

12-12-2017

## "Waiting on the (Music) World to Change": Licensing in the Digital Age of Music

Gabriella A. Conte

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/blr>

---

### Recommended Citation

Gabriella A. Conte, *"Waiting on the (Music) World to Change": Licensing in the Digital Age of Music*, 83 Brook. L. Rev. (2017).  
Available at: <https://brooklynworks.brooklaw.edu/blr/vol83/iss1/19>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Law Review by an authorized editor of BrooklynWorks.

# “Waiting on the (Music) World to Change”<sup>1</sup>

## LICENSING IN THE DIGITAL AGE OF MUSIC

### INTRODUCTION

The music industry appears to be thriving with constant record breaking sales<sup>2</sup> and more ways to listen to music than ever before.<sup>3</sup> But behind the scenes, government regulation has struggled to adapt to changes in the industry, leaving industry players uncertain of the bounds of copyright. Listeners have their choice of what song to listen to, on what medium, and to an extent, what they pay (or do not pay) for that music. What listeners likely never think about is *how* they are listening to that music, how the people that write and perform the song are being paid, and how Taylor Swift’s long absence from Spotify went deeper than “greed[.]”<sup>4</sup>

U.S. copyright law is in a similar state of ambiguity regarding music. Copyright in a song is different from many other works. Each song holds two copyrights: a copyright in the sound recording and a copyright in the musical composition.<sup>5</sup> The sound recording is the final musical product that we hear played on the radio or in a store, but it is the underlying musical composition—made up of written music, words, or both by a

---

<sup>1</sup> JOHN MAYER, *Waiting on the World to Change*, on CONTINUUM (Columbia 2006).

<sup>2</sup> See John Boone, *Here Are All the Records Adele Has Broken with ‘25’ So Far*, ET ONLINE (Dec. 4, 2015, 5:05 PM), [http://www.etonline.com/news/177316\\_all\\_the\\_records\\_adele\\_25\\_has\\_broken\\_so\\_far/](http://www.etonline.com/news/177316_all_the_records_adele_25_has_broken_so_far/) [<https://perma.cc/JQA6-YTLC>]; Gary Trust, *Drake Breaks Hot 100 Record with 20 Simultaneous Hits*, BILLBOARD (May 9, 2016), <http://www.billboard.com/articles/columns/chart-beat/7358100/drake-hot-100-record-20-simultaneous-hits-one-dance> [<https://perma.cc/2RAT-52TH>]; Gary Trust, *Justin Bieber Breaks the Beatles & Drake’s Record for Most Simultaneous Hot 100 Hits*, BILLBOARD (Nov. 23, 2015), <http://www.billboard.com/articles/columns/chart-beat/6770428/justin-bieber-breaks-beatles-drake-record-hot-100> [<https://perma.cc/Z992-7WRB>].

<sup>3</sup> See, e.g., *About Us*, SPOTIFY, <https://www.spotify.com/us/about-us/contact/> [<https://perma.cc/C2V4-2Z4Z>]; *iTunes*, APPLE, <https://www.apple.com/itunes/> [<https://perma.cc/9VSA-77QF>].

<sup>4</sup> See Dave Smith, *Taylor Swift Is Wrong About Spotify*, BUSINESS INSIDER (May 28, 2015, 5:38 PM), <http://www.businessinsider.com/taylor-swift-is-wrong-about-spotify-2015-5> [<https://perma.cc/WYF8-ZXFP>].

<sup>5</sup> Copyright Act of 1976, 17 U.S.C. § 102(a)(2), (7) (2012).

composer or lyricist—that is causing disarray in copyright law, and the music industry as a result.<sup>6</sup>

Most songs heard today have more than one writer or composer.<sup>7</sup> The average number of composers per song in 2016 was 4.53—and some of the most popular songs have boasted up to thirteen co-writers,<sup>8</sup> therefore creating more than one owner to the copyright of the musical composition. In its Copyright Law Revision of 1976 (Copyright Act), the U.S. House of Representatives stated that under current law, “co-owners of a copyright would be treated generally as tenants in common, with each co-owner having an independent right to the use [or] license the use of a work, subject to a duty of accounting to the other co-owners for any profits.”<sup>9</sup> Drawing from this default position of copyright law, it follows that when one of multiple copyright owners of a single musical composition wants to permit a music user<sup>10</sup> to play that composition publicly, that owner alone may give license.<sup>11</sup> This process is known as full-work licensing.<sup>12</sup> The long-standing tradition in the music industry, however, has been one of fractional licensing, whereby each owner holds a copyright to a portion of the song, and all must grant license to a music user in order to secure the rights to a public performance.<sup>13</sup> This seeming derailment from both common law and U.S. legislation has been a subject of contention for some time, and definitive steps toward solving the discrepancy began in 2014, in the

---

<sup>6</sup> See *infra* Part I.

<sup>7</sup> Letter from BMI Songwriters, to Chief, Litig. III Sec., Antitrust Div., U.S. Dep’t of Just. (Nov. 20, 2015), [www.justice.gov/atr/public/ascapbmi2015/ascapbmi38.pdf](http://www.justice.gov/atr/public/ascapbmi2015/ascapbmi38.pdf) [<https://perma.cc/7EGP-5N4U>] [hereinafter Letter from BMI Songwriters].

<sup>8</sup> See Mark Savage, *How Many People Does It Take to Write a Hit Song?*, BBC (May 16, 2017), <http://www.bbc.com/news/entertainment-arts-39934986> [<https://perma.cc/HN2D-RLKD>].

<sup>9</sup> H.R. Rep. No. 94-1476, at 121 (1976); see also *Cmty. For Creative Non-Violence v. Reid*, 846 F.2d 1485, 1498 (D.C. Cir. 1988).

<sup>10</sup> See *Music User: Pubs, Restaurants, TV, Radio, Hospitals, Promoters & More.*, SAMRO, <http://www.samro.org.za/music-user> [<https://perma.cc/EV29-WSWW>] (“Does your business or establishment play music in public? If so, that makes you a [m]usic [u]ser!”); Ben Sisario, *How a Justice Department Ruling Could Affect Your Favorite Musician*, N.Y. TIMES (Aug. 4, 2016), <http://www.nytimes.com/2016/08/05/business/media/how-a-justice-department-ruling-could-affect-your-favorite-musician.html> [<https://perma.cc/ZP44-BNS6>].

<sup>11</sup> See Coe W. Ramsey, Esq., *Music Performing Rights Organizations and the “Full-Work” vs. “Fractional” Licensing Dispute: Government Seeks to Overturn Fractional Licensing Decision*, LEXOLOGY (May 23, 2017), <https://www.lexology.com/library/detail.aspx?g=5169651d-513b-4047-8263-9a994f0b8193> [<https://perma.cc/S2F8-VSBB>].

<sup>12</sup> *Id.* The terms “full-work” and “100 percent” licensing are used interchangeably.

<sup>13</sup> See Ed Christman, *Disappointing: Publishing Industry Expresses Confusion, Concern Over Sweeping Dept. of Justice Decision*, BILLBOARD (July 5, 2016), <http://www.billboard.com/articles/business/7424128/publishing-industry-ascap-bmi-sony-atv-umpg-confusion-concern-blanket-licenses-100-percent> [<https://perma.cc/EUW5-QFLR>].

form of the Department of Justice's (DOJ) review and request for public comment.<sup>14</sup>

A major issue with the current regulation of music licensing is the failure to account for today's commanding digital music presence. Music in digital form, such as online radio, paid streaming subscription services, and downloadable song purchases has been on the rise since 2003.<sup>15</sup> Yet, the instruments governing music licensing have not been updated in decades.

An official mandate on the use of a full-work versus a fractional licensing scheme is ineffective and unwarranted without first modifying the consent decrees governing the two most prevalent performing rights societies (commonly referred to as Performing Rights Organizations or PROs),<sup>16</sup> which are responsible for licensing the right to publicly perform musical compositions, to fit with the current digital age of music. Part I of this note discusses the background information on the major PROs as well as the governing instruments that are the basis of the full-work versus fractional licensing issue. Part II delves into the differences between full-work and fractional licensing, as well as advantages, disadvantages, and criticisms to both schemes. Part III addresses the history and changes of the consent decrees that govern the two largest PROs and concludes that the current decrees do not support an explicit mandate on full-work or fractional licensing. Part IV discusses in detail the DOJ's review of the consent decrees, its mandate, and the subsequent overturn of its decision. Part V provides an in-depth look into today's music landscape to illustrate why modification of the consent decrees is necessary before making any decisions about full-work versus fractional licensing. This Part also provides potential amendments and solutions to cure the outdated nature of the consent decrees and ultimately recommends a best practice for the consent decrees to account for the digital age of music, and settle the full-work versus fractional licensing divide.

## I. PERFORMING RIGHTS ORGANIZATIONS

PROs are "association[s], corporation[s], or other entit[ies] that license[] the public performance of nondramatic

---

<sup>14</sup> See *Antitrust Consent Decree Review—ASCAP and BMI 2014*, U.S. DEPT OF JUSTICE, <https://www.justice.gov/atr/ascap-bmi-decree-review> [<https://perma.cc/8WK7-5FUK>].

<sup>15</sup> See *infra* Section V.B.

<sup>16</sup> See *infra* Part III.

musical works on behalf of copyright owners of such works,”<sup>17</sup> and are responsible for collecting and issuing payment for the public broadcast of these works.<sup>18</sup> They distribute the licensing fees to the songwriters and publishers that hold the copyright.<sup>19</sup> The DOJ has recognized the importance of PROs to music users and music creators alike.<sup>20</sup>

There are currently four main PROs in the United States, the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), the Society of European Stage Authors and Composers (SESAC) and most recently, Global Music Rights (GMR).<sup>21</sup> In 1941, consent decrees were placed on BMI and ASCAP to remedy antitrust concerns, namely the unlawful exercise of market power.<sup>22</sup> These decrees imposed court-mandated requirements to the PROs’ services, such as obtaining the nonexclusive right from composers to license their songs<sup>23</sup> (as opposed to an exclusive right) so as to not risk antitrust violations.<sup>24</sup> The PROs have long been petitioning the Antitrust Division of the DOJ (Antitrust Division) to amend these consent decrees. ASCAP’s decree was last amended in 2001, while BMI’s has not been modified since 1994.<sup>25</sup> Though

<sup>17</sup> Copyright Act of 1976, 17 U.S.C. § 101 (2012).

<sup>18</sup> See *Music Publishing Glossary*, SONGTRUST BLOG, <http://blog.songtrust.com/music-publishing-glossary/#PRO> [<https://perma.cc/68XB-X4XV>].

<sup>19</sup> See *About ASCAP*, ASCAP, <http://www.ascap.com/about> [<https://perma.cc/2UBT-WCZC>]; *About*, BMI, <http://www.bmi.com/about> [<https://perma.cc/4YTA-8KVJ>].

<sup>20</sup> See Statement of Dep’t of Justice, Closing of the Antitrust Division’s Review of the ASCAP and BMI Consent Decrees 10 (Aug. 4, 2016), <https://www.justice.gov/atr/file/882101/download> [<https://perma.cc/9GQ3-LXE5>] [hereinafter Antitrust Division’s Closing Review] (“PROs allow music users to obtain immediate access through licenses that protect them from copyright infringement risk to millions of works controlled by the hundreds of thousands of songwriters, composers, and publishers that have contributed songs to the PROs. . . . For many songwriters and composers, affiliating with a PRO and contributing their works to the PRO’s repertory provides the only practical way of licensing their works.”).

<sup>21</sup> Erin M. Jacobson, *Radio Seeks to Pay Songwriters Lower Rates (Again)*, FORBES (Nov. 29, 2016, 10:00 AM), <https://www.forbes.com/sites/legalentertainment/2016/11/29/radio-seeks-to-pay-songwriters-lower-rates-again/#5c643f7d3d43> [<https://perma.cc/4EMT-R6QS>].

<sup>22</sup> Antitrust Division’s Closing Review, *supra* note 20, at 2. SESAC and GMR are not subject to consent decrees, though SESAC has had similar antitrust concerns raised in court. See Ed Christman, *SESAC Settles Television Class-Action for \$58.5 Million*, BILLBOARD (Oct. 15, 2014), <http://www.billboard.com/articles/business/6281846/sesac-settles-television-class-action-for-58-million> [<https://perma.cc/3LCP-BATB>]; Erin M. Jacobson, *Radio Seeks to Pay Songwriters Lower Rates (Again)*, FORBES (Nov. 29, 2016), <https://www.forbes.com/sites/legalentertainment/2016/11/29/radio-seeks-to-pay-songwriters-lower-rates-again/#5c643f7d3d43> [<https://perma.cc/4EMT-R6QS>]. When discussing the consent decrees of the PROs throughout this note, it refers to BMI and ASCAP only.

<sup>23</sup> *United States v. Am. Soc’y of Composers, Authors and Publishers*, Civil No. 13-95, 1941 U.S. Dist. LEXIS 3944, at \*3 (S.D.N.Y. Mar. 4, 1941).

<sup>24</sup> Antitrust Division’s Closing Review, *supra* note 20, at 2.

