Regulating the Blanket License: A Path Towards Terminating the ASCAP/BMI Consent Decrees

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Introduction

Since 1941, the ASCAP and BMI consent decrees have shaped the legal and business landscape of the music industry. The market efficiencies of blanket licensing introduced by ASCAP's early 20th Century founding enabled owners of copyrighted musical compositions to monetize and enforce their exclusive rights on a scale previously impossible. Yet just as the public performance blanket license created beneficial market efficiencies, antitrust and anticompetitive concerns arose. The consent decrees were instituted to address such concerns.

Today, ASCAP and BMI say that the decrees regulate more than necessary and are in need of updating, or perhaps even elimination.[1] Some claim the ASCAP/BMI consent decrees have operated to depress rates paid to songwriters and publishers.[2] The performing rights organizations (PROs) argue that these WWII era regulations are out of date and out-of-line with current antitrust consent decree practice.[3] Even the Department of Justice wants to get out of the business of regulating the public performance rights marketplace.[4]

By way of brief overview, those who wish to publicly perform copyrighted musical compositions must obtain a license, or rights, from the copyright owner. Licensees today include bars, restaurants, live music venues, broadcast and cable television stations, radio stations,

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[1] *See* ASCAP, Comment Letter Regarding 2019 Review of the ASCAP and BMI Consent Decrees 1 (Aug. 9, 2019), https://media.justice.gov/vod/atr/ascapbmi2019/pc-043.pdf [hereinafter ASCAP 2019 Comment]; BMI, Comment Letter Regarding 2019 Review of the ASCAP and BMI Consent Decrees 1 (Aug. 9, 2019), https://media.justice.gov/vod/atr/ascapbmi2019/pc-077.pdf [hereinafter BMI 2019 Comment].

[2] MUSIC MARKETPLACE, U.S. COPYRIGHT OFF., COPYRIGHT AND THE MUSIC MARKETPLACE REPORT 155, 159 (2015), https://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf [hereinafter MUSIC MARKETPLACE]. *See also* Daniel L. Lawrence, Addressing the Value Gap in the Age of Digital Music Streaming, 52 Vand. J. Transnat'l L. 511, 542 (2019) (highlighting the value gap in the music industry as one of its most pressing issues); Pierre-E. Lalonde, Study Concerning Fair Compensation for Music Creators in the Digital Age, Int'l Council Of Music Authors (Oct. 22-23, 2014), http://songwriters.ca/ContentFiles/ContentPages/Documents/Fair%20Trade%20Music/ES%20Study_fair_compensation_2014_05_01.pdf (noting the "grossly inequitable" distribution of streaming royalties between major record labels who receive up to ninety-seven percent with the remaining three-percent going to songwriters and publishers); ASCAP, Public Comments of the American Society of Composers, Authors and Publishers Regarding Review of the ASCAP and BMI Consent Decrees 12-15 (Aug. 6, 2014), https://www.justice.gov/sites/default/files/atr/legacy/2014/08/14/307803.pdf (describing how the consent decrees cripple ASCAP's ability to negotiate fair market rates with new media services).

[3] Prior to 1980, it was the Division's practice not to have sunset provisions within their consent decrees. U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION, ANTITRUST DIVISION MANUAL at III:146–149 (5th edition, last updated April 2012), *available at* https://www.justice.gov/atr/file/761166/download. ("The 1979 change in policy was based on a judgment that perpetual decrees were not in the public interest."). Today generally, the Division will insist on provisions that "(1) stop the illegal practices alleged in the complaint, (2) prevent their renewal, and (3) restore competition to the state that would have existed had the violation not occurred." *Id.* at IV:50.

[4] U.S. DEP'T OF JUSTICE, CLOSING STATEMENT OF THE ANTITRUST DIVISION'S REVIEW OF THE PRO CONSENT DECREES 22 (Aug. 4, 2016), https://www.justice.gov/atr/file/882101/download. [hereinafter CLOSING STATEMENT]. The Copyright Office agrees that "it is Congress, not the DOJ, that has the ability to address the full range of issues that encumber our music licensing system." MUSIC MARKETPLACE, *supra* note 2, at 150.

internet streaming services, and others who publicly perform musical works.[5] The sheer number and fleeting nature of public performances makes it practically impossible for copyright owners to detect every case of infringement or potential licensees to negotiate for every use.[6] To facilitate a marketplace of public performance rights, copyright owners join PROs, which act as a sort of central clearing house and enforcement body. PROs provide users with licenses to the musical works in the PRO's repertoire and act on behalf of member copyright owners to collect fees and detect infringement.[7] But because the copyright owners also compete with each other to some extent, this arrangement between competitors can raise antitrust concerns involving price-fixing,[8] tying,[9] and other anticompetitive conduct.[10] Attempts to mitigate these concerns include the antitrust consent decrees between the Department of Justice and the two largest PROs, ASCAP and BMI, as well as private antitrust litigation.

Individuals and institutions have made various proposals for overhauling the public performance rights marketplace. For example, Kristelia Garcia proposes to resolve the public performance market's anticompetition problems through "remedial regulation."[11] Garcia proposes the creation of a statutory public performance license accompanied by a system to exempt rights holders from the compulsory license via petition demonstrating adequate market competition.[12] Whereas Ivan Ridel concludes that the blanket license itself is a form of price fixing and an "illegal restraint of trade."[13] In its place, Ridel favors the creation of an eBay-like online platform for transacting public performance rights.[14] And the U.S. Copyright Office, in its 2015 Music Marketplace Report, proposed releasing ASCAP and BMI from some consent decree obligations that they see as obstructing free market negotiations, while migrating the rate setting process from the courts to the Copyright Royalty Board (CRB), and further propose the creation of a General Music Rights Organization (GMRO) that would serve as the default licensing agency for unaffiliated or unidentified songwriters and publishers.[15] On the other hand, ASCAP and BMI have proposed that the decrees be simplified to their most essential elements,

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[5] MUSIC MARKETPLACE, *supra* note 2, at 33.

[6] MUSIC MARKETPLACE, *supra* note 2, at 32.

[7] *Id*.

[8] Price-fixing is an agreement between competitors to fix, affect, stabilize, or otherwise tamper with prices and is generally considered a *per se* violation of antitrust. § 4:34. Per se violations—Price-fixing, 1 Callmann on Unfair Comp., Tr. & Mono. § 4:34 (4th Ed.).

[9] A tying arrangement is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product." N. Pac Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

[10] Section 1 of the Sherman Antitrust Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several [s]tates." 15 U.S.C. § 1. However, the Supreme Court has held that "Congress could not have intended a literal interpretation of the word every,'" and as a result, courts "analyze[] most restraints under the so-called rule of reason.'" Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 342-43 (1982). The rule of reason test requires that a restraint on trade be unreasonable to be considered unlawful. Associated Press v. United States, 326 U.S. 1, 27 (1945).

[11] Kristelia A. Garcia, *Facilitating Competition by Remedial Regulation*, 31 BERKELEY TECH. L.J. 183, 246–47 (2016) (defining "remedial regulation" as ". . . regulation that discourages industry consolidation - in order to open the market and maintain competition.").

[12] *Id*. at 248–50.

