MUSIC CHOICE'S COMMENTS IN CONNECTION WITH THE DEPARTMENT OF JUSTICE'S REVIEW OF THE ASCAP AND BMI CONSENT DECREES

SUBMITTED TO

THE DEPARTMENT OF JUSTICE
ANTITRUST DIVISION

ON BEHALF OF

MUSIC CHOICE

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In connection with its newly-announced review of the antitrust consent decrees (the "Consent Decrees") in *United States v. ASCAP*, 41 Civ. 1395 (S.D.N.Y.) and *United States v. BMI*, 64 Civ. 3787 (S.D.N.Y.), the United States Department of Justice, Antitrust Division (the "Division") has requested public comments on a set of enumerated questions regarding the blanket licensing of musical compositions by the American Society of Composers, Authors, and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI"). Music Choice respectfully submits these comments to aid the Division's review in "determin[ing] whether the decrees should be maintained in their current form, modified, or terminated."[1]

I. INTRODUCTION

In the immortal words of Yogi Berra, "it's like déjà vu all over again." Barely three years ago, after a comprehensive, two-year review process comprising multiple rounds of written submissions by, and meetings with, industry stakeholders responding to almost the exact same enumerated questions posed here, the Division issued its closing statement for that review. In its closing statement, the Division concluded that the Consent Decrees remain vitally necessary to competition and the public interest, and that none of the various modifications requested by the performance rights organizations ("PROs") and music publishers were in the public interest. As a preliminary matter, nothing has changed in the intervening three years that could possibly support the opposite conclusions today. Nor could anything change during any sunset period that would support the opposite conclusions at the end of such a period, because the anticompetitive harm posed by the PROs' collective licensing practices flow from the very nature and structure of the blanket licenses.

[1] Press Release, U.S. DEP'T OF JUSTICE, Department of Justice Opens Review of ASCAP and BMI Consent Decrees (June 5, 2019), https://www.justice.gov/opa/pr/department-justice-opens-review-ascap-and-bmi-consent-decrees.

The only relevant fact that has changed in the past three years is the Second Circuit's rejection of the Division's position that the Consent Decrees, as currently drafted, already prohibit fractional licensing. Given the Division's prior finding that fractional licensing would harm competition and the public interest (which the Second Circuit did not reject), this one change in circumstances requires that the Division move to amend the Decrees to expressly prohibit fractional licensing, as suggested by the Second Circuit. Music Choice's licenses from ASCAP and BMI have always been full-work licenses. But if ASCAP and BMI are allowed to issue fractional licenses under the Consent Decrees, such licenses will allow those PROs, which each represent approximately 45% of the market based upon the shares of songs they own, to wield even higher effective market share because it would allow the PROs to threaten litigation over 100% of each song, even where they only represent 1% of that song. Moreover, fractional licensing would completely eliminate one of the key pro-competitive benefits of the blanket license recognized by the Supreme Court: providing licensees with "unplanned, rapid, and indemnified access" to all the works in the PRO's repertory. A fractional license, by definition, cannot provide this benefit.

Music Choice could not have entered the music broadcasting industry and successfully operated for 30 years without the Consent Decrees. Going forward, the Consent Decrees will remain vital to protect competition and should not be terminated. Termination of the Consent Decrees, either immediately or after a sunset period, would not be in the public interest. In its unregulated state, the market for public performance rights is characterized by collective action among competitors and overwhelming market power. The Consent Decrees provide an efficient mechanism for music creators to receive reasonable compensation (determined by a neutral judge to be the fair market value in a hypothetical competitive market for performance licenses),

protect music licensees from the exercise of market power, and spur innovation. If the Consent Decrees' protections are removed, whether immediately or after a sunset period, an unconstrained ASCAP and/or BMI will have the incentive, ability, and demonstrated inclination to abuse their market power to obtain royalty rates far above competitive levels and engage in other anticompetitive conduct, harming consumers and stifling innovation.

Terminating the Consent Decrees will not unleash competition and innovation. The stability and protections afforded by the Consent Decrees have allowed licensees to compete and innovate, including by creating entirely new revenue streams for music publishers and songwriters. Music Choice itself, the world's very first digital music service, never could have launched without the protections of the Consent Decrees. And music publishing industry revenues have seen several years of consecutive increases far greater than those enjoyed by most other industries, in large part because of innovation by music licensees and the royalties flowing through the Consent Decrees. Termination of the Decrees would destabilize the industry and raise barriers to entry, resulting in less investment, innovation, and ultimately less revenue to the publishers and songwriters. Moreover, termination will lead to royalty rates above competitive levels that would simply be passed along to consumers by those licensees capable of raising prices. For those like Music Choice in a constrained market, the only choice will be to either find a way to use less music or go out of business entirely. And without the Consent Decrees, the next Music Choice, Spotify or Pandora will face higher entry costs, and may decide not to enter the market.

Based on Music Choice's experience, a wholly unfettered market, moderated only by the existence of antitrust laws and the possibility of private antitrust litigation, will not be sufficient to protect the public interest. Music Choice faces a Hobson's choice in its negotiations to license

"must have" music from the PROs that are not subject to the Consent Decrees; it cannot realistically "play around" SESAC's license, for example, by avoiding all songs in in its repertory. This problem is only compounded by the current confusion surrounding fractional licensing, lack of transparency, and the unregulated PROs' strategy to attract a sufficient number of premier songwriters of "must have" songs to render their blanket licenses essential and command a premium rate. Music Choice is faced with the option of paying the demanded royalty or risk a ruinous copyright infringement lawsuit with potential statutory damages in the billions. Faced with this "take it or leave it choice," Music Choice has been forced to pay higher royalties to SESAC than is justified by the actual relative value of its repertory. An unconstrained ASCAP and/or BMI would engage in the same conduct.

II. MUSIC CHOICE

Music Choice is a subscription-based, multi-platform video and music network that delivers music programming to millions of consumers. Music Choice started as a project within Jerrold Communications, a division of General Instrument Corporation. It spent four years developing and market testing its product, ultimately launching a first-of-its-kind digital music distribution service in 1991. Today, Music Choice offers close to 100 channels of diverse audiovisual programming (including original produced content) available in approximately 65 million homes through televisions, mobile devices, and the Internet. Its partnership includes AT&T, Cox Communications, Comcast, Charter Communications, and Microsoft.

Music Choice has two primary products—residential and commercial. For residential customers, Music Choice offers its programming through cable operators and other multi-channel video programming distributors ("MVPDs") as part of a bundled package of television channels. Residential subscribers receive the service through cable, satellite, IPTV, or the

internet. Music Choice's channels are organized around genres of music (e.g., country or classical) and are provided commercial-free. For commercial customers, Music Choice provides background music services to business locations such as bars, restaurants, retail stores, and offices. These services are also transmitted through MVPDs, as well as sold by local dealers.

Since its launch, Music Choice has licensed music from ASCAP and BMI. Starting in the 1990s, Music Choice has also licensed music from SESAC. The ASCAP, BMI and SESAC repertories are not substitutes; Music Choice requires a license from all three PROs. Each control the rights to a sufficient number of "must have" songs for a sustainable music distribution service. Due largely to the market dynamics in the MVPD industry, Music Choice is a relatively small player, from a revenue perspective, in the market for music broadcasting services. Thus, ASCAP and BMI do not need Music Choice, but Music Choice needs ASCAP and BMI. The Second Circuit's recent decision regarding fractional licensing only further underscores the degree of market power that each PRO possesses.[2]

Music Choice offers a product distinct from, but similar to, radio and webcasting services. In recent years, Music Choice has faced increasing competition from other music services, including other MVPD channel providers and terrestrial radio. While many of these other services have trade associations that jointly negotiate with ASCAP and BMI, such as the Radio Music Licensing Committee ("RMLC"),[3] Music Choice has no mechanism to offset ASCAP's and BMI's market power. Without the Consent Decrees, Music Choice's lack of negotiating power creates a heightened risk it will pay royalty rates above competitive levels.

