJ to manage the ensuing complexities they have wrought. These, combined with a rapidly changing technological environment and the vastly transformed consumer preferences and expectations it has helped to engender, define the commercial (and, here, artistic) environment.

When static regulation meets dynamic markets, the effect is always costly constraints on organizational and pricing innovations, rent seeking and rent extraction, and, ultimately, an inevitable reduction in consumer welfare from both. In the operation of the consent decrees we are confronted with the phenomenon of static regulation colliding with dynamic markets on steroids.

To understand better how we arrived at the current situation—and as a prelude to a discussion of how to move forward—it is worth briefly recounting *why* the consent decrees were issued in the first place.

A. The origins of compulsory licensing and ASCAP

Since the development of the printing press, copying technologies have posed both opportunities and threats to creative individuals. Opportunity arises from the ability to expand the distribution of one's art to, and to receive compensation from, thousands or millions of people. The threat, however, is that the same or related technologies also facilitate unauthorized copying. If creators don't have a means of limiting unauthorized copying, the distribution and use of their works can take place without their control and without compensation.

Before copyright came to be recognized as an individual right, first at common law and later by statute,[2] printers formed guilds that lobbied for and were granted monopolies over the reproduction of individual works.[3] This did limit the extent of

---

[2] *See, e.g.,* RICHARD ROGERS BOWKER, COPYRIGHT, ITS HISTORY AND ITS LAW, ¶¶ 24-34 (1912).

[3] *See, e.g., Id. at* ¶¶ 10-14 (Discussing, for example, early Venetian grants of privilege to reproduce printed works that resulted from prominent citizens appealing to local lords).

unauthorized copying, but it also put the power firmly in the hands of the printers (rather than the authors) who became virtual monopsony purchasers of manuscripts.[4]

Modern copyright democratized publishing by putting far more power in the hands of authors.[5] But authors still faced challenges monitoring and enforcing their copyrights. In the absence of the long-gone, politicized entitlement to control distribution, publishing companies developed a business model to solve this transaction cost problem: they offered to by licensing copyrighted material from authors and, leveraging their own economies of scale, to monitor and challenge illegal reproductions and uses of works.[6]

But early copyright was limited only to written works. As technology and the consumption of creative works evolved, this led to new challenges for artists due to uncertainty over the applicability of copyright to new forms of reproduction—much of which came to a head with the popularization of the player piano.[7] Widespread reproduction of musical works was now no longer just a matter of print copying, and the question arose whether the piano rolls used to generate music infringed the copyrights of composers—and the publishers who had licensed their works.

Music publishers had scale relative to composers, but not enough to counter the threat posed by the immensely popular player piano. But, beginning in 1902, another intermediary with the ability and with its own competitive incentives offered another business model innovation to rectify the problem. The company was the player piano manufacturer, Aeolian, which agreed to fund litigation to challenge judicial decisions holding that the 1870 copyright law did not cover such "mechanical reproductions"—by suing *other*, competing, unlicensed player piano manufacturers.[8]

In exchange, Aeolian received exclusive rights to produce mechanical reproductions of (a disputed share of) the publishers' compositions, for which it would pay royalties

---

[4] *See, e.g., Id.* at ¶¶ 21-22 (Noting how certain printers retained the right to exclusively print certain classes of material, such as almanacs, prayer books, and copies of the Bible).

[5] *See, e.g.,* MARK ROSE, AUTHORS AND OWNERS, THE INVENTION OF COPYRIGHT, 35-36 (1993) (Noting how early advocates of statutory copyright law saw it as an opportunity to shift power into the hands of authors).

[6] *See* Christian Handke, *The Economics of Collective Copyright Management* at 2 (2013), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2256178.

[7] *See,* Zvi S. Rosen, *Common-Law Copyright*, 85 U. CINCINNATI L. REV. 1055, 1078, ff. (2018). *See also* Lydia Pallas Loren, *supra* note 1, at 679–80.

[8] *See* Howard B. Abrams, *Copyright's First Compulsory License*, 26 SANTA CLARA COMPUTER & HIGH TECH. L.J. 215, 219–20 (2010).

going forward if the suit was successful, but also an agreement that it "would not be liable for any infringement up to the date of such a decision."[9] Significantly, the contracts did not apply to the use of compositions in sound recordings, which, of course, soon enough came to dramatically eclipse piano rolls in significance.

The result was multifaceted. First, the litigation strategy failed to forestall the regnant judicial interpretation of the copyright law, ultimately yielding an infamous Supreme Court decision holding that unlicensed piano rolls did *not* violate composers' copyrights.[10] As the Court seemed to lament in its decision, the result "enables the manufacturers thereof to enjoy the use of musical compositions for which they pay no value."[11] But, the Court noted, such concerns were properly the province of the legislature, not the Court.[12]

Second, this, in turn, led to an anomalous situation in which composers could control who produced *printed* copies of their music, but were unable to limit the most popular means of *mechanically* reproducing that music. To rectify this anomaly, Congress enacted the Copyright Act of 1909, which extended copyright protection for musical works to mechanical reproductions such as piano rolls.[13]

But, third (and whether appropriately or not[14]), those earlier exclusive deals aroused competition concerns in Congress. Thus, the 1909 Act also created a compulsory license that enabled any player piano manufacturer to produce rolls derived from any published music on payment of a government-set fee.[15] To this day, cover songs are licensed in the shadow of, and sometimes (and increasingly) simply subject to, this compulsory license.[16]

---

[9] *Id.* at note 143.

[10] White-Smith Music Pub. Co. v. Apollo Co., 209 U.S. 1 (1908).

[11] *Id.* at 18.

[12] *Id.*

[13] Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (1909), *repealed by* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976). *See* Peter DiCola & Matthew Sag, *An Information-Gathering Approach to Copyright Policy*, 34 CARDOZO L. REV. 173, 198-200 (2012); Timothy Wu, *Copyright's Communications Policy*, 103 MICH L. REV. 278, 303-304 (2004).

[14] *See* Rosen, *supra* note 7, at note 143 & pp. 1081-82.

[15] Copyright Act of 1909, *supra* note 13, at ch. 320.

[16] *See* 17 U.S.C. § 115 (2012). *See also* John Baldrica, *Cover Songs and Donkey Kong: The Rationale Behind Compulsory Licensing of Musical Compositions Can Inform A Fairer Treatment of User-Modified Videogames*, 11 N.C. J. L. & TECH. 103, 104–06 (2009).