<sup>25</sup> Press Release, Justice Department Completes Review of ASCAP and BMI Consent Decrees, Proposing No Modifications at This Time, Dep’t. of Justice, Office of Pub.

the latest reiteration of the Copyright Act has lasting principles, “Congress could not have foreseen all of today’s technologies and the myriad ways consumers and others engage with creative works in the digital environment.”<sup>26</sup> For example, neither decree takes into account the rising popularity of internet radio<sup>27</sup> or the most popular way Americans listen to music: streaming services.<sup>28</sup> Therefore, the United States Copyright Office (Copyright Office) requested public comment on the issue of music licensing in order to issue its report, “Copyright and the Music Marketplace,”<sup>29</sup> regarding whether the current music licensing practices are effective in today’s digital music landscape.<sup>30</sup>

In August 2016, the DOJ decided that it would not amend the consent decrees, as an amendment would “disrupt the status quo, would not be consistent with the purposes of the consent decrees, and would not be in the interest of consumers.”<sup>31</sup> The DOJ’s decision concluded that fractional licensing was inconsistent with the consent decrees of BMI and ASCAP, as well as the Copyright Act.<sup>32</sup> The consent decrees, the DOJ asserted, mandated a full-work licensing scheme for the two PROs, whereby only one copyright co-owner need give license for the public use of the musical composition.<sup>33</sup> BMI’s rate court, the federal court which oversees the public performance royalty rates set for songwriters and publishers,<sup>34</sup> quickly overturned this mandate.<sup>35</sup> Though it is ineffective and counterproductive to

Affairs (Aug. 4, 2016), <https://www.justice.gov/opa/pr/justice-department-completes-review-ascap-and-bmi-consent-decrees-proposing-no-modifications> [<https://perma.cc/ZSTV-6W5Q>].

<sup>26</sup> Music Licensing Study: Notice and Request for Public Comments, 78 Fed. Reg. 14739, 14740 (Mar. 17, 2014).

<sup>27</sup> See Erik Sass, *Half of U.S. Listeners Tune Into Online Radio*, MEDIA DAILY NEWS (Mar. 5, 2014, 5:20 PM), <http://www.mediapost.com/publications/article/220860/half-of-us-listeners-tune-into-online-radio.html> [<https://perma.cc/J4SP-XC26>].

<sup>28</sup> NIELSEN, NIELSEN MUSIC YEAR-END REPORT: U.S. 2016 3 (2017), <http://www.nielsen.com/content/dam/corporate/us/en/reports-downloads/2017-reports/2016-year-end-music-report-us.pdf> [<https://perma.cc/ZTV5-N577>].

<sup>29</sup> U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE 14 (2015), <http://copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf> [<https://perma.cc/GK44-AKJW>].

<sup>30</sup> See Music Licensing Study: Notice and Request for Public Comments, 78 Fed. Reg. at 14739.

<sup>31</sup> Acting Assistant Att’y Gen. Renata Hesse, Remarks Regarding the Antitrust Division’s Closing of its Review of the ASCAP and BMI Consent Decrees 2 (Aug. 4, 2016).

<sup>32</sup> Antitrust Division’s Closing Review, *supra* note 20, at 3, 8–9.

<sup>33</sup> *Id.* at 11–13.

<sup>34</sup> See Marc D. Ostrow, *Why Pandora’s Batting 500 with BMI’s Recent Rate Court Win*, LEXOLOGY (June 4, 2015), <https://www.lexology.com/library/detail.aspx?g=10be482f-c3da-449d-8b5c-69650f4c3e86> [<https://perma.cc/5DBB-SBAX>]; Casey Rae, *BMI Scores Higher Royalties in Court, But What Does This Mean for Rate-Setting Overall?*, FUTURE OF MUSIC COALITION (June 2, 2015), <https://futureofmusic.org/blog/2015/06/02/bmi-scores-higher-royalties-court-what-does-mean-rate-setting-overall> [<https://perma.cc/UWQ9-NGWQ>].

<sup>35</sup> *United States v. Broad. Music, Inc.*, 207 F. Supp. 3d 374, 377 (S.D.N.Y. 2016).

base such decisions on clearly outdated documents, the DOJ and BMI's rate court explicitly took the consent decrees into account when making their respective decisions on the practices of fractional and full-work licensing.

## II. FRACTIONAL VERSUS FULL-WORK LICENSING SCHEMES

There are two types of licensing for a musical composition—fractional and full-work—which has caused a divide between the music licensors and the music users, with each advocating for use of the option that best suits their needs. The differing opinions of the DOJ and BMI's rate court concerning the proper licensing scheme leave this area of copyright law unsettled. The most dominant PROs in the United States, ASCAP and BMI, have advocated for the practice of fractional licensing as opposed to full-work licensing.<sup>36</sup> While this note ultimately argues that the DOJ must amend two antiquated consent decrees before mandating a type of licensing scheme, it is important to highlight the fundamental differences between fractional and full-work licensing in order to better understand the reasons why. This background demonstrates why PROs and the owners of musical compositions feel strongly that fractional licensing, the “longstanding practice of the music industry,”<sup>37</sup> is the more efficient and equitable system, and why, despite this industry favoritism, the government argues that full-work licensing is required under the consent decrees of ASCAP and BMI as well as U.S. Copyright law.

### A. *Fractional Licensing*

Fractional licensing is a scheme by which “each PRO collects and pays out only the shares of musical works each represents in its respective repertoire.”<sup>38</sup> For instance, if there are two composers of a musical composition and one belongs to ASCAP with 60 percent ownership and the other belongs to BMI with 40 percent ownership, ASCAP may only license its 60 percent ownership of the composition and collect the 60 percent royalty. The music user would need to obtain the remaining 40 percent from BMI in order to publicly perform the composition.

---

<sup>36</sup> See *BMI Members Say “No” to 100% Licensing*, BMI, [http://www.bmi.com/advocacy/doj\\_letter](http://www.bmi.com/advocacy/doj_letter) [https://perma.cc/CF75-F659].

<sup>37</sup> U.S. COPYRIGHT OFFICE, VIEWS OF THE UNITED STATES COPYRIGHT OFFICE CONCERNING PRO LICENSING OF JOINTLY OWNED WORKS 2 (2016), <http://www.copyright.gov/policy/pro-licensing.pdf> [https://perma.cc/3DES-RX8W].

<sup>38</sup> *BMI Members Say “No” to 100% Licensing*, *supra* note 36.

This has been the longstanding industry practice<sup>39</sup> in part because songwriters select and remain with a specific PRO of their choosing.<sup>40</sup> These composers trust their PRO to value their work and negotiate a fair rate for licensees, allowing the composers to rely on their PRO for fair royalty payments.<sup>41</sup>

PROs license their repertoires to music users for a fee, and then distribute royalties to their affiliated songwriters, composers, and publishers.<sup>42</sup> Under this scheme, the PRO is therefore only compensated for licensing the portion of the work it represents. Thus, because a song may be composed by affiliates of more than one PRO, fractional licensing provides that a PRO need only worry about distributing royalties to its affiliates. In practice, fractional licensing means that each PRO is able to pay out its affiliated composers for their share of the composition, under each PRO's own valuation system.<sup>43</sup>

At face value, a fractional licensing scheme is advantageous to music composers and publishers, but may disadvantage music users. Because fractional licensing allows composers to control the licensing of their portion of the work, each owner may in effect bar unwanted licensing by a co-owner affiliated with a different PRO. For example, if copyright co-owner A wants to license to music user X, but copyright co-owner B does *not* want to license to music user X, by B's refusal to grant license, B is effectively blocking A from exerting its right to grant license.

Music users need a license for the public performance of a musical work, whether the performance is a live band playing at a bar or a playlist in a retail store, so as to not infringe on the composer's copyright.<sup>44</sup> For music users, fractional licensing means that in order to receive permission to play certain works publicly, one must obtain a license from all copyright owners of the musical composition.<sup>45</sup> Though in many cases obtaining a license from all PROs may be relatively simple due to the small

---

<sup>39</sup> See U.S. COPYRIGHT OFFICE, *supra* note 37, at 2.

<sup>40</sup> See Letter from BMI Songwriters, *supra* note 7, at 2.

<sup>41</sup> See *id.* at 1–2.

<sup>42</sup> See *BMI FAQ, What is BMI*, BMI, <http://www.bmi.com/faq/category/about> [<https://perma.cc/T6PT-SWHH>].

<sup>43</sup> See *BMI Members Say "No" to 100% Licensing*, *supra* note 36. The Copyright Office has noted that "[n]otwithstanding the default rules of joint copyright ownership, publishers and songwriters frequently have understandings that they are not free to license each other's respective shares." U.S. COPYRIGHT OFFICE, *supra* note 37, at 163.

<sup>44</sup> See Nicholas Rubright, *13 Common Questions About Music Licensing for Businesses*, DOZMIA.COM (June 7, 2016), <http://blog.dozmia.com/13-common-questions-about-music-licensing-for-businesses/> [<https://perma.cc/VZG7-94XW>].

<sup>45</sup> Ed Christman, *BMI Rate-Court Judge Rules Against Dept. of Justice's '100 Percent' Licensing Decision*, BILLBOARD (Sept. 16, 2016), <http://www.billboard.com/articles/news/7511194/bmi-rate-court-judge-rules-against-dept-of-justices-100-percent-licensing> [<https://perma.cc/B8DX-A69F>].

number of PROs in the United States, fractional licensing can still be burdensome on the music user. In one scenario, a music user may license from all of the major PROs, only to find out that a composer with a small portion of copyright ownership is not a member of a major PRO.<sup>46</sup> Alternatively, a music user may not have control over a publicly performed composition and therefore may not have purchased a license to the works being publicly performed.<sup>47</sup>

Further, as the DOJ points out, there is no comprehensive database of ownership of musical compositions accessible to the public, so that music users can be sure to acquire licenses from each individual copyright owner.<sup>48</sup> This poses the daunting task for a music user to not only identify the proper composers and PROs but to also ensure that all necessary licenses are obtained.<sup>49</sup> With four PROs in the mix today, as well as independent publishers, songs with upwards of ten writers may require permissions from ten different entities.

Opponents of a fractional licensing scheme argue that it is in disaccord with U.S. copyright law, the consent decrees of both ASCAP and BMI,<sup>50</sup> and the services that PROs advertise on their websites.<sup>51</sup> The Copyright Act provides that the exclusive rights in and to a copyright (including the right to publicly perform the work)<sup>52</sup> may be separately owned, such as in joint works (works in which there is more than one copyright co-owner, like a song with more than one composer).<sup>53</sup> Such co-owners all possess the right to “grant a non-exclusive license to use” the whole work without permission of the other owners.<sup>54</sup> This means that under U.S. copyright law, the co-owner of a musical composition is able to grant a nonexclusive license to another to perform the entire work, which is the basis of the

---

<sup>46</sup> David Oxenford, Esq., *DOJ Recommends No Changes in ASCAP and BMI Consent Decrees, And Requires Full-Work Licensing—How It Affects Music Users*, BROADCAST LAW BLOG (Aug. 5, 2016), <http://www.broadcastlawblog.com/2016/08/articles/doj-recommends-no-changes-in-ascap-and-bmi-consent-decrees-and-requires-full-work-licensing-how-it-affects-music-users/> [<https://perma.cc/XB27-2R6E>].

<sup>47</sup> The DOJ pointed out this potential problem in the scenario of a bar that broadcasts a TV or radio station, whereby music is selected by the producer of the show or the DJ of the radio station and such song that has not been licensed by the bar. See Antitrust Division’s Closing Review, *supra* note 20, at 14.

<sup>48</sup> *Id.* at 15; Oxenford, *supra* note 46.

<sup>49</sup> See Hesse, *supra* note 31, at 5.

<sup>50</sup> For a more detailed discussion of the ASCAP and BMI consent decrees, see *infra* Part II.

<sup>51</sup> Raza Panjwani, *A Closer Look at the Department of Justice’s ASCAP and BMI Consent Decree Review*, PUBLIC KNOWLEDGE (July 18, 2016), <https://www.publicknowledge.org/news-blog/blogs/a-closer-look-at-the-department-of-justices-ascap-and-bmi-consent-decr-ee-re> [<https://perma.cc/KH5Q-UNZ6>].

<sup>52</sup> See Copyright Act of 1976, 17 U.S.C. § 106(6) (2012).

<sup>53</sup> U.S. COPYRIGHT OFFICE, *supra* note 37, at 6.

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

alternate scheme of full-work licensing. Public policy arguments suggest that fractional licensing has “devastating real-world consequences”<sup>55</sup> and is an unfair burden on the music user, given that “it’s not always obvious who owns what percentage of a given composition.”<sup>56</sup> It is argued that if the PROs are at times unable to figure this out, it is unreasonable to expect less-informed music users to understand ownership,<sup>57</sup> and therefore advocate for a full-work approach to licensing.

### B. Full-Work Licensing

Full-work licensing is a practice by which every co-owner of the copyright of the musical composition has the authority to license the whole work, rather than just the fraction owned.<sup>58</sup> For example, if copyright owner A does not want to license to music user X, but copyright co-owner B does want to license to music user X, B can effectively override A’s refusal by granting the full license to X. A full-work licensing scheme for joint-work musical compositions is plainly consistent with U.S. statutory and common law.<sup>59</sup>

Under a full-work licensing scheme, PROs would have authority to license a full work to a music user, regardless of whether their composer-affiliate owns five percent of the musical composition copyright, or one hundred percent of the musical composition copyright. This does not mean that the remaining owners who are not affiliated with the licensing PRO will not be compensated.<sup>60</sup> This scheme could involve subjecting a composer

---

<sup>55</sup> Matthew Guarnaccia, *Google, Netflix Back DOJ in 2nd Circ. Music Licensing Fight*, LAW360 (May 30, 2017, 8:18 PM), <https://www.law360.com/articles/929585> [<https://perma.cc/RAH8-79MT>] (internal quotations omitted).

