BEFORE THE

UNISTED STATES DEPARTMENT OF JUSTICE
ANTITRUST DIVISION

Washington, D.C.

COMMENTS OF THE TELEVISION MUSIC LICENSE COMMITTEE, LLC IN CONNECTION WITH THE DEPARTMENT OF JUSTICE REVIEW OF THE ASCAP AND BMI CONSENT DECREES

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Introduction

The Television Music License Committee, LLC ("TVMLC") respectfully submits these comments in response to the United States Department of Justice Antitrust Division ("DOJ" or the "Antitrust Division") request for public input on, among other things, whether the Consent Decree entered into between DOJ and the American Society of Composers, Authors and Publishers ("ASCAP") (the "ASCAP Consent Decree") and the Consent Decree entered into between the DOJ and Broadcast Music, Inc. ("BMI") (the "BMI Consent Decree") (collectively, the "Consent Decrees") continue to protect competition. *See* Antitrust Consent Decree Review – ASCAP and BMI 2019, *available at* https://www.justice.gov/atr/antitrust-consent-decree-review-ascap-and-bmi-2019. For the reasons detailed below, the TVMLC respectfully submits that:

- ASCAP and BMI continue to serve as a vehicle through which otherwise competing composers and music publishers can avoid the rigors of competition by having their performance rights licensed on a collective basis.

- This aggregation of millions of copyrights gives each of ASCAP and BMI significant market power, and, because of the Consent Decrees, local television stations and other music users have been able to secure some relief from the full exploitation of this market power.

- Accordingly – and consistent with the conclusion that DOJ has repeatedly reached over many decades, including just three years ago – if composers and music publishers are going to continue to use PROs to aggregate their performance rights, the Consent Decrees must be maintained.

- Termination of the Consent Decrees – whether immediately or after a sunset period – unquestionably would not be in the public interest. There is reason to believe that, if left unchecked, ASCAP and BMI would exploit their very significant market power, leaving music users in the unenviable position of having to either accede to whatever license fees and terms those PROs demand or shut down.

- Leaving it to private parties to bring antitrust lawsuits when ASCAP and BMI abuse their market power would lead to a patchwork of protections afforded to some users and not to others, and those protections would only come about through costly and time consuming litigations. Such an outcome is clearly inferior to the set of uniform regulations currently in place that protect all manner of licensees.

- While the Decrees work reasonably well, they can be improved, most notably by explicitly prohibiting so-called "fractional" licensing – a practice whereby ASCAP and BMI no longer provide each local station with immediate access to all of the works in their respective repertories.

The remainder of these comments, which elaborate on the fundamental points identified above, are organized as follows: After a brief description of the TVMLC, we provide an overview of the marketplace for musical works public performance rights licensing faced by local television stations and briefly summarize the recent conclusions reached by the DOJ as to the importance of and need for the Consent Decrees to protect competition and the public interest. We then address each of DOJ's specific questions in turn.

I. The Television Music License Committee

The TVMLC, an organization funded by voluntary contributions from the local television industry, represents the collective interests of some 1,200 full-power local commercial television stations – large and small – in the United States in connection with music performance rights licensing matters. The TVMLC has interacted over decades with the two largest U.S. Performing Rights Organizations ("PROs") – ASCAP and BMI – assisting local stations in an effort to secure fair and reasonable license fees and terms for the public performance of musical works on local television through industry-wide (or near industry-wide) negotiations.

When necessary, the TVMLC has also assisted the local television industry in the bringing of federal "rate court" litigation in an effort to rein in the abuse of monopoly power by ASCAP and BMI as well as to maximize the opportunities for local television stations to secure musical works public performance rights in actual competitive market transactions.[1] This ability to bring rate court litigation is, of course, only available as a result of the Consent Decrees.

The TVMLC has also interacted with SESAC, a PRO with a smaller repertory than ASCAP and BMI, but nevertheless an organization with monopoly power over local television stations (and other music users). The TVMLC's goal with respect to SESAC is the same as with ASCAP and BMI – to secure fair and reasonable license fees and terms for the public performance of music on local television while also allowing for the possibility of at least some actual competitive market licensing transactions to take place. But, because it is not subject to a Consent Decree, until recently there had been no check on SESAC's ability to exploit its monopoly power.

