# DEPARTMENT OF JUSTICE

# "And the Beat Goes On"[1]: The Future of the ASCAP/BMI Consent Decrees

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Good afternoon. Thank you very much to Vanderbilt Law School and in particular to the *Vanderbilt Journal of Entertainment & Technology Law* for hosting this event.[2] I love Vanderbilt and I love Nashville, and I'm sorry not to be there in person with you today. Someday when COVID-19 is a memory and social distancing is something you do only with people you don't like, I look forward to returning to Nashville and reconnecting with many of my old friends there. More importantly, I look forward to returning to some of my favorite honky-tonks and showing off my famous dance moves. I've been practicing at home in my free time, to make sure I'm ready.

My topic today is music—music and antitrust law. Over the past several years, the Antitrust Division has engaged in an investigation regarding the future of public performance licensing for musical works. Through meetings and discussions with numerous industry stakeholders, the Division has considered the proper role of the federal government in safeguarding a vibrant and competitive music licensing marketplace. As part of its two-year investigation, in 2019 the Division solicited public comments that resulted in over 800 submissions. Additionally, last summer, the Division convened a two-day public workshop at which leading artists, industry participants, and academics offered their insights on public performance licensing generally and on the two consent decrees that govern licensing of performance rights. These decrees bind the country's two largest performing rights organizations (PROs), the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), which together represent approximately 90 percent of the public performance licensing market. The public comments and workshop revealed a wide variety of views regarding the benefits, drawbacks, and continued need for the decrees. A key message, however, emerged: the music industry remains a dynamic, continually evolving space, and the Division's efforts in this area must be focused on one central goal—competition. Competition for the benefit of consumers, competition for the benefit of artists and songwriters, and competition for the benefit of music users.

In various forms over their nearly eighty-year history, the ASCAP and BMI consent decrees have governed the operation of the two largest PROs that license music for public performance. ASCAP and BMI pool the copyrights held by their composer, songwriter, and publisher members or affiliates and collectively license those rights to music users. These users range from bars and restaurants that play music, to radio and television stations and Internet television and movie streaming services that broadcast songs (or shows that contain songs), to digital music streaming services that provide music and video programming on demand. Among

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[1] THE WHISPERS, *And the Beat Goes On* (Dick Griffey, 1979).

[2] I would also like to express my deep gratitude to the staff of the Antitrust Division's Competition Policy and Advocacy section and to our talented attorneys and economists who work on media and entertainment issues for their role in the review of the ASCAP and BMI consent decrees. In addition, I would like to thank my Senior Counsel, Christopher Bates; my Chief of Staff and Senior Counsel, Taylor Owings, an alumnus of this Law School; and Deputy Assistant Attorney General Rene Augustine, also an alumnus of this Law School, for their instrumental roles in the review and for their counsel as we conclude this review.

other things, ASCAP and BMI provide licenses to these users so that they do not have to enter into individual licensing agreements with every songwriter or publisher whose music they wish to play. In this sense, collective licensing provides significant efficiencies to many businesses across the country that benefit from immediate access to music, as well as to songwriters, composers, and publishers who would otherwise have to individually license or enforce against multiple music users.

The United States entered into the consent decrees with ASCAP and BMI to remedy the competitive concerns that arise from the exclusive, collective, and blanket licensing of individual copyrights. The crux of the decrees is to encourage competition between ASCAP, BMI, and other PROs for members and music users, and between ASCAP, BMI, and their respective members to license copyrighted works to music users. The decrees prohibit exclusive licensing and protect the ability of ASCAP and BMI members to license works directly if they wish.

Critics have raised significant concerns about the ASCAP and BMI consent decrees for a number of years. First and foremost is the age of the decrees themselves. The earliest versions of the decrees date from 1941, a time when most Americans listened to music through the radio or on phonograph players. There were no cassette tapes, no CDs. The term "digital streaming" would have been complete gibberish. The most recent modifications to the decrees occurred in 1994 (for BMI) and 2001 (for ASCAP). The ASCAP and BMI consent decrees, some critics argue, fail to reflect the way Americans consume music today. Some critics also assert that the decrees discourage innovation by locking in existing practices and licensing terms. According to these critics, the decrees prevent ASCAP and BMI from experimenting with innovative licensing terms to assess whether new or different terms would foster competition. Moreover, the decrees regulate only ASCAP and BMI, leaving other PROs free to operate without the same constraints.

At the same time, however, there is significant reliance on the decrees within the licensee community. Throughout the Division's investigation, many licensees expressed the view that the decrees are largely working. ASCAP and BMI licenses allow music users to gain immediate access to millions of musical works and receive protection from unintended copyright infringement. The decrees also require ASCAP and BMI to offer the same license terms to similarly situated users in the same industry. The decrees further require ASCAP and BMI to provide "through-to-the-audience" licenses to certain users upon request, which grant rights to any intermediaries (such as a local affiliate) in between the licensee and ultimate audience. The decrees additionally provide certain protections for songwriters and publishers, including, for example, placing five-year caps on membership agreements and requiring ASCAP and BMI to accept as members any songwriter, artist, or publisher who meets certain requirements. For many composers, songwriters, and publishers, ASCAP and BMI licenses provide the most meaningful way to be compensated for the public performance of their works with respect to many categories of music users. Finally, the decrees provide protections against infringement actions for works not properly listed in the organizations' public repertories.