[13] Ivan Reidel, *The Taylor Swift Paradox: Superstardom, Excessive Advertising and Blanket Licenses*, 7 N.Y.U. J.L. & Bus. 731, 804 (2011).

[14] *Id*. at 805–08.

[15] MUSIC MARKETPLACE, *supra* note 2, at 3–5.

accompanied by a sunsetting provision that would ultimately terminate the decrees after a number of years.[16]

But which among these proposed alternatives should, or will, be implemented? At the moment, none of these comprehensive solutions have achieved consensus—somewhat of a prerequisite to getting Congress to act on music industry legislation these days.[17] The challenge is that a comprehensive, status-quo-altering solution to licensing public performance rights of musical works is unlikely. So then what happens if the Department of Justice moves to terminate the decrees, as it has suggested it might?[18] In that scenario it is possible that licensees will push for a compulsory license. But it need not come to that. Instead, Congress could adjust the form of antitrust oversight of the blanket license while maintaining much of the regulatory substance currently provided by the consent decrees.

With some changes to copyright law, Congress can address anticompetitive concerns with the blanket license. This paper examines a Congressional solution to carve out a limited antitrust exemption by granting copyright owners a right to collectively bargain with licensees for the right to publicly perform musical works. To accompany this right, Congress might consider codifying the consent decrees "genuine alternatives" and "similarly situated" licensing provisions as limitations on the right. With such regulation on the blanket license in place, the role of the consent decrees could then be reduced to PRO specific provisions addressing issues such as licensing additional rights, membership qualifications, and other regulations. From there the Department of Justice can focus on regulating potential anticompetitive conduct of the individual PRO instead of the blanket license itself. Admittedly, this proposal is not likely to alter in any dramatic way the status quo between licensees, PROs, or rights holders. But it may get the Department of Justice out of the job of regulating the public performance licensing market and align antitrust oversight of the market with current practices. Further, it moves the immediate conversation away from compulsory licensing and preserves the opportunity for greater discussion and debate of comprehensive solutions to be enacted in the future.

Part I: Anticompetitive concerns inherent to the blanket license

The blanket license is a product born out of necessity. In 1897 Congress granted owners of copyrighted musical compositions the exclusive right to publicly perform their works for

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[16] Mike O'Neill & Elizabeth Matthews, *BMI and ASCAP Issue Open Letter to the Music Industry on Consent Decree Reform,* ASCAP (Feb. 28, 2019), https://www.ascap.com/press/2019/02/02-28-ascap-bmi-announcement.

[17] Legislative incidents such as the sound recording termination rights rule reversal and backlash against SOPA/PIPA left Congress wary of meddling in music industry politics. *See* Eric Boehlert, Four little words, SALON.COM, Aug. 28, 2000, https://www.salon.com/2000/08/28/work_for_hire/; Larry Downes, Who Really Stopped SOPA, and Why?, FORBES.COM, Jan. 25, 2012, https://www.forbes.com/sites/larrydownes/2012/01/25/who-really-stopped-sopa-and-why/#7b1289607b76. As a result, Congress only passed the recent Orrin G. Hatch Music Modernization Act when it could do so unanimously. *See* Senate Passes Music Modernization Act, VARIETY.COM, Sept. 18, 2018, https://variety.com/2018/music/news/senate-passes-music-modernization-act-1202947518/.

[18] *See* Makan Delrahim, Assistant Attorney Gen., Antitrust Div. U.S. Dep't of Justice, Remarks at the National Music Publishers Association Annual Meeting (June 13, 2018), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-national-music-publishers.

profit.[19] But licensing and enforcing those rights proved difficult for early twentieth century composers.[20] The potential profits to any single composer were not worth the expense of locating and negotiating a license with every bar, restaurant, and hotel in America.[21] So in 1914 composers Victor Herbert, Alfred Sloan, Irving Berlin and others formed The American Society of Composers and Publishers (ASCAP) to license and enforce their public performance rights collectively.[22] Three years later, the Supreme Court handed down a victory, holding that even non-ticketed and ambient performances in business establishments infringe the copyright owner's exclusive right to perform the work publicly for profit.[23] "If music did not pay it would be given up," wrote Justice Holmes.[24] With legal backing, ASCAP began issuing blanket licenses to music users who, in return for a fee, obtained rights to perform all compositions in the ASCAP repertoire.[25]

Although the blanket license introduced market efficiencies it enabled conduct that some considered to be anticompetitive. When copyright owners pooled their works and charged a single price for a blanket license, it eliminated price competition between themselves, effectively allowing songwriters to charge higher prices through their representative, ASCAP, to play their music.[26] For some, the establishment of a uniform price for a song ran the blanket license dangerously close to antitrust laws against price fixing.[27] Further, some saw a restraint on trade when ASCAP established exclusive relationships with its members, preventing licensees from contracting directly with ASCAP members.[28] Without an alternative to the ASCAP blanket license, any music user that wanted to play a few songs was required to purchase an ASCAP blanket license for all ASCAP registered songs.[29]

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[19] Act of Mar. 3, 1897, ch. 392, 29 Stat. 694; *see also* Zvi S. Rosen, *The Twilight of the Opera Pirates: A Prehistory of the Exclusive Right of Public Performance for Musical Compositions*, 24 CARDOZO ARTS & ENT. L.J. 1157, 1158–59 (2007).

[20] *See* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 4–5 (1979).

[21] *See id*. at 20.

[22] *ASCAP 100*: *1914,* ASCAP, https://www.ascap.com/100#1914 (last visited Jan. 1, 2020).

[23] Herbert v. Shanley Co., 242 U.S. 591, 594–95 (1917).

[24] *Id.* ("The defendants' performances of plaintiffs' music in hotels or restaurants are not eleemosynary. They are part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order, is not important. It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. The object is a repast in surroundings that to people having limited powers of conversation or disliking the rival noise give a luxurious pleasure not to be had from eating a silent meal. If music did not pay it would be given up. If it pays it pays out of the public's pocket. Whether it pays or not the purpose of employing it is profit and that is enough").

[25] *See ASCAP 100*: *1914, supra* note 15.

[26] *See* 15 U.S.C. § 13(a) (2012) ("It shall be unlawful for any person engaged in commerce . . . to discriminate in price . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly.").

[27] *See* Michelle E. Arnold, *A Matter of (Anti)trust: The Harry Fox Agency, the Performance Rights Societies, and Antitrust Litigation*, 81 TEMP. L. REV. 1169, 1186 (2008).

[28] *See* MUSIC MARKETPLACE, *supra* note 2, at 35–36; *see also* Columbia Broad. Sys., Inc. v. Am. Soc'y of Composers, Authors & Publishers, 620 F.2d 930, 935 (2d Cir. 1980) ("Trade is restrained, frequently in an unreasonable manner, when rights to use individual copyrights or patents may be obtained only by payment for a pool of such rights.").

[29] *See* WILLIAM C. HOLMES, INTELLECTUAL PROPERTY AND ANTITRUST LAW § 36:6 (2019) ("If licensees have no real choice but to accept licensing on a blanket basis, then the arrangement may indirectly, but quite effectively, restrict competition with the copyright owner . . . and tie the availability of desired to undesired copyrighted items.").