The result of this particular competition-protection device was to alter the relative bargaining power of rightsholders (and policy-makers) and to complicate copyright by further driving a wedge between reproduction rights and performance rights. The effort to protect against the monopolization of the piano roll market by means of a compulsory license employs a mechanism that works by dramatically lessening the transaction costs of reproducing musical works. Thus, among other things, it shifts bargaining power and control over the terms on which copies are made and over the level of remuneration *further* away from songwriters and composers and vests them in Congress (which set the fee, initially, at 2 cents per roll).[17]

But no such compulsory license was extended to the public performance of musical works. Yet, monitoring and enforcing performance rights remained a challenge for individual composers and music publishers who wished to assert control over public performances of their works. So, in 1914, a group of composers and publishers, most of whom were based in New York's Tin Pan Alley, established the American Society for Composers, Authors and Publishers (ASCAP)—the first American Performing Rights Organization (PRO)—in order to collect royalties on behalf of copyright holders, including those related to performances made under the compulsory license.[18]

Even though ASCAP was clearly aimed at lowering costs and increasing output by facilitating otherwise unwieldy contracting,[19] the nonstandard arrangement it embodied was unacceptable to the antitrust enforcers of the era, and not long after it was created, the Department of Justice began investigating ASCAP for potential antitrust violations.[20]

---

[17] Howard B. Abrams, *supra*, note 8 at 215.

[18] E.C. Mills, *What is ASCAP?*, 3 COPYRIGHT L. SYMP. 385 (1939).

[19] *See* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 4-5 (1979) [hereinafter "*BMI*"]:

> Since 1897, the copyright laws have vested in the owner of a copyrighted musical composition the exclusive right to perform the work publicly for profit, but the legal right is not self-enforcing. In 1914, Victor Herbert and a handful of other composers organized ASCAP because those who performed copyrighted music for profit were so numerous and widespread, and most performances so fleeting, that, as a practical matter, it was impossible for the many individual copyright owners to negotiate with and license the users and to detect unauthorized uses.

[20] Department of Justice, Statement of the Department of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees at 2, Aug. 14, 2016, *available at* https://www.justice.gov/atr/file/882101/download. *See also* Geoffrey A. Manne and Kristian Stout, *The Evolution of Antitrust Doctrine After* Ohio v. American Express, *and the* Apple v. Pepper *Decision that Should Have Been*, Nebraska Law Review, forthcoming, 7-11 (May 24, 2019), *available at*

Meanwhile, in order to close out this background, it must be noted (although it will become relevant only later) that although composers have had a right to control the reproduction and public performances of their musical works since the 19th century, *performers* of (or other copyright holders in) sound recordings had no federal copyright protection from unauthorized reproduction until 1971 (although with important limitations on that protection), and no protection from unauthorized *digital* public performance of their recordings until 1995 (again with significant limitations). There is still no federal right to non-digital public performance of sound recordings.[21] This additional incongruity represents yet another of the inordinate complexities of the music licensing regime—and one that, as we discuss below, is of particular relevance to a complete understanding of the competitive effects of the consent decrees (and their termination).

B. The *BMI* decision, the consent decrees, and the blanket license

While, as noted, the agglomeration of rights under a single entity had obvious theoretical benefits for licensors of musical works, a power struggle nevertheless emerged between ASCAP and radio broadcasters over the terms of those licenses. Eventually this struggle led to the formation of a new PRO, the broadcaster-backed BMI, in 1939.[22] The following year, the DOJ challenged the activities of both PROs in dual criminal antitrust proceedings.[23] The eventual result, of course, was a set of

---

https://ssrn.com/abstract=3393873 (discussing the role of nonstandard contracting in the development of antitrust doctrine).

[21] *See, e.g.,* Kevin J. Hickey, *The Music Modernization Act: Extending Copyright Protection to Pre-1972 Sound Recordings,* CRS Legal Sidebar LSB10181 3, 1 (Oct. 15, 2018):

> In 1995, Congress granted a limited performance right in sound recordings, but only to public performances by "means of a digital audio transmission." After this change, digital radio stations and streaming services were generally required to pay royalties to performers for post-1972 sound recordings. However, others, such terrestrial radio and cafes, still need only pay the songwriter, and pre-1972 sound recordings lacked any federal copyright protection at all.

And *id.* at 1:

> Title II of the MMA . . . extends copyright protection to pre-1972 sounds recordings on essentially the same terms as post-1972 sound recordings. Specifically, anyone who engages in "covered activity" with respect to a pre-1972 sound recording is liable "to the same extent as an infringer of copyright."

[22] *BMI*, supra note 19, at 5.

[23] *Id.* at 10.

consent decrees in 1941 that, with relatively minor modifications over the years, still regulate the music industry.

In order to overcome the high costs incurred by broadcasters of negotiating and enforcing agreements with thousands of songwriters and publishers, ASCAP and BMI established the "blanket license"—a single license that allowed broadcasters and other music users to license all of the works managed by BMI at a single price.[24]

And yet, again despite the transaction cost benefits of one-stop shopping, broadcasters eventually became unhappy with BMI's licensing practices and rates, as well. That unhappiness eventually led to CBS's antitrust challenge of the PRO.

Ironically, however, it was the blanket license itself—the most obviously cost-saving aspect of the PROs— that was the basis for the suit.

> CBS argued that ASCAP and BMI are unlawful monopolies, and that the blanket license is illegal price-fixing, an unlawful tying arrangement, a concerted refusal to deal, and a misuse of copyrights. The District Court . . . ruled that the practice did not fall within the per se rule . . . [and] dismissed the complaint, rejecting again the claim that the blanket license was price-fixing and a per se violation of § 1 of the Sherman Act, and holding that, since direct negotiation with individual copyright owners is available and feasible, there is no undue restraint of trade, illegal tying, misuse of copyrights, or monopolization.
>
> . . . [T]he Court of Appeals held that the blanket license issued to television networks was a form of price-fixing illegal per se under the Sherman Act.[25]

But the Supreme Court in 1979 found that such licenses—while technically amounting to price fixing—are lawful. Importantly, the first basis offered by the Court for this conclusion is copyright law:

> In the first place, the line of commerce allegedly being restrained, the performing rights to copyrighted music, exists at all only because of the copyright laws. Those who would use copyrighted music in public performances must secure consent from the copyright owner or be liable at least for the statutory damages for each infringement and, if the conduct is willful and for the purpose of financial gain, to criminal penalties . . . . Although the copyright laws confer no rights on copyright

---

[24] *Id.* at 5.

[25] *Id.* at 6 (citations omitted).