[2] *See U.S. v. Broadcast Music, Inc.*, 720 Fed. Appx. 14 (2nd Cir. 2017) (holding that BMI consent decree does not prohibit fractional licensing).

[3] The RMLC represents the interests of the commercial radio industry, which includes some 10,000 commercial radio stations as members. Our Mission, RMLC, http://www.radiomlc.org/.

III. SPECIFIC RESPONSES TO THE DIVISION'S QUESTIONS RELATED TO THE CONSENT DECREES

1. Do the Consent Decrees continue to serve important competitive purposes today? Why or why not? Are there provisions that are no longer necessary to protect competition? Which ones and why? Are there provisions that are ineffective in protecting competition? Which ones and why?

The Consent Decrees were essential to Music Choice's market entry and continue to serve important competitive purposes today. The Consent Decrees protect Music Choice and its customers, foster innovation and new entry, and benefit all participants in the market for music distribution services.[4]

A. The Consent Decrees Protect Music Choice and Its Customers

The Consent Decrees' license upon request, rate court and nondiscrimination provisions have been essential to Music Choice's entry, growth, and innovation in the digital music broadcasting market. As discussed further in response to Question 3 below, these protections are just as necessary today as they have been since Music Choice entered the market in the late 1980s. In some ways, they are even more vital today, as the music publishing industry has grown even more concentrated.

(i) License Upon Request

The requirement that ASCAP and BMI issue a license upon request, before the parties reach an agreement on price, facilitated Music Choice's entry. Today, this provision eliminates the risk that ASCAP and BMI might refuse to renew Music Choice's license and use the threat of massive infringement liability as additional leverage.

At the time Music Choice launched its business, ASCAP and BMI controlled nearly 100% of the commercially significant public performance rights for musical works in the United

[4] Music Choice believes that all Consent Decree provisions are necessary to and effective in protecting competition.

States.[5] The license upon request provision guaranteed that Music Choice could enter the market for music distribution services. Early investment was key to Music Choice taking its product from a testing environment to a national cable radio service. The Consent Decrees reassured investors that Music Choice would have a license by its launch. Without this provision, Music Choice would have waited to launch until the parties reached an agreement on the royalty rate. This could have taken years,[6] during which time the cost of capital could have increased, or Music Choice could have lost access to needed capital. By enabling Music Choice to launch while still negotiating with ASCAP and BMI, the Consent Decrees prevented ASCAP and BMI from using the threat of refusing to deal, combined with the resulting risk of massive copyright infringement liability, to extract royalties far above competitive rates.

In addition to helping Music Choice launch its business, the license upon request guarantee also played an important role during a key transition period in Music Choice's business. In the mid-1990s, Music Choice shifted its business model from an a la carte subscription-based television offering (such as HBO) to a bundled, basic cable offering (such as TBS) in response to lower than expected consumer demand for the former. Consequently, Music Choice sought a new license structure with BMI and ASCAP. BMI proposed increasing Music Choice's royalty rates significantly, despite Music Choice's revenue struggles. When BMI refused to lower its offer, Music Choice applied for and immediately received a license. Music Choice then negotiated with BMI for the next two and a half years, with the parties ultimately

[5] Today, ASCAP and BMI control approximately 90% of the market, with SESAC accounting for nearly all of the remaining share.

[6] *See, e.g., In re Pandora Media, Inc.*, 6 F. Supp. 3d 317, 331 (S.D.N.Y. 2014) , *aff'd sub nom. Pandora Media, Inc. v. Am. Soc. of Composers, Authors & Publishers*, 785 F.3d 73 (2d Cir. 2015) (noting Pandora filed a rate court petition "after roughly two years of negotiations" with ASCAP); David Touve, Music Startups and the Licensing Drag, Music Business Journal (Dec. 2012), http://www.thembj.org/2012/12/music-startups-and-the-licensing-drag/ (Spotify spent an estimated four years negotiating licenses).

ending up in rate court. Without the mandate of a license upon request, Music Choice would have faced two unacceptable choices: shut down its business during negotiations or accept BMI's confiscatory and supracompetitive royalty increase.

(ii) Rate Court

Music Choice also had to resort to rate court protections to obtain reasonable royalty rates. The rate court determines a fair and reasonable rate based on the licensing history between the parties and the licenses for similarly situated licensees. ASCAP and BMI are thus constrained in their negotiations because a rate court will examine their justification for any royalty rate.

As mentioned above, Music Choice applied to BMI for a blanket license in the mid to late 1990s. After the parties failed to reach an agreement, BMI filed a petition in the rate court seeking a reasonable rate determination. BMI sought a rate of 3.75% (increasing to 4.0%)—nearly double the previous rate.[7] BMI argued this rate was reasonable because it would maintain royalties at roughly the same *level* as before. But Music Choice's revenue was *decreasing* at that time, which meant that Music Choice would pay a significantly greater share of its revenue to BMI. While BMI was more than willing to share in Music Choice's gains, it wanted none of its losses. In addition to disagreeing over whether BMI was entitled to the same level of royalty payments, the parties disagreed on the proper analogue to Music Choice. BMI maintained that Music Choice was most similarly situated to DMX, which had agreed to a 3.75% rate. But that rate was distorted by negotiations that included BMI's near $500,000 claim against DMX.[8]

[7] *U.S. v. Broad. Music, Inc.*, 316 F.3d 189, 190 (2d Cir. 2003).

[8] *Id.* at 192.

Music Choice, on the other hand, argued that radio service was the proper analogue, and thus Music Choice should receive the radio rate of 1.75%.

The litigation between Music Choice and BMI lasted more than 5 years. Some decisions were in favor of Music Choice,[9] while others were in favor of BMI.[10] Ultimately, the parties settled at 2.5%, about two-thirds of the rate BMI originally sought. The parties' settlement at 2.5% set a benchmark for Music Choice's rate with ASCAP. Without the Consent Decrees, BMI and ASCAP would likely have sought, and extracted, a rate even higher than 3.75%, ultimately forcing Music Choice to either cut back on features or services offered to consumers, or to leave the market entirely. While litigation costs forced Music Choice to settle at a rate higher than fair market value based upon what radio or webcasters pay, Music Choice would have been even worse off without the rate court.

After the conclusion of Music Choice's rate court proceedings, ASCAP has started each new round of negotiations by stating that rates need to increase. For example, in the most recent negotiation ASCAP asked for a significant commercial background service rate hike, while refusing to provide important information on the rate paid by the licensee most similarly situated to Music Choice, even though this information is relevant and discoverable in a rate court proceeding. In order to frustrate the nondiscrimination provisions of the Decrees, ASCAP has in recent years inserted confidentiality restrictions into their directly negotiated licenses, which they then use to justify their refusal to provide copies of licenses issued to similarly situated licensees during negotiations. A negotiating licensee is then forced to take the PROs at their word that

[9] *See, e.g., U.S. v. Broad. Music, Inc.*, 426 F.3d 91 (2d Cir. 2005) (vacating district court's decision setting an interim rate analogous to DMX at 3.75%).

[10] *See, e.g., Broad. Music, Inc.*, 316 F.3d at 189 (vacating district court's decision setting an interim rate analogous to Internet distribution at 1.75%).

whatever new rates or terms they are demanding have already been agreed to by similarly situated licensees. Ultimately, ASCAP backed down once Music Choice pushed back on the justification for the increase, which they would have had no incentive to do in the absence of a rate court alternative.

(iii) Nondiscrimination Provision

Music Choice and its customers also benefit from the nondiscrimination provision. When Music Choice launched its business, ASCAP and BMI published their commercial MVPD licenses, which included the rate and terms. For years, ASCAP and BMI maintained that these licenses had to be public to comply with the Consent Decrees' nondiscrimination provision. Because Music Choice received a rate and terms comparable to its similarly situated competitors, it was thus able to compete for customers on a level playing field when it launched its business.

