DEPARTMENT OF JUSTICE

Sign of the Times[1]: Innovation and Competition in Music

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I. Introduction

Good evening. I am grateful to the National Music Publishers Association for the invitation to join you. I care deeply about the topics I will discuss tonight and the important policies that affect the great, magical, works that your members create.

Like all of you here tonight, I love music. It transports us. It lifts us up, or calms us down. It's very much like the taste of the madeleine cookie dipped in tea that Marcel Proust wrote about in *Swann's Way*: music reaches into "the very depths of [our] being"[2] to trigger emotions and memories, remembrances of things past.

Who did not feel happy when they heard Pharell's "Happy?"[3] Who isn't moved by Leonard Cohen's "Hallelujah?"[4] Who isn't transported back to the place where they first heard Guns n' Roses "Welcome to the Jungle?"[5]

Music does more than that, though. It connects us, even defines us, as an American people with a shared artistic and cultural heritage. When I emigrated from Iran as a child, I didn't even speak English. The songs on the radio and in my tape deck helped to define America for me, as they have for so many others. *The Jazz Singer* album by Neil Diamond is what transports me to my first memories as a child in the United States.[6]

We can't forget that every song starts with a songwriter: Someone, somewhere, sitting at a piano, strumming a guitar, or staring at a blank sheet of paper waiting for the lyrics to flow. Songwriters are the creators that give music its first breath of life; they make it all possible. They also inspire us.

Take, for instance, the incredible rendition of Stevie Wonder's "I Wish"[7] by Lady Gaga at a recent Grammy's concert. She shared how that was her first album as a child and had an

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[1] *See* HARRY STYLES, *Sign of the Times*, (Erskine & Columbia 2017).
[2] MARCEL PROUST, REMEMBRANCE OF THINGS PAST: SWANN'S WAY (D.J. Enright ed., C.K. Scott Moncrieff & Terence Kilmartin trans., 1998).
[3] PHARRELL WILLIAMS, *Happy, on* GIRL (Back Lot Music 2014).
[4] LEONARD COHEN, *Hallelujah, on* VARIOUS POSITIONS (Columbia Records 1984).
[5] GUNS N' ROSES, *Welcome to the Jungle, on* APPETITE FOR DESTRUCTION (Geffen Records 1987).
[6] NEIL DIAMOND, THE JAZZ SINGER (Capitol Records 1980).
[7] STEVIE WONDER, *I Wish, on* SONGS IN THE KEY OF LIFE (Tamla Records 1976).

influence on her becoming an artist. She noted that each time she hears the song she thinks about that moment she first heard it. That is powerful inspiration; and look at the talent it helped unleash.

Songwriters are innovators in the truest sense of the word. Like inventors whose creations obtain the protections of patent law, songwriters create valuable intellectual property, and they deserve the protection of copyright law. An artist's or inventor's rights to their work are so fundamental that we sometimes take them for granted. Owning their creations, however, is a core right for artists. Without the ability to seek remuneration under our copyright laws, could, or would, songwriters chase a dream to write the next hit song? Many fewer would, to our great collective loss.

Songwriters aren't the only innovators. More than a century ago, someone realized that creative types like songwriters may not be best suited to deal with the business aspects of their craft. Their highest calling may be to write songs, not to pound the pavement selling sheet music.

That realization led to another great innovation: the business of music publishing. As you know, for a share of the royalties on a copyright, the music publisher would promote the songwriter's music, letting the songwriter focus on what he or she does best.

The artist's copyright drives producers and publishers to invest in their success, further encouraging and enabling the musician's work. It's an enduring partnership that's given us the Great American Songbook and the music industry that we are celebrating this evening.

In that process, there are three forces at work: First, innovation by artists and producers to create new works. Second, the regulatory backdrop of rights that unlock the value of those creations. Third, competition—the fight to get to the top of the charts.

Tonight, I would like to share with you some thoughts about how innovation, regulation, and competition have shaped the music industry over time. I will also offer some observations about how one might strike a better balance among them in the future in the interest of maximizing music creation.

II. Innovation

I will start with innovation. I started practicing law as a patent attorney and have deep regard for intellectual property rights. Innovation is one of the engines that drives our economy, and the intellectual property laws that protect the products of innovation are necessary to establish the incentives that fuel the genius of the creative process.

When we talk about intellectual property, we should remember the wisdom of our Founding Fathers, and in particular the vision of James Madison, who is often called the Father of the Constitution.

Article I of our Constitution expressly recognizes the importance of intellectual property. Its text empowers Congress to "promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[8] The significance of its appearance in the text of the Constitution itself, even before the First Amendment and the Bill of Rights, should not be lost.

Madison understood the value of strong intellectual property protection as a means of fueling innovation. As the head of the Antitrust Division, I have embraced that view and advocated for what I call a "New Madison" approach, one that respects intellectual property and recognizes its full potential to unleash the power of innovation.[9]

I have noted already how the innovations of songwriters and music publishers gave birth to the music industry. The force of innovation has continued to have a powerful effect on the industry in other ways as well.