> owners to fix prices among themselves or otherwise to violate the antitrust laws, we would not expect that any market arrangements reasonably necessary to effectuate the rights that are granted would be deemed a per se violation of the Sherman Act. Otherwise, the commerce anticipated by the Copyright Act and protected against restraint by the Sherman Act would not exist at all, or would exist only as a pale reminder of what Congress envisioned.[26]

Although the Court does not directly draw the connection, an important implication of this realization is that a considerable share of the monopoly power exercised by the PROs is derived from the underlying copyrights they license. That the copyrights are licensed collectively and with a blanket license may have some effect (for some users) of exacerbating the power the PROs exercise, but, fundamentally, and especially for users like radio and tv broadcasters that would tend to have extremely broad, if not fully extensive, licensing needs, the PROs' basic bargaining power is a function of the underlying rights, not their combination. As such, the effort by broadcasters to try to realize lower licensing costs by attacking the (manifestly cost-reducing) PROs appears pretextual. The aim was simply to shift bargaining power by altering the institutional environment in which licensing took place. And, ironically, the lowering of costs by collective licensing provided them a colorable justification to try to shift more of those reduced costs to themselves via antitrust law.

A second point to draw attention to is the Court's recognition that part of the impetus for the litigation and its timing was the exogenous changed circumstances of the broadcasters who were the PROs' largest customers:

> With the advent of radio and television networks, market conditions changed, and the necessity for and advantages of a blanket license for those users may be far less obvious than is the case when the potential users are individual television or radio stations, or the thousands of other individuals and organizations performing copyrighted compositions in public. But even for television network licenses, ASCAP reduces costs absolutely by creating a blanket license that is sold only a few, instead of thousands, of times, and that obviates the need for closely monitoring the networks to see that they do not use more than they pay for.[27]

Third, without using the language of two-sided markets, the Court essentially understands the PROs as intermediaries that facilitate transactions between two

---

[26] *Id.* at 18-19.

[27] *Id.* at 21.

distinct groups of users. Anticipating Ohio v. Amex by 40 years, the Court makes clear that the benefits offered to users on the other side of the "platform" must be considered and can (and in this case, do) justify the adoption of seemingly anticompetitive restraints and the imposition of costs on users on the other side:

> ASCAP also provides the necessary resources for blanket sales and enforcement, resources unavailable to the vast majority of composers and publishing houses. Moreover, a bulk license of some type is a necessary consequence of the integration necessary to achieve these efficiencies, and a necessary consequence of an aggregate license is that its price must be established.[28]

Finally, contrary to some claims, although relevant to its analysis, it is clear that the Court did not rest primarily on the existence of the constraints of the consent orders in reaching its decision. Rather the consent decrees are offered as a final, secondary argument in the alternative: "***Moreover***, the substantial restraints placed on ASCAP and its members by the consent decree ***must not be ignored***."[29]

C. The failure of past DOJ attempts to modify the consent decrees

The consent decrees have been modified periodically, most recently in 1994 for BMI's and 2001 for ASCAP's.[30] Thus, both PROs are currently subject to consent decree language established before the emergence of widespread downloading and streaming of music.

The emergence of new ways to distribute music has, perhaps unsurprisingly, resulted in renewed interest from artists in developing alternative ways to license their material. In 2014, BMI and ASCAP asked the DOJ to modify their consent decrees to permit music publishers partially to withdraw from the PROs, which would have enabled those partially-withdrawing publishers to license their works to digital services under separate agreements (and prohibited the PROs from licensing their

---

[28] *Id.*

[29] *Id.* at 24 (emphasis added).

[30] U.S. v. BMI, Final Judgement, 64 Civ 3787, 11/18/1994; U.S. v. ASCAP, Second Amended Final Judgement, Civ Action No. 41-1395, 6/11/2001.

works to those same services). However, the DOJ rejected this request and insisted that the consent decree requires "full-work" licenses. [31]

This decision by the DOJ went beyond rejecting the PRO's request; it sought to impose a blanket restriction on fractional licensing. This would have had the effect of making it difficult if not impossible for two artists belonging to different PROs to collaborate on writing a song. And it would have caused great complications for the licensing of repertory works written by multiple authors with affiliations to different PROs. This absurd outcome was prevented when the District Court for the Southern District of New York found in favor of BMI, which had objected to the proposed reform.[32]

This episode demonstrates a critical flaw in how the consent decrees currently operate. Imposing full-work license obligations on PROs would have short-circuited what functional market currently exists, either to the detriment of creators or competition among PROs — a harm that flows directly from a top-down regulatory presumption that enforcers can dictate market terms better than participants working together.

If a PRO wants to offer full-work licenses to its licensee-customers, it should be free to do so (including, e.g., by contracting with other PROs in cases where the PRO in question does not own the work outright). These could be a great boon to licensees and the market. But such an innovation would flow from a feedback mechanism in the market, and would be subject to that same feedback mechanism.

However, for the DOJ as a regulatory overseer to intervene in the market and assert a preference that it deemed superior (but that was clearly not the result of market demand, or subject to market discipline) is fraught with difficulty. And this is the emblematic problem with the consent decrees and the mandated licensing regimes. It allows regulators to imagine that they have both the knowledge and expertise to manage highly complicated markets. But, as Mark Lemley has observed, "[g]one are the days when there was any serious debate about the superiority of a market-based economy over any of its traditional alternatives, from feudalism to communism."[33]

---

[31] US Department of Justice, Statement of the Department of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees, 8/4/2016, *available at* https://www.justice.gov/atr/file/882101/download.

[32] United States v. Broad. Music, Inc., 207 F. Supp. 3d 374, 377 (S.D.N.Y. 2016), *aff'd*, 720 F. App'x 14 (2d Cir. 2017).

[33] Mark A. Lemley, *Faith-Based Intellectual Property*, 62 UCLA L. Rev. 1328, 1330 (2015).

It is no knock against the DOJ that it patently does not have either the knowledge or expertise to manage these markets: no one does. That's the entire point of having markets, in that they are mechanisms for collecting and transmitting vast amounts of information for relatively effective management. When regulators can allow this process to work, they should.

II. The economic realities strongly counsel in favor of terminating the consent decrees

The DOJ is confronted with a great opportunity to use modern technology to unleash market discipline on an industry laboring under artificial monopoly power and its partner in crime: regulation.

Rather than impose further restrictions on the PROs, it seems clear that the welfare of both artists and consumers would be best served by terminating the consent decrees. We hasten to add that this is not, of course, without its own complications, which we discuss below.