<sup>56</sup> Robert Levine & Ed Christman, *The Only Certainty Is Uncertainty: What the Dept. of Justice’s Decision Means for Music Publishing*, BILLBOARD (July 8, 2016), <http://www.billboard.com/articles/business/7431011/understanding-music-publishing-dept-of-justice-consent-decree> [<https://perma.cc/ZQQ9-ZFRH>].

<sup>57</sup> Panjwani, *supra* note 51.

<sup>58</sup> See Ed Christman, *Dept. of Justice Makes Dramatic Change for Music Licensing Official*, BILLBOARD (Aug. 4, 2016), <http://www.billboard.com/articles/business/7461614/dept-of-justice-100-percent-full-works-licensing-official> [<https://perma.cc/C573-89R7>]; see also Ben Sisario, *Justice Department Won’t Alter Music Industry Royalty Rules*, NY TIMES (June 20, 2016), <http://www.nytimes.com/2016/07/01/business/media/justice-department-wont-alter-music-industry-royalty-rules.html> [<https://perma.cc/KQC2-ELNU>].

<sup>59</sup> See H.R. REP. NO. 94-1476, at 21, 25 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5736, 5752-53; MELVILLE B. NIMMER & DAVID NIMMER, 1 NIMMER ON COPYRIGHT §6.10[2b] (July 2017).

<sup>60</sup> U.S. COPYRIGHT OFFICE, *supra* note 37, at 6 (citing Cmty. for Creative Non-Violence v. Reid, 846 F.2d 1485, 1498 (D.C. Cir. 1988)) (“Each co-owner may thus grant a nonexclusive license to use the entire work without the consent of other co-owners, provided that the licensor accounts for and pays over to his or her co-owners their pro-rata shares of the proceeds.”).

to the rates of another PRO, causing the potential for reduced royalty rates and delayed payment.<sup>61</sup>

Financial concerns are prevalent in those opposing a full-work licensing scheme. PROs may charge different licensing fees,<sup>62</sup> and thus might prompt music users to “catalog shop” for the PRO offering the lowest licensing fee.<sup>63</sup> This may be an unreasonable concern, as there is no incentive for PROs to drop their rates—a reduction in rates would mean a reduction in PRO commission.<sup>64</sup> Further, “[s]ongwriters can easily terminate the agreement with a misbehaving PRO and sign up with another one that prefers more royalties rather than less.”<sup>65</sup> A songwriter is, however, limited in his or her choice of PRO, as BMI and ASCAP are estimated to control about ninety percent of the musical works in the United States.<sup>66</sup> Additional financial concerns for music composers stem from royalty payments flowing through two PROs, the need to monitor and understand payments, and track bonuses by a PRO that the composer has “no relationship with,” while tracking if that alternate PRO has failed to account for any public performances.<sup>67</sup>

On the other end of the spectrum, music users prefer full-work licensing because it requires obtaining a license from one copyright holder, instead of tracking down the potentially dozens of copyright holders of one work. “A full-work blanket license from [a PRO] allows the music user to publicly perform, without risk of copyright infringement liability, all works in the licensing PRO’s repertory.”<sup>68</sup> This scheme is advantageous to a music user because of the extraordinary number of musical works, which make it unreasonable for a music user to engage in individual negotiations with each copyright holder.<sup>69</sup> Further, it appears unreasonable to expect that a music user is able to

---

<sup>61</sup> See *BMI Members Say “No” to 100% Licensing*, *supra* note 36.

<sup>62</sup> Letter from BMI Songwriters, *supra* note 7, at 1.

<sup>63</sup> Oxenford, *supra* note 46; see Christman, *supra* note 58.

<sup>64</sup> See Jody Dunitz, *Songwriters: The DOJ Got It Right. Your Sky Is Not Falling*, DIGITAL MUSIC NEWS (July 14, 2016), <http://www.digitalmusicnews.com/2016/07/14/songwriters-doj-got-right-100/> [<https://perma.cc/XB8F-E8E4>]. Dunitz contends that because ASCAP and BMI control a strong majority of the songs in the United States, and both oppose full-work licensing, they would not reduce their rates, and smaller societies “boast that their free-market status gives them greater bargaining leverage to extract higher royalties.” *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Dan Horowitz, *ASCAP and BMI: Attempting to Strong-Arm the Department of Justice*, TOWNHALL (Mar. 12, 2016, 12:01 AM), <http://townhall.com/columnists/danhorowitz/2016/03/12/ascap-and-bmi-attempting-to-strongarm-the-department-of-justice-n2132489> [<https://perma.cc/D5FU-PLLD>].

<sup>67</sup> Letter from BMI Songwriters, *supra* note 7, at 1.

<sup>68</sup> Hesse, *supra* note 31, at 5.

<sup>69</sup> *Meredith Corp. v. SESAC, LLC*, 1 F. Supp. 3d 180, 188 (S.D.N.Y. 2014).

identify all of the proper parties from whom permission is needed to obtain a license.<sup>70</sup>

The consent decrees require BMI and ASCAP to provide music users the ability to perform all compositions and works respectively.<sup>71</sup> In explaining the DOJ's decision that full-work licensing is to be the new norm, former Acting Assistant Attorney General Renata Hesse remarked that the Antitrust Division "concluded that only full-work licenses could fulfill the purpose and meaning of the requirement in the consent decrees that ASCAP and BMI offer blanket licenses that provide users the ability to play all the songs in the PROs' repertoires."<sup>72</sup> The DOJ has interpreted the consent decrees as inconsistent with fractional licensing<sup>73</sup> because a music user would not be able to perform *all* of the works in a PROs' repertory without obtaining licenses from the PRO of a copyright co-owner under a fractional licensing scheme, thus perpetuating the need for full-work licensing to be the new normal.<sup>74</sup>

Further, the DOJ pointed out that the continuation of the use of the PROs' blanket licenses<sup>75</sup> depends on a full-work licensing scheme because those licenses "[allow] the licensee *immediate use* of covered compositions, *without the delay or prior individual negotiations*, and great flexibility in the choice of musical material."<sup>76</sup> The DOJ admitted, however, that full-work licensing may make it impossible to offer blanket licenses if co-owners of a work impose limitations on one another's ability to license the song.<sup>77</sup> While the DOJ offered no justification for this limitation, the deterrent against copyright co-owners imposing these limitations might be that, under the DOJ's interpretation, full-work licensing is the only option. An additional concern may be that the refusal to license a song

---

<sup>70</sup> *Id.*

<sup>71</sup> *United States v. Am. Soc'y of Composers, Authors and Publishers*, Civ. Action No. 41-1395 (WCC), 2001 WL 1589999, at \*4 (S.D.N.Y. June 11, 2001); *United States v. Broad. Music, Inc.*, 64 Civ. 3787, 1994 U.S. Dist. LEXIS 21476 (S.D.N.Y. Nov. 18, 1994).

<sup>72</sup> Hesse, *supra* note 31, at 4.

<sup>73</sup> *See infra* Section III.D.

<sup>74</sup> *See* Antitrust Division's Closing Review, *supra* note 20, at 11–12.

<sup>75</sup> *United States v. Am. Soc'y of Composers, Authors and Publishers*, 627 F. 3d 64, 68 (2d. Cir. 2010) ("A blanket license . . . gives the licensee the right to perform all of the works in the repertory for a single stated fee that does not vary depending on how much music from the repertory the licensee actually uses.").

<sup>76</sup> Antitrust Division's Closing Review, *supra* note 20, at 12 (emphasis in original) (quoting *Broad. Music, Inc. v. Colum. Broad. Sys., Inc.*, 441 U.S. 1, 21–22 (1979)). The Department of Justice rationalizes the need for a full-work license by stating that fractional licenses would not provide for the "*immediate use of covered compositions*" because users would need to gather licenses from all of the other copyright holders before publicly performing the work. *Id.* (emphasis in original).

<sup>77</sup> *Id.* at 13.

would result in no public performance of the work, and thus no public performance royalties issued to the composers.

Because PROs have established their payment distribution based on fractional licensing, commentators argue that a shift to full-work licensing may “require that they change the way that they account for payments” to composers and songwriters.<sup>78</sup> Problems may arise, for example, if a BMI-affiliated composer co-owns a song with an affiliate-composer of SESAC, which is not subject to a consent decree. If a collaboration exists amongst a BMI composer and a SESAC composer, SESAC is still able to license only its owned fraction of the song, creating inconsistency and an unequal distribution of the power of each PRO to license a collaborative work.<sup>79</sup> Music composers have expressed dismay for a full-work licensing scheme, citing financial and creative impacts the new system could have on their lives.<sup>80</sup> Songwriters fear that in order to keep their works within their desired PRO, they would be limited on a choice of collaborators.<sup>81</sup>

The decision on which licensing scheme to implement is a challenging one, as the practices under a fractional or full-work license are so vastly different. Due to reliance on the consent decrees in interpreting which scheme is lawful, it follows that without clarity of the consent decrees regarding today’s music landscape, mandating one scheme over another in today’s music world is unreasonable.

### III. AMENDMENT OF THE CONSENT DECREES

Underlying this whole debate are consent decrees developed over seventy-five years ago. ASCAP voluntarily entered into its consent decree after a 1941 lawsuit that the DOJ filed<sup>82</sup> for alleged “violation of . . . the Sherman Act.”<sup>83</sup> BMI also entered into a consent decree with nearly identical terms.<sup>84</sup>

---

<sup>78</sup> Oxenford, *supra* note 46.

<sup>79</sup> See Levine & Christman, *supra* note 56.

<sup>80</sup> See Letter from BMI Songwriters, *supra* note 7, at 1. (“[A] shift to [full-work] licensing would severely impact our creative freedom, our ability to choose which PRO licenses our music and, ultimately, our livelihood as songwriters.”); see also Ben Haggerty & Ryan Lewis, Comment Letter on the U.S. Dep’t of Justice Review of the BMI and ASCAP Consent Decrees (Nov. 20, 2015), <https://www.justice.gov/atr/public/ascapbmi2015/ascapbmi54.pdf> [<https://perma.cc/XM82-K8V4>].

<sup>81</sup> Letter from BMI Songwriters, *supra* note 7, at 1–2; *BMI Members Say “No” to 100% Licensing*, *supra* note 36.

<sup>82</sup> See *United States v. Am. Soc’y of Composers, Authors and Publishers*, Civ. Action No. 41-1395 (WCC), 2001 WL 1589999, at \*1 (S.D.N.Y. June 11, 2001).

<sup>83</sup> Antitrust Division’s Closing Review, *supra* note 20, at 2; see *Sherman Antitrust Act of 1890*, 15 U.S.C. §1 (2012).

<sup>84</sup> *Music Licensing History*, NRBMLC, <http://www.nrbmlc.com/music-licensing/music-licensing-history/> [<https://perma.cc/2VZY-7FPX>].

Under the consent decrees, ASCAP and BMI are required to “offer to radio and television stations *program licenses* that make the full catalogue available on an individual program basis.”<sup>85</sup> The DOJ amended both of the PROs’ consent decrees throughout the years to reflect industry changes, such as pre-recorded music incorporated into motion pictures<sup>86</sup> and the advent of television.<sup>87</sup> These decrees do not “anticipate how changes in technology and consumer habits alter market mechanisms and the effect of the consent decree itself will have on how market actors behave.”<sup>88</sup> Naturally, neither of the consent decrees takes into account internet radio or streaming services as they were not prevalent sources of music consumption at the time of their most recent updates. This means that PROs must use consent decrees—originally aimed at regulating the licensing for traditional broadcast radio in the mid-twentieth century<sup>89</sup>—to now guess how to license music in 2017, where the main consumption is through digital mediums. At sixteen and twenty-three years since the latest amendments, the time has come to update these decrees.

#### A. *History of the Consent Decrees*

ASCAP was founded in 1914 to “protect the rights of composers and collect fees for the public performances of their music.”<sup>90</sup> When public performances expanded from live, in-person performances to include radio broadcasts and broadcast reproductions, ASCAP grew in size of members, and profit, eventually gaining “control of the great bulk of music in commercial demand” and cementing itself as a strong player in the performance-rights industry.<sup>91</sup>

---

<sup>85</sup> Michael A. Einhorn, *Intellectual Property and Antitrust: Music Performing Rights in Broadcasting*, 24. COLUM. VLA J.L. & ARTS 349, 351 (2001) (emphasis in original).

<sup>86</sup> *Music Licensing History*, *supra* note 84.

<sup>87</sup> The broadcasting medium of television was not accounted for in BMI’s initial consent decree, but was introduced in its 1966 decree and further amended by the 1994 revision. *United States v. Broad. Music, Inc.*, 64 Civ. 3787, 1994 U.S. Dist. LEXIS 21476 (S.D.N.Y. Nov. 18, 1994).

<sup>88</sup> Noel L. Hillman, *Intractable Consent: A Legislative Solution to the Problem of the Aging Consent Decrees in United States v. ASCAP and United States v. BMI*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 733, 733–34 (1998).

<sup>89</sup> *Music Licensing History*, *supra* note 84.

<sup>90</sup> ASCAP, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/ASCAP> [<https://perma.cc/X4FH-3U27>].

<sup>91</sup> Richard W. Ergo, *ASCAP and the Antitrust Laws: The Story of a Reasonable Compromise*, 1959 DUKE L.J. 258, 260–61 (1959).