Since its entry, Music Choice has continued to benefit greatly from the nondiscrimination provision, particularly with regards to its commercial services. For example, starting in the mid-2000s, ASCAP and BMI stopped publishing their commercial MVPD licenses. A large Music Choice Competitor, Muzak,[11] was able to negotiate lower rates and a preferential rate structure with ASCAP and BMI as compared to the previous publicly-disclosed commercial background music service license. During Music Choice's subsequent negotiations, ASCAP and BMI at first refused to provide Music Choice terms similar to those provided to Muzak. ASCAP and BMI claimed that Music Choice's service was materially different from Muzak's merely because Muzak had a larger number of accounts (*i.e.*, customers). Music Choice was able to push back

[11] Muzak is a part of Mood Media Corporation, which is much larger than Music Choice. In 2011, Mood Media Corporation acquired Muzak for $345 million. One year later, Mood Media acquired another Music Choice competitor, DMX. Press Release, Mood Media to buy DMX Holdings in $86.1 mln deal (Mar. 19, 2012), https://www.proactiveinvestors.com/companies/news/84621/mood-media-to-buy-dmx-holdings-in-861-mln-deal-26463.html.

successfully against this argument because the Consent Decrees explicitly prohibit ASCAP and BMI from "discriminating in rates or terms between licensees similarly situated."[12]

Without the Consent Decrees, Music Choice would have ultimately received a rate significantly higher than Muzak's rate, thus making it even more difficult for Music Choice to compete with Muzak on price and quality. Both the rate court and nondiscrimination provisions were crucial in limiting the PROs' abuse of their market power. Music Choice was only able to be aware of Muzak's rate because it had been set in a public rate court decision. Once that rate was publicly known, the nondiscrimination provision prevented ASCAP and BMI from effectively picking industry winners and limiting consumer choice for music distribution. Without these provisions, it would be highly unlikely that small companies such as Music Choice could survive. Consumers would thus be left with an industry of major players, like Muzak, Google, Amazon, and others.

B. The Consent Decree Regime Benefits All Market Participants

Every participant in the market for public performance rights and music distribution -- music creators, PROs, licensees, and consumers -- depends upon, and benefits from, the Consent Decrees.

For music creators, the Consent Decree regime enables them to collectively bargain in licensing their works. Without the Consent Decrees, music creators could not jointly negotiate through PROs as such behavior would raise significant issues under Sherman Act § 1.[13]

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[12] Final Judgment, *U.S. v. Broadcast Music, Inc. and RKO General, Inc.*, No. 64-civ-3787, § VIII(A) (S.D.N.Y. Nov. 18, 1994) [hereinafter "BMI Consent Decree"]; *see also* Second Amended Final Judgment, *U.S. v. The American Society of Composers, Authors and Publishers*, No. 41-1395, § IV(C) (S.D.N.Y. June. 11, 2001) [hereinafter "ASCAP Consent Decree"].

[13] *See, e.g., Glob. Music Rights, LLC v. Radio Music License Comm., Inc.*, No. CV1609051, 2017 WL 3449606, at *4 (C.D. Cal. Apr. 7, 2017) (plaintiff sufficiently alleged GMR was a conspiracy to restrain the music licensing market).

Individual songwriters and music publishers cannot negotiate individual licenses with each of the millions of bars, restaurants, concert venues, radio and television stations, hotels, retail establishments, streaming services, and other businesses that publicly perform music. Prior to ASCAP's founding, songwriters and music publishers largely went unpaid for most public performances of their songs. ASCAP was formed to solve this very problem. Today, "writers are dependent upon ASCAP for [their] success."[14] Additionally, ASCAP and BMI protect music creators by policing infringement of their works. Without this assistance, it would be impossible for lesser-known, independent music creators to police their own works on a national level.

Music creators have also benefitted financially. The members of ASCAP and BMI have seen their royalties increase due to the proliferation of new music broadcast and distribution channels. Digital streaming has eclipsed physical distribution as a revenue source for music copyright owners. Global revenue from music streaming services has increased $500 million in 2010 to $7.4 billion in 2018.[15] Moreover, global music publishing industry revenues have seen very large increases in each of the past several years. Industry revenue totaled $6.1 billion in 2018, up 13% from another record year in 2017, and those revenues are projected to increase further to $9.6 billion by 2026.[16] Consistent with this run of large industry revenue increases, both ASCAP and BMI have posted several consecutive years of significant increases in both revenue collections and distributions.[17] Any claim that music publishers and the songwriters

[14] *In re Pandora Media, Inc.*, 6 F. Supp. 3d at 335.

[15] Music streaming revenue in the U.S. 2010-2018, Statistica (March 2019), https://www.statista.com/statistics/437717/music-streaming-revenue-usa/.

[16] Quick Take: The Bull Argument for Music Publishing Acquisitions, Midia Research (May 30, 2019), https://www.midiaresearch.com/blog/quick-take-the-bull-argument-for-music-publishing-acquisitions/.

[17] See, e.g., Press Release, ASCAP Annual Revenue and Distributions Continue to Break Records: 2018 Revenue Tops $1.227 Billion; Distributions Hit $1.109 Billion (May 1, 2019), https://www.ascap.com/press/2019/05/05-01-financials-release (7% increase in revenues and 10% increase in distributions); Press Release, ASCAP Delivers for the First Time More Than $1 Billion to Songwriter, Composer and Music Publisher Members (Apr. 19, 2019), https://www.ascap.com/press/2018/04/04-19-financials-2017 (8% increase in revenues and 10% increase in

they are contractually obligated to pay are somehow financially suffering under the Consent Decrees is demonstrably false.

On the licensor side of the market, new PROs have entered. For example, SESAC was formed in 1932 and came to prominence in the 1990s. Today, it has gone from an obscure foreign rights music collective to a major PRO.[18] Its members include must-play artists such as Bob Dylan, Adele, and Neil Diamond.[19]

For licensees, the Consent Decrees constrain ASCAP and BMI's abuse of their market power. Today, ASCAP and BMI control approximately 90% of the public performance rights market. ASCAP's and BMI's repertories are not substitutes because each license unique (and popular) musical works. Their blanket licenses are a Cournot complement; a licensee like Music Choice must have rights from both ASCAP and BMI to have a viable business. A license from BMI is worthless without a license from ASCAP and *vice versa*. Nor can Music Choice realistically negotiate with individual licensors to replace a blanket license for each of ASCAP's and BMI's 10,000,000+ songs. The Consent Decrees prevent abuse of this market power by requiring that ASCAP and BMI, *inter alia*, make a list of songs in their repertories available to licensees, issue a blanket license upon request, offer non-discriminatory royalty rates and terms,

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distributions); Press Release, ASCAP Delivers Record-High 2016 Financial Result: Collects $1.059 Billion in Revenue and Distributes More Than $918 Million to Songwriter, Composed and Music Publisher Members (Apr. 5, 2017), https://www.ascap.com/press/2017/04-04-2016-financial (6% increase in revenues and 5.6% increase in distributions); Press Release, BMI Sets Revenue Records with $1.199 Billion (Sept. 12, 2018), https://www.bmi.com/press/entry/580648 (6% increase in revenues and 9% increase in distributions); Press Release, BMI Tops Revenue Records for Third Straight Year with $1.130 Billion (Sept. 7, 2017), https://www.bmi.com/press/entry/577940 (7% increase in revenues and 10% increase in distributions); Press Release, BMI Announces $1.060 Billion in Revenue, the Highest in Company's History (Sept. 8, 2016), https://www.bmi.com/press/entry/575371 (5% increase in revenue and 6% increase in distributions).

[18] *In re Pandora Media, Inc.*, 6 F. Supp. 3d at 361-62 n.75 (estimating SESAC's market share between 7-10%).

[19] SESAC, https://www.sesac.com/#/.

and submit to rate court jurisdiction if a licensee and ASCAP or BMI are unable to agree on a royalty rate.