A. A needlessly complex legal and regulatory environment

The licensing environment in which the consent decrees operate is uniquely—but not justifiably—burdened by a veritable morass of outdated and questionable governance institutions. The depredations of this calcified and unnatural market are well known—most importantly, the combined overhangs of: (1) the complexity of copyright law's bifurcated (between composition and sound recording and between reproduction and performance rights) music copyrights regime; (2) the player-piano-inspired compulsory composition licenses and the Pandora-inspired digital public performance right and compulsory license; and (3) the price-fixing side effect of blanket licenses. These shackle the ability of artists to control the terms under which they license their works and thus, in turn, their ability to structure the contracts governing the joint production of their works. "This lack of control has led to a market imbalance that is threatening the sustainability of music creation and distribution. It also singles out songwriters and musicians from other copyright owners by not letting them control the dissemination of their works."[34]

---

[34] Aloe Blacc, Irina D. Manta & David S. Olson, *A Sustainable Music Industry for the 21st Century*, 101 CORNELL L. REV. ONLINE 39, 45 (2016).

It is, of course, not within the purview of the Antitrust Division to rectify the problems borne of copyright legislation. And with the Music Modernization Act (MMA) Congress is indeed—if slowly—working to correct some of the problems caused by the morass of current music copyright law. But it is not only Congress that controls the problematic music licensing environment. And it is difficult to imagine its sensible rationalization without all relevant players recognizing that music copyright exceptionalism is unjustified:

> [I]t is time for Congress, the DOJ, and collecting organizations to withdraw and let the market determine the future landscape of the music industry. ***There was never a good economic reason to treat music copyrights differently from other copyrights. And with the current state of technology and innovation, there is probably no longer a need for the blanket licenses that fix prices for all songs***. Now that computerized, networked systems can be built to license, distribute, and collect payments for music copyrights, the blanket license system is most likely no longer necessary or beneficial for artists and consumers.[35]

When the modern recording industry was forming, it may well have been difficult for music users and rights holders to find each other and enter into licensing arrangements, or for small rights holders to police infringement. These high transaction costs led small creators to depend on music publishers and, later, PROs to license and protect their works. They also led to the use of the blanket license (and the creation by Congress of compulsory mechanical licenses in 1909). But, as the Court noted in *BMI* 40 years ago: Changing circumstances change the calculation of costs and benefits.[36] Sensible regulation demands that those changed circumstances lead to changes in regulation, as well.

B. Changed circumstances

While, as we have discussed, the copyright legal environment for music licensing is itself dysfunctional (including because of the antiquated compulsory licenses), the problems are compounded by the system of blanket licenses that grew up pre-Internet and in a time of significant transaction costs. The technology and the extent of the transaction costs are assuredly completely different now and can no longer support either compulsory or blanket licenses.

---

[35] Aloe Blacc, et al., *supra* note 34, at 46 (emphasis added).

[36] *See* note 27, *supra*, and accompanying text (quoting the Supreme Court's discussion of changed circumstances in *BMI*).

Today, "[t]otal digital revenues account for nearly 80 percent of the recorded music market in the U.S., of which 95 percent is from [just eight] companies."[37] Out of these, just three companies—Spotify (36%), Apple (19%), and Amazon (12%)—have over two-thirds of the (global) market.[38] Meanwhile, streaming now accounts for close to (and will soon surpass) 50% of global industry revenue, and 60% of record industry revenue in the U.S.[39] By another, broader measure, streaming now accounts for 75% of U.S. record industry revenue.[40]

Meanwhile, in terms of transaction costs, the Internet and platform companies have transformed the way consumers communicate and interact with music, but also the way businesses transact. In every possible way transaction costs have gone down.

The world of today is much different than that of a century ago. New technologies make what was impossible in the past now merely a challenge. We have the capability to store and rapidly process the large amounts of data necessary to track music users. Innovators like the MIT Media Lab are developing ways to use blockchain technology accurately to identify music rights holders.[41] Database technology, like that used by SoundExchange, has assembled records that track important things like sound recording usage and works for which rights holders need to be identified.[42] And applications have been developed to scan portions of the internet and identify unauthorized uses of protected works.[43] Today it is perfectly plausible to

---

[37] DIMA - DIGITAL MEDIA ASSOCIATION, ANNUAL MUSIC REPORT (Mar. 2018), *available at* https://dima.org/wp-content/uploads/2018/04/DiMA-Streaming-Forward-Report.pdf.

[38] *See* Mark Mulligan, *Mid-Year 2018 Streaming Market Shares*, MIDIA MUSIC INDUSTRY BLOG (Sep. 13, 2018), https://musicindustryblog.wordpress.com/2018/09/13/mid-year-2018-streaming-market-shares/.

[39] IFPI, GLOBAL MUSIC REPORT 2019: STATE OF THE INDUSTRY (Apr. 2, 2019) at 13, 17 *available at* https://www.ifpi.org/news/IFPI-GLOBAL-MUSIC-REPORT-2019..

[40] RIAA, MID-YEAR 2018 MUSIC REVENUES REPORT (Sep. 2018) at 2, *available at* https://www.riaa.com/wp-content/uploads/2018/09/RIAA-Mid-Year-2018-Revenue-Report.pdf.

[41] For example, Walmart is using Hyperledger Fabric, a blockchain based system developed with IBM to track a range of fresh produce, Including all leafy greens. *See* https://corporate.walmart.com/newsroom/2018/09/24/in-wake-of-romaine-e-coli-scare-walmart-deploys-blockchain-to-track-leafy-greens and https://www.hyperledger.org/resources/publications/walmart-case-study. Meanwhile, the Blockchain In Trucking Alliance, which accounts for about 85% of trucking transactions in the U.S., is developing and applying blockchain applications to reduce transactions costs in logistics. *See* https://www.winnesota.com/blockchain.

[42] SoundExchange has arrangements with over 3,000 webcasters, as well as satellite and cable TV stations and satellite radio broadcasters, from which it collects royalties and distributes them to artists (currently over 190,000 artists are registered with the organization). *See* https://www.soundexchange.com/.

[43] *See, e.g.*, Audible Magic, *available at* https://www.audiblemagic.com/ (last visited Aug. 9, 2019).

