

DOJ Antitrust Consent Decree Review – ASCAP and BMI 2019

Public Comment by the Electronic Frontier Foundation

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The Electronic Frontier Foundation (EFF) is grateful for the invitation from the Antitrust Division of the Department of Justice (DOJ) to comment on the review of antitrust consent decrees entered against two performance rights organizations (PROs): the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI). In this comment, we highlight the effectiveness of the consent decrees in promoting competition today and emphasize the importance of transparency in any potential modification of the decrees.

EFF is the leading nonprofit organization defending civil liberties in the digital world. Founded in 1990, EFF champions privacy, free expression, and innovation through impact litigation, policy analysis, grassroots activism, and technology development. EFF works to ensure that rights and freedoms are enhanced and protected as the use of technology grows.

EFF supports a fair and transparent music rights licensing system that expands access to musical works by a variety of users, lowers barriers to entry for new digital music services, prices licenses fairly, and reduces administrative hurdles. The best path to achieving these goals today, absent action by Congress, is to maintain the consent decrees.

I. Because ASCAP and BMI Fundamentally Operate as Price Agreements Among Competitors, The Antitrust Consent Decrees Promote the Public Interest.

a. ASCAP and BMI are inherently price-fixing agreements among thousands of competitors and pose anti-competitive concerns.

Where markets allow for robust competition, private negotiations and baseline enforcement of the antitrust laws are preferable to government refereeing of licensing transactions. But markets for the licensing of musical works have always had structural barriers that distort competition, including high transaction costs and a serious lack of accurate information about rights ownership. Thus, sector-specific oversight through consent decrees or statutory licensing has always been necessary to avoid anticompetitive behavior.

The history of the performance rights organizations illustrates these structural challenges. Before they were subject to the original DOJ consent decrees, both ASCAP and BMI entered into exclusive dealing agreements with copyright holders of musical compositions, forbade their

members from separately reaching agreements with licensees, and only offered blanket licenses.¹ These were classic anticompetitive actions that Section 1 of the Sherman Act is intended to address.²

Even today, the fundamental nature of the PROs is one of price agreements among competitors. Indeed, in *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979), the Supreme Court acknowledged that ASCAP and BMI were price-fixing enterprises: “the composers and publishing houses have joined together into an organization that sets its price for the blanket license it sells.”³ This explains the recurrence of anticompetitive conduct throughout the PROs’ history, and shows a need for continued oversight, above the baseline of potential new Sherman Act liability.

b. The DOJ originally intended the consent decrees to alleviate antitrust concerns raised by ASCAP and BMI, and they have been effective in doing so.

Noting the PROs’ anti-competitive behaviors and the harm they imposed on licensees, the DOJ, after extensive litigation, entered into consent decrees with ASCAP and BMI in 1941.⁴ Both decrees prohibited exclusive licensing agreements between the PROs and the publishers and compelled the PROs to provide alternative licenses to users. More importantly, as later amended, the decrees mandated that if a proper fee arrangement cannot be reached between the licensees and the PROs, the rate courts – judges of the U.S. District Court for the Southern District of New York (SDNY) – were to set a “reasonable” rate for a given use.⁵ The ASCAP consent decree also prohibited that organization from licensing other music copyrights and bundling them together with the public performance rights of musical compositions.⁶

Courts have confirmed the effectiveness and validity of the consent decrees since they were enacted. For example, in *BMI v. CBS*, the Supreme Court observed that the consent decrees were the fruits of careful scrutinization of the PROs’ practices by the DOJ, and that after decades in effect, the decrees have become “fact[s] of economic and legal life” in the industry.⁷ On remand, the Second Circuit, following the guidance of the Supreme Court, affirmed that ASCAP’s conduct when operating under the decree did not violate Section 1 of the Sherman Act under a rule of reason analysis.⁸

II. The Consent Decrees Have Continued Pro-competitive Vitality in Today’s Music Publishing Market and Should Not Be Withdrawn.

The music licensing industry has seen increased consolidation in recent years, elevating antitrust concerns. The biggest three music publishers now own a majority of composition rights

¹ U.S. Copyright Office, *Copyright and the Music Marketplace: A Report of the Register of Copyrights* 35-36 (2015).

² See generally, 15 U.S.C. § 1.