Finally, music users have arguably benefitted the most from the rapid innovation in music distribution enabled by the Consent Decrees. By acting as a check on ASCAP's and BMI's market power, the Consent Decrees created an environment where competition and innovation among music licensees has flourished. As described above, Music Choice's entry was facilitated by the Consent Decrees. In addition, numerous other music broadcasters and distributors entered the market as substitutes to terrestrial radio and physical distribution, including Spotify, Pandora, Apple Music, Napster (formerly Rhapsody), Amazon, Google, DMX, Sirius XM, last.fm, and Tidal. These companies offer consumers access to music through cable, satellite, IPTV, and the Internet. And, these companies offer varied services and features depending on the needs of the music listener, such as one-to-one stations, one-to-many stations, on-demand streaming, and business-specific services.

2. What, if any, modifications to the Consent Decrees would enhance competition and efficiency?

A. Full-Work Licenses Enhance Competition and Efficiency

Modifying the Consent Decrees to require ASCAP and BMI to offer full-work licenses, rather than fractional licenses, would enhance competition and efficiency. Only full-work licensing allows the licensee immediate use of the covered compositions, and thus gives effect to the license upon request provision of the Consent Decrees.[20]

ASCAP, BMI, and licensees operated for decades with the understanding that the Consent Decrees required full-work licensing. Indeed, the Division came to this same

[20] *See* ASCAP Consent Decree, *supra* note 12 § 5; BMI Consent Decree, *supra* note 12 § VIII(B).

conclusion just a few years ago based on the language and purpose of the Consent Decrees, years of interpretation of the Consent Decrees by federal courts, and ASCAP and BMI's own licenses that purported to offer full-work licenses for decades.[21] But a recent Second Circuit decision has sowed uncertainty on this issue.[22] In 2017, the Second Circuit held that the BMI consent decree does not prohibit fractional licensing, a practice which the Division stated goes against the "public interest."[23] The Second Circuit concluded its decision by inviting the DOJ to "move to amend the decree" if it decided that fractional licensing "raises unresolved competitive concerns."[24]

The Division should do just that: move to amend the Consent Decrees to require full-work licensing. Without full-work licensing, the license upon request provision cannot achieve its intended effect to "license the rights publicly to perform" a work "upon the request of any unlicensed broadcaster."[25]

The ASCAP and BMI blanket licenses have always provided the immediate, indemnified right to play all songs in their respective repertory, irrespective of whether the PRO represents all of the joint owners of a given song in the repertory. This historical practice is fully consistent with copyright law, the intent of the Consent Decrees, the terms of ASCAP's and BMI's licenses, ASCAP's and BMI's agreements with publishers and song writers, ASCAP's internal rules, and ASCAP's and BMI's public statements.

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[21] U.S. DEP'T OF JUSTICE, Statement on the Closing of the Antitrust Div.'s Review of the ASCAP and BMI Consent Decrees 3 (Aug. 4, 2016) (the "Closing Statement"), https://www.justice.gov/atr/file/882101/download ("only full-work licensing can yield the substantial procompetitive benefits associated with blanket licensees that distinguish ASCAP's and BMI's activities from other agreements among competitors that present serious issues under the antitrust laws").

[22] *See Broadcast Music, Inc.*, 720 Fed. Appx. at 14.

[23] Closing Statement *supra* note 21 at 13.

[24] *Broadcast Music, Inc.*, 720 Fed. Appx. at 18.

[25] BMI Consent Decree, *supra* note 12 § VIII(B); ASCAP Consent Decree, *supra* note 12 § 5.

(i) Joint ownership under copyright law

As a preliminary matter, any claim that ASCAP's and BMI's licenses cannot provide full-work rights is inconsistent with the long-standing treatment of licensing by joint owners under copyright law. Under United States copyright law, each joint owner of a copyrighted work owns a share of an undivided interest in the whole work and therefore has the authority to grant a non-exclusive license for that work without the participation or permission of any other joint owners.[26] Such a license from even one joint owner obviates the need for a license from any of the others because "a license from a co-holder of a copyright immunizes the licensee from liability to the other co-holder for copyright infringement."[27]

(ii) The Consent Decrees and judicial precedent

The Consent Decrees themselves describe ASCAP's and BMI's licenses as conveying the rights to play all works in each organization's repertory. Even if the Consent Decrees do not currently have a provision expressly prohibiting fractional licensing, such fractional licensing is inconsistent with the purpose of the Decrees, and also inconsistent with judicial precedent relating to the Decrees.

Courts interpreting the Consent Decrees have long recognized the bedrock principle that ASCAP's and BMI's blanket licenses grant users access to the entire repertory. In addition to the Second Circuit's 2015 Pandora decision, which stated that ASCAP is "required to license its

[26] *Submersion Records, Inc. v. UAV Corp*., 517 F.3d 1137, 1145 (9th Cir. 2008) (joint owners each own share of undivided interest in the whole); *Davis v. Blige*, 505 F.3d 90, 100 (2d Cir. 2007) (a co-owner may grant a non-exclusive license to a jointly-owned work unilaterally); *Thomson v. Larson*, 147 F.3d 195, 199 (2d Cir. 1998); *see also* 2 Pantry on Copyright, § 5:7 (2015); H.R.Rep. No. 94-1476, at 121 (1976) ("Under the bill, as under the present law, coowners of a copyright would be treated generally as tenants in common, with each coowner having an independent right to use or license the use of a work, subject to a duty of accounting to the other coowners for any profits.").

[27] *McKay v. Columbia Broad. Sys., Inc*., 324 F.2d 762, 763 (2d Cir. 1963).

entire repertory to all eligible users,"[28] the Supreme Court has stated that the blanket license grants licensees access to "any and all of the compositions" in a PRO's repertory.[29] Every other federal court that has examined the issue has similarly held that a blanket license is "a license that grants the licensee access to [a PRO]'s entire repertory in exchange for an annual fee."[30]

Courts have also noted that the value of a blanket license hinges on its ability to provide users access to the entire repertory.[31] One of the key procompetitive features of the ASCAP's and BMI's blanket licenses relied upon by the courts and the PROs themselves to justify allowing the anticompetitive conduct of joint price fixing by the PROs is that a blanket license provides licensees with immediate access to any and all of the works in a PRO's repertory. Notably, even if a music publisher that owns 100 percent of the copyright in a song withdraws from a PRO, that PRO retains the right to license the song if the corresponding songwriter of the work remains with that PRO (and vice versa).[32] If fractional licensing were allowed, however, even if a music publisher owns only one percent of the copyright in a song, that publisher could threaten litigation over 100 percent of that song. While ASCAP and BMI each have about a 45

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[28] *Pandora Media, Inc.*, 785 F.3d at 77.

[29] *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 5 (1979) ("Both [ASCAP and BMI] operate primarily through blanket licenses, which give the licensees the right to perform any and all of the compositions owned by the members or affiliates as often as the licensees' desire for a stated term."); *id*. at 20 (describing the circumstances under which the blanket license arose as one where licensees wanted "unplanned, rapid, and indemnified access to any and all of the repertory of compositions," and where individual transactions would be "expensive," indeed, "prohibitive" for "licenses with individual radio stations, nightclubs, and restaurants").

[30] *U.S. v. Broad. Music, Inc*., 275 F.3d 168, 173 (2d Cir. 2001); *see also Am. Soc. of Composers, Authors & Publishers v. Showtime/The Movie Channel, Inc*., 912 F.2d 563, 565 (2d Cir. 1990) ("As required by the ASCAP consent decree, ASCAP offers a blanket license for all of the three million songs in its repertory.").

[31] *See Broad. Music, Inc. v. Moor-Law, Inc*., 527 F. Supp. 758, 767 (D. Del. 1981), *aff'd*, 691 F.2d 490 (3d Cir. 1982) ("BMI justifies the 'full repertory' blanket license on the ground that… a less than full repertory license system, if feasible at all, would be significantly more expensive to administer than a full repertory one.").