> [i]magine an iTunes- or Spotify-type interface through which music programmers could look up songs and specific prices for various uses. Or songs could be searched by price, among other features. Commercial music purchasers may select songs and know individual prices with virtually the same ease that they currently enjoy in making their programming selections. This would allow for much more variety of music use and distribution than we currently have. Members of the industry are very interested in building transformative business models for delivering music.[44]

C. The current, outdated regime imposes very real costs, especially on songwriters

Consider what the consequences of this regime might be. To take one example, our current, top-40-driven music ecosystem is plausibly a direct result of (at least in part) the governance of music licensing. If blanket licenses didn't exist, songwriters could try to get their music played and used on broadcasts by competing on price. As it is, however, when all the songs in the ASCAP catalog cost the same, (and, for that matter, entail a marginal price of zero[45]), programmers' incentive is to play only the most popular songs (with some variation for genre, and the like). Under this state of affairs, broadcast networks and investors benefit because it reduces risk and helps ensure advertising revenue. Large record labels benefit, of course, because they can focus their investments on finding and building up a relatively smaller number of superstars. The media benefits because they can exploit celebrities to sell both news and advertising. And so on. But the vast majority of songwriters and performers who don't win the superstar lottery are significantly harmed, as are a huge number of consumers with "long-tail" preferences.

If less well-known songs could be licensed at lower (or even, a la payola, negative) cost, it seems likely that the result would be greater diversity in the recording and performance of songs.

---

[44] Aloe Blacc, et al, *supra* note 34, at 48.

[45] *See id.* at 43-44 ("The blanket licenses inherently fix song prices because when an entity buys a blanket license for a set fee per month, it can use any song in the collecting organizations' catalogs. The marginal cost of each song is zero once a blanket license is purchased. Thus, there is no difference in price whether songs are good or bad, popular or unpopular").

In fact, the payola analogy is instructive. Terrestrial radio reaches 92% of U.S. adults each week, and it is the most commonly cited source of music discovery.[46] Yet the effect of radio on the industry's competitive dynamics is complex. Most notably, while terrestrial radio broadcasters do not pay performers, record labels or other sound recording copyright owners to perform their recordings, they do pay songwriters and publishers for the right to perform their compositions. But, as noted, most songwriters can't effectively reduce the cost of licensing their works from a PRO in order to induce more airplay. As is well-known, certain *record labels* have often attempted to pay *broadcasters* to play their recordings, however. The most likely conclusion to draw from the practice of payola, however, is not that radio play offers the recording industry as a whole net benefit from "free" promotion; rather, certain record labels—and typically smaller, independent record labels—may benefit (and thus may be willing to pay for the privilege), while larger labels and the industry overall do not, on balance, benefit.[47] Obviously, the potential for less well-known and independent songwriters to benefit from the analogous practice is possible—but impossible in the current, static regime.

Or consider the influence of the current regime on the relationship between songwriters and streaming services. Although they can take advantage of the compulsory mechanical license, streaming services must license the performance rights of composition copyright holders. In theory this might rebalance some of the bargaining power back toward songwriters. But because of the blanket licenses—which rates are set by a government authority if the parties can't otherwise agree—the economic reality is that the law forces musical work copyright holders to license their work to PROs.

When some PROs allowed their members to opt not to allow their compositions to be licensed for streaming services, Pandora sued and won lawsuits in which the courts interpreted the consent decrees to prohibit PROs from exempting streaming services from blanket licensing.[48] In practical effect the result is that songwriters who have

---

[46] *See The Steady Reach of Radio: Winning Consumer Attention*, NIELSEN (Jun. 17, 2019), https://www.nielsen.com/us/en/insights/article/2019/the-steady-reach-of-radio-winning-consumers-attention/.

[47] *See* Ronald H. Coase, *Payola in Radio and Television Broadcasting*, 22 J.L. & ECON. 269 (1979); Stan J. Leibowitz, *The Elusive Symbiosis: The Impact of Radio on the Record Industry*, 1 REV. ECON. RESEARCH COPYRIGHT ISSUES 93, 117 (2004).

[48] *See* In re Pandora Media, Inc., 2013 WL 5211927, at *5 - *7 (S.D.N.Y. Sept. 17, 2013), *aff'd sub nom.* Pandora Media, Inc. v. Am. Soc. of Composers, Authors & Publishers, 785 F.3d 73 (2d Cir. 2015); Broad. Music, Inc. v. Pandora Media, Inc., 2013 WL 6697788, at *3–4 (S.D.N.Y. Dec. 19, 2013).

licensed to a PRO in order to collect performance royalties cannot stop a service from streaming their work *either* by means of the composition or performance right. (Taylor Swift was somewhat uniquely able to improve her bargaining position with streaming services because, as the performer as well as songwriter, she was able to refuse to license the sound recording (which is not subject to compulsory license).

Surely not coincidentally there is evidence that the decrease in album sales and digital downloads due to the shift of music consumption to streaming services is having a disastrous effect on songwriters (especially non-performing songwriters).[49]

Whatever the benefits of the status quo regime (and, of course, there are some), the constraints of the consent decrees impose costs by restricting certain conduct (such as certain joint production contracts among songwriters under the DOJ's contention that fractional licensing was impermissible (until the DOJ's position was rejected by the court in 2017)). Changing circumstances undoubtedly not only reduce some of the benefits of the PRO/blanket license regime supported by the consent decrees, but also make some of those constraints more problematic. As Assistant Attorney General Makan Delrahim aptly noted during the Antitrust Division's roundtable discussion on consent decrees last year:

> And that's one of the dangers of these types of decrees where there is a dispute resolution mechanism, whether it's a rate court or a judge like in Southern District in New York that seems to be the price regulator, for lack of a better word, but probably more accurately the price regulator. And the discussion for inefficiency to have that would be just have compulsory license. Congress just does that, which is a horrible idea I think in general because we should not be for that. We actually should encourage greater creativity, whether by songwriters or innovators, inventors, to allow that. And then allow them to have the free market right to set the prices to recoup for that creation. I think that would be probably a more appropriate way, under the constitutional framework we have.
>
> If Lady Gaga wants to hold out to get you know $0.10 per play, but my song the market doesn't care to give me a fraction of a penny, that should be her right to be able to do that even though that might be inconvenient

[49] *See, e.g.,* Nate Rau, *Nashville's Musical Middle Class Collapses*, THE TENNESSEAN (Jan. 13, 2015) (noting that industry trends have led to "the collapse of Nashville's music middle class"). *See also* U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE 69, ff. (Feb. 2015).