This changed after the local television industry, with the assistance of the TVMLC, brought a class action antitrust lawsuit alleging that SESAC's licensing practices violated Sections 1 and 2 of the Sherman Act. After more than five years of litigation, $16 million in litigation costs, and after defeating SESAC's motion to dismiss and motion for summary judgment, the local television industry was able to reach a settlement with SESAC in which SESAC agreed, in addition to providing significant monetary relief, to certain restraints, limiting its ability to fully exploit its market power.

[1] The TVMLC has also, when necessary, assisted local stations in the bringing of federal antitrust litigation on behalf of the local television industry.

These restrictions were modeled in large part after key provisions of the Consent Decrees.

II. The Local Television Music Licensing Marketplace

For the most part, local television stations are responsible for obtaining licenses for the public performance of copyrighted musical works in the programming and commercial announcements they air.[2] For local television stations, the majority of such programming and commercial announcements is not produced by the stations themselves but, rather, by third parties, who incorporate the music (along with all other programming elements) into the program. Once incorporated into the programming, the music cannot be changed – stations are contractually prohibited from doing so. While the producers and syndicators of such programming obtain and license to the stations all of the other rights necessary to broadcast the programming, they do not obtain musical works public performance rights licenses – these licenses are left for the stations themselves to secure.[3] But, because public performance rights licenses are being secured *after* the music has already been irrevocably embedded in the programing, local stations have no meaningful ability to negotiate with composers and publishers over license fees and terms – they must secure a license in order to air the program and have no ability to change the music in the event that a rightsholder demands an exorbitant license fee.

[2] Currently, the ABC, CBS, NBC, and Univision networks obtain "through-to-the-viewer" licenses from ASCAP and BMI covering public performances of the music embedded in the programming they distribute, including performances made by their local-station affiliates when those stations broadcast the network programming. Accordingly, no separate licenses from those PROs are needed by those networks' local station affiliates to broadcast that network programming.

[3] This is so despite the fact that the program producers are usually negotiating with musical works rightsholders, both to contract for any new music to be created and, when needed, to convey a separate copyright right – a synchronization or "sync" right – permitting the producer to incorporate the selected music into the audiovisual work.

This long-standing practice – one that is engrained in television program production, financing, and distribution – stands in contrast to the opportunity for fostering the competitive licensing of such performance rights that can occur at the time the program is produced – prior to the music being embedded in the program – were the program producer to negotiate directly with the necessary rightsholders to secure public performance rights on the stations' behalf, as is done with all other necessary rights in pre-recorded programming, including the related "sync" rights. Under such circumstances, if the composer demanded an unreasonable royalty, the program producer would have the ability to turn to a competing composer to secure the necessary rights for a competing musical work. This ability to substitute one work for another is what allows competitive market forces to take hold.

While there are other markets in which these forces of competition have taken hold – for example, in the market in which movie theaters secure performance rights for the music embedded in the motion pictures they show[4] – the market in which local stations secure performance rights licenses does not function in this manner.[5] As a result of the above-noted longstanding industry arrangements, whereby stations are required to secure performance rights licenses after (and sometimes long after) programs have been created, particularly when coupled with the significant penalties for copyright infringement, the stations have no practical option but to secure a blanket license from

[4] This competitive licensing marketplace only came about as a result of a combination of private antitrust litigation and provisions of the ASCAP Consent Decree. *Alden-Rochelle Inc. v. ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1948); *M Witmark & Sons v. Jensen*, 80 F. Supp. 843 (D. Minn. 1948).

[5] As discussed below, such competition between composers and publishers can emerge, under certain limited circumstances, when the local station has control over the music being incorporated into its programming and there is a mechanism in place that allows for the station to avoid paying twice for performance rights.

each of ASCAP and BMI in order to comply with copyright law.[6] The DOJ has previously recognized exactly this, concluding that the relationship between ASCAP and BMI, on the one hand, and music users, on the other, "may be more accurately described as co-monopolists in the sale of blanket licenses." Brief for the United States, *United States v. BMI (In Re Application of AEI Music Network, Inc.,)*, Case No. 00-6123, dated June 26, 2000 (2d Cir.), at 25.