[32] *See Broad. Music v. Taylor*, 10 Misc. 2d 9, 20, 55 N.Y.S.2d 94, 103 (N.Y. Sup. Ct. 1945) (where publisher member withdrew from ASCAP and moved to BMI, songs remained in ASCAP repertory because songwriters remained as ASCAP members); *see also Schwartz v. Broad. Music, Inc*., 180 F. Supp. 322, 333 (S.D.N.Y. 1959) ("ASCAP would continue to have the right to grant nonexclusive licenses in a resigned writer's composition as long as his publishers and collaborators remained members of ASCAP.").

percent market share from an ownership perspective, fractional licensing would further amplify that market power because each would have about a 65-70 percent market share based on infringement risk. For the same reason, fractional licensing also further amplifies the market power of any other PRO that shares ownership of songs with ASCAP or BMI.

Critically, the exact question of whether a single PRO's license provides the right to perform jointly-owned songs when that PRO represents less than 100 percent of the song's owners, has already been answered by the courts. In *Buffalo Broadcasting*, the district court was confronted with this question and held, in the context of the per-program license, that if both PROs had the same song in their repertories due to split ownership, a licensee had the option of licensing the song through either one of the PROs, without obtaining a license from the other.[33] The Buffalo Broadcasting court lauded the procompetitive benefits of allowing each PRO to license the entirety of jointly-owned songs.[34]

(iii) Terms of ASCAP's and BMI's licenses

The publishers' claims are also inconsistent with ASCAP's and BMI's licenses. As the Division correctly noted in its most recent review of the Consent Decrees, ASCAP's and BMI's licensing practices have always suggested that each organization's license entitles users to play all works in their repertories, without regard to whether such works are partially or fully owned by the licensing PRO's affiliates.[35] The Division cited provisions in the BMI license for bars and restaurants and the ASCAP Business Blanket License, both of which clearly state that the licenses provide the right to perform all of the songs in each PRO's respective repertory, not

[33] *United States v. ASCAP (In Re Application of Buffalo Broad. Co.)*, No. 13-95 (WCC), 1993 WL 60687, at *79 (S.D.N.Y. Mar. 1, 1993) ("Buffalo Broadcasting").

[34] *See also Schwartz*, 180 F. Supp. at 333 (noting that ASCAP would retain the right to license a song after one songwriter withdrew as long as any of the song's co-writers remained members of ASCAP).

[35] Closing Statement, *supra* note 21 at 11-13.

merely contingent, fractional interests in playing those songs. Music Choice's ASCAP and BMI licenses have always contained similar language, granting it the right to play all songs in each PRO's respective repertory.

(iv) The PROs' agreements with publishers and songwriters

The very agreements through which ASCAP and BMI obtain their licensing authority from music publishers and songwriters expressly require that those publishers and songwriters provide the PROs with the right to issue licenses for entire songs, even where the affiliated publisher or songwriter signing the agreement does not control 100 percent of the song. For example, the ASCAP Writer Agreement requires the songwriter to grant ASCAP "the right to license non-dramatic public performances…of each musical work" that the songwriter, whether "alone, **or jointly, or in collaboration with others**": (1) "wrote, composed, published, acquired or owned"; or (2) "has any right, title, interest or control whatsoever, **in whole or in part**"; or (3) that "may be written, composed, acquired, owned, published, or copyrighted by the owner, alone, **jointly or in collaboration with others**"; or (4) in which "the owner may hereafter … have any right, title, interest or control, whatsoever, **in whole or in part**". (Emphasis added)[36] ASCAP and BMI would have no reason to obtain these rights if their blanket licenses did not include these rights; the fact that they get such rights is clear evidence that ASCAP's and BMI's licenses have always provided the right to perform entire songs, irrespective of fractional ownership.

Moreover, in light of the songwriters' membership and affiliation agreements with ASCAP and BMI, it would be of no consequence if certain of those songwriters had private

[36] ASCAP Writer Agreement, http://www.ascap.com/~/media/files/pdf/join/ascap-writer-agreement.pdf (emphasis added); *see also* ASCAP Publisher Agreement, http://www.ascap.com/~/media/files/pdf/join/ascap-publisher-agreement.pdf; *see also* BMI Writer Agreement, http://www.bmi.com/forms/affiliation/bmi_writer_kit.pdf (requiring each songwriter to grant BMI the right to license "[a]ll musical compositions…composed by you alone or with one or more co-writers").

agreements with their co-writers to refrain from whole-work licensing as allowed by copyright law. Such a scenario would not legally impact the scope of the ASCAP and BMI license, but rather would at most give rise to a breach of contract dispute between the contracting co-writers.[37]

(v) ASCAP's internal rules

The fact that the PROs have always issued licenses allowing performance of any song for which one of its members has any interest is also reflected in ASCAP's internal rules. In its Compendium of ASCAP Rules and Regulations and Policies Supplemental to the Articles of Association ("ASCAP Compendium"), ASCAP expressly represents that it "licenses to Music Users, on a non-exclusive basis, the right to publicly perform, non-dramatically, all of the works in the ASCAP Repertory."[38] ASCAP's rules acknowledge that works in the repertory include works that are jointly owned by members and non-members.[39] The ASCAP Compendium also states that ASCAP requires each member to grant it "the non-exclusive right to license the non-dramatic public performance of that Member's musical compositions," regardless of whether that composition was jointly or individually created.[40]

ASCAP's internal rules provide (consistent with established precedent) that ASCAP retains the right to issue licenses to perform a song even if the music publisher that owns 100

[37] *See* 1 Nimmer of Copyright § 6.10[C] (so long as licensee did not have notice of contractual restriction among co-owners, one co-owner's grant of a license is valid for licensee even if that co-owner breached contractual restriction against unilateral licensing of whole work); *see also* 17 U.S.C. § 205(E); 1 Nimmer on Copyright § 10.07[B] (even where copyright owner has assigned all rights in work to another party, a non-exclusive license granted by the prior owner after the assignment is valid if licensee paid consideration and took license without notice of the assignment).

[38] ASCAP Compendium § 2.1, http://www.ascap.com/~/media/files/pdf/members/governing-documents/compendium-of-ascap-rules-regulations.pdf.

[39] *Id*. § 2.3 (discussing method of registering a song as part of the ASCAP repertory "[r]egardless of whether a work is the product of a collaboration with other ASCAP Members or with non-ASCAP members. . ..").

[40] *Id*. at § 2.7.1.

percent of the copyright in a song resigns from ASCAP, so long as any writer of the song remains in ASCAP, and vice versa.[41] ASCAP's own internal rules and regulations repeatedly recognize that ASCAP both obtains the right to license, and actually does license, the entirety of a jointly-owned song, even if not all of the owners are ASCAP members and even (in some circumstances) where none of the music publisher owners are members. These rules are wholly inconsistent with the publishers' recent claims that the PRO licenses have not granted the right to perform jointly-owned songs in the PROs' repertories.

(vi) The PROs' public admissions

Until certain publishers (very recently) began raising allegations to the contrary, both ASCAP and BMI have consistently taken positions in their public statements and regulatory filings acknowledging that their licenses provide the right to play all songs in their repertories, irrespective of whether each PRO represents 100 percent of each song. The Division has cited examples of such public statements in the most recent review of the Consent Decrees, but there are many others. For example, in connection with the Copyright Office's recent music licensing study, ASCAP submitted public comments in which it acknowledged that "ASCAP must grant a license to all the musical works in its repertory upon written request."[42] Similarly, ASCAP and BMI submitted joint comments in connection with the Copyright Office's Report on the Satellite Television Extension and Localism Act of 2010, in which they acknowledged that each of their collective licenses provide licensees with "rights to perform every work in the repertory."[43]

[41] *Id*. § 1.11.5 (citing *Marks v. Taylor*, 55 N.Y.S.2d 94 (N.Y. S.Ct. 1945)).

[42] Comments of ASCAP, Docket No. 2014-3, at 3 (May 23, 2014), http://copyright.gov/policy/musiclicensingstudy/comments/Docket2014_3/ASCAP_MLS_2014.pdf.

[43] Comments of BMI and ASCAP, Docket No. RM 2010-10, at 11 (April 25, 2011), http://www.copyright.gov/docs/section302/comments/initial/042511-bmi-ascap.pdf.