BMI was created in 1939 as an alternative to ASCAP,<sup>92</sup> which continued to be the most prevalent PRO in the United States and held most of the power in music licensing.<sup>93</sup> In 1941, the United States sued ASCAP for antitrust violations and concerns over market abuse;<sup>94</sup> the suit was an attempt to balance the power of the PRO, since at the time, only a copyright in the musical composition (and not the sound recording) existed, which tilted licensing power in the PROs' favor. With ASCAP dominating the industry, there were fears that it had a monopolist power over the licensing of musical repertoires.<sup>95</sup> Key provisions to the ASCAP consent decree include that ASCAP must grant a license to anyone who requests one, must not differ in license price to those similarly situated, and must not attempt to restrict any licensee from public performance in order to receive additional consideration.<sup>96</sup>

### B. *Modifications to the Consent Decrees*

Throughout the years, modifications have been made to both consent decrees. ASCAP's main revision came in 1950 (Amended Final Judgment) and created a rate court with jurisdiction to hear discrepancies in licensing fees between ASCAP and its licensees when the parties are unable to reach an agreement.<sup>97</sup> BMI's consent decree was first modified in 1966, and is the basis of most parts of the current decree,<sup>98</sup> though it contained no such rate court provision.<sup>99</sup> Many modifications and additions coincided with the advent of television and motion picture popularity.<sup>100</sup> After the creation of audiovisual films, ASCAP was ordered to change its practices to coincide with this

---

<sup>92</sup> See *BMI's Timeline Through History*, BMI, [http://www.bmi.com/about/75\\_years](http://www.bmi.com/about/75_years) [<https://perma.cc/HWU3-S4K4>].

<sup>93</sup> *ASCAP-BMI Consent Decrees*, FUTURE OF MUSIC COALITION (Aug. 4, 2016), <https://futureofmusic.org/article/fact-sheet/ascap-bmi-consent-decrees> [<https://perma.cc/R449-7FE5>].

<sup>94</sup> Antitrust Division's Closing Review, *supra* note 20, at 2.

<sup>95</sup> *Id.* (The DOJ alleged that ASCAP "unlawfully exercised market power acquired through the aggregation of public performance rights.")

<sup>96</sup> See *United States v. Am. Soc'y of Composers, Authors and Publishers*, Civil No. 13-95, 1941 U.S. Dist. LEXIS 3944, at \*4, 8-11 (S.D.N.Y. Mar. 4, 1941).

<sup>97</sup> See *United States v. Am. Soc'y of Composers, Authors and Publishers*, Civil Action No. 13-95, 1950 U.S. Dist. LEXIS 4341, at \*12-13 (S.D.N.Y. Mar. 14, 1950).

<sup>98</sup> *Change is Now: What is the Consent Decree*, BMI, [https://www.bmi.com/pdfs/advocacy/about\\_bmi\\_consent\\_decree.pdf](https://www.bmi.com/pdfs/advocacy/about_bmi_consent_decree.pdf) [<https://perma.cc/2KWX-TZBJ>].

<sup>99</sup> See *United States v. Broad. Music, Inc.*, Civ. No. 64 Civ. 3787, 1966 U.S. Dist. LEXIS 10449 (S.D.N.Y. Dec. 29, 1966).

<sup>100</sup> See *Am. Soc'y of Composers, Authors and Publishers*, 1950 U.S. Dist. LEXIS 4341, at \*4-5, 7-11, 16.

technological advance.<sup>101</sup> BMI's 1966 decree modifications are interpreted to expand to television.<sup>102</sup>

The ASCAP Amended Final Judgment was further amended in 1960, and again by the most current consent decree, amended in 2001 (the Second Amended Final Judgment).<sup>103</sup> The most recent amendment to the BMI consent decree was in 1994, which included the addition of a rate court.<sup>104</sup> Today, the consent decrees of ASCAP and BMI read almost the same.

Due to the fact that both consent decrees were last amended before the prevalence of digital music programs, a change in the consent decrees is warranted. Looking back on previous decree amendments, it is inconsistent with past practices that the consent decrees have not been updated to reflect industry change. This leaves the music world today with a mandated licensing scheme tailored for a world that existed two decades ago. Without an amendment for today's music landscape, any decision based off the consent decrees is rendered virtually automatically antiquated.

### C. *The Future of the Consent Decrees*

Changes to the ASCAP decree were made to address antitrust concerns,<sup>105</sup> however, these antitrust concerns are also a statutory cover for changes made for policy interests like changes in technology. The Amended Final Judgment provided for a number of changes due to antitrust concerns over ASCAP's monopoly, but these changes would not have happened if not for the popularity of motion pictures. Similarly, the Second Amended Final Judgment was made pursuant to a shift in the music industry created by "the growth of cable television and the emergence of the Internet."<sup>106</sup> These changes were still largely under the guise of antitrust concerns.<sup>107</sup> While antitrust issues

---

<sup>101</sup> See *id.* at \*4–5, 7–9, 16.

<sup>102</sup> See *Broadcast Music, Inc.*, 1966 U.S. Dist. LEXIS 10449, at \*8–9. The original BMI consent decree, entered into in 1941 explicitly discussed radio broadcasting, while the 1966 amendment no longer mentioned radio explicitly. See *Full Text of Consent Decree in U.S. v. BMI Case*, BROADCASTING, Feb. 3, 1941, at 24.

<sup>103</sup> See *United States v. Am. Soc'y of Composers, Authors and Publishers*, Civ. Action No. 41-1395 (WCC), 2001 WL 1589999, at \*1 (S.D.N.Y. June 11, 2001).

<sup>104</sup> See *United States v. Broad. Music, Inc.*, 64 Civ. 3787, 1994 U.S. Dist. LEXIS 21476, \*3–5 (S.D.N.Y. Nov. 18, 1994).

<sup>105</sup> See *supra* Section III.B.

<sup>106</sup> ASCAP, Comment Letter on U.S. Copyright Office Music Licensing Study, Docket No. 2014-03, 11 (May 23, 2014), [http://www.copyright.gov/docs/musiclicensingstudy/comments/Docket2014\\_3/ASCAP\\_MLS\\_2014.pdf](http://www.copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/ASCAP_MLS_2014.pdf) [<https://perma.cc/X498-MYG5>].

<sup>107</sup> See *Am. Soc'y of Composers, Authors and Publishers*, 2001 WL 1589999, at \*1 (The Second Amended Final Judgment states that relief may be granted against ASCAP pursuant to § 1 of the Sherman Antitrust Act).

surely existed in these two instances, the changes made had much to do with the progression of the music industry and American society as a whole. Certainly, the Second Amended Final Judgment provided for Internet and cable television popularity (a large step forward), but many more changes and advancements in the music industry have occurred since, and thus necessitate further amendments to both consent decrees in order to adhere to the digital age of music.

Neither consent decree allows publishers to “partially withdraw[] just portions of their rights,” therefore requiring that the PROs “administer all public performance rights for a given composition . . . or none of them.”<sup>108</sup> This means that publishers and composers wishing to eliminate their works from certain avenues, such as streaming services, cannot do so without completely disassociating themselves from their PRO,<sup>109</sup> the consequences of which include independently licensing out a musical composition, keeping track of how often that composition is publicly performed, and collecting one’s own fees. Issues arise where some of the biggest names in music have refused to have their works streamed.<sup>110</sup> The DOJ made no decision regarding partial withdrawal due to the uncertainty of the effects of such withdrawal and its public policy implications.<sup>111</sup> In light of the digital age of music, it would behoove the DOJ to consider an amendment to the consent decrees of both BMI and ASCAP to allow for exceptions or independent reviews for certain public performances, such as plays on streaming and Internet radio services, particularly before any decision on a proper licensing scheme is made.

#### D. *The Consent Decrees’ Position on Licensing Schemes*

The main cause of strife in the licensing decisions has been whether the consent decrees require or provide for full-work licensing over fractional licensing or vice versa. The plain language of the consent decrees has on occasion been interpreted to support full-work licensing, as ASCAP’s consent decree states it must grant music users “a non-exclusive license to perform *all*

---

<sup>108</sup> FUTURE OF MUSIC COALITION, *supra* note 93.

<sup>109</sup> See Pandora Media, Inc. v. Am. Soc’y of Composers, Authors and Publishers, 785 F.3d 73, 77 (2d Cir. 2015) (Affirming ASCAP’s rate court that ASCAP may not withdraw any rights from Pandora to perform any compositions licensed to them under the consent decree).

<sup>110</sup> See Maeve McDermott, *4 Artists You Won’t See on Streaming Services*, USA Today (Dec. 23, 2015, 12:35 PM), <http://www.usatoday.com/story/life/music/2015/12/23/artists-against-streaming-services-prince-garth-brooks-thom-yorke-pete-townshend/77824882> [<https://perma.cc/79C4-32GE>].

<sup>111</sup> Antitrust Division’s Closing Review, *supra* note 20, at 17.

of the works in the ASCAP repertory.”<sup>112</sup> The ability to perform all of the works in the repertory seems to align with the idea of full-work licensing, in that if you have a license from ASCAP, you have the ability to perform, without seeking licensure elsewhere. The language, however, does not explicitly denounce a fractional licensing scheme, as “the decrees—like any contract—must be interpreted in light of the prevailing customs of the industry.”<sup>113</sup> Thus, the plain language of the consent decrees forces PROs to look elsewhere to determine which licensing scheme to follow.

The Copyright Office is one source that can provide PROs with this needed guidance. The Copyright Office points out that, considering the definition of “repertory”<sup>114</sup> in the decrees, rejecting the practice of fractional licensing, “would mean that the ASCAP and BMI repertoires must *exclude* any work for which the PRO could offer only a partial license, since there would be no ‘right’ to license the entire work,”<sup>115</sup> because the blanket licenses provided to music users “allow[] the licensee immediate use of covered compositions.”<sup>116</sup> Under a fractional scheme, immediate use would not be possible in a joint work by co-owner affiliates of both BMI and ASCAP, because there would be a need for the music user to obtain a license from the other party. Without the use of fractional licensing, many works may be rendered unavailable. In contrast, without the use of a full-work scheme, the PROs may not be operating in accordance with the blanket licenses that they are issuing to music users. This difficult decision magnifies the complexity of the situation and the need for explicit clarification in the consent decrees.

While the DOJ decided that the consent decrees “require [the PROs] to offer full-work licenses,”<sup>117</sup> critics argue that the DOJ misread its own laws. Interpretations of ASCAP’s consent decree contend that ASCAP cannot “continue to license and collect the share of a former member who has licensed his share to another PRO. Yet, this is exactly what the DOJ says that ASCAP must now do.”<sup>118</sup> While this is a valid interpretation of

---

<sup>112</sup> Panjwani, *supra* note 51 (emphasis added) (quoting *Am. Soc’y of Composers, Authors and Publishers*, 2001 WL 1589999, at \*4).

<sup>113</sup> U.S. COPYRIGHT OFFICE, *supra* note 37, at 13 (footnote omitted).

<sup>114</sup> *Am. Soc’y of Composers, Authors and Publishers*, 2001 WL 1589999, at \*1 (defining repository as “those works . . . the right of public performance of which [the PRO] has or hereafter shall have the right to license at the relevant point in time”).

<sup>115</sup> U.S. COPYRIGHT OFFICE, *supra* note 37, at 14 (emphasis in original).

<sup>116</sup> *Broad. Music, Inc. v. Colum. Broad. Sys., Inc.*, 441 U.S. 1, 22 (1978).

<sup>117</sup> Antitrust Division’s Closing Review, *supra* note 20, at 3.

<sup>118</sup> Stephen Carlisle, *ASCAP and the Terrible, Horrible, No Good, Very Bad DOJ Decision That’s Going to Create Chaos in the Music Industry*, Copyright Nova Southern

the consent decrees, it must be noted that this language does not expressly deny full-work licensing. The language of the cited provision of the consent decree references former members of ASCAP who later leave for a different PRO.<sup>119</sup>

The plain language of the BMI and ASCAP consent decrees does not provide for an express mandate on fractional versus full-work licensing, and any decision on a licensing scheme is susceptible to various interpretations and a constant back-and-forth when relying on the decrees to determine proper licensing practice. Therefore, amendments to the decrees to account for prevalent uses and customs in today's music industry must be instated before any decision on fractional versus full licensing can be firmly established. Due to the fact that streaming and Internet radio are major sources of music consumption today,<sup>120</sup> committees to oversee licensure to such music users is in the best interest of all parties.<sup>121</sup>

#### IV. THE DEPARTMENT OF JUSTICE'S REFUSAL TO AMEND THE CONSENT DECREES

The history of the DOJ's recent decision, and the BMI rate court's subsequent overturn highlights the importance of why a decision by the DOJ mandating a full-work or fractional licensing scheme cannot be made operative without first amending the consent decrees. In 2014, the Antitrust Division entered into a review of the BMI and ASCAP consent decrees.<sup>122</sup> Of particular interest was the "competitive concerns that arise from the joint licensing of music by [PROs] and the remediation of those concerns."<sup>123</sup> The Antitrust Division solicited public comments on an array of issues and received a wide range of responses on both sides of the argument by individuals and corporations alike.<sup>124</sup> Both sides advocated for some form of change to the decrees.<sup>125</sup> Unsurprisingly, many artists, composers,

---

University (Aug. 12, 2016), <http://copyright.nova.edu/ascap-terrible-horrible-no-good-bad-doj-decision-thats-going-create-chaos-music-industry/> [<https://perma.cc/F6NQ-CG2G>].