Another crucial innovation was the blanket license, a development dating back more than a century. As the Supreme Court explained in the landmark BMI case in 1979,[10] the blanket license emerged "out of the practical situation in the marketplace: thousands of users, thousands

[8] U.S. CONST. art. I, § 8, cl. 8.
[9] Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Justice, The "New Madison" Approach to Antitrust and Intellectual Property Law (Mar. 16, 2018).
[10] Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1 (1979).

of copyright owners, and millions of compositions."[11] Music users wanted rapid access to the music compositions held by the PROs (Performance Rights Organizations), but high transaction costs made negotiation, monitoring, and enforcement by individual rights holders "a virtual impossibility,"[12] according to the Supreme Court.

The blanket license was "an obvious necessity if the thousands of individual negotiations … were to be avoided."[13] PROs "provide[d] the necessary resources for blanket sales and enforcement, resources unavailable to the vast majority of composers and publishing houses."[14] The result was a "substantial lowering of costs, which is of course beneficial to both sellers and buyers."[15] The Supreme Court emphasized this in rejecting a challenge to the blanket license as a per se violation of the antitrust laws, explaining that the blanket license was "a different product," one in which "the whole is truly greater than the sum of its parts."[16]

Finally, no one can ignore the impact of technological innovation on the music industry, especially over the past two decades. Music distribution has, of course, evolved over the lifetime of the industry, from sheet music, to piano rolls, radios, vinyl records, eight tracks, cassettes, and CDs. No one could have predicted the revolutionary impact of digital downloads and, more recently, internet streaming.

What each of those innovations has in common is delivering more music to more people in more places. They've created value. When the Eagles got together in 1971, your choices were to listen to a radio and hope the DJ played their hits, or buy a single. Today, new music is available to stream anytime, anywhere, on any of a variety of devices.

Meanwhile, innovation always continues. In his hit "Sign of the Times," Harry Styles sings: "Welcome to the final show, hope you're wearing your best clothes," and "the end is near."[17] For innovation and songwriting, however, there is no final show and we aren't

[11] Id. at 20.
[12] Id.
[13] Id.
[14] Id. at 21.
[15] Id.
[16] Id.
[17] *See* Harry Styles, *Sign of the Times*, (Erskine & Columbia 2017).

anywhere close to the end of the road. Markets and technology will continue to develop as music evolves with them. We can't imagine what that future holds, but we embrace it.

Deputy Attorney General Rod Rosenstein talked earlier this week about the role of leadership in managing change.[18] He shared that most successful organizations thrive amidst change, which is constant and unavoidable. He also talked about philosopher Nassim Nicholas Taleb's term "antifragile" that describes the most successful model of managing change. Things that are antifragile aren't just resilient, and they aren't just robust. They actually thrive in change and they grow stronger with stress, much like muscles.

Amidst decades of change, your industry has proven to be antifragile. You have adapted to constant change. The more things develop and change, the stronger the music business seems to grow. And we are all better off for that.

III. Regulation

That brings me to the second force, regulation.

Of course, the regulatory framework that governs the music industry is extensive. Its foundation is the Constitution, on which Congress has built an impressive, and complex, statutory structure recognizing intellectual property rights in music, such as public performance rights, mechanical rights, sync rights, and sound recording rights. Certain rights are subject to statutory licenses, and rates for these licenses are set by a federal regulatory agency—the Copyright Royalty Board.

Antitrust enforcement by the Department of Justice has also resulted in a form of industry regulation. In the 1930s, the Antitrust Division became concerned about the competitive effects of exclusive blanket licenses, and it sued ASCAP under the antitrust laws. In 1941, ASCAP settled that lawsuit, and BMI entered into a separate, but similar settlement. The resulting

[18] Rod J. Rosenstein, Deputy Attorney General, U.S. Dep't of Justice, Remarks at the International Economic Forum of the Americas Conference of Montreal (June 11, 2018).

consent decrees, with some modifications over the years, still regulate most aspects of public performance licensing today, more than 75 years later.[19]

The challenge of regulating public performance rights through interpretations of decades-old consent decrees was clearly demonstrated last year. As many of you know, the Antitrust Division, in the previous administration, conducted a review of the ASCAP and BMI consent decrees. During that review, technological innovations—including the digital distribution of music—gave rise to a novel question: Whether the consent decrees require the PROs to issue blanket licenses only on a "full-work" basis, or whether they also allow the PROs to license songs on a "fractional" basis.

The Antitrust Division, after its review, concluded that the consent decrees required the PROs to offer only "full-work" licenses because "only full-work licensing can yield the substantial procompetitive benefits associated with blanket licenses."[20] Judge Stanton—the judge overseeing BMI's consent decree—subsequently disagreed, observing that "[n]othing in the [BMI] Consent Decree [gave] support to the [Antitrust] Division's views."[21]

As is our custom at the Division, the new administration allowed the appeal to continue on its course. Last December, the Second Circuit summarily affirmed Judge Stanton, and it expressly stated that "[i]f the DOJ decides that the consent decree, as interpreted by the district court, raises unresolved competitive concerns, it is free to move to amend the decree or sue under the Sherman Act in a separate proceeding."[22] To date, the Antitrust Division has not done either of those things, a point I will return to at the end of my remarks.