For many years ASCAP was the only show on the road, but in 1939, responding to an attempt by ASCAP to double its radio licensing fees, members of the National Association of Broadcasters formed a competitor PRO, Broadcast Music Inc. (BMI).[30] The introduction of a competitor obviously didn't resolve the antitrust concerns because shortly thereafter in 1941 the Department of Justice brought suit against both ASCAP and BMI.[31] The government claimed that the blanket license constituted an illegal restraint of trade and that the PROs were charging arbitrary prices as a result of exclusive agreements with their members.[32] ASCAP and BMI settled the suits by way of consent decree.[33] Similar, but not identical, the decrees obligated ASCAP and BMI to obtain only non-exclusive licensing rights from their members and offer to music users a per-program license as an alternative to the blanket license.[34] The PROs also agreed to offer a license to all who apply for one—a sort of mandatory license—and treat alike all similarly situated licensees.[35] Over time, modifications to the decrees strengthened the per-program license offering and added provisions establishing the S.D.N.Y. as a rate court for settling fee disputes.[36] Additionally, the decrees imposed a host of other restrictions and obligations on ASCAP and BMI's conduct with their members[37] and the music industry generally, [38] on top of its obligations to licensees. Today, ASCAP and BMI's combined 85-90% of the public performance market share means that these consent decrees have shaped and essentially govern the business and legal landscapes of the public performance rights marketplace.[39] Although in existence at the time, SESAC, originally the Society of European Stage Authors and Composers, was small enough not to warrant the government's involvement

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[30] *BMI's Timeline Through History: 1939,* BMI*,* https://www.bmi.com/about/history (last visited Jan. 1, 2020).

[31] Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 10–11 (1979).

[32] *Id.*

[33] United States v. Am. Soc'y of Composers, Authors & Publishers, Civil No. 13-95, 1941 U.S. Dist. LEXIS 3944 (S.D.N.Y. Mar. 4, 1941); United States v. Broad. Music, Inc., Trade Cases P 56096 (C.C.H.), 1941 WL 307851.

[34] *United States v. ASCAP*, 1941 U.S. Dist. LEXIS 3944, at *3-5; *United States v. BMI*, 1941 WL 307851 § II(3). A per-program or per-segment license "allows the licensee to publicly perform any of the musical works in the PRO's repertoire" for specified programs or parts of their programming, in exchange for a flat fee or a percentage of that programs advertising revenue. MUSIC MARKETPLACE, *supra* note 2, at 33.

[35] *United States v. Ascap,* 1941 U.S. Dist. LEXIS 3944, at *3-5.

[36] United States v. Am. Soc'y of Composers, Authors & Publishers, Civil Action No. 13-95., 1950 U.S. Dist. LEXIS 1900 (S.D.N.Y. Mar. 14, 1950); United States v. Broad. Music, Inc., 64 Civ. 3787, 1994 U.S. Dist. LEXIS 21476 (S.D.N.Y. Nov. 18, 1994).

[37] For example, ASCAP and BMI must admit as a member all songwriters and publishers who wish to join and they must disclose distribution formulas to their members. United States v. Am. Soc'y of Composers, Authors & Publishers, Civ. Action No. 41-1395, 2001 U.S. Dist. LEXIS 23707, at *25–26 (S.D.N.Y. June 11, 2001); United States v. Broad. Music, Inc., Civil No. 64 Civ. 3787., 1966 U.S. Dist. LEXIS 10449, at *3 (S.D.N.Y. Dec. 29, 1966), *modified*, 1996-1 Trade Cas. (CCH) P 71,378, 1994 U.S. Dist. LEXIS 21476 (S.D.N.Y. 1994).

[38] For example, ASCAP is prohibited from licensing anything other than public performance rights and cannot deal with movie theaters. *ASCAP*, 2001 U.S. Dist. LEXIS 23707, at *9–10. BMI cannot engage in publishing, recording, or distribute sheet music or sound recordings. *BMI*, 1966 U.S. Dist. LEXIS 10449, at *3.

[39] *See* Diane Bartz, *U.S. Considers Updating Music Licensing Accords with ASCAP, BMI*, REUTERS (June 4, 2014), http://www.reuters.com/article/us-usa-copyright-doj-idUSKBN0EF07H20140604 (noting that ASCAP and BMI jointly have 90% market share of musical compositions). The remainder of today's market share belongs to SESAC and Global Music Rights (GMR), PROs not subject to consent decrees. *See* Paula Parisi, *SESAC, Radio Music Licensing Committee Both Claim Victory in Price War,* VARIETY (July 31, 2017), https://variety.com/2017/music/news/sesac-radio-music-licensing-committee-price-war-1202511443/ (noting that SESAC and GMR have approximately 15% market share).

at the time and therefore today is not subject to a consent decree, though not beyond antitrust scrutiny altogether.[40] Also in the mix today is Irving Azoff's Global Music Rights (GMR), founded in 2013; and, while GMR is not subject to a consent decree, it too faces allegations of anticompetitive conduct.[41]

Part II: The consent decrees' essential role in the legal status of the blanket license

In 2014 the Department of Justice Antitrust Division reviewed these decrees and two years and two rounds of public comments later, the Division concluded that the decrees warranted neither termination nor modification.[42] In the same closing statement, the Division also suggested that it might not be the right regulator of the blanket license and "encourages the development of a comprehensive legislative solution that ensures a competitive marketplace and obviates the need for continued Division oversight of the PROs."[43] Then in 2017, President Trump nominated and the Senate confirmed Makan Delrahim as the new Assistant Attorney General for the United States Department of Justice Antitrust Division.[44] Soon thereafter, the Department of Justice announced an initiative to terminate legacy antitrust judgments.[45] Although its prior review had concluded less than four years prior, Department of Justice decided that a "fresh look" at the PRO consent decrees was warranted,[46] and its chief, Delrahim, signaled that decree termination was an option on the table.[47]

With the Department of Justice in the process of reconsidering the decrees, ASCAP and BMI desire consent decree termination and have proposed a path forward.[48] Both PROs recognize that abrupt termination could stir opposition and possibly backfire into a push for a statutory compulsory license.[49] So, instead, they propose a gradual transition to termination through the implementation of a modified decree with a sunset clause.[50] This decree proposed by

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[40] *See e.g., Meredith Corp. v. Sesac, LLC*, 1 F. Supp. 3d 180, 194 (S.D.N.Y. 2014) (noting that in 2008 the DOJ closed an investigation into SESAC without taking action); Meredith Corp. v. SESAC, 87 F. Supp. 3d 650, 657 (S.D.N.Y. 2015) (approving settlement between SESAC and television and radio stations imposing obligations and restrictions similar to those found in the ASCAP/BMI consent decrees).

[41] *See* Ed Christman, *Battle Over Radio Royalties Goes West: What's at Stake as RMLC & GMR Head to Court*, BILLBOARD, April 12, 2019, https://www.billboard.com/articles/business/8506930/gmr-rmlc-antitrust-lawsuits-california-court-radio-royalties.

[42] CLOSING STATEMENT, *supra* note 4, at 3.

[43] *Id.* at 22. The Copyright Office agrees that "it is Congress, not the DOJ, that has the ability to address the full range of issues that encumber our music licensing system." MUSIC MARKETPLACE, *supra* note 2, at 150.

[44] On the Nomination of Makan Delrahim, of California, to be an Assistant Attorney General: Hearings before the Senate, 115th Cong.