These "co-monopolist" PROs, each of which controls a license that all local stations must have in order to operate, have extraordinary leverage over local stations. *See, e.g.*, United States Memorandum in Aid of Construction of the Final Judgment, *United States v. BMI*, 64 Civ. 3787 (LLS), dated June 4, 1999 (S.D.N.Y.), at 3-4 ("The PROs' pooling and blanket licensing of copyrights creates antitrust concerns. Because both ASCAP and BMI have so many compositions in their repertories, most music users cannot avoid the need to take a license from each PRO .... As a result, the PROs have market power in setting fees for licenses."); Brief for the United States as Amicus Curiae, *In Re Application of THP Capstar Acquisiton Corp.*, Case No. 11-127, dated May 6, 2001 (2d Cir.), at 1 (concluding that because each of ASCAP and BMI have "hundreds of thousands of members and millions of works, and [because] no member may license the same composition through both PROs, [that] no bulk user can operate without licenses for works from both."). This extraordinary leverage is only tempered by the presence of the Consent Decrees.

[6] Were a local station to attempt to secure a license from each and every rightsholder before airing each of its programs, it would meet significant hurdles that are impossible to overcome. As an initial matter, the information necessary to engage in such rightsholder-by-rightsholder licensing is simply not available. Moreover, even were the station able to identify each and every rightsholder it needed a license from, many of those rightsholders would not grant a direct license, preferring to stick with the PRO licensing collective that has served them well for decades.

III. The Antitrust Division's Recent Review of the Consent Decrees

As noted in the Antitrust Division's request for comments, periodically DOJ has reviewed the operation and effectiveness of the Consent Decrees. And while the Consent Decrees have been modified from time to time, DOJ has never sought to sunset or eliminate them outright, consistently concluding that the Consent Decrees continue to serve important purposes, including protecting music users from the full exploitation by ASCAP and BMI of their market power.[7]

That the Consent Decrees continue to serve the public interest by mitigating the monopoly power created through collective licensing was reaffirmed by the DOJ just three years ago – after it concluded its most recent review of the Consent Decrees. That comprehensive multi-year review, commenced in 2014 at the request of ASCAP and BMI, included two rounds of public comments during which over 330 sets of comments were provided and included dozens of meetings between the Antitrust Division and industry stakeholders. Statement of the Department of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees, August 4, 2016, at 2 ("Closing Statement"). After this thorough investigation, the DOJ "decided not to seek to modify the decrees" concluding that the "current system has well served music creators and music users for decades and should remain intact." *Id*. at 3.

Nothing has changed in the music licensing marketplace that should change DOJs conclusion – one it has held over many decades. ASCAP and BMI still continue to

[7] *See, e.g.*, Brief for the United States as Amicus Curiae, *In Re Application of THP Capstar Acquisiton Corp.*, Case No. 11-127, dated May 6, 2001 (2d Cir.), at 1-2 (noting Consent Decrees were the result of earlier Government antitrust challenges designed "to cabin the exercise of [those PROs'] [market] power"); Memorandum of the United States in Response to Motion of Broadcast Music, Inc. To Modify The 1966 Final Judgment Entered In This Matter, *United States* v. *Broadcast Music, Inc.*, 64 Civ. 3787, dated June 20, 1994 (S.D.N.Y.), at 9 (noting that the rate court serves "as an effective restraint on potential abuse of market power.").

aggregate the performance rights to millions of musical works from thousands of otherwise competing composers and music publishers and license those rights only on a collective basis. And music users such as local television stations still have no choice but to secure licenses from each of ASCAP and BMI in order to operate.

If anything, the only change that has occurred since DOJ last reviewed the Consent Decrees – the Second Circuit's determination that the express language of the BMI Consent Decree does not prohibit fractional licensing – calls for even more scrutiny of the music performance rights licensing marketplace. Not only does this change counsel in favor of maintaining the protections afforded users by the Consent Decrees, but it also calls for modification of the Decrees to make explicit that ASCAP and BMI cannot engage in fractional licensing – for the very reasons that DOJ recognized just three years ago when it concluded that "only full-work licensing can yield the substantial procompetitive benefits associated with blanket licenses that distinguish ASCAP's and BMI's activities from other agreements among competitors that present serious issues under the antitrust laws." Closing Statement at 3.[8]

With this background and context in mind, we now address each of the Antitrust Division's specific questions in turn.

[8] We address this requested modification in greater detail in response to Question 2 below.