[19] Settlements of private lawsuits have also created de facto regulations for some within the industry. For example, SESAC—which has grown from its origins in 1930 when it was established to help European publishers and writers collect royalties in the United States—is subject to the terms of a private settlement with the Radio Music Licensing Committee ("RMLC"). Under that settlement, SESAC and the RMLC agreed to arbitrate the licensee fees owed to SESAC through 2037, if the parties don't reach agreement in negotiation.
[20] U.S. Dep't of Justice, Statement of the Department of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees 3 (2016), https://www.justice.gov/atr/antitrust-consent-decree-review-ascap-and-bmi-2015.
[21] United States v. Broad. Music, Inc., 207 F.Supp.3d 374, 376 (S.D.N.Y. 2016).
[22] United States v. Broad. Music, Inc., 720 Fed.Appx. 14 (2d Cir. 2017).

IV. Competition

Before I get to that, I want to say a few words about competition, the third dynamic force that has shaped the music business for a century.

You don't have to look further than the Grammy Awards, the Songwriter's Hall of Fame, American Idol and The Voice to see that musicians, songwriters, and music publishers are an incredibly competitive group.

Competition helps keep the music business healthy. Songwriters compete vigorously to write the next big hit. Music publishers compete to represent those songwriters. With the establishment of Global Music Rights in 2013, there is now a fourth PRO competing to include music in its repertory and license users. Competition in the distribution of music has also exploded, with technological innovation increasing competition for consumers.

The core mission of the Antitrust Division is to protect and preserve this kind of competition. At its most fundamental level, our mission is in tension with prescriptive government regulation.

One of my favorite Jacksons, with due respect to Michael, is Robert Jackson, who served as head of the Antitrust Division before serving as a distinguished Associate Justice on the U.S. Supreme Court in the Franklin D. Roosevelt administration. He described the virtue of antitrust enforcement displacing regulation in a 1937 speech. He said, "[t]he antitrust laws represent an effort to avoid detailed government regulation of business by keeping competition in control of prices. It was hoped to … let [government] confine its responsibility to seeing that a true competitive economy functions."[23]

Proper, vigorous antitrust enforcement is as essential to securing the benefits of competition in the music industry as it is in any other. It is important to ask what that means in

[23] Robert H. Jackson, Assistant Attorney General, U.S. Dep't of Justice, Should the Antitrust Laws Be Revised?, 71 U.S. L. Rev. 575, 576 (Sept. 17, 1937).

an industry that is characterized by constant innovation, and which has a complicated regulatory overlay.

V. Consent Decree Review Project

As I said earlier, for the music industry it's never the final show. In the meantime, the regulatory overlay has stayed roughly the same. That could mean it's working, but it also could mean it's due to be reworked.

In fact, the ASCAP and BMI consent decrees are among 1300 legacy judgments the Antitrust Division has on the books. As some of you are aware, the Antitrust Division has recently set out to review many of those longstanding judgments to make sure they're not doing more harm than good.[24]

Some of those longstanding decrees are remarkably out of date, like the decree for the Horseshoer's National Protective Association judgment from 1913. In fact, we will soon be moving to eliminate dozens of out of date decrees from the books through our Judgment Termination Initiative.

Though they're old, the ASCAP and BMI decrees were not among that first group that we've sought to examine. We recognize the industry has grown up around them, and we should not take any action lightly or without due care and consideration. Unlike the Horseshoer's National Protective Association, I am pleased to note that ASCAP and BMI still exist and remain very relevant.

Some have commented that because the industry has grown up around these two decrees, they should never be changed, apparently ever. While the industry has grown around these two decrees, it should also recognize they are subject to periodic review. As Bill Baxter, a former

[24] *See* JUDGMENT TERMINATION INITIATIVE, https://www.justice.gov/atr/JudgmentTermination (last visited June 7, 2018).

head of the Antitrust Division said, some decrees need to be reviewed to ensure that they don't themselves become causes of anticompetitive harm due to changing market circumstances.[25]

To be clear, the Antitrust Division has not reached any conclusion about whether the ASCAP and BMI decrees strike the best balance among competition, innovation, and regulation. Congress, moreover, is also paying proper attention to the industry. It is taking a hard look at the Music Modernization Act, and we look forward to seeing that legislation enacted and the results of those changes, which have involved several years of process and input from various interested parties.[26]

I can say with confidence, however, how we approach that question. You've heard tonight the principle the Division adheres to: protecting competitive markets in which innovation and consumers thrive. I also hope you understand from my remarks tonight the passion and respect I, and the Division, have for this industry. That principle, and that passion, will define our approach to the decrees and to antitrust enforcement in the music industry.

Thank you.

[25] William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the Common Law Nature of Antitrust Law*, 60 Tex. L. Rev. 661 (1982).
[26] *Protecting and Promotion Music Creation for the 21st Century*: Hearing Before the S. Comm. on the Judiciary, 115th Cong. (2018).