[45] Press Release, U.S. Dep't of Justice,Initiative to Terminate "Legacy" Antitrust Judgments (Apr. 25, 2018), https://www.justice.gov/opa/pr/department-justice-announces-initiative-terminate-legacy-antitrust-judgments.

[46] Press Release, U.S. Dep't of Justice, Initiative to Review ASCAP and BMI Consent Decrees (June 5, 2019), https://www.justice.gov/opa/pr/department-justice-opens-review-ascap-and-bmi-consent-decrees

[47] Makan Delrahim, Assistant Attorney Gen., Antitrust Div. U.S. Dep't of Justice, Remarks at the National Music Publishers Association Annual Meeting (June 13, 2018), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-national-music-publishers.

[48] *See* ASCAP 2019 Comment, *supra* note 1, at 2; BMI 2019 Comment, *supra* note 1, at 1.

[49] *See* O'Neill & Matthews, *supra* note 10; *see also* ASCAP 2019 Comment, *supra* note 1, at 2; BMI 2019 Comment, *supra* note 1, at 4.

[50] *See* O'Neill & Matthews, *supra* note 10.

ASCAP and BMI is essentially a bare bones version of the current decrees that only retains certain provisions, including the: (1) non-exclusivity requirement; (2) requirement to license all applicants upon request; (3) Rate Court for licensees to dispute fees; and (4) availability of alternatives to the blanket license.[51] But most significantly, the proposed modified decree would contain a sunset clause that would terminate the decrees entirely after a specified number of years.[52]

The remaining decree provisions get at the heart of addressing the anticompetitive effects of the blanket license, but the proposal's sunset clause doesn't address the perpetual nature of licensees' concerns. Terminating the decrees, without more, eliminates both protections for licensees as well as justification for the existence of the blanket license itself. ASCAP and BMI claim that "protections exist today, in the form of antitrust laws" that would "effectively oversee" the blanket license.[53] Unfortunately, antitrust law may not be adequate to address the blanket license's anticompetitive effects in a post-decree world because the body of law that would likely apply literally relies upon the existence and substance of the consent decrees.

Justification for the blanket license in the face of antitrust concerns comes from a series of cases litigated between Columbia Broadcasting System Inc. (CBS) and major PROs, ASCAP and BMI. CBS alleged that the blanket license amounted to unlawful price fixing and a *per se* restraint on trade.[54] CBS claimed that the PROs' copyright pool coerced CBS into paying for rights to music it didn't use.[55] Siding with CBS, the Second Circuit found the blanket license a *per se* violation of antitrust law.[56] The circuit court did not accept the PROs' argument that the consent decrees "disinfected"[57] the alleged anticompetitive conduct, nor that the decrees "constitute an implied partial repeal of the antitrust laws."[58] The Supreme Court then reversed, holding that economic benefits provided by the blanket license justify its subjection to the more lenient antitrust "rule of reason"[59] rather than *per se*, automatic illegality.[60]

The preexisting consent decrees were essential to the Supreme Court's analysis. Justice White, writing for the Majority, described the consent decrees as "a fact of economic and legal life in this industry"—a "unique indicator" that the blanket license "may have redeeming

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[51] *Id*.

[52] *Id.*

[53] *Id.*

[54] Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 5–6 (1979).

[55] *Id*. at 18.

[56] Columbia Broad. Sys., Inc.v. Am. Soc'y of Composers, Authors & Publrs., 562 F.2d 130, 140 (2d Cir. 1977).

[57] *Id.* at 139 (quoting K-91, Inc. v. Gershwin Publ'g. Corp., 372 F.2d 1, 4 (9th Cir. 1967) *cert. denied*, 389 U.S. 1045 (1968) ("In short, we think that as a potential combination in restraint of trade, ASCAP has been 'disinfected' by the decree.").

[58] *Id.* (quoting Columbia Broad. Sys., Inc.v. Am. Soc'y of Composers, Authors & Publrs., 337 F. Supp. 394, 400 (S.D.N.Y. 1972).

[59] "A rule of reason analysis requires a determination of whether an agreement is on balance an unreasonable restraint of trade, that is, whether its anti-competitive effects outweigh its pro-competitive effects." Columbia Broad. Sys. Inc. v. Am. Soc'y of Composers, Authors & Publrs., 620 F.2d 930, 934 (2d Cir. 1980) (citing National Society of Professional Engineers v. United States, 435 U.S. 679, 689–92 (1978).

[60] "In construing and applying the Sherman Act's ban against contracts, conspiracies, and combinations in restraint of trade, the Court has held that certain agreements or practices are so 'plainly anticompetitive,' and so often 'lack . . . any redeeming virtue, that they are conclusively presumed illegal without further examination under the rule of reason generally applied in Sherman Act cases." Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. at 7–8 (citations omitted).

competitive virtues."[61] He then admonished the Second Circuit, saying "the Court of Appeals should not have ignored [the decrees] completely in analyzing the practice."[62] On remand the Second Circuit agreed with the lower court's assessment that CBS had failed to prove that the blanket license restrained competition.[63] Following cues from the Supreme Court, the Second Circuit described the consent decrees as a fact that "overshadows" all CBS's alleged barriers to direct licensing as an alternative to the blanket license.[64]

Post-*CBS* cases—arguably the body of law regulating the blanket license—elaborate on either the viability of genuine alternatives as required by *CBS*,[65] or interpret the consent decrees' licensing obligations placed on ASCAP and BMI.[66] Importantly, both kinds of cases rely on the existence of the consent decrees. Upon termination of the consent decrees, cases interpreting ASCAP and BMI's decree obligations toward licensees virtually become null—along with their justification of the blanket license itself.

Further, without the decrees, antitrust law as it exists today may not "effectively oversee" the blanket license and any anticompetitive effects that concern licensees.[67] As noted above, terminating the decrees could undermine the analysis of *CBS* and the other cases that rely on the "fact" of the consent decrees. Without consent decree and related case law obligations, the only remaining post-decree regulation imposed by antitrust law on the blanket license today is that there exist genuine alternatives to the blanket license.[68] In other words, assuming the post-decree blanket license is not held to be a *per se* violation, the subsequent rule of reason analysis simply

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[61] *Id.* at 13.

[62] *Id.* at 13–14 (citing K-91, Inc. v. Gershwin Publishing Corp., 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968) ("relying heavily" on the existence of the consent decrees to reject the defendant's claims that ASCAP was a combination in restraint of trade).

[63] *CBS v. ASCAP*, 620 F.2d at 938.

[64] *See id.* at 935 ("If the opportunity to purchase performing rights to individual songs is fully available, then it is customer preference for the blanket license, and not the license itself, that causes the lack of price competition among songs.").

[65] *See, e.g.*, Buffalo Broad. Co. v. Am. Soc'y of Composers, Authors & Publrs., 744 F.2d 917 (2d Cir. 1984) (holding that television stations challenging the blanket license failed to demonstrate they had no realistic alternatives); Broad. Music, Inc. v. Moor-Law, Inc., 527 F. Supp. 758 (D. Del. 1981), *aff'd mem.*, 691 F.2d 490 (3d Cir. 1982) (rejecting plaintiff's genre based "mini blanket license" proposal as an impractical alternative to the blanket license).