³ *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 9 (1979) (although BMI’s actions were not per se violations of the Sherman Act, it was still “literally ‘price-fixing’”).

⁴ *United States v. ASCAP*, 1940-43 Trade Cas. (CCH) ¶56,104 (S.D.N.Y. 1941); *United States v. Broadcast Music, Inc.*, 1940-43 Trade Cas. ¶56,096 (E.D. Wisc. 1941).

⁵ See *United States v. ASCAP*, 2001-2 Trade Cas. (CCH) ¶73,474 (S.D.N.Y. 2001); *United States v. Broadcast Music, Inc.*, 1996-1 Trade Cas. ¶71,378 (S.D.N.Y. 1996).

⁶ *Id.*

⁷ See *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. at 13.

⁸ See *CBS v. Am. Soc’y of Composers*, 620 F.2d 930 (2d Cir. 1980).

for the most popular music the public listens to today.⁹ On the other hand, despite the rise of new PROs such as Global Music Rights (GMR), ASCAP and BMI still control over 90% of the music licensing market and remain the predominant players wielding tremendous market power.¹⁰

Anticompetitive licensing practices still occur within the framework of the consent decrees. For example, the rate court responsible for administering the ASCAP decree found that during the rate negotiations with Pandora, both Sony/ATV and ASCAP refrained from providing Pandora with a list of works in ASCAP's repertoire owned by Sony/ATV despite having that information readily available.¹¹ Another tactic, intentionally delaying the negotiations to the last minute in the hopes of pressuring licensees to agree to terms favorable to the publishers and PROs, was also common and can prove especially harmful when combined with withholding information.¹² The rate court expressed serious concerns about coordination between the publishers and the PROs:

...[T]he evidence at trial revealed troubling coordination between Sony, UMPG, and ASCAP, which implicates a core antitrust concern underlying [the consent decrees] and casts doubt on the proposition that the 'market under examination reflects an adequate degree of competition to justify reliance on agreements that it has spawned.' ... ASCAP, Sony, and UMPG did not act as if they were competitors with each other in their negotiations with Pandora. Because their interests were aligned against Pandora, and they coordinated their activities with respect to Pandora, the very considerable market power that each of them holds individually was magnified.¹³

These practices were addressed by the court applying the consent decree much faster and more efficiently than bringing a new antitrust action.

The behaviors of PROs not subject to the consent decrees also show the need for ongoing oversight of music licensing. Multiple private entities, including local television stations and the Radio Music Licensing Committee, have sued SESAC and GMR in a series of cases alleging antitrust violations, and have successfully obtained favorable settlements from the organizations.¹⁴ Some of the private arbitration results reached between the PROs and the licensees reveal that the PROs often claim exorbitant fees because of their market power—sometimes twice the fair value

⁹ Sony/ATV Music Publishing, Universal Music Publishing Group, and Warner Chappell Music have owned the rights to a majority of the top 100 most popular radio songs in each of the most recent four quarters. See Ed Christman, *Publisher's Quarterly: Sony/ATV Reigns Again as Concord Breaks Into Top 10*, Billboard (May 9, 2019); Ed Christman, *Publisher's Quarterly: Marshmello Sweetens UMPG's Market Share as Sony/ATV Keeps No. 1 Spot in Q4*, Billboard (Feb. 8, 2019); Ed Christman, *Publisher's Quarterly: Sony/ATV Widens Lead as Nearest Competitors Lose Ground in Q3*, Billboard (Nov. 11, 2018); Ed Christman, *Publisher's Quarterly: Kobalt Surges, Sony/ATV Stays On Top in Second Quarter*, Billboard (Aug. 9, 2018).

¹⁰ U.S. Copyright Office, *Copyright and the Music Marketplace: A Report of the Register of Copyrights 20*.

¹¹ See *In re Pandora Media, Inc.*, 6 F. Supp. 3d 317, 344-45 (S.D.N.Y. 2014).

¹² *Id.*

¹³ *Id.* at 357-58.