> for a new service that ultimately gets her to the consumer. But that's where the market really plays.
>
> And then if we have a system in place that is in effect a compulsory license mechanism, it is probably not the most market enhancing or innovation enhancing system. Now if Congress wanted to come in—they certainly have done that in multiple areas where they have compulsory licenses—that's their judgment. That's one thing.
>
> But I don't know if it is a valid exercise of the Antitrust Division's authority to impose such a scheme absent direct congressional authority to do so.[50]

At the same time, there is a tendency by some (especially in antitrust circles) to assume that the consent decrees are doing *all* the work to define not only the contours of the market, but the scope of PRO licensing governance and its consequences:

> The issue is that in the absence of a consent decree and in the absence of any kind of oversight, we have seen examples of anticompetitive behavior that the PROs have engaged in . . . . But because of this tendency towards collective negotiation and blanket licensing, which is fundamentally an efficiency for all players involved really, it does raise certain behavioral incentives for these groups to collude or to boycott or to attend things like partial withdrawal where they said despite the fact that we were required to treat all comers equally, we would like to be able to discriminate based on technology. And so these kinds of things naturally arise.[51]

But as important as they are, there is little reason to believe that they are solely responsible for the structure of the market, nor, by the same token, that the effect of removing them can be predicted to be the dysfunctional obverse of the functional status quo. Indeed, it has to be noted—and was noted by AAG Delrahim, but seemingly missed by most everyone else—that the consent decrees do not operate to preclude antitrust enforcement: "[A]s Judge Cote said, look, if you guys think that there's antitrust violations, there's nothing in these consent decrees rather than creative interpretations to [preclude] bring[ing] yet another case for anticompetitive

---

[50] DOJ Antitrust Division, Public Roundtable Discussion Series on Regulation & Antitrust Law, Session Two: Antitrust Consent Decrees, 26 (Apr. 26, 2018), *available at* https://www.justice.gov/atr/roundtable-antitrust-consent-decrees-thursday-april-26-2018.

[51] Remarks of Meredith Rose, Public Roundtable Discussion on Antitrust Consent Decrees, *id.* at 26.

harm. That's always available and that's the proper exercise of the authority."[52] The basis for this claim is, of course, found in the Court's *BMI* decision itself: "[A] consent judgment, even one entered at the behest of the Antitrust Division, does not immunize the defendant from liability for actions, including those contemplated by the decree, that violate the rights of nonparties."[53]

D. New technologies have changed the economics of music licensing

It is also frequently assumed that the blanket license is somehow optimal, and that if terminating the consent decrees means blanket licenses are no longer tenable because the anticompetitive conduct around them negates their benefits we should not terminate the decrees. But while the blanket license with the consent decree restrictions was pretty obviously a benefit in 1941, it is not clear today that the *net* benefit of blanket license plus restraints on the market from the consent decrees is preferable to the absence of both. Thus, when critics of revisiting or terminating the decrees warn about anticompetitive harm incident to blanket licenses and the PROs, they are committing a sort of fallacy. The relevant alternative to the status quo need not arise in a world with PROs and blanket licenses as we know them, and thus need not encompass risk of anticompetitive harm from their operation without the consent decrees.

In fact, this is precisely the point: the prospective gains from terminating the decrees arise from the possibility that, unfettered, the market will adopt more innovative and beneficial alternatives. A side benefit, then, is that these alternatives may not even implicate antitrust harm.

III. As much as the consent decrees should be terminated, they should not be terminated hastily or without deliberation

There is every reason to terminate the consent decrees. But we must be cautious. Past regulation has indelibly and deeply influenced the structure of the industry and the expectations of the players and consumers. At the same, decades of compulsory and blanket licenses and consent decree constraints have ensured that the current

---

[52] Remarks of Makan Delrahim, Second Roundtable on Consent Decrees, *supra* note 50, at 26 (alterations added for clarity).

[53] *BMI*, *supra* note 19, at 13.

marketplace does not enable true competition among songwriters and has moved relative bargaining powers among all players enormously out of whack.

If the decrees were simply terminated there is a reasonable chance that the demands for continuity would enable the artificially favored interests under the current regime to maintain their status under a new regime for a considerable length of time. And the possibility that those players could (intentionally or not) adopt practices that impose short-term costs on other firms, individuals, and consumers (even possibly through anticompetitive conduct), could impel Congress to adopt even greater regulation, sealing the music industry's fate (or, more accurately, that of its consumers) as a regulated monopoly. This suggests the need for a "staged" deregulation.

Diana Moss got right to the heart of the argument for a deliberate process at the DOJ roundtable: "So long story short, it was a very, very stepwise careful process to consider a wholesale change in the landscape of an industry to open it to deregulation. I think there's a useful analogy here in the case of these long-term perpetual decrees."[54] The fact that we believe the consent decrees should go does not mean they should go immediately or impetuously. Rather, it is surely the case that, paradoxically, the more pernicious a longstanding consent decree's effect on a market, the more care is required to extricate it from the market.

A. The benefits of a deliberate process

First, in our estimation, the DOJ should use the opportunity of announcing the termination of the consent decrees to emphatically embrace the deregulatory intent behind the move. It should make clear that its intention is to promote a competitive and free market, which cannot exist without true price competition and the innovation that removal of the consent decrees will enable. And it should reinforce this objective and the importance of the industry embracing the deregulatory and procompetitive ethos for the duration of the transition.

Second, after the industry is put on notice, but before the deregulation takes effect, the industry and entrepreneurs should be encouraged to establish new music rights marketplaces (although it's not so much the encouragement they need as it is the time). There are a number of forms this could take, and, in fact, it may be that there a number of different potential solutions for different use cases. Lack of foreknowledge about what particular business models and technologies will emerge

---

[54] Remarks of Diana Moss, Public Roundtable Discussion on Antitrust Decrees, *supra* note 51, at 27.

is in no way a mark against the termination of the consent decrees and the reintroduction of more competitive markets. Indeed, it is the normal state of affairs in all free markets.

That said, there is likely to be some obvious application of modern technologies to the problem. Notably, the cost of data processing and storage has been reduced along a number of dimensions. As such, modern database technology—broadly understood[55]—will undoubtedly play an important role in reducing transaction costs in a pure (or purer) music licensing marketplace. Thus, it is likely that a variety of public and private data processing and storage experiments will be stood up as firms begin to work on managing the often very complicated licensing arrangements between rightsholders.

Finally, the DOJ should itself attempt to facilitate the transition by seeking continuing input into the dynamics of the emerging market, and by using its position to offer advice and an informed and public forum for the sharing of the knowledge it gleans before the consent decrees are officially terminated. It is important to recognize that competition authorities can be important forces in markets without direct regulation, micromanagement, or enforcement, but simply by bringing their expertise and authority to bear.

Importantly, freeing the market forces in licensing requires that that antitrust enforcers take care not to stifle procompetitive innovations before entrepreneurs have a chance to properly work through them and prove their pro- or anti-competitive effect on the market. Further, when new business models are tried, incumbents often attempt to use regulatory apparatuses to stifle upstart competitors, thus cutting off a potentially beneficial avenue of competition because the practice is poorly understood and, therefore, maligned. The DOJ should not provide the raw materials for that dynamic, nor curtail uncertain innovations before their effects are understood, by micromanaging the process.