[66] *See, e.g.*, United States v. Am. Soc'y of Composers, Authors & Publrs. (Turner), 782 F. Supp. 778 (S.D.N.Y. 1991) (holding that ASCAP must provide "through-to-the-viewer" licenses to cable providers); United States v. Am. Soc'y of Composers, Authors & Publrs. (Fox), 870 F. Supp. 1211 (S.D.N.Y. 1995) (requiring "through-to-the-viewer" decree provisions to apply upwards to the program provider when local stations obtain a license); United States v. Broad. Music, Inc. (AEI), 275 F.3d 168 (2d Cir. 2001) (holding that BMI must provide reduced fee "carve-out" blanket licenses to account for direct licenses already obtained by the licensee); Pandora Media, Inc. v. Am. Soc'y of Composers, Authors & Publrs., 785 F.3d 73 (2d Cir. 2015) (rejecting ASCAP's attempt to allow publishers to "partially withdraw" their works from the ASCAP repertoire); United States v. Broad. Music, Inc., 207 F. Supp. 3d 374 (S.D.N.Y. 2016) *aff'd*, No. 16-3830-cv, 2017 U.S. App. LEXIS 25545 (2d Cir. Dec. 19, 2017) (holding that the consent decrees do not require "100%" or "full-work" licensing).

[67] "We don't need to create or rewrite legislation to accomplish what antitrust laws already effectively oversee." O'Neill & Matthews, *supra* note 10.

[68] *See* Meredith Corp. v. SESAC LLC, 1 F. Supp. 3d 180, 210 (S.D.N.Y. 2014) (denying SESAC's motion for summary judgment because there was an issue of whether there were genuine alternatives for licensing the works found in its blanket license.); *See also* Broadcast Music, Inc. v. Hearst/ABC Viacom Entertainment Services, 746 F. Supp. 320, 326, 1990-2 Trade Cas. (CCH) ¶ 69171 (S.D.N.Y. 1990).

turns on whether there are alternative means of licensing the same copyrights.[69] Licensees may not find this reassuring. Generally, licensees are not concerned about having alternatives to the blanket license, but rather worry about the bargaining power of the PROs in setting rates.[70] Here, the question for licensees is not necessarily whether the blanket license should exist (because many prefer it), but rather, at what price may they obtain that license. Generally, pricing regulations in copyright law are either statutory or delegated to a particular agency and outside the consent decrees there are no such statutes or agencies that would set prices or terms of the PRO blanket licenses.

Terminating the decrees, without more, could reopen the argument that the blanket license constitutes *per se* anticompetitive price fixing. And even if it withstands a fresh *per se* review, subject to a post-decree rule of reason analysis, some have suggested that the blanket license "may not ultimately survive that attack."[71] Thus, decree termination, without additional oversight, licensees may ask Congress for exactly what the PROs fear—a compulsory license that PROs have said "would take us backwards, not forwards."[72]

Part III: Codifying a limited right to collectively bargain

But Congress need not resort to a compulsory license to harmonize the economic efficiencies of the blanket license with anticompetitive concerns. Similar to other contexts where Congress has carved out limited exemptions from antitrust law, an antitrust exemption could be carved out for the public performance blanket license. [73] Indeed, copyright itself is a limited monopoly.[74] Anticipating consent decree termination, Congress could attempt to ensure the continued viability of the blanket license by adding to copyright law an explicit right to collectively bargain the rights of public performance, subject to certain limitations. Codification

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[69] *Id*.

[70] *See e.g.*, Bowling Proprietors Association of America, Public Comments of the Bowling Proprietors Association of America Submitted in Response to the U.S. Department of Justice's Request for Comment on the ASCAP and BMI Consent Decrees 2 (Aug. 8, 2019), https://media.justice.gov/vod/atr/ascapbmi2019/pc-083.pdf; Texas Wine and Grape Growers Association, Public Comments of the Texas Wine and Grape Growers Association Submitted in Response to the U.S. Department of Justice's Request for Comment on the ASCAP and BMI Consent Decrees 1–3 (2019), https://media.justice.gov/vod/atr/ascapbmi2019/pc-769.pdf.

[71] Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. at 24 ("Rather, when attacked, it should be subjected to a more discriminating examination under the rule of reason. It may not ultimately survive that attack, but that is not the issue before us today."). *See, e.g.*, *id*. at 36–38 (Stevens, J., dissenting) (concluding that even under a rule of reason analysis, the record demonstrates that the ASCAP and BMI blanket license "is a monopolistic restraint of trade proscribed by the Sherman Act"); Buffalo Broad. Co. v. Am. Soc'y of Composers, Authors & Publrs., 546 F. Supp. 274, 293 (S.D.N.Y. 1982) *rev'd'*, 744 F.2d 917 (2d Cir. 1984) (enjoining ASCAP and BMI from licensing to local television broadcasters after finding that the blanket license violates the antitrust rule of reason); Ivan Reidel, *The Taylor Swift Paradox: Superstardom, Excessive Advertising and Blanket Licenses*, 7 N.Y.U. J.L. & Bus. 731, 804 (2011) (arguing that the blanket license should fail the rule of reason analysis after properly weighing its pro-competitive effects against the anticompetitive harms).

[72] *Id*.

[73] *See, e.g.*, The Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (2012) (granting organized labor an exemption from antitrust laws); The Newspaper Preservation Act of 1970, 15 U.S.C. § 1801 et seq. (2012) (creating limited antitrust immunity for certain joint newspaper operating arrangements after the Supreme Court found a merger unlawful in Citizen Publishing Co. v. United States, 394 U.S. 131 (1969)); The Bank Merger Act of 1966, 12 U.S.C. § 1828(c)(11) (2012) (creating an exemption from *per se* illegality in bank mergers following the Supreme Court decision in United States v. First National Bank & Trust Co. of Lexington 376 U.S. 665 (1962)).

[74] *See* Golan v. Holder, 565 U.S. 302, 346 (2012) (describing copyright as a "limited monopoly").

of the familiar consent decree "genuine alternatives" and "similarly situated" requirements could properly limit the anticompetitive effects of this newly codified right.

A. Right to Collectively Bargain

The Sherman Antitrust Act prohibits contracts and combinations which restrain trade.[75] Agreements among rivals restrain trade when they eliminate competition among themselves such as by price fixing or tying their products together.[76] As discussed previously, the pooling of copyrights by songwriters to create a blanket license raises such antitrust concerns. Since the passage of the Act, Congress has created various exemptions from general antitrust law to promote market efficiencies or other societal interests. From utilities companies,[77] to communications,[78] to organized labor,[79] antitrust exemptions are found throughout the economy. But these exemptions are never total, they always include limitations that still apply antitrust principles where possible. Even copyright follows this pattern of granting limited monopolies or exemptions from what would otherwise be a restraint on trade.[80] For example, copyright law grants the author exclusive rights of reproduction, public performance, and to create derivative works, but limits that right by eliminating infringement liability for fair uses such as for educational purposes.[81]

Following a similar framework, Congress could grant copyright holders an explicit right to collectively license their exclusive rights of public performance. This right doesn't create anything new. It just codifies into copyright law the current practice of pooling copyrights rights for collective licensing and enforcement. As previously argued, terminating the consent decrees eliminates a major premise for upholding the blanket license in the face of antitrust law. Although it is unclear whether the courts in a post-decree world would find the blanket license a *per se* violation of antitrust, the creation of an exemption to collectively bargain those rights would definitively settle the issue. The practice is already well established and its economic benefits have been long acknowledged by the courts,[82] codification merely enacts a change of form and not substance. The only remaining question then becomes: which limitations on the right are necessary to balance its economic benefits and efficiencies with the anticompetitive conduct and power enabled by it?