<sup>119</sup> See *Am. Soc'y of Composers, Authors and Publishers*, 2001 WL 1589999, at \*10.

<sup>120</sup> See *infra* Section V.B.

<sup>121</sup> For a discussion of such a committee, see *infra* Section V.D.

<sup>122</sup> Ed Christman, *U.S. Dept. of Justice to Review ASCAP and BMI Consent Decrees*, *Billboard* (June 4, 2014, 2:16 AM), <http://www.billboard.com/biz/articles/news/legal-and-management/6106492/us-dept-of-justice-to-review-ascap-and-bmi-consent> [<https://perma.cc/8B5W-LGPM>].

<sup>123</sup> U.S. DEPT OF JUSTICE, *supra* note 14.

<sup>124</sup> See *id.*

<sup>125</sup> See, e.g., Future of Music Coalition, Comment on the U.S. Dept of Justice, Antitrust Division Review of the ASCAP and BMI Consent Decrees (2014), <https://www.justice.gov/sites/default/files/atr/legacy/2014/08/13/307749.pdf> [<https://perma.cc/3XBT-GAR5>] (advocating for the decrees to remain in place, but suggesting amendments to make

and publishers advocated for an amendment or elimination, while many business owners and licensees advocated for the decrees to remain in place.

After receiving a multitude of public comments, the Antitrust Division extended its inquiry in 2015,<sup>126</sup> as a result of previous comments recommending, “additional modifications regarding ASCAP’s and BMI’s licensing practices related to jointly owned works.”<sup>127</sup> The DOJ cited to language in each of the consent decrees suggesting that licenses have been granted to provide licensees “to play all works in their repertoires, whether partially or fully owned.”<sup>128</sup> This notion is in direct contrast with the historical industry practice of licensing on the fractional ownership of the copyright that each co-owner holds.<sup>129</sup> This inquiry solicited more comments, resulting again in an expected division between publishers and their PROs,<sup>130</sup> and music users.<sup>131</sup>

the decrees more beneficial and fair in practice); SAG-AFTRA, Comment on the U.S. Dep’t of Justice, Antitrust Division Antitrust Consent Decree Review 3–5 (2014), <https://www.justice.gov/sites/default/files/atr/legacy/2014/08/13/307818.pdf> [<https://perma.cc/PN24-LVJQ>] (advocating for a complete overhaul of the decrees).

<sup>126</sup> See *ASCAP and BMI Consent Decree Review Request for Public Comments 2015*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/atr/ascap-and-bmi-consent-decree-review-request-public-comments-2015> [<https://perma.cc/B9JF-DMR5>]. The DOJ requested comments on what the licenses actually provide, potential risk of infringement for users who have licensed with only one PRO, and public interest questions arising from a potential modification of the decrees to allow partial grants. See *id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> See *id.*

<sup>130</sup> See, e.g., Am. Soc’y of Composers, Authors and Publishers, Comment on the U.S. Dep’t of Justice, Antitrust Division Review of PRO Licensing of Jointly Owned Works 1–2 (Nov. 20, 2015), <https://www.justice.gov/atr/public/ascapbmi2015/ascapbmi9.pdf> [<https://perma.cc/FH8K-CPKS>] (ASCAP advocating for fractional licensing and against full-work licensing); Broadcast Music, Inc., Comment on the U.S. Dep’t of Justice, Antitrust Division Review of Consent Decree in *United States v. Broad. Music, Inc.* 2–3 (Nov. 20, 2015), <https://www.justice.gov/atr/public/ascapbmi2015/ascapbmi18.pdf> [<https://perma.cc/FE9A-NDMW>] (BMI advocating for fractional licensing and against full-work licensing); Wixen Music Publishing Inc., Comment on the U.S. Dep’t of Justice, Antitrust Division Review of ASCAP and BMI Consent Decrees (Nov. 19, 2015), <https://www.justice.gov/atr/public/ascapbmi2015/ascapbmi114.pdf> [<https://perma.cc/5E4S-KTD5>] (Wixen, a music publisher advocating for fractional licensing and against full-work licensing).

<sup>131</sup> See, e.g., American Beverage Licensees, Comment on the U.S. Dep’t of Justice, Antitrust Division Review of ASCAP and BMI Consent Decrees 2 (Nov. 20, 2015), <https://www.justice.gov/atr/public/ascapbmi2015/ascapbmi12.pdf> [<https://perma.cc/HSP6-CENK>] (the American Beverage Licensees advocating for full-work licensing and against fractional licensing); Media Licensees, Comment on the U.S. Dep’t of Justice, Antitrust Division Review of ASCAP and BMI Consent Decrees 2–4 (Nov. 20, 2015), <https://www.justice.gov/atr/public/ascapbmi2015/ascapbmi19.pdf> [<https://perma.cc/4X64-5KRK>] (a collective group of music users advocating for full-work licensing and against fractional licensing).

In August 2016, the DOJ closed its review with a decision that “sent an earthquake rumbling through the music industry.”<sup>132</sup> The DOJ stated that not only would the consent decrees remain without amendment, but that a plain reading of the decrees requires ASCAP and BMI to operate under a full-work licensing scheme as opposed to its traditional practice of fractional licensing.<sup>133</sup> The conclusion of the Antitrust Division was that “it would not be in the public interest to modify the . . . consent decrees to permit . . . fractional licens[ing].”<sup>134</sup> The rationale behind the decision was that any change would impair the public performance market, undermine the PROs’ traditional role in “providing protection from unintended copyright infringement liability,” and potentially limit the public performance of music.<sup>135</sup>

In explaining the decision to stick with the outdated consent decrees, despite the changed landscape of music consumption, the Antitrust Division explained that the it “could not assess the likely impact of [modifying the consent decrees] without first understanding precisely what is granted by the PROs’ licenses.”<sup>136</sup> But, circularly, the Antitrust Division stated that the determination to mandate full-work licensing began “with the language of the consent decrees themselves.”<sup>137</sup>

After the DOJ issued its decision, BMI and ASCAP released a joint statement, demonstrating unity in their disappointment and in future plans.<sup>138</sup> A change in legislation is a promising remedy as ASCAP has many allies in its endeavor to make fractional licensing the law.<sup>139</sup> Indeed, the DOJ even

---

<sup>132</sup> Jon Healey, *Justice Department Rocks Music Industry with ASCAP-BMI Decision*, L.A. TIMES (Aug. 4, 2016, 10:20 AM), <http://www.latimes.com/opinion/opinion-la/la-ed-ascap-bmi-justice-department-20160804-snap-story.html> [<https://perma.cc/E7TG-KTF4>].

<sup>133</sup> Antitrust Division’s Closing Review, *supra* note 20, at 11–12 (“[T]he plain text of the decrees cannot be squared with an interpretation that allows fractional licensing.”).

<sup>134</sup> *Id.* at 13.

<sup>135</sup> *Id.* at 13, 15; Further, the Division declined to modify the consent decrees in any other way because doing so “during this uncertain period could complicate the industry’s move to a shared approach with full clarity for all industry participants as to the rights conveyed by the PRO’s licenses.” *Id.* at 17.

<sup>136</sup> Hesse, *supra* note 31, at 3 (the question of what is granted by the PROs’ license centers around whether fractional or full schemes are required).

<sup>137</sup> *Id.* at 4.

<sup>138</sup> See ASCAP and BMI Join Forces to Fight the Department of Justice’s Interpretation of Their Consent Decrees, ASCAP (Aug. 4, 2016), <https://www.ascap.com/press/2016/08-04-ascap-bmi-join-forces-to-fight-doj.aspx> [<https://perma.cc/MM6P-QCZZ>] (“United in their belief that the DOJ’s decision to mandate 100% licensing will cause unnecessary chaos in the marketplace and place unfair financial burdens and creative constraints on songwriters and composers, the two organizations are pursuing a joint campaign: BMI through litigation and ASCAP through legislative reform.”).

<sup>139</sup> Eighteen members of Congress have signed a letter to Attorney General Loretta Lynch “calling for the [DOJ] to reconsider its decision on 100%, or ‘full-works’ licensing.” Andy Gensler, *Congress Members Send Attorney General Letter Urging Dept. of Justice to Reverse Songwriting Decision: Exclusive*, BILLBOARD (Sept. 28, 2016, 3:46 PM),

dedicated a section in its decision to concede that the consent decrees are “inherently limited in scope.”<sup>140</sup> It also suggested that the decrees could be modified “through a legislative solution that brings performance rights licensing under a similar regulatory umbrella as other rights,” and further “encourages the development of a comprehensive legislative solution.”<sup>141</sup> While both PROs were given a one-year grace period to transition their practices to fit this new mandate,<sup>142</sup> each began taking steps to halt the change to full-work licensing.

BMI requested a pre-motion conference in its rate court immediately after the issuance of the DOJ’s decision.<sup>143</sup> BMI refuted the DOJ’s finding, stating that the Antitrust Division erred in its interpretation of the consent decrees, case law, and the public interest.<sup>144</sup> Further, BMI sought a declaration that full-work licensing is not required under the consent decree, and if it is required, the court should implement a modification of the decree that would allow BMI to continue to license fractionally.<sup>145</sup> If the rate court agreed with the DOJ, BMI sought a final order stating so, along with an order granting BMI ample time to conform to the full-work licensing scheme.<sup>146</sup>

Just over a month after the DOJ’s decision, BMI’s rate court issued an opinion reversing the DOJ’s mandate<sup>147</sup> before either party entered a motion.<sup>148</sup> The judge eventually came to the conclusion that the BMI consent decree “neither bars fractional licensing nor requires full-work licensing.”<sup>149</sup> For BMI, this means that they may continue their practice of fractional licensing.<sup>150</sup> After much speculation due to the changing

---

<http://www.billboard.com/biz/articles/7525693/congress-members-send-attorney-general-letter-urging-dept-of-justice-to-reverse> [<https://perma.cc/M5QL-U4MF>].

<sup>140</sup> Antitrust Division’s Closing Review, *supra* note 20, at 22.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 17.

<sup>143</sup> See Pre-Motion Conference Letter, United States v. Broad. Music, Inc., No. 64 Civ. 3787, ECF No. 87 at 1–2 (Aug. 4, 2016).

<sup>144</sup> *Id.* at 2.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> See United States v. Broad. Music, Inc., 207 F. Supp. 3d 374, 377 (S.D.N.Y. 2016).

<sup>148</sup> Ed Christman, *Publishing Industry Praises BMI Consent-Decree Decision—But Outcome Remains Unclear*, BILLBOARD (Sept. 19, 2016), <http://www.billboard.com/articles/news/7511350/publishing-industry-praises-bmi-consent-decree-decision-but-outcome-remains> [<https://perma.cc/QV39-7FCU>] (Fakler, a partner at Arent Fox LLP who represents digital services, told Billboard: “Nobody expected him to rule on what had so far been submitted. Neither side had even put in a motion yet.”).

<sup>149</sup> *Broad. Music, Inc.*, 207 F. Supp. 3d at 377.

<sup>150</sup> Christman, *supra* note 45.

administration,<sup>151</sup> the DOJ filed an appeal to the BMI rate court decision on May 18, 2017.<sup>152</sup>

Currently, there are two different mandates on licensing schemes based on two almost identical consent decrees.<sup>153</sup> This kind of inconsistency marks a time of extreme uncertainty in the music industry. Both the DOJ and BMI's rate court have relied on the consent decrees heavily in making their decision on fractional versus full-work licensing, and have come out on opposite sides of the coin.<sup>154</sup>

In order to maintain consistency in the music industry and marketplace, it is clearer than ever that a decision on licensing cannot be administered without first amending the consent decrees. A constant shifting of the system, made possible by appeals from both parties, a potential inconsistent decision from ASCAP's rate court, and a lengthy legislative reform effort would mean that music users, publishers, composers, and PROs alike will all face uncertainty in what is the proper practice. Such uncertainty opens a floodgate of legal battles between music users, music composers, PROs, and publishers.

The consent decrees, which must be interpreted within their four corners, do not provide for the contemporary needs of the PROs, as there is currently no way to interpret the consent decrees within the scope of digital music.<sup>155</sup> While this "four corner" interpretation is to protect the waiver of litigation that the PRO agrees to when voluntarily entering into a consent decree, if "the wording is susceptible to more than one reasonable construction, then the court must look to extrinsic

---

<sup>151</sup> See Ed Christman, *Department of Justice Appeals Consent Decree Ruling, BMI Hits Back*, BILLBOARD (May 18, 2017), <http://www.billboard.com/articles/business/7800937/department-justice-appeals-consent-decree-bmi-comment> [<https://perma.cc/9SAW-JHGX>]; Robert Levine, *Songwriters of North America File Motion to Proceed in DOJ Consent Decree Lawsuit: Exclusive*, BILLBOARD (Feb. 8, 2017), <http://www.billboard.com/articles/business/7685106/songwriters-of-north-america-file-motion-to-proceed-in-doj-consent-decree> [<https://perma.cc/6L32-VUNW>].

<sup>152</sup> See Brief for Appellant United States of America at 1, *United States v. Broad.Music, Inc.*, 16-3830-CV, ECF No. 49 (May 18, 2017), <http://www.djcounsel.com/wp-content/uploads/2017/05/2017-DOJ-Brief-BMI-Full-Work-Licensing.pdf> [<https://perma.cc/P8ZV-EFND>].