¹⁴ See, e.g., *Meredith Corp. v. SESAC, LLC*, 1 F. Supp. 3d 180 (S.D.N.Y. 2014); *Radio Music License Comm., Inc. v. SESAC, Inc.*, 29 F. Supp. 3d 487 (E.D. Pa. 2014); *Radio Music License Comm., Inc. v. Global Music Rights, LLC*, 2019-1 Trade Cas. (CCH) P80,725 (E.D. Pa. 2019). See also *SESAC RMLC Settlement Agreement*, available at <http://dehayf5mhw1h7.cloudfront.net/wp-content/uploads/sites/893/2017/09/22194517/Final-SESAC-RMLC-Settlement-Agreement.pdf> (last accessed July 23, 2019).

determined by independent arbitrators.¹⁵ Without the consent decrees, it is likely that ASCAP and BMI would also engage in anticompetitive conduct.

These examples demonstrate that the consent decrees continue to promote competition in the marketplace today and should not be withdrawn. Most members of the industry echo this sentiment. Indeed, comments solicited from stakeholders in DOJ's 2014 and 2015 review of the consent decrees showed "broad consensus" that ASCAP and BMI, as currently constituted, serve valuable procompetitive functions and provide benefits for music users and creators alike.¹⁶ DOJ itself also concluded that because the industry has relied on the consent decrees, they should remain in place.¹⁷ Similar comments were presented by the Copyright Office in its 2015 report as well.¹⁸

III. Modifications to the Consent Decrees Could Enhance Competition and Efficiency, but They Must be Conducted Carefully and Must not Reduce Transparency and Competition.

While the consent decrees still prevent anticompetitive conduct, there have been renewed calls for modification. The Copyright Office recommended a series of changes to the music copyright regime in its 2015 report, including unifying the governing body of rate-setting, permitting partial withdrawal of rights from the PROs, allowing bundled licensing of public performance and mechanical rights, among others.¹⁹ These reforms were aimed at streamlining the licensing process for both musical compositions and sound recordings, and adding greater transparency to current regimes. It noted DOJ's ongoing review of the consent decrees and emphasized the importance of continued antitrust oversight of the industry.²⁰

In its most recent review of the consent decree (upon the request of ASCAP and BMI), the Antitrust Division received almost 400 comments from institutional actors and individuals, a majority of which support at least some form of modification of the consent decrees.²¹ However, participants in the public comment process harbored "sharply conflicting views" on how the decrees should be modified.²² DOJ later focused its attention, particularly during the second round of review in 2015, on whether fractional licensing of music composition was permitted by the consent decrees. It eventually refrained from making any modifications in its final statement at the conclusion of the review because it felt that it first needed to address the effects of its interpretation that the decrees required full work licensing.²³ Making other modifications to the decrees

¹⁵ See, e.g., *Arbitrators Side with Radio and Reduce SESAC License Fees*, Radio Music License Committee (July 31, 2017), available at <http://dehayf5mhw1h7.cloudfront.net/wp-content/uploads/sites/893/2017/09/22194403/RMLC-SESAC-press-release-07312017.pdf> (last accessed July 23, 2019).

¹⁶ Dept. of Justice, *Statement of the Department of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees* 10-11 (2016).

¹⁷ *Id.*

¹⁸ U.S. Copyright Office, *Copyright and the Music Marketplace: A Report of the Register of Copyrights* 97.

¹⁹ *Id.* at 1-12.

²⁰ *Id.* at 2.

²¹ *ASCAP and BMI Consent Decree Review Public Comments 2014*, U.S. Dept. of Justice, available at <https://www.justice.gov/atr/public-comments> (updated Sept. 22, 2018); *ASCAP and BMI Consent Decree Review Public Comments 2015*, U.S. Dept. of Justice, available at <https://www.justice.gov/atr/ASCAP-BMI-comments-2015> (updated Sept. 23, 2018).

²² Dept. of Justice, *Statement of the Department of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees* 17.

²³ *Id.* at 16-17.

simultaneously, the Division reasoned, would render it too uncertain to determine whether they would be in the public interest.²⁴ DOJ's decision to mandate the industry to comply with full work licensing first and address other potential modifications later, however, was immediately challenged by the PROs. The rate court blocked DOJ's interpretation, and today the government oversight structure remains the same as five years ago.²⁵

a. The consent decrees should remain in force absent congressional action, and any potential modification should protect transparency and competition.