(vii) The Division's recent finding that fractional licensing is not in the public interest mandates amendment of the Consent Decrees to expressly prohibit such anticompetitive practices

In its recent review of the Consent Decrees, the Division ultimately found that allowing fractional licensing would not be in the public interest and would be inconsistent with the Supreme Court's analysis of the procompetitive features of the blanket license upon which the Court based its holding that the PROs' blanket licenses are permissible under a rule of reason analysis.[44] The Division correctly noted that the Supreme Court focused particularly on the fact that the blanket license "allows the licensee *immediate use* of covered compositions, *without the delay of prior individual negotiations*, and great flexibility in the choice of musical material."[45] The Supreme Court further emphasized the procompetitive feature of providing "unplanned, rapid, and indemnified access" to all the works in ASCAP's and BMI's repertories.[46] The reduced transaction costs and the ability for licensees to gain immediate, unfettered access to the entirety of a PRO's repertory has similarly been advanced as a justification (for what may otherwise be illegal price fixing) in many other decisions.[47] The Division correctly found that fractional licenses would completely fail to provide these key procompetitive benefits.[48]

The Division identified many reasons why the public interest would be harmed by fractional licensing:[49]

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[44] Closing Statement, *supra* note 21 at 12-16.

[45] *Id*. at 12 (citing *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. at 21-22) (emphasis added by Division).

[46] *Broad. Music, Inc.*, 441 U.S. at 20.

[47] *See, e.g., Broad. Music, Inc. v. Moor-Law, Inc*., 527 F. Supp. 758, 767 (D. Del. 1981), *aff'd*, 691 F.2d 490 (3d Cir. 1982) ("As earlier noted, the parties agree that performing rights societies and their blanket licenses reduce transaction costs which would otherwise be prohibitive. BMI's blanket license thus has a pro-competitive effect in the sense that there would be no market if individual [licensees] were left to negotiate with individual copyright owners.").

[48] Closing Statement, *supra* note 21 at 12.

[49] *Id*. at 13-16.

Modifying the consent decrees to permit fractional licensing would undermine the traditional role of the ASCAP and BMI licenses in providing protection from unintended copyright infringement liability and immediate access to the works in the organizations' repertories, which the Division and the courts have viewed as key procompetitive benefits of the PROs preserved by the consent decrees.

Allowing fractional licensing would also impair the functioning of the market for public performance licensing and potentially reduce the playing of music. If ASCAP and BMI were permitted to offer fractional licenses, music users seeking to avoid potential infringement liability would need to meticulously track song ownership before playing music. As the experience of ASCAP and BMI themselves shows, this would be no easy task. . . . even with their years of experience in finding and compensating song owners and their established relationships with music creators, the PROs often do not make distributions until weeks or months *after* a song is played, and even then do so imperfectly. The difficulties, delays, and imperfections that are tolerated in the context of PRO payments would prove fatal to the businesses of music users, who need to resolve ownership questions *before* playing music to avoid infringement exposure.

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Finally, allowing fractional licensing might also impede the licensed performance of many songs by incentivizing owners of fractional interests in songs to withhold their partial interests from the PROs. A user with a license from ASCAP or BMI would then be unable to play that song unless it acceded to the hold-out owner's demands, providing the hold-out owner substantial bargaining leverage to extract significant returns. The result would be a further reduction in the benefits of the ASCAP and BMI license and the creation of additional impediments to the public performance of music.

For all of these reasons, the Division believes that [permitting] fractional licensing would not be in the public interest. Although PROs, songwriters, and publishers suggested there are problems associated with full-work licensing, especially the creation of works that would be unlicensable by the PROs, the Division believes that the potential costs associated with these concerns are far outweighed by the benefits of full-work licensing. In particular, the Division believes . . . that songwriters possess several options that would allow PROs to continue to license their works as well as

> allow those songwriters to continue to be paid by the PRO of their choice.

In its Closing Statement, the Division also concluded that, in large part because of these findings relating to the public interest, the Consent Decrees already prohibited fractional licensing. The Second Circuit subsequently ruled, based solely upon the express language of the Decrees, that the Decrees were silent and therefore did not prohibit fractional licensing. The Second Circuit did not, however, consider the merits of the public interest analysis undergirding the Division's interpretation. Rather, the court indicated that the proper course for the Division to take if fractional licensing is not in the public interest would be to amend the Consent Decrees to prohibit such practices expressly.[50] Music Choice respectfully submits that, given its prior, comprehensive findings that fractional licensing is not in the public interest, the Division has no choice but to seek to amend the Consent Decrees to expressly prohibit fractional licensing.

B. Any Proposals to Weaken Consent Decree Protections Should be Rejected

Music Choice expects ASCAP, BMI and the music publishers will use the Division's request for comments as an opportunity to re-litigate their previous request for a wish-list of modifications that will weaken the Consent Decree's protections. These requests were all seriously considered by the Division only three years ago, at which time the Division correctly and expressly found that none of those modifications would be in the public interest. Nothing in the public performance license market has changed in the intervening three years that could support the opposite conclusion now.

Modifying the Consent Decrees to allow music publishers to "partially withdraw" rights and thereby allow ASCAP and BMI to grant licenses to certain types of licensees but not others

[50] *Broadcast Music, Inc*., 720 Fed. Appx. at 18.

would not be in the public interest. In litigation involving Pandora, both Judge Cote and Judge Stanton ruled the Consent Decrees did not permit partial withdrawal.[51] Undeterred, ASCAP and BMI, during the Division's 2014-16 review of the Consent Decrees, sought a modification to allow partial withdrawal.

The Division should be very skeptical of any argument that allowing partial withdrawal will create more competitive pricing for music rights. The very concept of partial withdrawal was itself an anticompetitive scheme concocted by ASCAP, BMI and major music publishers, including Sony and Universal. The purpose of the scheme was to use the music publishers' market power to leverage higher prices in direct negotiations with licensees and then use these higher prices as a "benchmark" for higher rates for blanket licenses. Judge Cote concluded the scheme was to designed to close the gap between rates for sound recording rights and public performance rights.[52] Judge Cote found "the evidence at trial revealed troubling coordination between Sony, [Universal], and ASCAP, which implicates a core antitrust concern underlying the [ASCAP Consent Decree.]"[53] Judge Cote further found that "ASCAP, Sony, and [Universal] did not act as if they were competitors with each other in their negotiations with Pandora," and by coordinating "the very considerable market power that each of them holds individually was magnified."[54]

The purpose of the Consent Decrees is to mitigate ASCAP and BMI's market power by, among other things, requiring a license on request and prohibiting discrimination among licensees. The purpose of the Consent Decrees would be undermined if music publishers could

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[51] *In re Pandora Media, Inc.*, No. 12 CIV. 8035(DLC), 2013 WL 5211927 (S.D.N.Y. Sept. 17, 2013); *Broadcast Music, Inc. v. Pandora Media, Inc.*, No. 13 CIV. 4037(LLS), 2013 WL 6697788 (S.D.N.Y. Dec. 19, 2013).

[52] *In re Pandora Media, Inc.*, 6 F. Supp. 3d at 334-35.

[53] *Id*. at 357.

[54] *Id*. at 357-58.

selectively withdraw performance rights from ASCAP and BMI and then use their combined market power to extract anticompetitive prices from licensees.

There is also no basis to replace the rate courts, which have worked effectively for decades, with binding arbitration. ASCAP's and BMI's concerns are not with the rate courts themselves, but with the courts' consistent refusal to rubber stamp requested royalty rates that are outside the range of reasonable fair market value. Abolishing the rate courts would strengthen ASCAP's and BMI's negotiating leverage in several ways. First, eliminating rate courts would sacrifice decades of precedent and predictability. The establishment of precedent in published opinions fosters certainty and encourages settlements without the need to resort to the rate courts. Second, federal judges are preferable to the use of private arbitrators. The rate courts have extensive experience enforcing the Consent Decrees and have significant other experience with complex issues involving copyright and antitrust laws and hearing testimony from economic experts. Moving rate disputes from highly-experienced federal judges to arbitrators, each of whom would have to be educated on the intricacies of the music industry, would significantly reduce the quality of rate decisions. Finally, arbitration proceedings would exacerbate information asymmetries. ASCAP and BMI have an information advantage because they engage in numerous negotiations and have access to all licensing agreements and fees paid by licensees. A licensee is only aware of its negotiation history and the terms of its agreement. The Federal Rules of Civil Procedure level the playing by ensuring all parties have access to relevant information.