<sup>153</sup> See *Broad. Music, Inc.*, 207 F. Supp. 3d at 377 (BMI may operate under fractional licensing as per its rate court); Antitrust Division's Closing Review, *supra* note 20 at 3 (ASCAP is under the control of the DOJ decision mandating full-work licensing as it has not appealed to its rate court for a judgment allowing the continuation of fractional licensing.).

<sup>154</sup> See *Broad. Music, Inc.*, 207 F. Supp. 3d at 377 ("The Consent Decree neither bars fractional licensing nor requires full-work licensing."); Antitrust Division's Closing Review, *supra* note 20, at 12 ("[T]he [C]onsent [D]ecrees must be read as requiring full-work licensing.").

<sup>155</sup> See *United States v. Am. Soc'y of Composers, Authors and Publishers*, 782 F. Supp. 778, 787–88 (S.D.N.Y. 1991).

evidence.”<sup>156</sup> In looking to such extrinsic evidence, it is clear that digital music services are becoming more and more prevalent, and it would therefore be in the best interest of the public and the PROs to explicitly provide unambiguous terms in the consent decrees to bind the PROs to certain practices concerning digital music services. Accordingly, changes in the decrees must be made to fit for the digital age of music before any legislative or judicial decision on licensing can be effectively made without compromising the integrity of the music industry.

V. A MANDATE ON A LICENSING SCHEME CANNOT BE MADE WITHOUT AMENDMENT TO THE CONSENT DECREES

Since the consent decrees were last amended, there has been a significant and undeniable change in the music industry. The scheme of licensing is at the core of how the music industry compensates its artists and how it publicly broadcasts works. It is against past practices, public policy, and general common sense not to modify the consent decrees to fit in to today’s music landscape, which is so vastly different from the time of the decrees’ most recent amendments. The consent decrees of ASCAP and BMI should reflect this change in the industry.<sup>157</sup> As the licensing decision is largely based off of the content of the consent decrees, this must be done before any mandate on full-work versus fractional licensing can be made.

A. *Inconsistencies with Regard to Licensing Schemes Will Persist Without Amendments to the Consent Decrees*

The debate of fractional versus full licensing for PROs will continue endlessly without amendments to the consent decrees. This results from both the DOJ and BMI’s rate court’s heavy reliance on the consent decrees to determine whether full or fractional licensing is required, yet each reached a decision on the opposite end of the spectrum.<sup>158</sup> Opinions on the issue will

---

<sup>156</sup> *Id.*

<sup>157</sup> *See id.* at 783–84 (“The [1950] amendment of the Decree was . . . instigated by a number of related developments . . . television began to be recognized as a potentially significant transmitter of programming to the American public. It therefore became necessary to address the manner in which its use of copyrighted music would be licensed.”).

<sup>158</sup> The Department of Justice stated that “the plain text of the decrees cannot be squared with an interpretation that allows fractional licensing,” and that “the consent decrees must be read as requiring full-work licensing.” Antitrust Division’s Closing Review, *supra* note 20, at 11–12. While BMI’s Rate Court ruled that BMI’s decree “neither bars fractional licensing nor requires full-work licensing.” *Broad. Music, Inc.*, 207 F. Supp. 3d at 377.

continue to differ because each scheme skews an advantage to one side. A music user will advocate for a full-work licensing scheme because it keeps them better protected from copyright infringement. Music publishers and PROs will prefer a fractional license because it is simply better for business and compensation.<sup>159</sup>

Amendment to both consent decrees is particularly important when considering the music landscape today. Change is warranted as copyright law has continued to evolve to accommodate changes and advancements in technology.<sup>160</sup> It is increasingly difficult for PROs to comply with the current consent decrees when they are based on decades-old practices of music consumption and do not take into consideration important factors, such as how to fairly compensate a composer when a user has a song at his or her fingertips for free via digital streaming. Further, consent decree modification “may be warranted when changed factual conditions make compliance with the decree substantially more onerous.”<sup>161</sup> It is therefore appropriate to consider changes to meet today’s digital age of music.<sup>162</sup>

### *B. Amending the Consent Decrees to Fit with the Digital Age of Music is Consistent with Past Practices*

Just as the consent decrees were altered to account for pre-recorded music in motion pictures and cable television,<sup>163</sup> it follows that they should each now be altered to adhere with the popularity of digital music use.<sup>164</sup> It is of note that of the two consent decrees, ASCAP’s provides more specific provisions and its last amendment came seven years after BMI’s last amendment. In giving the current decrees the benefit of the doubt for evaluation, ASCAP’s later modification date of 2001 will serve as the benchmark for

---

<sup>159</sup> See *supra* Section II.A; see also David Balto, *Modifying the Music Consent Decrees Without Clear Goals Will Harm Consumers*, THE HILL (July 5, 2015, 10:00 A.M.), <http://thehill.com/blogs/congress-blog/246725-modifying-the-music-consent-decrees-without-clear-goals-will-harm> [<https://perma.cc/7KGU-QVY4>].

<sup>160</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 430 (1984).

<sup>161</sup> *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 384 (1992).

<sup>162</sup> In 2014, weekly estimates of streaming amounted to 67% of Americans and streaming is only growing in popularity. *Everyone Listens to Music, But How We Listen Is Changing, Media and Entertainment*, NIELSEN (Jan. 22, 2015), <http://www.nielsen.com/us/en/insights/news/2015/everyone-listens-to-music-but-how-we-listen-is-changing.html> [<https://perma.cc/7PTQ-F3KP>]. In 2016, audio streams were up 76% from the previous year. NIELSEN, *supra* note 28, at 3 (2017).

<sup>163</sup> See *supra* Section III.B for a discussion of these consent decree amendments.

<sup>164</sup> In a 2016 survey, 57 percent of Americans ages twelve and over listened to Internet radio in the past month. See Nancy Vogt, *Audio: Fact Sheet*, in STATE OF THE NEWS MEDIA 2016 68–69 (2016), <https://assets.pewresearch.org/wp-content/uploads/sites/13/2016/06/30143308/state-of-the-news-media-report-2016-final.pdf> [<https://perma.cc/X69Q-XN9S>].

determining if the consent decrees, as they stand today, are fit for the current music landscape.

In 2001, the revolution to how people consume music was in its infancy. In November 2001, the first iPod was released.<sup>165</sup> Apple opened the iTunes Music Store in April 2003.<sup>166</sup> It sold one million songs in its first week of operation,<sup>167</sup> and by September of the same year, ten million songs had been downloaded.<sup>168</sup> By July 2004 one hundred million songs had been downloaded from the store,<sup>169</sup> demonstrating an extremely quick progression of digital music sales at a time when broadband had yet to overtake dial-up Internet.<sup>170</sup> iTunes went on to be the most dominant music seller, overtaking physical stores that previously commanded the market.<sup>171</sup>

Four years after the latest consent decree amendment in 2001,<sup>172</sup> Internet radio was born. In November 2005, Pandora's free public internet radio was fully launched, becoming the first digital service of its kind.<sup>173</sup> Spotify followed, launching in the United States in 2011.<sup>174</sup> In 2015 and 2016 respectively, Apple Music and Pandora Premium were launched, likely to compete directly with Spotify.<sup>175</sup> Additional streaming services have since

<sup>165</sup> Billboard Staff, *From SoundJam to 25 Billion Songs Sold: An iTunes Timeline on Its Tenth Anniversary*, BILLBOARD (Apr. 28, 2013, 2:31 PM), <http://www.billboard.com/biz/articles/news/digital-and-mobile/1559621/from-soundjam-to-25-billion-songs-sold-an-itunes> [https://perma.cc/G5V7-XQDA].

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> Luke Dormehl, *Today in Apple History: iTunes Store Hits 10 Million Music Downloads*, CULT OF MAC (Sept. 8, 2017, 5:00 AM), <https://www.cultofmac.com/444689/today-apple-history-itunes-store-hits-10-million-music-downloads/> [https://perma.cc/3TVL-RGXJ].

<sup>169</sup> Billboard Staff, *supra* note 165.

<sup>170</sup> *World Wide Web Timeline*, PEW RESEARCH CENTER (Mar. 11, 2014), <http://www.pewinternet.org/2014/03/11/world-wide-web-timeline/> [https://perma.cc/VR5W-L8YB].

<sup>171</sup> *See iTunes Overtakes Wal-Mart In Music Sales*, CBS News (Apr. 4, 2008, 8:47 AM), <https://www.cbsnews.com/news/itunes-overtakes-wal-mart-in-music-sales/> [https://perma.cc/D8JX-BVBE].

<sup>172</sup> Dep't. of Justice, Office of Pub. Affairs, *supra* note 25.

<sup>173</sup> *See* Patrick Maloney, *Origin Story: The Founding of Pandora Radio*, Startup Grind, <https://www.startupgrind.com/blog/origin-story-the-founding-of-pandora-radio/> [https://perma.cc/P2FZ-V33Z]. Pandora allowed users to listen for free with ads, or to pay a per-month fee to go ad-free. *See* Lauren Gil, *History of Music Streaming*, SUTORI, <https://edu.hstry.co/timeline/history-of-music-streaming> [https://perma.cc/32XE-UA7P].

<sup>174</sup> Charlie Sorrel, *Spotify Launches in the U.S. at Last*, WIRED, <https://www.wired.com/2011/07/spotify-launches-in-the-u-s-at-last/> [https://perma.cc/F7ZA-ZXNY] (July 14, 2011). The European service's United States launch was "highly anticipated." Alex Pham, *Spotify Music Service Coming 'Soon' to U.S.*, L.A. Times (July 7, 2011), <http://articles.latimes.com/2011/jul/07/business/la-fi-ct-spotify-20110708> [https://perma.cc/ZBZ7-VAVR].

<sup>175</sup> Press Release, Apple, *Introducing Apple Music—All The Ways You Love Music. All in One Place* (June 8, 2015), <https://www.apple.com/pr/library/2015/06/08Introducing-Apple-Music-All-The-Ways-You-Love-Music-All-in-One-Place-.html> [https://perma.cc/RM67-YVJX]; Andrew Flanagan, *Pandora Reveals Its Spotify Competitor, Pandora Premium*, BILLBOARD (Dec. 6, 2016), <http://www.billboard.com/articles/news/7604144/pandora-premium-reveal-spotify-competitor-streaming> [https://perma.cc/ZVW6-497X]. It is of note that

emerged to compete, including TIDAL, helmed by Jay-Z,<sup>176</sup> and Google Play Music.<sup>177</sup> Neither has been able to seriously challenge Spotify or Apple Music.<sup>178</sup>

The music industry experienced a financial decline due to piracy, file-sharing services, and lower song purchase prices.<sup>179</sup> Physical music sales (e.g., purchasing a CD copy) have further declined; downloads have also declined in 2016.<sup>180</sup> While this decline has at times been blamed on streaming popularity,<sup>181</sup> streaming might actually be benefitting the music industry as a whole. The U.S. music industry is “on pace to expand for the second straight year,” which has not happened in almost ten years.<sup>182</sup> Streaming has even been credited for the rise in retail spending in the first half of 2016, as “U.S. streaming revenue grew [57%] to \$1.6 billion in the first half of 2016 and accounted for almost half of industry sales.”<sup>183</sup>

Evidently music streaming, whether free with advertisements or via paid-for on-demand subscriptions, is not going anywhere and will only continue to grow.<sup>184</sup> Much like

---

iTunes is arguably the most powerful music retailer and yet needed to launch a streaming service in an attempt to keep its reign of control on the music market.

<sup>176</sup> See Andrew Flanagan & Andrew Hampp, *It's Official: Jay Z's Historic Tidal Launches with 16 Artist Stakeholders*, *Billboard* (Mar. 30, 2015), <http://www.billboard.com/articles/news/6509498/jay-z-tidal-launch-artist-stakeholders> [<https://perma.cc/VQ6L-S38P>].

<sup>177</sup> See Chris Welch, *Google Launches Free Music Streaming Ahead of Apple Music Debut*, *THE VERGE* (June 23, 2015, 12:00 PM), <http://www.theverge.com/2015/6/23/8830629/google-play-music-free-streaming-now-available> [<https://perma.cc/8V36-8Q8J>].

<sup>178</sup> See Ryan McQueeney, *Which Music Streaming Service is the Best Right Now?*, *NASDAQ* (Aug. 2, 2016), <http://www.nasdaq.com/article/which-music-streaming-service-is-the-best-right-now-cm659219> [<https://perma.cc/V6T6-4NBZ>]; see also Devin Leonard, *That's Business, Man: Why Jay Z's Tidal Is a Complete Disaster*, *BLOOMBERG* (May 28, 2015), <http://www.bloomberg.com/news/features/2015-05-28/why-jay-z-s-tidal-streaming-music-service-has-been-a-disaster> [<https://perma.cc/PRY4-N89R>].

<sup>179</sup> Lucas Shaw, *The Music Industry Is Finally Making Money on Streaming*, *BLOOMBERG* (Sept. 19, 2016, 9:16 PM), <https://www.bloomberg.com/news/articles/2016-09-20/spotify-apple-drive-u-s-music-industry-s-8-first-half-growth> [<https://perma.cc/4VL5-32XT>].