Comments

I. Question 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, just as they always have, continue to serve vitally important purposes, protecting all manner of music users from the full exploitation by ASCAP and BMI of their significant market power. As explained in greater detail in the accompanying Economic Analysis of the ASCAP and BMI Consent Decrees prepared by Professor Adam B. Jaffe ("Jaffe Analysis"), attached hereto as Appendix A, and as repeatedly recognized by reviewing courts and the Antitrust Division, collective licensing of the type engaged in by ASCAP and BMI eliminates competition between otherwise competing composers and music publishers, thereby giving these PROs significant market power.[9] *See, e.g.*, Brief for the United States as Amicus Curiae, *In Re Application of THP Capstar Acquisition Corp.*, Case No. 11-127, dated May 6, 2011 (2d Cir.), at 1 (The PROs "aggregate rights from copyright holders, license them on a non-exclusive basis to music users, and distribute royalties to their members. These and other functions provide some efficiencies, but also give the PROs *significant market power*." (emphasis added)); Jaffe Analysis at 7-9. *See also* Brief for the United States, *United States v. BMI (In Re Application of AEI Music Network, Inc.,)*, Case No. 00-6123, dated June 26, 2000 (2d Cir.), at p. 24 n. 15 ("The PROs' aggregation of composers' license rights increases … [the market] power [of individual composers] exponentially.").

Decades ago, the Consent Decrees were put in place to, among other things, place a check on this market power. As the Antitrust Division has recognized, "the [Consent Decrees] contain[] a number of provisions intended to provide music users with some

protection from ASCAP's [and BMI's] market power." Memorandum of the United States In Support of the Joint Motion to Enter Second Amended Final Judgment, *United States v. ASCAP*, Civ. No. 41-1395 (WCC), dated Sept. 4, 2000 (S.D.N.Y.), at 15-16; *see also* Brief for the United States as Amicus Curiae, *In Re Application of THP Capstar Acquisiton Corp.*, Case No. 11-127, dated May 6, 2001 (2d Cir.), at 8 n. 2 ("The function of the [ASCAP Consent Decree] is to mitigate ASCAP's market power by imposing certain obligations and prohibitions on it.").[10]

The importance of these protections is no less today than in the past. Just as they always have, ASCAP and BMI continue to facilitate the elimination of competition between and among their affiliated composers and publishers by aggregating those affiliates' performance rights and licensing them solely on a collective basis. Accordingly, these PROs continue to maintain the market power that they have always had over music users – it is inherent in their business model. There is therefore a continued need for a check, preventing these PROs from fully exploiting their market power. Indeed, the TVMLC (as well as many other music users) has found, and continues to find, it necessary to occasionally invoke the protections of the Consent Decrees in its dealings with these PROs in order to secure reasonable license fees as well

[9] *ASCAP v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563,570 (2d Cir. 1990) ("[I]n the licensing of music rights, songs do not compete against each other on the basis of price."); *BMI v. CBS*, 441 U.S. 1, 32-33 (1979) (Stevens, J., dissenting) ("[T]he blanket license does not present a new songwriter with any opportunity to try to break into the market by offering his product for sale at an unusually low price. The absence of that opportunity, however unlikely it may be, is characteristic of a cartelized rather than a competitive market.").

[10] *ASCAP v. MobiTV, Inc.*, 681 F.3d 76, 82 (2d Cir. 2012) ("[T]he rate-setting court must take into account the fact that ASCAP, as a monopolist, exercises market-distorting power in negotiations for the use of its music."); *United States v. BMI (In re Application of Music Choice)*, 426 F.3d 91, 96 (2d Cir. 2005) ("[R]ate-setting courts must take seriously the fact that they exist as a result of monopolists exercising disproportionate power over the market for music rights."); *ASCAP v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563,570 (2d Cir. 1990) (rate court not simply a "placebo" intended to rubber stamp the "fees ASCAP has successfully obtained from other users.").

as to obtain competition-enhancing license alternatives to the all-or-nothing, fixed-fee blanket license preferred by ASCAP and BMI.

The Consent Decrees perform this critical function through, amongst others, a handful of key provisions: *First*, the Consent Decrees bar "gun to the head" licensing tactics by requiring ASCAP and BMI to issue licenses on request, thereby preventing ASCAP and BMI from using the threat of crippling copyright infringement litigation if the licensee does not agree to whatever license fees and terms the PRO demands. As explained by Professor Jaffe, this prevents ASCAP and BMI from restricting supply – a mechanism that can be used to elevate price above the competitive level. Jaffe Analysis at 10.