---

[55] Database technology includes many modalities, including the familiar relational databases of MS Access, MySQL, and MS SQL Server, as well as developing technologies like blockchain, and NoSQL databases. Importantly, the cost of these cutting-edge technologies is rapidly falling and widely available through cloud-based systems. *See, e.g.*, Amazon DynamoDB, Amazon.com, https://aws.amazon.com/dynamodb/ (last visited Aug. 9, 2019) (Offering web-based access to scalable resources for a wide variety of uses and firm sizes); *see also* AWS Free Tier, Amazon.com, https://aws.amazon.com/free/ (last visited Aug. 9, 2010) (A large amount of computing and database resources offered at a free-tier level that could power many startups in this area).

B. Other entertainment industry consent decrees were lifted and the sky did not fall

The antitrust agencies' record with longstanding consent decrees is less than stellar. And most tellingly, several of the most prominent consent decree failures involve media markets—and media markets that, like this one, underwent significant change. For example, between 1948 and 1952, the DOJ issued a series of decrees (commonly known as the "Paramount Decrees") on the predominant movie studios of the day (Paramount, RKO, MGM, 20th Century Fox, and Warner Bros.). Among other things, the decrees required the studios to divest their movie theater holdings.[56] This led to a marked decrease in the quantity of content:

> [The most] noticeable trend is from 1950 to 1955, when output share from the seven majors, excluding United Artists, fell by nearly 30 percent. After 1951, the year by which all studios had spun off their theatre holdings, output of the major studios dropped significantly and rental rates rose accordingly. Although this reaction had beneficial results for the independent producers, the increase in rental prices severely worsened the plight of exhibitors [and consumers].[57]

Transaction costs explain this reduction in consumer welfare. As with the blanket license, vertical integration reduced both *ex ante* costs from negotiation and *ex post* costs from monitoring. As studios lost control over distribution, they "became more uncertain about revenues, [and] their discount rates went up . . . . Thus, transaction cost increases meant supply contracted, which led to market excess demand and rising rental rates."[58] Essentially, the studios could afford to produce only the most profitable content, thus curtailing the quantity of content produced.

But the Paramount Decrees went much further than this initial structural remedy. For decades, all manner of business decisions by the studios were subject to approval

---

[56] United States v. Paramount Pictures, Inc., 66 F. Supp. 323 (S.D.N.Y. 1946), 70 F. Supp. 53 (S.D.N.Y. 1947), *aff'd in part and rev'd in part*, 334 U.S. 131 (1948), *on remand*, 85 F. Supp. 881 (S.D.N.Y. 1949), aff'd, 339 U.S. 984 (1950).

[57] Gregory M. Silver, *Economic Effects of Vertical Disintegration: The American Motion Picture Industry, 1945 to 1955* 16-17 (London School of Economics Working Paper No. 149/10) (2010) ("This sharp drop in output illustrates one of the most interesting ironies of Paramount: that many of the typical characteristics of a restrained market became more apparent in the industrial organisation after divorcement than before it. M.A. Adelman, a prominent MIT economist of the 1950s stated that the signs of a controlled market 'are not size, or agreement, but restricted output, higher prices, and excess capacity.'").

[58] *Id.* at 19.

from the DOJ.[59] Given the significant changes in taste and technology over the period in question, such bureaucratic interference almost certainly hindered innovation and harmed consumers.

Consent decrees imposed on the three main broadcast TV networks in the 1970s had a similar effect. These decrees prohibited ABC, CBS and NBC from holding stakes in the programs they air or even profiting from reruns of those shows when sold to local TV stations.[60] These prohibitions had the effect of inhibiting competition between TV networks and movie studios, harming consumers. The decrees, as well as similar rules imposed by the FCC, were finally lifted in 1993.[61] As is well known, today's video markets are among the most successful, innovative, competitive, and well-liked by consumers.

IV. Existing antitrust law is sufficient to protect competition in the absence of the consent decrees

Existing antitrust law, both statutory and judicially created, evolved to become essentially neutral as to the particular industry in question when examining competition issues. So long as there is a functional market, the basic precepts of American competition law apply—regardless whether the good being supplied is a tire, an airline ticket, or a license to play a song.

And this, as we noted above, was the motivating factor in the DOJ permitting what would otherwise be seen as anticompetitive monopolies to dominate the market for music licensing. The transaction costs involved in thousands of publishers, composers, and artists dispersed across the United States negotiating with the tens of thousands of radio stations, tv broadcasters restaurants, bars and other establishments that would publicly perform music were nearly impossible to overcome in the era in which the decrees were crafted. Even as late as fifteen years ago, the ability to create reliable, publicly accessible databases of rights to content was only incipient.

Yet, as noted above, technology has rapidly developed, and the potential for a market in which a number of firms—and a number of technologies, including technologies likely to enable disintermediation—compete to represent songwriters in relatively

---

[59] See Barry J. Brett & Michael D. Friedman, *A Fresh Look at the Paramount Decrees*, 9 ENT. & SPORTS LAW 1 (1991).

[60] John Lippman, *Networks Can Own TV Shows Judge Rules*, LA TIMES (Nov. 4, 1993).

[61] *Id.* and United States v. National Broadcasting Co., 842 F. Supp. 402 (C.D.Cal.1993).

efficient licensing negotiations is today a real possibility. To be sure, there may yet be *some* further requirements of license pooling on the PRO model, but it is no longer clear what the optimal extent of such pooling is, nor the terms under which it should be offered. As such, consumer welfare will be improved if experimentation in new licensing models—including both pooling and direct licensing models—is permitted.

And, if such a market is permitted to exist, it will operate under the exact same legal and regulatory constraints as any other. Collusion among publishers, or anticompetitive behavior from monopolistic or monopsonistic firms that exercise market power in music licensing negotiations are fully cognizable harms under modern antitrust law. If a harm occurs, the DOJ and the FTC are fully capable of investigating, prosecuting and remedying the harm.