B. Genuine Alternatives

As previously mentioned, in their early years ASCAP and BMI received exclusive rights to license their members' copyrighted works.[83] Then, PROs were accused of leveraging the pool of copyrights to force music users to purchase a blanket license even when one was not needed—a restraint of trade proscribed since the first 1941 decrees.[84] That the decrees' guaranteed the availability of direct licensing helped the Second Circuit in *CBS* to sustain the

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[75] 15 U.S.C. § 1.

[76] *See, e.g.* N. Pac. Ry Co. v. United States, 356 U.S. 1 (1958)*;* Int'l Salt Co. v. United States*,* 332 U.S. 392 (1947)

[77] *See* 15 U.S.C. § 717.

[78] Act of June 19, 1934, 48 Stat. 1064 (codified at 47 U.S.C. §§ 151-609 (1982)); Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in 15 U.S.C., 18 U.S.C., and 47 U.S.C.).

[79] The Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (2012).

[80] *See* Golan v. Holder, 565 U.S. 302, 346 (2012) (describing copyright as a "limited monopoly").

[81] 17 U.S.C. § 106–107 (2012).

[82] *See* Herbert v. Shanley Co., 242 U.S. 591, 594–95 (1917); Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 21 (1979).

[83] MUSIC MARKETPLACE, *supra* note 2, at 35–36.

[84] United States v. Am. Soc'y of Composers, Authors & Publishers, Civil No. 13-95, 1941 U.S. Dist. LEXIS 3944, at *3 (S.D.N.Y. Mar. 4, 1941); United States v. Broad. Music, Inc., Trade Cases P 56096 (C.C.H.), 1941 WL 307851 § II(1).

blanket license under its rule of reason analysis.[85] Indeed, even non-decree PROs today, SESAC and GMR, allow their members to issue direct licenses.[86] For ASCAP and BMI, however, the consent decrees also require that they also offer per-program licenses.[87] Additionally, to further ensure that genuine alternatives exist, courts have interpreted the decrees to require ASCAP and BMI licenses to contain "through-to-the audience"[88] provisions, and carve-out fee structures.[89] The genuine alternatives requirement in the decrees is an attempt to preserve competition between copyright holders for those licensees who would not make full use of a blanket license.

Codifying the genuine alternatives requirement as a limitation on the right to collectively bargain could be as simple as writing into the copyright statute a requirement that all offerors of a public performance blanket license[90] must also provide genuine alternatives to that license. What constitutes a "genuine alternative" could then be either worked out in the courts, like other limitations on copyright such as "fair use,"[91] and "useful objects,"[92] or defined in rulemaking proceedings by the Copyright Office, as it does for section 1201 exemptions.[93] Alternatively, the law could take the genuine alternatives requirement a step further and interpret it to look more

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[85] Columbia Broad. Sys., Inc. v. Am. Soc'y of Composers, Authors & Publishers, 620 F.2d 930, 933 (2d Cir. 1980); *see also* Buffalo Broad. Co. v. Am. Soc'y of Composers, Authors & Publrs., 744 F.2d 917 (2d Cir. 1984) (reversing the district court's rule of reason analysis that found the blanket license an unreasonable restraint on trade).

[86] *Frequently Asked Questions: Do I have any other option to obtain the required authorization to perform copyrighted music?*, SESAC, https://www.sesac.com/#!/business-owners/licensing-faqs (last visited Jan. 1, 2020) ("Yes. While SESAC offers the convenience and low cost of a blanket license authorizing the performance of all of the songs in the SESAC repertory, you have the option of contacting each copyright owner of each song you wish to play. As an alternative to a blanket license, you can negotiate a separate license agreement directly with each copyright owner of each song you will play."); *FAQ: Do I have any other options to obtain the required authorization to perform copyrighted music?,* GMR, http://www.globalmusicrights.com/FAQ (last visited Jan. 1, 2020) ("No. In order for a business to perform music publicly, a performing rights license is required or permission granted via a direct license from each songwriter and publisher whose works are performed.").

[87] United States v. Am. Soc'y of Composers, Authors & Publishers, Civ. Action No. 41-1395, 2001 U.S. Dist. LEXIS 23707, at *13–14 (S.D.N.Y. June 11, 2001); United States v. Broad. Music, Inc., Civil No. 64 Civ. 3787., 1966 U.S. Dist. LEXIS 10449, at *7–8 (S.D.N.Y. Dec. 29, 1966), *modified*, 1996-1 Trade Cas. (CCH) P 71,378, 1994 U.S. Dist. LEXIS 21476 (S.D.N.Y. 1994).

[88] *See* United States v. Am. Soc'y of Composers, Authors & Publrs. (Turner), 782 F. Supp. 778 (S.D.N.Y. 1991) (requiring "through-to-the-viewer" provisions to apply to cable providers even though not contemplated by the existing consent decree); United States v. Am. Soc'y of Composers, Authors & Publrs. (Fox), 870 F. Supp. 1211 (S.D.N.Y. 1995) (interpreting "through-to-the-viewer" provisions to apply in the reverse direction to broadcasters when local stations purchase a license).

[89] *See* United States v. Broad. Music, Inc. (AEI), 275 F.3d 168 (2d Cir. 2001) (holding that as a blanket license with an alternative fee structure, the consent decrees obligate BMI to offer "carve-out" licenses); *see also* Broad. Music, Inc. v. DMX Inc., 683 F.3d 32 (2d Cir. 2012) (allowing the rate court to consider direct licenses when setting rates for "carve-out" blanket licenses).

[90] The choice here to apply limitations to all "offerors of a public performance blanket license" instead of just "PROs" is deliberate. *See* MUSIC MARKETPLACE, *supra* note 2, at 134 ("The Office believes that any overhaul of our music licensing system should strive to achieve greater consistency in the way it regulates (or does not regulate) analogous platforms and uses."); *see also id.* at 152–53 (describing licensee and songwriter apprehension in the face of possible withdrawal by major publishers from ASCAP and BMI due to publishers being the ones to then issue blanket licenses).

[91] 17 U.S.C. § 107 (2012).

[92] 17 U.S.C. § 102(b) (2012).

[93] 17 U.S.C. § 1201 makes it illegal to circumvent technological measures that control access to copyrighted works with certain exemptions including those determined by the Librarian of Congress in triennial rulemaking proceedings conducted by the U.S. Copyright Office.

like the Music Modernization Act.[94] Lengthy and explicit provisions could codify the genuine alternatives provisions with language already found in the decrees[95] along with the interpretive holdings of relevant court cases,[96] and grant further rule making authority to the Copyright Office as necessary. Under any method, a guiding principle of the law would be to prevent the blanket license from becoming a *per se* antitrust violation by preserving competition between rights holders for music users who do not need a blanket license while ensuring its benefits are available to those who do need it.