The current licensing system, while not perfect, remains a good model that has mostly balanced the interests of stakeholders and prevents anticompetitive behaviors. As discussed above, the consent decrees have become an integral part of the music publishing industry, and any changes must be carefully evaluated.

EFF does not object to modifications to the consent decrees that would adapt them to today's music licensing landscape, but any changes should be carried out only after thorough public review, and must preserve transparency. Particularly, licensees must know what is being licensed by the publishers and PROs. To quote the Copyright Office, "[i]nfringement liability should not arise from a game of 'gotcha.'"²⁶ Music publishers and PROs should be required to take great care to compile and disclose what works are within their repertoires, allowing licensees sufficient information before making a decision on whether to contract with the PROs or negotiate licenses with music publishers directly. The Music Modernization Act of 2018 (MMA) has already provided for such a database: the nonprofit mechanical licensing collective will, by law, establish a comprehensive database containing copyright information for musical works, and provide free public access.²⁷ The Act also provides incentives for the publishers and PROs to make this information available, and while it remains to be seen how effective the law is, it is nevertheless a good start.²⁸ Other changes that put an emphasis on transparency are also welcome, and the already cumbersome process of obtaining rights to musical works should not be compounded.

Notably, many of the changes recommended by the Copyright Office in its report require Congress to pass new laws.²⁹ The Antitrust Division also noted the need for and encouraged legislative action at the conclusion of the 2014 and 2015 review of the consent decrees.³⁰ However, unless and until Congress acts, the consent decrees should remain in place, without diminishing transparency requirements and limitations on the PROs' conduct.

²⁴ *Id.* at 17.

²⁵ See *United States v. Broad. Music, Inc.*, 207 F. Supp. 3d 374 (S.D.N.Y. 2016), *aff'd* by *United States v. Broad. Music, Inc.*, 720 Fed. Appx. 14 (2d Cir. 2017).

²⁶ U.S. Copyright Office, *Copyright and the Music Marketplace: A Report of the Register of Copyrights* 155.

²⁷ 17 U.S.C. § 115(d)(3)(E).

²⁸ Ed Christman, *Licensing Experts Wanted: Now That the Music Modernization Act Is Law, Who Will Lay It Down?*, *Billboard* (Oct. 19, 2018).

²⁹ *Id.* at 150 ("[T]he Office observes that it is Congress, not the DOJ, that has the ability to address the full range of issues that encumber our music licensing system, which go far beyond the consent decrees.").

³⁰ Dept. of Justice, *Statement of the Department of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees* 22 ("The Division encourages the development of a comprehensive legislative solution that ensures a competitive marketplace and obviates the need for continued Division oversight of the PROs.").

b. Comments on specific potential reforms

i. A statutory license alternative

In theory, the consent decrees could be replaced by a statutory license. The Digital Millennium Copyright Act granted such licenses to users as long as royalties set by the Copyright Royalty Board (CRB) are paid, and new legislation could provide for such a statutory license for public performance rights of music compositions. This would subject all PROs, including those not covered by the consent decrees, to government regulation. It would also assuage the concern of some licensees that the music publishers may choose to withdraw from the PROs to escape increased regulatory scrutiny.³¹

Such a move, however, requires congressional action. While the MMA shows that significant changes to the Copyright Act are possible, the existing system works reasonably well, and any such reform must be conducted after careful consideration of the opinions of all stakeholders to ensure that it would not reduce competition in the market.

If a statutory license is enacted, keeping the rate-setting in the rate court is preferable to moving the procedures to the CRB because the current process is much faster and is therefore more accessible to music users. Keeping the proceedings in court also allows open access to information that might be useful to other licensees. If, on the other hand, Congress chooses to move the rate-setting function to the CRB, it should ensure that rate-setting can be initiated at any time, can be concluded quickly, and is at least as accessible to the public as federal court proceedings.

ii. Partial withdrawal

The consent decrees should not be modified to permit publishers to partially withdraw some rights, e.g., digital performance rights. Such a move would pose significant harm to the industry, raising barriers to entry for new digital music services, which in turn will short-change music listeners and ultimately limit access to musical works.