<sup>180</sup> *Id.* While this is bad news for some, streaming is helping the market as a whole, being that monthly prices for on-demand streaming services average at ten dollars per month, and one hundred twenty dollars is more money per year than the average consumer would spend on CDs. See Ben Sisario, *Amazon and Pandora to Gauge Music Value in the Internet Age*, *N.Y. TIMES*, Sept. 11, 2016, <http://www.nytimes.com/2016/09/12/business/media/amazon-and-pandora-to-gauge-music-value-in-the-internet-age.html> [<https://perma.cc/W8QH-7VCK>].

<sup>181</sup> See Ben Sisario & Karl Russell, *In Shift to Streaming, Music Business Has Lost Billions*, *N.Y. TIMES* (Mar. 24, 2016), <http://www.nytimes.com/2016/03/25/business/media/music-sales-remain-steady-but-lucrative-cd-sales-decline.html> [<https://perma.cc/QVE7-GAQ2>].

<sup>182</sup> Shaw, *supra* note 179.

<sup>183</sup> *Id.*

<sup>184</sup> As a result of the growth of streaming, in 2014, the Billboard 200 changed its charting methodology to account for streaming. Hugh McIntyre, *Billboard Will Change Their Charting Methodology to Include Streaming*, *FORBES* (Nov. 11, 2014, 10:00AM), <http://www.forbes.com/sites/hughmcintyre/2014/11/20/billboard-will-change-their-charting-methodology-to-include-streaming/print/> [<https://perma.cc/NXW9-CTCL>].

music embedded in motion pictures and paid-for cable television, this is not a change in the music industry that can easily be ignored. It is therefore necessary that the consent decrees of ASCAP and BMI reflect this change.<sup>185</sup> Only then will it be justifiable to decide whether the licensing of music should be mandated on a full-work or fractional basis, as it does not make sense to make industry-shaping decisions without taking into consideration the landscape of the industry as a whole. Because of the rise of streaming, physical sales and digital downloads are on the decline;<sup>186</sup> it is therefore pertinent that this change in behavior be accounted for in deciding on a licensing scheme. Since the recent licensing mandates have been based off of the consent decrees of ASCAP and BMI, it is reasonable that the consent decrees should account for this change in behavior as well.

### C. *Possible Avenues to Modernizing Music Licensing Schemes*

#### 1. Elimination of the Consent Decrees

The most drastic solution to this pressing problem would be the elimination of the decrees altogether. In favor of the elimination of the consent decrees is the 1979 determination of the DOJ that “entering into perpetual decrees was not in the public interest.”<sup>187</sup> Many of the decrees that were entered into pre-1980 do not have “sunset” provisions, which “automatically terminate [the decree] after a term of years, not to exceed 10 years,” though these pre-1980 decrees “cannot be terminated or modified except by court order.”<sup>188</sup> While the DOJ stated that it will advise courts that most pre-1980 decrees will be presumed to no longer be in the public interest, there may be limited circumstances in which that presumption may be invalid,

---

<sup>185</sup> See *United States v. Am. Soc’y of Composers, Authors and Publishers*, 782 F. Supp. 778, 783–84 (S.D.N.Y. 1991) (“The [1950] amendment of the Decree was . . . instigated by a number of related developments . . . television began to be recognized as a potentially significant transmitter of programming to the American public. It therefore became necessary to address the manner in which its use of copyrighted music would be licensed.”).

<sup>186</sup> See Sisario & Russell, *supra* note 181.

<sup>187</sup> Press Release, U.S. Dep’t of Justice, Antitrust Div. Announces New Streamlined Procedure for Parties Seeking to Modify or Terminate Old Settlements and Litigated Judgments (Mar. 28, 2014), <https://www.justice.gov/sites/default/files/atr/legacy/2014/03/28/304744.pdf> [<https://perma.cc/AT2G-AH8X>].

<sup>188</sup> *Id.*

namely “when there is a long-standing reliance by industry participants on the decree.”<sup>189</sup>

Unsurprisingly, the suggestion to eliminate the decrees rises from the PROs themselves. In response to the Antitrust Division’s request for public comment in 2014, ASCAP stated that “the antiquated ASCAP and BMI [c]onsent [d]ecrees must be updated, if not eliminated.”<sup>190</sup> ASCAP argued that the consent decree was originally motivated at a time where there was no real competition in the marketplace, but today, ASCAP faces competition from other PROs and its own publisher and writer affiliates.<sup>191</sup> Save for BMI, none of these competitors are restricted by consent decrees.<sup>192</sup> An elimination of the consent decrees will put all PROs and publishers on equal footing in the marketplace.

But this solution is not entirely practical. Considering the main purpose of the decrees was to stave off the possibility of antitrust violations, it is very possible that the government would have trouble supporting the elimination of the decrees without dismissing the risks of monopolistic behaviors.

## 2. Partial Withdrawal Permitted by the Consent Decrees

Perhaps the most cited of suggested changes is amendments permitting “partial withdrawals” by publishers.<sup>193</sup> Partial withdrawal allows publishers to license to new media platforms directly, instead of licensing through their PRO.<sup>194</sup> This is in the best interest of the large publishers; it allows them

---

<sup>189</sup> *Id.* It appears fitting that the BMI and ASCAP consent decrees would fall under this limited circumstance, as they have each been relied on by the courts, and have governed the PROs.

<sup>190</sup> ASCAP, *supra* note 106, at 2. ASCAP contends that an elimination of its consent decree is warranted “to ensure ASCAP’s licensing can meet the needs of today’s competitive marketplace.” *Id.* at 10.

<sup>191</sup> See ASCAP, Comment Letter on the U.S. Dep’t of Just., Antitrust Division Review of the ASCAP and BMI Consent Decrees 35 (Aug. 6, 2014), <https://www.justice.gov/sites/default/files/atr/legacy/2014/08/14/307803.pdf> [<https://perma.cc/N4D6-C6CU>].

<sup>192</sup> See Steve Schlackman, *The Music Industry Overhaul: What You Need to Know*, ART LAW JOURNAL (Feb. 9, 2015), <https://artlawjournal.com/music-industry-overhaul/> [<https://perma.cc/7FDN-PNBX>]. Though SESAC, the third largest United States PRO at the time of this writing, has had its own antitrust issues. See *Radio Music License Comm., Inc. v. SESAC, Inc.*, 29 F. Supp. 3d 487 (E.D. Pa. 2014).

<sup>193</sup> *Pandora Media, Inc. v. Am. Soc’y of Composers, Authors and Publishers*, 785 F.3d 73, 76 (2d Cir. 2015). Publishers belonging to ASCAP began to partially withdraw their digital licensing rights from the PRO among concerns that ASCAP was licensing to “new media companies such as Pandora” at a below-market rate. *Id.*

<sup>194</sup> Chris Cooke, *DoJ Expected to Support Partial Withdrawal in Consent Decree Review*, COMPLETE MUSIC UPDATE (Apr. 8, 2015), <http://www.completemusicupdate.com/article/doj-expected-to-support-partial-withdrawal-in-consent-decree-review/> [<https://perma.cc/TD6F-EY4D>].

to have more control over negotiations, which effectively gives them a higher monetary return because they could demand “higher royalty rates for their material,”<sup>195</sup> while not paying out a portion of their collected fee to their PRO.

Courts ruled, however, that due to the blanket license granted to licensees there is an all-in or all-out option only, and publishers cannot license digital services in an entirely different manner than that in which broadcast and other public performances are licensed.<sup>196</sup> For example, the Second Circuit held that the consent decree precludes ASCAP from allowing partial withdrawal. An allowance of partial withdrawal, the court reasoned, would require rewriting the consent decrees “so that it speaks in terms of the right to license the particular subset of public performance rights being sought by a specific music user.”<sup>197</sup>

A downfall of partial withdrawal, and the reason it is not an ideal solution, is that its allowance for digital services may create a slippery slope into exceptions and carve outs for other types of music users. For instance,

[a]llowing copyright owners to selectively withdraw from ASCAP and BMI would substantially undermine the competitive protections of the [c]onsent [d]ecrees by giving copyright holders the freedom to exercise their market power. Ultimately rights holders would withdraw from ASCAP and BMI with respect to all licensees for which the exercise of market power would be beneficial to the rights holders.<sup>198</sup>

There is also a deep concern in regard to the financial liability of digital services with regard to partial withdrawal.<sup>199</sup> These

<sup>195</sup> Ben Sisaro, *Justice Department Plans to Begin a Review of Music Licensing Rules*, N.Y. TIMES (June 4, 2014), <http://www.nytimes.com/2014/06/04/business/media/justice-department-is-said-to-plan-a-review-of-music-licensing-rules.html> [https://perma.cc/JPC8-5VSH]. PROs and publishers argue that partial withdrawal would “afford greater latitude in structuring license arrangements, ultimately benefitting copyright owners and music users alike.” ASCAP, *supra* note 191 at 21.

<sup>196</sup> Cooke, *supra* note 194. See *Broad. Music, Inc. v. Pandora Media, Inc.*, Nos. 13 Civ. 4037(LLS), 64 Civ. 3787 (LLS), 2013 WL 6697788, at \*3–4 (S.D.N.Y. Dec. 19, 2013); see also *Pandora Media, Inc.*, 785 F.3d at 76.

<sup>197</sup> *Pandora Media, Inc.*, 785 F.3d at 77.

<sup>198</sup> Steven R. Peterson, Ph. D. on Behalf of the Nat’l Ass’n of Broadcasters, Comment Letter on the U.S. Dep’t of Justice, Antitrust Div., Antitrust Consent Decree Review 2 (Aug. 6, 2014), <https://www.justice.gov/sites/default/files/atr/legacy/2014/08/13/307974.pdf> [https://perma.cc/3S7T-Q7CF].

<sup>199</sup> In a case of partial withdrawal from ASCAP, Sony put Pandora in a position to be liable for an exorbitant amount of money, per infringement, for any song played after Sony’s withdrawal from ASCAP. Balto, *supra* note 159. (“[I]n 2013 Sony withdrew from ASCAP the rights to license its music to digital music services. During rate negotiations, Sony refused to give to Pandora a list of the songs it owned. Not only did Pandora have to negotiate without knowing what it was getting in the deal, Pandora also could not remove Sony’s songs from its service if negotiations fell through . . . Pandora would be liable for \$150,000 per infringement for any Sony song that played after Sony withdrew from ASCAP.”).

concerns make their way to songwriters as well, in that publishers could potentially take advantage of songwriters if partial withdrawal is allowed.<sup>200</sup>

### 3. Digital Music Service-Specific Provision

The consent decrees are rendered even more antiquated today as they do not even account for digital downloads of music, let alone streaming (which has overtaken digital downloads as the most revenue-producing system in the music industry).<sup>201</sup> A digital music service-specific provision should be introduced to reflect this industry change. Modification to include provisions for streaming should be enacted in at least two ways. First, the PROs must issue blanket licenses at a to-be-determined rate to all digital music services that request one, and the license shall be up for renewal after two years.<sup>202</sup> Second, the rate courts should determine the rate, which shall be the same for each similarly situated user.<sup>203</sup>

The rates for digital music services should be marginally higher than most other users because it is clear that some artists do not wish to participate in streaming for financial compensation reasons.<sup>204</sup> Digital music services paying higher rates to a PRO will increase the royalty payout to a composer, which would likely lead to more artists consenting to streaming their music. Such a pay scale would help to prevent copyright owners removing themselves from their PRO, which would in turn diminish the PROs' business, because of what may appear to be "mandatory streaming."

---

<sup>200</sup> The Songwriters Guild of America expressed concern to the Department of Justice, and "[t]hese fears appear to be warranted, a leaked contract between Sony and Spotify showed that while Spotify is paying most of its revenue to rights holders, a decent amount of this revenue is being paid to Sony in such a way that it might not be going to artists." *Id.*

<sup>201</sup> Joshua P. Friedlander, RIAA, News and Notes on 2015 RIAA Shipment and Revenue Statistics, available at <http://www.riaa.com/wp-content/uploads/2016/03/RIAA-2015-Year-End-shipments-memo.pdf> [<https://perma.cc/3D76-GJBZ>]; Sisario & Russell, *supra* note 181.

<sup>202</sup> The rationale of the two-year period for renegotiation is to account for future changes in the music industry, including streaming services revenue and popularity, standard royalty rates, and administration costs while still accounting for the time it takes to partake in these negotiations.

<sup>203</sup> In moving directly to the rate courts to determine a fair rate, the courts will take several factors into account that will weigh the interests of the public, music users, and copyright holders.

<sup>204</sup> See, e.g., Taylor Swift, *For Taylor Swift, the Future of Music Is A Love Story*, WALL ST. J. (July 7, 2014), <http://www.wsj.com/articles/for-taylor-swift-the-future-of-music-is-a-love-story-1404763219> [<https://perma.cc/EG5S-BYXR>] (opining that "music should not be free").

Licensing should be a seamless process for music users while also providing PROs with flexibility in licensing to digital music services. PROs requiring its composers to agree to license to digital music services would lead to industry chaos. Such mandatory streaming would likely lead to composers leaving the PRO if they do not want to stream for compensation reasons.<sup>205</sup> For this reason, the rate courts must establish rates for digital music services that would allow for a composer or songwriter to be paid amounts competitive to what they may receive for actual purchases of the work via digital downloads or physical purchases. As paid streaming is the way forward, it should be a focus of the music industry.<sup>206</sup> If it becomes the focus, streaming services may have to increase the monthly fees charged to their subscribers, but under the proposed consent decree amendments, that increase would be up to their discretion.<sup>207</sup>

Such flexibility will aid in the rate courts' ultimate decision on fractional versus full-work licensing because it will determine whether composers choose to withdraw from their PRO. In a scenario where many do withdraw from a PRO, full-work licensing may be appropriate to remedy the burden that would be placed on music users. If many do not withdraw from their PRO, it appears that the industry custom of fractional licensing could remain intact, or alternatively, full-work licensing may not be such an issue for PROs if they are receiving higher monetary compensation than they were receiving with fractional licensing before the implementation of this provision.