Particular disagreement has arisen in recent years over how the decrees relate to two issues: fractional licensing and partial withdrawal.

Fractional licensing involves the question of what happens when a work has multiple songwriters or publishers affiliated with different PROs. Under fractional licensing, a PRO licenses only that portion of the work that the PRO controls, meaning that a licensee must obtain a license from all of the PROs affiliated with the work (or from the songwriters or publishers directly) in order to legally perform it. ASCAP and BMI, along with some songwriters and publishers, favor this approach because it allows the PROs to grant a partial license to works with multiple ownership where the songwriter or publisher owners affiliated with the PRO lack the ability to grant a license to the entire work.

Under the alternative approach, called full-work licensing, ASCAP and BMI cannot offer a license for a song unless the licensor grants full rights to use the song, rather than a fractional right that would require the licensee to track down other rightsholders (or their affiliated PROs) to license the remaining portion of the work. Licensees, including bars, restaurants, radio and television stations, and digital streaming services, favor this approach because, they say, it would simplify licensing and allow users to perform works in ASCAP and BMI's public repertories without having to track down additional rightsholders and determine their PRO affiliation, if any.

The Antitrust Division in the past took the position that the ASCAP and BMI consent decrees require full-work licensing. The U.S. Court of Appeals for the Second Circuit disagreed, affirming a district court decision that the BMI consent decree (which contains similar language as the ASCAP decree) permits fractional licensing. Whether ASCAP and BMI should offer full-work licenses remains a subject of considerable debate. What is clear for present purposes, following the Second Circuit's ruling, is that the BMI consent decree does not require BMI to do so.

The other issue related to the decrees that has received considerable attention in recent years is partial withdrawal. Under partial withdrawal, a songwriter or publisher would be able to limit ASCAP or BMI's ability to grant licenses for its works to certain types of users. Thus, a songwriter or publisher could authorize ASCAP or BMI to grant licenses for its works to bars or terrestrial broadcast stations, but prevent the PRO from licensing its works to digital streaming services, thus requiring such services to negotiate direct deals with the songwriter or publisher if they wish to perform its songs. Some songwriters and publishers favor this approach because they believe negotiating direct deals with digital streaming services would lead to higher rates. Many licensees oppose partial withdrawal, with digital streaming services particularly vocal in opposition. In 2013, an effort to persuade the rate courts that the consent decrees permit partial withdrawal failed. Consequently, action on this front would likely require modification of the decrees, or an act of Congress.

There also has been discussion regarding whether ASCAP and BMI should be able to license other types of rights in addition to performance rights, such as mechanical rights or synchronization (sync) rights. Mechanical rights relate to the reproduction or recording of a musical work; sync rights relate to its use as part of a television show or movie. ASCAP's consent decree prohibits it from licensing anything other than performance rights. BMI's decree does not expressly address the subject. ASCAP and BMI in the past have expressed interest in expanding their licensing activities to other rights besides performance rights. Some members of

the publishing community, which currently handles the lion's share of mechanical and sync licensing, have expressed concern about such a possibility.

The Antitrust Division has considered carefully stakeholders' views on all of these issues and recognizes that continuing disagreements exist among artists and within the music community regarding the benefits, drawbacks, and continued need for the ASCAP and BMI consent decrees. Continued review of, and stakeholder input concerning, the decrees remains necessary to ensure the decrees continue to satisfy their purpose to protect competition and do not act as an impediment to innovation.

The Division's recent work has highlighted three essential points that should guide these efforts going forward: First, the ultimate goal should be a market-based solution that ensures songwriters, publishers, and other artists are compensated fully for their creative efforts at market rates. In a well-functioning, competitive market, when it comes to determining license rates and compensation, consent decrees that continue in perpetuity are not the answer. Rather, a properly functioning market is the best method for determining the rates that properly reflect supply, demand, and each party's relative contribution to the music ecosphere. The market is also far more adaptive to changes in technology and consumer preferences than decades-old court judgments. During the Department's investigation, many stakeholders expressed the view that the competitive concerns surrounding the collective licensing of public performance rights that prompted the original ASCAP and BMI consent decrees still exist. Nevertheless, the Division recognizes that changes in the music marketplace, as well as in the ways Americans consume music, continue to require the Division to monitor the decrees and, where market realities require, seek to modify them to promote competition.

Indeed, changes in the music marketplace, including the rise of additional PROs and significant transformations in the way Americans consume music, have placed important aspects of the industry on a different competitive footing. Rather than a geographically distributed scheme of terrestrial broadcasters, or an assortment of record and phonograph stores, the principal means through which many Americans now get their music is a collection of digital streaming services.