Partial withdrawal raises at least three concerns. First, in the short period before the rate courts ruled on whether the decrees in their current form allow partial withdrawal, publishers and PROs have, as discussed above, engaged in anticompetitive conduct by withholding repertoire information from licensees to bolster their bargaining position.³² Second, partial withdrawal would only inject more complications in an already technical system and further reduce transparency since the rates negotiated between users and publishers directly are not subject to disclosure. Third, such a move would hinder innovation and present significant entry barriers for newcomers, as they would be required to go through complex licensing procedures and secure public performance rights with individual rights owners before launching their product. It would also disadvantage smaller publishers and independent rightsholders. They would be forced to choose to either stay in the PROs and license digital rights at the same rate as other rights or shoulder the high administrative cost of negotiating with individual users. Whatever their choice is, they would be worse off under consent decrees that allow partial withdrawal. These concerns demonstrate that

³¹ U.S. Copyright Office, *Copyright and the Music Marketplace: A Report of the Register of Copyrights* 12-13.

³² See *In re Pandora Media, Inc.*, 6 F. Supp. 3d at 344-45.

allowing partial withdrawal would seriously disrupt the marketplace and potentially result in significant loss of competition, and should be disfavored.

iii. Rate-setting venue

Any proposal that reduces the transparency of the rate-setting process should be rejected. In the Division's previous review of the consent decrees, ASCAP and BMI proposed to move the rate-setting function from the courts to private arbitrators.³³ However, moving to mandatory arbitration would render the rate-setting process opaque. The mostly confidential process could shield rates from public disclosure, which would be particularly harmful to new market entrants and exacerbate anticompetitive effects.

There are alternatives to the current rate-setting mechanism that could preserve transparency. For example, the CRB could take over rate-setting, but courts could continue to be responsible for monitoring compliance with other parts of the consent decree. This was endorsed by the Copyright Office in its report: a unified rate-setting body that has more expertise than judges on setting a reasonable, market-oriented standard would increase consistency and reduce litigation costs, provided that it remains accessible to individual licensees in a timely manner.³⁴ Moreover, such continued judicial supervision may be more effective in deterring anticompetitive behavior. This too would require congressional action, and there must be reforms that make the CRB rate-setting process more transparent. CRB should not default to using blanket protective orders and limiting access to the proceedings, but should allow public monitoring and participation. This option would not prevent music publishers from joining PROs not subject to the consent decrees or negotiate individually with users and would still require additional supervision to ensure that these actors do not engage in anticompetitive conduct.

iv. Bundled licensing

ASCAP also proposed that its consent decree be modified to permit the PRO to license multiple rights in musical compositions during the last review.³⁵ It listed three ways such modification could improve competition: adding experienced actors such as ASCAP to the marketplace, spurring competition among PROs to provide streamlined services to rights holders, and facilitating innovation by reducing overall transaction costs for licensees.³⁶ Meanwhile, the BMI consent decree has no provisions restricting its ability to bundle licenses, nor are such actions per se violations of the Sherman Act.

ASCAP's arguments in support of bundled licensing have some merit, as bundled licenses may be an attractive product for some users. However, these proposals would allow ASCAP to obtain even greater market power and could raise serious antitrust concerns. The Division must carefully evaluate, under a rule of reason analysis, the potential effects of allowing PROs to obtain multiple rights, before moving forward with any changes. In any event, careful monitoring of the market status is required should bundled licensing become available for ASCAP.

³³ ASCAP, *Public Comments of the American Society of Composers, Authors and Publishers Regarding Review of the ASCAP and BMI Consent Decrees 22-26* (Aug. 6, 2014); BMI, *Public Comments of Broadcast Music, Inc. 21-22* (Aug. 6, 2014).

³⁴ U.S. Copyright Office, *Copyright and the Music Marketplace: A Report of the Register of Copyrights 3, 4*.

³⁵ ASCAP, *Public Comments of ASCAP Regarding Review of the ASCAP and BMI Consent Decrees 31-35*.

³⁶ *Id.* at 35.

IV. Conclusion

Despite their shortcomings, the consent decrees have become the norm in public performance rights licensing of musical compositions and have been relatively successful in preventing PROs' anticompetitive conduct. They continue to serve important functions today and should not sunset or be withdrawn without congressional action that would preserve competition. EFF would like to reemphasize the importance of enhancing transparency and competition when making any modifications to protect the interests of music creators, publishers and users, and thanks the DOJ for its continued oversight.