While this solution may be a step in the right direction, the significant changes that might occur if the PROs mandate streaming may be too forceful and unsavory for composers to accept. Though helpful for the rate courts to decide on full-work

---

<sup>205</sup> If those who did not wish to participate in streaming removed themselves from their PRO, music users would hardly be able to keep track of who they must receive a license from, what works they would be authorized to use, who does or does not accept streaming, etcetera. Though it is likely that many artists and composers will continue to want to stream their music. Success on streaming services is likely to be an incentive. For example, Justin Bieber's 2016 "album *Purpose* had over 100 [m]illion on-demand audio streams in its release week." NIELSEN, 2015 NIELSEN MUSIC U.S. REPORT 5 (2016), <http://nck.pl/media/attachments/317410/2015%20Nielsen%20music%20U.S.%20report.df.pdf> [<https://perma.cc/Z6X8-T5L9>].

<sup>206</sup> Jan Dawson, *RIAA Stats Means Music Industry Must Focus on Subscriptions*, VARIETY (Mar. 22, 2016, 5:01 PM), <http://variety.com/2016/digital/news/riaa-streaming-revenue-music-industry-1201736586/> [<https://perma.cc/NG5W-TA4W>].

<sup>207</sup> Research shows that many listeners are not willing to pay for streaming when they can get it for free, and that cost is a big factor in decisions to not pay for streaming. See NIELSEN, *supra* note 205, at 27. Downloads and physical purchases are mostly continuing to decline, however, while streaming is continuing to rise and listeners may find that if they want to conveniently listen to a wide variety music, a paid streaming subscription will be their best, and possibly only option. See *id.* at 8.

versus fractional licensing, the uncertainty of whether or not many composers will choose to withdraw from a PRO prolongs the licensing scheme decision.

#### 4. User-Specific Provision

A less severe, yet similar solution to the digital music service-specific provision, would be amending the consent decrees to require more specificity in licensing for specific types of music users. Each type of music user has different needs and potentially very different financial capabilities.<sup>208</sup> Provisions specifying licensing agreements to different groups of music users are mutually advantageous to music users, publishers, and PROs. A small family-owned restaurant, for example, may not require a large sampling of music, and may not have the means or the desire for a catalogue of one million songs. In this sense, it would be best for them to be able to go to one PRO only and receive a license to play songs from its repertory without being required to go elsewhere for an additional license to the musical composition. Whether this business receives the rights to all of ASCAP's repertory, which it could under a full-work scheme, or only those works to which ASCAP has one hundred percent control, under a fractional scheme, this type of business should be able to choose its course of action. This would change the requirement of issuing blanket licenses, but would be in the best interests of many small businesses.

On the other end of the spectrum are radio stations and streaming services. They may require access to millions of songs, have the funds to pay multiple PROs, and have the resources to acquire information on how many licenses they need and from whom. This express dichotomy between music users should be accounted for under the consent decrees because, although the music landscape has changed, not every music user that requires a license is a digital music magnate and it might be inequitable for those users to be subject to changes that provide no real benefit.

This solution, while promising, does allow even more room for error than may currently exist. It gives music users and PROs many options, which may lead to unnecessary litigation or rate court proceedings to determine fair rates. Further, under this amendment, a decision on full versus fractional licensing

---

<sup>208</sup> ASCAP's website describes eight different types of businesses that future licensees may select to determine their particular agreement with ASCAP. *Music Users*, ASCAP, <https://www.ascap.com/music-users> [<https://perma.cc/5VKR-G92M>]. These types of businesses may serve as a guideline to the types of users that should be provided for in the consent decrees.

may not be required. Each provision for each particular music user may state explicitly under which scheme it recommends or mandates the licenses to be obtained. While in theory this seems like an easily achievable undertaking, there may be certain exceptions for unforeseen subsections of music users who might require a combination of services, for which full-work versus fractional licensing would need to be negotiated, causing unnecessary delay in licensing.

##### 5. Implementation of a Central Database and Sunset Provision in Lieu of Amendment

If the consent decrees are not amended to fit in with the digital age of music, they should continue to exist without explicit determination of whether a full-work or fractional scheme is necessary.<sup>209</sup> In order to put the industry in a more certain place than it stands at the moment, it would be helpful to mandate a committee amongst all PROs to create and maintain a universal database that allows music users to clearly access and understand which PROs they must obtain a license from in order to play certain works.<sup>210</sup>

A sunset provision<sup>211</sup> mandating that the DOJ implement a firm termination date of the consent decrees, or alternatively, review the consent decrees on a specific time interval, would be

---

<sup>209</sup> This would be most in tune with BMI's rate court decision that "[t]he Consent Decree neither bars fractional licensing nor requires full-work licensing," but would also mean that the consent decrees neither bar full-work licensing nor require fractional licensing. *United States v. Broad. Music, Inc.*, 207 F. Supp. 3d 374, 377 (S.D.N.Y. 2016). Further, in its remarks, the Department of Justice stated that "the industry has largely avoided a definitive determination of whether ASCAP and BMI offered full-work or fractional licenses because the vast majority of music users obtain a license from ASCAP, BMI, and SESAC." Antitrust Division's Closing Review, *supra* note 20, at 9.

<sup>210</sup> Currently, BMI, ASCAP, and SESAC all allow public access to their repertory, however not all disclose their percentage in ownership of a specific work. It is further complicated when one searches for a song and discovers complex charts and industry jargon that make it hard to understand exactly who, and how many owners control the copyright to the musical composition, if one must license from that PRO their foreign affiliate, or the publisher directly. See *ACE Repertory*, ASCAP, <https://mobile.ascap.com/aceclient/AceWeb/> [<https://perma.cc/42GU-55R8>]; *BMI Search*, BMI, <http://www.bmi.com/search> [<https://perma.cc/PL4B-75JS>]; *Repertory Search*, SESAC, <https://www.sesac.com/repertory/> [<https://perma.cc/8E73-8KAB>]; see also Nicholas Thomas DeLisa, Note, *You(Tube), Me, and Content ID: Paving the Way for Compulsory Synchronization Licensing on User-generated Content Platforms*, 81 BROOK. L. REV. 1275, 1290–91 (discussing how YouTube, a music user, cannot know whether any of its users have properly cleared the use of a master recording or composition before uploading a video because "licensing databases do not communicate with YouTube.").

<sup>211</sup> A provision implemented "under which a governmental agency or program automatically terminates at the end of a fixed period unless it is formally renewed." *Sunset Law*, BLACK'S LAW DICTIONARY (10th ed. 2014). For the consent decrees, this would mean either a termination of the decrees at a fixed date, or a formal review of the decrees to take place one per period specified within such provision of the decree.

a warranted amendment if no other changes were accounted for. A sunset provision would allow PROs, publishers, and music users a chance to account for unforeseen changes in the music landscape in the future. This does not have to mean an end to the consent decrees, but rather an assurance that they will be reviewed regularly and calls for change will be taken seriously.

ASCAP and BMI announced that they are working together to create a centralized database of their combined repertoires with an anticipated launch in the fourth quarter of 2018.<sup>212</sup> While this fits with this proposed solution, it does not account for the shares of musical compositions owned by other PROs. In July 2017, Representative James F. Sensenbrenner introduced the Transparency in Music Licensing and Ownership Act to the House.<sup>213</sup> Though not yet passed, this Act would mandate the creation of a comprehensive database under the maintenance of the Copyright Office.<sup>214</sup> While seemingly a giant leap in the right direction, this Act is not without its critics due to the strict implications imposed on composers and publishers.<sup>215</sup>

#### *D. The Recommended Solution: Independent PRO Licensing Committees*

A provision in the consent decrees to require each PRO to have a separate committee is in the best interest of all parties. A governing body should oversee these committees, which should each contain a combination of company executives (from that particular PRO) and disinterested antitrust experts as well as music industry stakeholders, so that concerns of all parties are addressed. Further, because ASCAP and BMI are not the only PROs, but the only PROs subject to consent decrees, these

---

<sup>212</sup> Press Release, ASCAP, ASCAP & BMI Announce Creation of a New Comprehensive Musical Works Database to Increase Ownership Transparency in Performing Rights Licensing (July 26, 2017), <https://www.ascap.com/press/2017/07-26-ascap-bmi-database> [<https://perma.cc/LM78-72ZA>].

<sup>213</sup> H.R. 3350, 115th Cong. (2017).

<sup>214</sup> *Id.* (The bill was introduced in the House of Representatives on July 20, 2017 “[t]o amend title 17, United States Code, to establish a database of nondramatic musical works and sound recordings to help entities that wish to publicly perform such works and recordings to identify and compensate the owners of rights in such works and recordings, and for other purposes.”); see also Jim Sensenbrenner, *Transparency in Music Licensing Helps Small Businesses*, MORNING CONSULT (July 21, 2017), <https://morningconsult.com/opinions/transparency-music-licensing-helps-small-business/> [<https://perma.cc/4KUK-689U>].

<sup>215</sup> Robert Levine, *Federal ‘Transparency’ Bill Endangers Songwriters’ Leverage for Getting Paid*, BILLBOARD (Aug. 11, 2017), <http://www.billboard.com/articles/business/7898132/federal-transparency-bill-songwriters-rights-payment> [<https://perma.cc/G5L5-UZ6Z>]. The Act would require that all copyright owners supply and maintain the information to be put into the database in order to recover any damages other than injunctive relief and actual damages, for copyright infringement connected to the public performance, reproduction and distribution rights. H.R. 3550(d)(1).

committees should be instated in each PRO registered in the United States via legislative action.

The committee would be responsible for reviewing license issues to determine an allowance of partial withdrawal if the specific instance has merit, and for spearheading the development and maintenance of a comprehensive database of copyright holders to each work in the PROs' collective repertoires. These individual databases would then be compiled into one by the joint efforts of all the PRO committees. These committees would confirm fair compensation, but would not, however, be able to solve discrepancies with regard to fair rates for specific licenses, as they could not be impartial as each committee represents a designated PRO. Therefore, resolution of any conflict would still remain with the rate courts.

These committees should also deal exclusively with licensing to streaming and Internet radio services for their respective PROs. The purpose is to provide assurance that all publishers belonging to a PRO would have someone to specifically advocate for their licensing desires to particular music users. The committee could advocate for a composer who wanted higher pay from a streaming service. This would eliminate the need for partial withdrawal. Music users would be advantaged, as the PRO from which they license holds the responsibility to communicate any pertinent information regarding potential restrictions on their license. This system would incentivize publishers to sign with, and stick with, a PRO because they can feel confident that their needs will be fairly considered, thus making the system more transparent and fair for music users.

This committee will aid in a decision on full versus fractional licensing, though it does not provide a firm decision one way or the other. On the one hand, a large issue with fractional licensing is the difficulty for music users in knowing all of the different owners from whom they need to obtain a license; the database to be implemented here would help. On the other hand, with the committee reviewing licensing disputes before litigation begins, they may be in the best position to determine that, under the supervision of the committee to ensure fair compensation, a full licensing scheme is entirely workable.

The lack of licensing scheme decision here is purposeful. There is a strong likelihood of a continued back and forth via appeals and proposed legislation that may be extended and costly as both sides fight for their favored scheme. Under this solution, both schemes can be operable at the determination of the parties involved. Fractional licensing can persist if the committees come

together to create a master database of copyright ownership, while full licensing may be appropriate in certain circumstances where fair compensation is all but guaranteed.

## CONCLUSION

It is hard to imagine a world without digital music services. If the agreements that bind the two largest American music licensors do not account for digital music services, they are not consistent with today's music landscape. When there is an integral part of the music consumption process missing from a governing document, it is hard to imagine how the practices of the music industry can be adequately regulated.

A decision on full-work versus fractional licensing has the ability to alter the entire music industry, from what songs are played on the radio down to how much a musician is paid in royalties. Reliance on antiquated documents to make this decision does not fit with today's music landscape, past practices, or public policy. As such, the consent decrees imposed on BMI and ASCAP must be amended to fit with the digital age of music before any consideration of mandating a licensing scheme. Amendments will help to ensure fair compensation for composers and artists, as well as a decrease in litigation for music users. Then, listeners may never again have to suffer a seven-month wait for Adele's newest album to stream.<sup>216</sup>

*Gabriella A. Conte†*

---

<sup>216</sup> See Dan Rys, *Adele's '25' Finally Headed to Streaming Services*, BILLBOARD (June 23, 2016), <http://www.billboard.com/articles/columns/pop/7416349/adele-25-finally-headed-streaming-services> [https://perma.cc/NHQ4-N89R].

† J.D. Candidate, Brooklyn Law School, 2018; B.A., Fairfield University, 2014. Thank you to Anne Conroy, Charles Wood, Joseph Santiago, Jason George, and everyone at the *Brooklyn Law Review* for the time and effort devoted to this note. I would also like to thank my parents, Renata and Anthony for their endless love, support, and encouragement, my brother Anthony for being the best role model I could ask for, and my grandmother, Anne Marie for being my biggest fan in all that I do. Lastly, this note is dedicated to my grandfather, Guido, who taught me the value of hard work.