The Division considered these modifications in its mist recent review of the Consent Decrees and determined that they were not in the public interest at that time. Nothing has changed since then to warrant a different outcome. Any modification of the Consent Decrees

should be fully evaluated to ensure they are designed to promote a competitive and efficient market. If the Division were to reach the tentative conclusion that certain modifications are appropriate, the Division should solicit a second round of comments to allow the public the opportunity to comment on any specific proposed modifications.

3. Would termination of the Consent Decrees serve the public interest? If so, should termination be immediate or should there instead be a sunset period? What, if any, modifications to the Consent Decrees would provide an efficient transitionary period before any decree termination?

Termination of the Consent Decrees would not serve the public interest. There have been no technological, business or other changes in the industry that render the Consent Decrees' protection unnecessary. Fifty years ago, ASCAP and BMI were effectively a duopoly. Today, that has hardly changed with ASCAP and BMI controling approximately 90% of music publishing rights. The music publishing industry is no less conducive to, or inclined toward, anticompetitive conduct today than it was when the Consent Decrees were entered. Indeed, in the recent rate case between ASCAP and Pandora, Judge Cote found that the PROs and music publishers have demonstrated a propensity towards coordinated and anticompetitive behavior.[55] In that same timeframe, approximately three years ago, the Department had to pursue civil contempt sanctions against ASCAP for wantonly violating the Consent Decree's prohibition on obtaining exclusive rights from its members, resulting in a large settlement.[56] If this is how the PROs behave even with the Consent Decrees in place, there can be no question that their anticompetitive conduct will only increase if the Decrees are terminated.

[55] *See In re Pandora Media, Inc.*, 6 F. Supp. 3d at 357-61.

[56] Press Release, U.S. DEP'T OF JUSTICE, Justice Department Settles Civil Contempt Claim against ASCAP for Entering into 150 Exclusive Contracts with Songwriters and Music Publishers (May 12, 2016), https://www.justice.gov/opa/pr/justice-department-settles-civil-contempt-claim-against-ascap-entering-150-exclusive

A mere three years ago, after two years of extensive investigation including multiple rounds of written submissions and meetings with industry stakeholders, the Division found "that it would not be in the public interest to modify the consent decrees."[57] It noted that the Consent Decrees "fill important and procompetitive roles in the music licensing industry" through various provisions discussed above, such as granting a license upon request.[58] The Division also recognized impediments to a fully-functioning market that still exist today, such as "the absence of a reliable source of data on song ownership."[59] Nothing has changed in the past three years that could support a contrary conclusion today regarding the public interest.

Nor would terminating the Consent Decrees with a sunset period be in the public interest. ASCAP and BMI's market power has not decreased since the Consent Decrees were entered or in the three years since the Division found that it would not be in the public interest to modify the Consent Decrees. There is no reasonable prospect that market conditions will change in the next 5-10 years in a way that will dissipate ASCAP's and BMI's market power. Without any realistic prospect of structural changes in the public performance rights market, a sunset provision would simply delay competitive harm.

ASCAP and BMI continue to have overwhelming market power and if the Consent Decrees were terminated there would be no constraint on their ability to raise prices or engage in other anticompetitive conduct. The members of ASCAP and BMI are reaping the benefits of the increased proliferation and enjoyment of music. But that innovation and growth would decline

[57] Closing Statement, *supra* note 21 at 17.

[58] *Id*. at 10, 13 (noting that "immediate access to the works in the organizations' repertories" is a "key procompetitive benefit[]" of the Consent Decrees).

[59] *Id*. at 15.

as incumbents and new entrants would face higher costs and heightened uncertainty in licensing public performance rights.

A. Music Choice Would Be Forced to Pay Rates Above Fair Market Value, with No Corresponding Increase in Quality

If the Consent Decrees were terminated, ASCAP and BMI would seek excessive royalties. In Music Choice's experience, ASCAP and BMI always take the position that rates should significantly increase. Music Choice has been in interim licenses with both ASCAP and BMI for several years because they have been insisting on substantial, and unjustified, rate increases. Additionally, ASCAP has been pressing Music Choice to take a fractional license since Judge Stanton's 2016 decision.[60] Without the protection of the Consent Decrees, including the requirement that ASCAP and BMI grant Music Choice a license and the availability of a rate court to determine fair market rates, those PROs would immediately raise Music Choice's rates far above a fair market value and likely force Music Choice to accept a fractional license, rather than a blanket license.

Without the Consent Decrees, ASCAP and BMI could use the threat of no license to coerce even higher, supracompetitive royalty rates. Music Choice is a small licensee from a revenue perspective, and thus pays far less to ASCAP and BMI than larger licensees, such as RMLC. Thus, ASCAP and BMI are far less dependent on Music Choice for revenue and may even be willing to sacrifice Music Choice's fees as a warning shot to others—accept our rates or close-up shop. On the other hand, Music Choice cannot credibly threaten to walk away from the negotiating table. Nor could Music Choice feasibly remove ASCAP and BMI's repertories from its rotation. While the Consent Decrees require that ASCAP and BMI publish their repertories,

[60] *See U.S. v. Broad. Music, Inc.*, 207 F. Supp. 3d 374 (S.D.N.Y. 2016), *aff'd*, 720 F. App'x 14 (2d Cir. 2017) (holding that BMI consent decree does not prohibit fractional licensing).

both comply merely by providing a song-by-song lookup on their websites. To determine which songs are in ASCAP and BMI's repertories, Music Choice would have to individually type each song in its rotation into this database—an impossible task given Music Choice's catalogue has hundreds of thousands of songs.

Even if ASCAP and BMI would not refuse Music Choice a license, time is on their side. Without a license, Music Choice would quickly face two equally problematic scenarios: risk an injunction and/or statutory damages lawsuit or shut down until the parties come to an agreement. Either option risks permanent damage to Music Choice's business, which already faces stiff competition.

If Music Choice were forced to accept a license at rates above fair market value, it would be forced either to decrease the services and products offered to consumers or leave the market entirely. Under any scenario—Music Choice shuts down (temporarily or permanently) or Music Choice has fewer features and services—consumers are worse off. Of course, the same is true for all other digital music service licensees that need to make a viable business from those services. When, in the absence of the Consent Decrees, ASCAP and BMI abuse their market power to extract ever-higher, supracompetitive rates, the only companies that will be able to remain in the market will be the few massive technology companies who are willing to operate their music services as a perpetual loss-leader. This market consolidation will stifle competition and innovation, all to the detriment of consumers.

B. Innovation Will Decline

Termination of the Consent Decrees would substantially raise entry barriers in the music distribution market. As described in Section III(1)(B) *supra*, numerous companies have entered the music distribution market in the past two decades, offering various services under different business models. The Consent Decrees reduce business risk by providing certainty that a new

entrant can obtain a license to ASCAP's and BMI's repertories. Without such certainty, investors would be less likely to make substantial investments until a new entrant has obtained a license from ASCAP and BMI. In addition, licensing negotiations can delay or prevent entry. Spotify is rumored to have spent almost four years seeking music licenses.[61] Other businesses, such as Beyond Oblivion, gave up entirely.[62] At a minimum, the rate of growth in the music distribution market will slow as ASCAP and BMI negotiations can last years.[63]

4. Do differences between the two Consent Decrees adversely affect competition? How?

No. Music Choice does not believe that differences between the two Consent Decrees adversely affect competition.