C. Similarly Situated Licensees

Today the decrees prohibit ASCAP and BMI from discriminating between similarly situated licensees[97] and further require that the PROs offer any rate court-set fee to all similarly situated licensees in the future.[98] A broadly interpreted similarly situated licensing limitation on the collective bargaining right would do for the fractionalized licensing problem what the consent decree mandatory licensing provisions and rate courts currently do. Additionally, the similarly situated limitation could possibly eliminate the need for mandatory licensing provisions and third-party rate-setting bodies altogether. Codifying the similarly situated licensing consent decree provision into copyright law could be as simple as prohibiting issuers of a blanket license from discriminating between similarly situated licensees.

Licensees see the blanket licensing of fractionalized copyright interests as anticompetitive bargaining, but have their concerns largely addressed by the consent decrees' mandatory license and rate court provisions. The ownership interest in many songs today is fractionalized, crediting multiple songwriters and often giving them varied percentages of ownership.[99] Furthermore, each writer and their respective publisher may be associated with a

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[94] *See* Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. 115-264, 132 Stat. 3676 (2018).

[95] *See, e.g.*, United States v. Am. Soc'y of Composers, Authors & Publishers, Civ. Action No. 41-1395, 2001 U.S. Dist. LEXIS 23707, at *9–10 (S.D.N.Y. June 11, 2001) (preserving direct licensing with copyright owners); United States v. Broad. Music, Inc., Civil No. 64 Civ. 3787., 1966 U.S. Dist. LEXIS 10449, at *2 (S.D.N.Y. Dec. 29, 1966), *modified*, 1996-1 Trade Cas. (CCH) P 71,378, 1994 U.S. Dist. LEXIS 21476 (S.D.N.Y. 1994) (same); *ASCAP*, 2001 U.S. Dist. LEXIS 23707, at *13 (per-program licenses); *BMI*, 1966 U.S. Dist. LEXIS 10449, at *8 (same); *ASCAP*, 2001 U.S. Dist. LEXIS 23707, at *12 (through-to-the-viewer licenses); *BMI*, 1966 U.S. Dist. LEXIS 10449, at *9–10 (same).

[96] Note that while non-decree PROs, SESAC and Global Music Rights (GMR) do allow for direct licensing, such a requirement would more greatly affect them as their per-program offerings do not currently match those of ASCAP and BMI. *See RMLC Files Antitrust Suit Against Global Music Rights*, INSIDE RADIO (Nov. 21, 2016), http://www.insideradio.com/free/rmlc-files-antitrust-suit-against-global-music-rights/article_861a8874-afc0-11e6-a39e-4798863519ea.html. ("GMR will only offer radio stations a blanket license—rejecting calls for other options, including per-program licenses and adjustable fee blanket licenses."); David Kluft, *Antitrust Claims Against SESAC Copyright Licenses Permitted to Proceed,* TRADEMARK & COPYRIGHT L. BLOG, https://www.trademarkandcopyrightlawblog.com/2014/03/antitrust-claims-against-sesac-copyright-licenses-permitted-to-proceed/ (noting that SESAC offers a per-program license, but the license has been accused of being economically unviable compared to the blanket license).

[97] *See ASCAP*, 2001 U.S. Dist. LEXIS 23707, at *9–10; *BMI*, 1966 U.S. Dist. LEXIS 10449, at *7.

[98] *See ASCAP*, 2001 U.S. Dist. LEXIS 23707, at *21; *BMI*, 1994 U.S. Dist. LEXIS 21476, at *5.

[99] *See* Tim Ingham, *How To Have A Streaming Hit In The USA: Hire 9.1 Songwriters (And A Rap Artist)*, MUSIC BUS. WORLDWIDE (Jan. 6, 2019), https://www.musicbusinessworldwide.com/how-to-have-a-streaming-hit-in-the-us-hire-9-1-songwriters-and-a-rap-artist/; *see also* Daniel Sanchez, *The Average Hit Song Has 4+ Writers And 6 Different Publishers*, DIGITAL MUSIC NEWS (Aug. 2, 2017), https://www.digitalmusicnews.com/2017/08/02/songwriters-hit-song/.

different PRO.[100] As a result, a song's public performance rights are often administered between multiple PROs.[101] This fractionalized ownership and administration of songs is sometimes viewed as creating a problem where a blanket license from one PRO only confers the right to publicly perform the subset of works in its repertoire for which the PRO administers 100% of the rights.[102] In other words, licensees are concerned that to make fully effective the blanket license of one PRO and avoid copyright infringement, they must obtain blanket licenses from multiple, if not all, PROs.[103] While PROs do compete for market share of songwriters and works, there may be less competition for licensee market share because a blanket license from one PRO often requires a blanket license from all.[104] Licensees fear potential holdout scenarios where one PRO could leverage the incomplete licenses of the other PROs to demand higher rates for the repertoire of fractionalized rights in its blanket license.[105] Although fractionalized licensing results in licensees needing the blanket license of all PROs, currently, the decrees' mandatory licensing[106] and third party rate-court provisions[107] prevent ASCAP and BMI from taking advantage of that fact to bargain for high rates. As a result, courts have never addressed the antitrust consequences of fractional versus full-work licensing outside the consent decree context.[108]

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[100] "Notably, for the year 2014, it has been reported that 93 of the top 100 charting songs had co-writers, and 64 or more of those songs were registered with more than one PRO." Letter from Maria Pallante, Register of Copyrights, to Doug Collins, Subcommittee on Courts, Intellectual Property and the Internet, (Jan. 12, 2016), https://www.copyright.gov/policy/pro-licensing.pdf.

[101] CLOSING STATEMENT, *supra* note 4, at 11.

[102] Licensees highlighted fractionalized licensing during the 2014 consent decree review. The Department of Justice then took up this issue and decided that the fractionalized ownership and administration of compositions was anticompetitive and violated the consent decrees. They argued that the consent decrees require "100%" or "full work" licensing. *Id.* The Department of Justice's interpretation was shortly thereafter rejected by a federal court in favor of the Copyright Office's view that fractional licensing is consistent with copyright law and industry practice and that the consent decrees do not mandate 100% licensing. *See* United States v. Broad. Music, Inc., 207 F. Supp. 3d 374 (S.D.N.Y. 2016), *aff'd*, No. 16-3830-cv, 2017 U.S. App. LEXIS 25545 (2d Cir. Dec. 19, 2017).

[103] *See, e.g.,* National Association of Broadcasters, Comment Letter Regarding 2014 Review of the ASCAP and BMI Consent Decrees 2 (Aug. 6, 2014), https://www.justice.gov/atr/public/ascapbmi2015/ascapbmi19.pdf.

[104] *Id.* ("Notably, there is no competition between ASCAP and BMI with respect to these licenses because neither license provides a substitute for the other. Thus, in order to avoid potentially devastating penalties for infringement, broadcasters must license performance rights from each of the PROs."); s*ee also* CLOSING STATEMENT, *supra* note 4, at 15.

[105] *See* Garcia, *supra* note 5, at 229–30. ("Even if one firm is not found to be monopolistic on its own, two or more firms may tacitly collude to set prices or to bar entry to a new service by withholding content altogether. It is well established that antitrust law does not address the oligopolist problem of tacit collusion. This is why the maintenance of structural competition is so important.").