There also have been important strides in market transparency. I am pleased that just last month, ASCAP and BMI announced the launch of their SONGVIEW databases, which the PROs say will provide an authoritative listing of the copyright ownership and shares of musical works in their respective repertories. This effort, if successful, will enable licensees to better and more easily determine which licenses—and which types of licenses—they need for which songs and to more easily research and seek out direct licensing opportunities. New forms of licensing agreements also have emerged within the marketplace that ASCAP and BMI say are the result of the PROs meeting market demand. These sorts of changes—rooted in technological advances and consumers' changing preferences—will only continue, and reinforce that a dynamic, adaptive, market-based solution to performance licensing should be the goal. I commend ASCAP and BMI on this development and encourage them to continue to analyze and improve the databases as necessary in the coming years.

The second guiding principle of the Division's future review efforts should be ensuring that songwriters and other intellectual property rightsholders are not shortchanged by the non-market effects of the ASCAP and BMI consent decrees, or by other efforts to regulate the music marketplace. Without songwriters and their creative genius, there would be no music, let alone an entire music industry. Yet songwriting is a notoriously difficult way to make a living. The recently enacted Orrin G. Hatch–Bob Goodlatte Music Modernization Act was motivated in large part by a recognition that existing methods for matching and licensing mechanical rights were leaving many songwriters high and dry. Mechanical royalties often were never paid, and even when they were paid, they did not make it to the true rightsholder. The Music Modernization Act included a variety of reforms to address this problem, including creating a central clearinghouse to match and clear mechanical rights.

The Music Modernization Act also made certain changes to the ASCAP-BMI rate-setting process, including by creating a so-called "wheel" of judges under which rate disputes are assigned to one of a number of judges within the Southern District of New York, rather than the same judge that oversees the respective decree. The Act partially repealed the limitation on considering digital performance license rates for sound recordings in setting license rates for the performance of musical works, which supporters hope will lead to better negotiations and rate-setting proceedings. It also requires the Department of Justice to notify Congress before moving to terminate one of the decrees and to provide timely updates to Congress upon request regarding the status of any review of the decrees.

As the Division works with stakeholders to review the ASCAP and BMI consent decrees, it should keep in mind the core guiding principle that, in the future, songwriters and other music creators—most of whom lack the financial resources, clout, and sophistication of larger market players—should not be placed at a competitive disadvantage. Provisions of the decrees that shape the market in ways that benefit entrenched participants, or that result in lower royalties for rightsholder than a free market would, warrant particular scrutiny. Congress, as well, should bear this goal in mind as stakeholders provide their views on the content and continued need for the decrees.

The third principle that should guide any future review of the ASCAP and BMI consent decrees, as well as the Division's—and Congress's—efforts with regard to music licensing more generally, is the recognition that compulsory licensing is not the answer. In the early days of the music industry, some observers worried that without compulsory licensing, the nascent industry would not survive. They feared that large, corporate interests would use exclusive licensing arrangements to tie up distribution channels, exclude new market entrants, and prevent consumers from accessing the full range of available works. Too often, however, it has been creators—songwriters, artists, and other rightsholders—who have received the short end of the stick under compulsory licensing, necessitating reforms like the recent Music Modernization Act, by Congress.

Compulsory licensing also runs counter to the principles that form the very foundation of the free market and rights in intellectual property. Those principles hold that the best, most efficient way to allocate resources—and the most effective way to maximize consumer

welfare—is through allowing parties to negotiate, to set prices based on supply, demand, and available information. Antitrust law serves as a crucial backstop when market conditions become distorted or when industry actors attempt to stifle the free and full exchange of goods. Compulsory licensing, however, does not permit this sort of market-based negotiation—quite the opposite.

Similarly, chief among basic property rights, including intellectual property rights, is the right to exclude, to determine who may or may not use your property. It is this right to exclude that gives property its value, and that enables property holders to negotiate over use rights. Compulsory licensing eviscerates essential aspects of the right to exclude. It transfers the power to set rates—to determine when property may be used or exploited by a non-rightsholder—to a third party. That third party may be seeking to act in the public interest, but it is not the rightsholder, and the two entities' goals may be in conflict. For this reason, compulsory licensing in the United States is the exception—the rare exception—not the rule, and our representatives seek to avoid compulsory licensing requirements in agreements with other countries.

It is incumbent upon the Division, the Congress, and the courts to keep these principles in mind as they strive to ensure a free, fair, and competitive music licensing marketplace.

The ASCAP and BMI consent decrees should be reviewed every five years, to assess whether the decrees continue to achieve their objective to protect competition and whether modifications to the decrees are appropriate in light of changes in technology and the music industry. Factors that could weigh in favor of modification might include increased competition in the licensing marketplace, including increased direct licensing or technological developments that may affect the market. In all of these efforts, competition must be the watchword. Competition for the benefit of consumers, competition for the benefit of innovation, and most importantly, competition for the benefit of the artists and songwriters without whom the American music industry would not exist.

Thank you so much.