5. Are there differences between ASCAP/BMI and PROs that are not subject to the Consent Decrees that adversely affect competition?

Yes. Based on Music Choice's experience, the antitrust laws and the threat of private antitrust litigation would not be sufficient to constrain the exercise of market power by ASCAP and BMI. Today, SESAC—a PRO that is not subject to the Consent Decrees—is extracting royalties above competitive levels from Music Choice and engaging in other anticompetitive conduct.

While Music Choice could challenge any ASCAP or BMI anticompetitive conduct, such litigation would cost millions of dollars in legal fees and take years to resolve. Moreover, given the modest revenue and margins available in the MVPD market, Music Choice could not

[61] David Touve, *Music Startups and the Licensing Drag*, Music Business Journal (Dec. 2012), http://www.thembj.org/2012/12/music-startups-and-the-licensing-drag/.

[62] *Id*. (startup Beyond Oblivion shut its doors after two years of negotiations for music licenses).

[63] *See, e.g.*, *In re Pandora Media, Inc.*, 6 F. Supp. 3d at 331 (noting that Pandora was "unable to agree with ASCAP on the proper price for the license after roughly two years of negotiation, and…on November 5, 2012, Pandora filed with this Court a petition for determination of reasonable licensing fees").

realistically afford to bear those costs as a sole, private litigant. Because Music Choice could not legitimately threaten litigation and has no negotiating leverage, ASCAP and BMI could charge Music Choice royalties above competitive levels as SESAC does now.

SESAC's business strategy is to recruit high-profile members away from ASCAP and BMI. Even though its total number of represented songs is small relative to the total size of the respective repertories of ASCAP and BMI, SESAC nonetheless has market power. SESAC controls the rights to a significant number of popular songs that are necessary to have a viable music distribution service. Even if Music Choice could provide a viable service without SESAC's repertory, Music Choice could not program around its catalogue. For most of SESAC's history, it refused even to identify the songs it represents (and it is not subject to any consent decree requiring it to do so, as are ASCAP and BMI).

In 1999, Music Choice attempted to remove SESAC music from its playlists and pursue a direct licensing strategy for those songs. Without knowing which songs were covered by SESAC's repertory, Music Choice had no way to remove those songs from its playlists or negotiate with the music composers directly. When Music Choice sought this information from SESAC, SESAC threatened to sue Music Choice for copyright infringement rather than share the requested information. Facing imminent and costly litigation, Music Choice entered into a license with SESAC far above any semblance of a fair market rate and wholly unjustified based on any change in the relative value of the SESAC repertory.

In 2007, Music Choice again attempted to remove SESAC music from its playlists. However, SESAC once more refused to provide the information necessary to pull SESAC's songs. Even though it eventually began providing a list of its repertory on its website, the list was initially provided in one 42,601-page pdf document without any indication of the fractional

ownership interest of each song. Thus, it is near impossible for Music Choice to determine the copyright owner of each song, which would allow Music Choice to negotiate directly with the owner or confirm its current licenses cover that song.

Even though SESAC recently started publishing this list (though still seemingly incomplete and in an unusable format), it still leverages its monopoly power at every annual license renewal. It demands substantially higher fees and argues that the increase is justified by the increased size and value of its repertory. These increases are more than any demonstrated increase in the fair market value of SESAC's repertory, and with no equivalent decrease in the rates Music Choice pays ASCAP and BMI (even though SESAC's repertory has increased at the expense of ASCAP/BMI's repertory).[64]

Reliance on the antitrust laws and private litigation would not be sufficient to protect Music Choice when ASCAP and BMI, like SESAC, begin charging royalty rates above competitive levels or engaging in other anticompetitive conduct. The marketplace for SESAC's products are a far cry from the "productive, efficient and level playing field" that ASCAP and BMI claim would result from "less government regulation."[65] Unsurprisingly, the only stakeholders who view SESAC as operating in a "free" and competitive market place are the PROs themselves.[66] If the Consent Decrees were terminated, ASCAP and BMI would have the

[64] *See In re Pandora Media, Inc.*, 6 F. Supp. 3d at 356 ("the justification for an escalating rate for SESAC suggests that the ASCAP rate should be a declining rate since SESAC's growth would come at the expense of ASCAP and BMI").

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

[66] *See* Letter from Senator Lindsey Graham to Assistant Attorney General Makan Delrahim (Feb. 12, 2019) ("the current ASCAP & BMI consent decrees…protect[] consumers from anticompetitive abuses in this marketplace"), https://mic-coalition.org/cms/assets/uploads/2019/02/LG-letter-to-Delrahim-Consent-Decrees-02121911-1.pdf.

incentive and ability to raise royalty rates above competitive levels.[67] In Music Choice's experience, ASCAP and BMI always take the position that royalty rates should significantly increase. ASCAP and BMI have pushed for rates in line with those for sound recording rights, which are "many times higher than" the rates for performance rights.[68]

6. Are existing antitrust statutes and applicable caselaw sufficient to protect competition in the absence of the Consent Decrees?

No. If an unconstrained ASCAP and BMI engaged in anticompetitive conduct, Music Choice's only recourse would be to bring a private antitrust lawsuit. Antitrust litigation is costly and inefficient. As Music Choice experienced in its rate court litigation, ASCAP and BMI have far deeper pockets and far more resources to sustain prolonged and costly litigation. It is no surprise that ASCAP and BMI advocate for reliance on the antitrust laws to regulate this industry.[69] In addition, even if Music Choice could afford to litigate an antitrust case against ASCAP and BMI, the antitrust cases against SESAC demonstrates that litigation is not sufficient to replace the protections provided by the Consent Decrees.[70] RMLC and the Television Music License Committee ("TMLC") recently won significant early rulings of likelihood of success on antitrust claims against SESAC,[71] but the parties settled prior to trial so no final decisions were

[67] Music Choice is not claiming that the rates it pays ASCAP and BMI are fully competitive. However, those rates are closer to fully competitive rates than rates it pays in a world with no constraints, such as those paid to SESAC.

[68] *In re Pandora Media, Inc.*, 6 F. Supp. 3d at 333 ("Pandora pays over half of its revenue to record companies for their sound recording rights, and only approximately four percent to the PROs for the public performance rights to their songs.").

[69] Press Release, BMI President & CEO Mike O'Neill and ASCAP CEO Elizabeth Matthews Issue Open Letter to the Industry on Consent Decree Reform, *supra* note 65.

[70] *See e.g.*, *Global Music Rights, LLC v. Radio Music License Committee, Inc.*, No. 16-09051, 2017 WL 3449606 (C.D. Cal. Apr. 7, 2017); *Radio Music License Committee, Inc. v. Global Music Rights, LLC.*, No. 16-6076, 2017 WL 8682117 (E.D. Pa. Nov. 29, 2017); *Radio Music License Committee, Inc. v. SESAC, Inc.*, 29 F. Supp. 3d 487 (E.D. Pa. 2014); *Meredith Corp. v. SESAC, Inc.*, 1 F. Supp. 3d 180 (S.D.N.Y. 2014).

[71] *See Radio Music License Committee, Inc.*, 29 F. Supp. 3d at 487; *Meredith Corp.*, 1 F. Supp. 3d at 180.

issued.[72] Pursuant to those settlements, RMLC and TMLC obtained significant, ongoing relief from SESAC, including rate arbitration. The only benefit Music Choice has seen is SESAC's curbed appetite to threaten litigation, which would disappear instantaneously should SESAC's position or leadership change.

* * *

Music Choice thanks the Division for this opportunity to present its view on the importance of the Consent Decrees in the markets for public performance rights and music distribution.

[72] *See* Order Dismissing with Prejudice, *Radio Music License Committee, Inc. v. SESAC*, No. 12-cv-05807 (E.D. Pa. July 28, 2015), ECF No. 136; Final Judgment and Order of Dismissal, *Meredith Corp. v. SESAC, Inc.*, No. 09-cv-09177 (S.D.N.Y. Feb. 19, 2015), ECF No. 221.