[106] ASCAP and BMI must issue a blanket license to all who request one. United States v. Am. Soc'y of Composers, Authors & Publishers, Civ. Action No. 41-1395, 2001 U.S. Dist. LEXIS 23707, at *17 (S.D.N.Y. June 11, 2001); United States v. Broad. Music, Inc., Civil No. 64 Civ. 3787., 1966 U.S. Dist. LEXIS 10449, at *7–8 (S.D.N.Y. Dec. 29, 1966), *modified*, 1996-1 Trade Cas. (CCH) P 71,378, 1994 U.S. Dist. LEXIS 21476 (S.D.N.Y. 1994) (same).

[107] *ASCAP*, 2001 U.S. Dist. LEXIS 23707, at *17–23 (outlining rate court procedures); United States v. Broad. Music, Inc., 64 Civ. 3787, 1994 U.S. Dist. LEXIS 21476, at *2–5 (S.D.N.Y. Nov. 18, 1994) *modifying*, Civil No. 64 Civ. 3787., 1966 U.S. Dist. LEXIS 10449 (S.D.N.Y. Dec. 29, 1966) (same).

[108] *See United States v. Broad. Music, Inc.,* 207 F. Supp. 3d 374, 377 (S.D.N.Y. 2016) *aff'd*, No. 16-3830-cv, 2017 U.S. App. LEXIS 25545 (2d Cir. Dec. 19, 2017). Suits alleging anticompetitive bargaining have been brought against non-decree PROs, SESAC and GMR, but litigation has either been settled with decree-like provisions or remains unresolved. *See* Meredith Corp. v. SESAC, LLC, 87 F. Supp. 3d 650, 657–58 (S.D.N.Y. 2015) (agreeing to settlement with television stations on terms similar to ASCAP and BMI consent decree obligations); *RMLC Files*

A similarly situated licensing limitation on the collective bargaining right could be interpreted broadly to adequately address the anticompetitive effects created by fractionalized licensing. To whatever extent licensees are similarly situated rates should be charged relatively, both across types of licensees and time. Any discrimination between licensees would need to be justified by actual differences or "applicable business factors," as the BMI decree puts it.[109] Then, a licensee's rate from year to year should only change to the extent that its situation is no longer "similarly situated" to the previous cycle; in other words, when circumstances have changed (*e.g.*, changes in a PRO's market share of musical works, a licensee's business model, or inflation).

Furthermore, a similarly situated licensing limitation on the right to collectively bargain could obviate the need for a permanent ratesetting body. Fee disputes could be brought in federal court as violations of the similarly situated limitation, where judges would focus on the relevance and justification of factors for discriminating between licensees instead of necessarily setting rates. Court decisions would then establish precedence on the relevance and weight of various business factors to guide future negotiations between all licensees and PROs. The courts could encourage settlement by ruling on the merits justifications of price discrimination before getting to the issue of setting rates in the form of damages.

The similarly situated limitation may also render unnecessary a mandatory licensing requirement as found in the consent decrees. On a relative scale all licensees are similarly situated to some degree in their need for, and use of, musical works. Where the cost to the PRO of issuing additional licenses is negligible, it would be difficult for the issuer of a blanket license to justify a flat out refusal to license or demanding rates—though both options would remain available if truly warranted. Further, licensees would likely remain able to make use of the songs throughout litigation due to the growing rarity of preliminary injunctions in copyright cases; but again, injunctions would be available when justified.[110]

Together, the genuine alternatives and the similarly situated licensing limitations would serve to address licensee's concerns about the blanket license while enabling its continued use. Such codification may bring the blanket license into alignment with antitrust oversight practices and copyright law generally through a balancing of the blanket license's market efficiencies with its anticompetitive effects.

Antitrust Suit Against Global Music Rights, INSIDE RADIO (Nov. 21, 2016), http://www.insideradio.com/free/rmlc-files-antitrust-suit-against-global-music-rights/article_861a8874-afc0-11e6-a39e-4798863519ea.html (claiming that GMR has exercised anticompetitive bargaining power in negotiations with radio stations).

[109] *BMI*, 1966 U.S. Dist. LEXIS 10449, at *7; *see also ASCAP*, 2001 U.S. Dist. LEXIS 23707, at *7–8 (". . . factors relevant to determining whether music users or licensees are similarly situated include, but are not limited to, the nature and frequency of musical performances, ASCAP's cost of administering licenses, whether the music users or licensees complete with one another, and the amount and source of the music users' revenue.").

[110] Preliminary and permanent injunctions have grown rarer due to the Second and Ninth Court's applications of *eBay*, to copyright. *See* eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006) (holding that courts cannot presume irreparable harm in a patent infringement case); Salinger v. Colting, 607 F.3d 68, 70 (2d Cir. 2010) (applying *eBay* holding to copyright case); Flexible Lifeline Sys. v. Precision Lift, Inc., 654 F.3d 989, 998 (9th Cir. 2011) (same).

Conclusion

Since 1941 the ASCAP/BMI consent decrees have regulated both the blanket license on a market level and ASCAP and BMI respectively as organizations. Where modern consent decree theory encourages the use of temporary consent decrees to guide companies towards free market operations, the current decrees cannot do that because of their near industry-wide regulation of the blanket license.[111] But, Congress can eliminate the need for perpetual consent decrees by codifying into copyright law a right to collectively bargain limited by "genuine alternatives" and "similarly situated" provisions. Such legislation does not solve every problem with the ASCAP/BMI consent decrees, but, this change of form over substance thereby opens a path towards eventual reform of the public performance licensing market—avoiding the need for a statutory compulsory license. When regulation of the blanket licensing market is out of the hands of the Department of Justice, it will then be free to address the remaining ASCAP and BMI specific consent decree provisions not addressed in the legislation. Issues that today get drowned out by licensees' concerns about anticompetitive conduct could then receive adequate attention from government officials and affected stakeholders. From payments to songwriters to low bars of PRO membership[112] to bundled licensing of additional rights[113] and a myriad of other issues, lawmakers, scholars, songwriters, and industry leaders will have one less obstacle to finding solutions and consensus to the remaining challenges facing the market today.

[111] Generally, the Division will insist on provisions that "(1) stop the illegal practices alleged in the complaint, (2) prevent their renewal, and (3) restore competition to the state that would have existed had the violation not occurred." U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION, ANTITRUST DIVISION MANUAL at IV:50 (5th edition, last updated April 2008), *available at* https://www.justice.gov/atr/file/761166/download. Prior to 1980, it was the Division's practice not to have sunset provisions within their consent decrees. *Id.* at III:146–149. ("The 1979 change in policy was based on a judgment that perpetual decrees were not in the public interest.").

[112] *See* ASCAP 2019 Comment, *supra* note 1, at 39–40 ("Eliminating this requirement also would alleviate administrative and other burdens on ASCAP.").

[113] ASCAP is limited to the licensing of only public performance rights and BMI has not historically licensed additional rights, deterred by the requirement in the ASCAP consent decree. *See* BMI 2019 Comment, *supra* note 1, at 34. *See also* MUSIC MARKETPLACE, *supra* note 2, at 161. ("It now seems apparent that the government should pursue appropriate changes to our legal framework to encourage bundled licensing, which could eliminate redundant resources on the part of both licensors and licensees.").