A. Should we be concerned about the PROs' current market dominance?

One commonly voiced concern about lifting the consent decrees is monopolization by ASCAP and BMI, which together currently control some 90% of the US music licensing market:

> It is clear the major publishers and largest PROs would coordinate to magnify their market power against licensees without the consent decrees. . . .
>
> By consolidating public performance rights for compositions across most songwriters and publishers, the PROs have raised significant competition concerns. Together the three PROs control almost all of the market for public performance rights. . . . And. . . the music publishing space is also significantly consolidated. The music publishing business is dominated by three companies[that] hold a combined three-firm market share of more than 65%. Similar to the major labels, the major publishers' market share gives them the incentive and ability to use their catalogs as leverage against new distribution services, especially those that threaten their existing business models.[62]

These concerns are overstated. To begin, the fundamental basis for the concern is the market share of the PROs (and publishers and labels in the music industry). But

---

[62] Comments of Public Knowledge Before the United States Department of Justice Antitrust Division 14-15 (Aug. 6, 2014), In the Matter of Antitrust Consent Decree Review, United States v. ASCAP, 41 Civ. 1395 (S.D.N.Y.) & United States v. BMI, 64 Civ. 3787 (S.D.N.Y.), *available at* https://www.publicknowledge.org/documents/public-knowledge-consent-decree-comments.

structural presumptions are a woefully inadequate basis for concluding that anticompetitive harm is likely.[63] As a former Antitrust Division Chief Economist and former FTC Chief Economist recently noted:

> In short, there is no well-defined 'causal effect of concentration on price,' but rather a set of hypotheses that can explain observed correlations of the joint outcomes of price, measured markups, market share, and concentration. . . .
>
> . . . Our own view, based on the well-established mainstream wisdom in the field of industrial organization for several decades, is that regressions of market outcomes on measures of industry structure like the Herfindahl-Hirschman Index should be given little weight in policy debates. Such correlations will not produce information about the causal estimates that policy demands.[64]

Indeed, the very fact that there are significant, large, and sophisticated players among the PROs, music labels, publishers *and* distributors[65] at every level of the industry suggests strongly that the market's competitive dynamics are not encapsulated by the existence of concentration among PROs or any other group of players.

This is only bolstered by the fact that these large players have unaligned or imperfectly aligned interests in the relevant licensing arrangements. Notably, for example, Martin Bandier, the CEO of Sony/ATV Music Publishing (holder of the largest music publishing catalogue in the world) wrote in a widely circulated memorandum in 2014:

> At current rates one million plays of a song on Pandora typically translates to only approximately $60 in royalties shared between the

---

[63] *See, e.g.*, Harold Demsetz, *The Intensity and Dimensionality of Competition*, in HAROLD DEMSETZ, THE ECONOMICS OF THE BUSINESS FIRM: SEVEN CRITICAL COMMENTARIES 137, 140-41 (1995) ("[I]t is presumptuous to conclude . . . that markets populated by fewer firms perform less well or offer competition that is less intense.").

[64] Steven Berry, Martin Gaynor, & Fiona Scott Morton, *Do Increasing Markups Matter? Lessons from Empirical Industrial Organization*, Working Paper (Jun. 2019) at 5-6, *available at* https://www.researchgate.net/publication/333966085.

[65] *See, e.g.,* DIMA ANNUAL MUSIC REPORT, *supra* note 37 ("Total digital revenues account for nearly 80 percent of the recorded music market in the U.S., of which 95 percent is from DiMA's [the Digital Media Association's] [eight] members."). Out of these, just three companies—Spotify (36%), Apple (19%), and Amazon (12%)—have over two-thirds of the (global) market. *See* Mulligan, *supra* note 38.

> songwriters and publishers. This is a totally unacceptable situation and one that cannot be allowed to continue.
>
> The royalty rates for songwriters on interactive streaming services such as Spotify are equally dissatisfying . . . .
>
> . . . We at Sony/ATV want these digital music services to be successful . . . . However, this success should not come at the expense of songwriters . . . . That is why I have made it my No. 1 priority to address this issue and ensure songwriters are fairly compensated for their work. I will not rest until the present system is reformed to allow this to happen.[66]

Of course, we do not know, and cannot know, for *certain* if the cost of reintroducing dynamism into a forced static arrangement around which technology and consumer behavior has utterly transformed will yield net benefits. But it's a pretty good bet. And if it the results are otherwise, as AAG Delrahim (and Judge Cote) point out, it is not the consent orders that preclude antitrust enforcement, nor would their absence prevent it, either.[67]

What we *do* know, however, is that the consent decrees impose constraints on innovation and experimentation, and preclude the operation of market forces and prices:

> [T]he PROs were a result of an information problem. And anybody paying attention might notice that the costs of information have dropped over the course of the last 50 years. The possibility of direct licensing, direct licensing is happening all over the music marketplace and all over the media marketplace. And so the one thing we know is that as long as those consent decrees are in place, we won't be able to experiment with alternatives.[68]

---

[66] Ed Christman, *Sony/ATV Chairman Blasts Payouts From Internet Radio*, BILLBOARD (Dec. 11, 2014), https://www.billboard.com/articles/6405565/sony-atv-chairman-pandorapayouts.

[67] Jon Jacobson argued that "because [in BMI] you have a Supreme Court decision that says the blanket licenses are efficient and not illegal per se, . . . if the Division were to just jettison the decree and sue BMI and ASCAP, . . . [t]here's no guarantee that you're going to get a better public policy outcome from a new case." Remarks of Jon Jacobson, Public Roundtable Discussion on Antitrust Decrees, *supra* note 51, at 27. While true (as is, generally, any statement beginning with "there's no guarantee" . . .), there's also no reason to think that the harmful conduct, if any, would arise from the blanket license rather than collusion or exclusion that would not be intrinsic to or ancillary to the blanket license. It is presumably this sort of theory to which Judge Cote was referring.

[68] Remarks of Jeffrey Eisenach, Public Roundtable Discussion on Antitrust Consent Decrees, *supra* note 51, at 27.

Finally, the extent of antitrust risk from terminating the consent decrees should not be presumed just because we cannot be certain that terminating the decrees is *without* antitrust risk. Indeed, the onus is properly on those who would maintain the decrees to demonstrate that they are preventing otherwise unavoidable harm. The market distortions created by maintaining a regulatory regime are not without costs, and the assumption that maintaining the status quo is a net positive should not simply be taken on faith. As Mark Lemley admonishes: "When you are spending a lot of time and money every year in a government sponsored departure from the free market, even maintaining the status quo ought to require some evidentiary support. And doubling down on that policy certainly should."[69]

Conclusion: The Times They Are a-Changin' / A Change is Gonna Come

We have argued that there are significant shortcomings with the current BMI and ASCAP consent decrees. They prohibit licensing schemes that are tailored to the business and technology realities of the twenty-first century. As a result, they harm both songwriters and consumers, without offering countervailing benefits to the competitive process. We thus strongly recommend that the DOJ terminate the consent decrees in an orderly manner, as described herein.

---

[69] Lemley, *Faith-Based Intellectual Property*, *supra* note 33, at 1335.