Second, the Consent Decrees empower the federal court in the Southern District of New York to act as a "rate court" in setting "reasonable" license fees if the PRO and the music user are not able to agree on license fees and terms. The rate courts have interpreted this "reasonable" fee standard as requiring them to set rates that most closely resemble those that would emerge in a competitive marketplace. *United States v. ASCAP (In Re Applications of RealNetworks, Inc. and Yahoo! Inc.)*, 627 F.3d 64, 76 (2d Cir. 2010) ("Fundamental to the concept of 'reasonableness' is a determination of what an applicant would pay in a competitive market..."); *United States v. ASCAP (In Re Application of Buffalo Broad. Co.),* No. 13-95 (WCC), 1993 WL 60687, at *16 (S.D.N.Y. Mar. 1, 1993) *("Buffalo Broadcasting")* ("[T]he rate court must concern itself principally with defining a rate ... that approximates the rates that would be set in a competitive market.") (internal quotation marks and citation omitted).

The Antitrust Division has previously recognized the importance of both preventing PROs from withholding access to their repertories, as well as having them subject to a rate court. Indeed, the addition of the BMI rate court provision – one adopted at the joint urging of BMI and music users such as local television stations – was supported by the DOJ because, among other things, it "viewed the provision as promoting the public interest in competition as defined by the antitrust laws." Brief for the United States, *United States v. BMI (In Re Application of AEI Music Network, Inc.),* Case No. 00-6123, dated June 26, 2000 (2d Cir.), at 22.[11] The Government reasoned that "empowering the Court to resolve licensing disputes when negotiations between BMI and music users break down is sound enforcement policy," and noted the role of a rate court "as an effective restraint on potential abuse of market power." Memorandum of the United States in Response to Motion of Broadcast Music, Inc. To Modify The 1966 Final Judgment Entered In This Matter, *United States* v. *Broadcast Music, Inc.*, 64 Civ. 3787, dated June 20, 1994 (S.D.N.Y.), at 9.[12] For its part, BMI agreed: "The proposed modification [to add a Rate Court] substitutes a rate court mechanism for BMI's right to withhold access to its repertoire, thus further limiting any possible market power BMI might derive as a result of its accumulation of performing rights to over 2 million compositions. Therefore, the proposed modification is clearly consistent with a key purpose of the Consent Decree – limiting any alleged market power BMI may have – as it now exists." Memorandum of Defendant Broadcast Music, Inc. In Support of Motion to

[11] "BMI and the government agreed at the time the rate court provision was entered that it was to be a constraint on BMI's market power. ... That BMI has market power, the ability to exercise some control over price, is plain." *Id.* at 24 (internal citation omitted).

[12] *See also id.* at 12 ("[T]he opportunity to ask the decree court to determine a reasonable licensing fee may provide additional protection against any attempt by BMI to exercise market power in the pricing of its blanket license.").

Modify Consent Decree, *United States v. BMI*, 64 Civ. 3787, dated June 27, 1994 (S.D.N.Y.), at 30. BMI went on to note that the "creation of a BMI rate court is procompetitive because it adds a licensing alternative and does not detract from the parties' existing ability to reach privately negotiated agreements. Nor would the creation of a rate court have any impact upon the right of any music user to obtain music rights directly from BMI's songwriters, composers, and publishers in the free market." *Id.* at 31. Nothing has changed in relation to the markets for local television music performance rights that warrants revisiting any of these conclusions.[13]

The Second Circuit, in reviewing decisions of the ASCAP and BMI rate courts, similarly has recognized the critical role that the rate courts play in mitigating ASCAP's and BMI's market power. For example, the Second Circuit noted that "rate-setting courts must take seriously the fact that they exist as a result of monopolists exercising disproportionate power over the market for music rights." *United States v. BMI (In re Application of Music Choice),* 426 F.3d 91, 96 (2d Cir. 2005). More recently, the Court made clear that "the rate-setting court must take into account the fact that ASCAP, as a monopolist, exercises market-distorting power in negotiations for the use of its music." *ASCAP v. MobiTV, Inc.,* 681 F.3d 76, 82 (2d Cir. 2012).

Third, the Consent Decrees serve to bar ASCAP and BMI from obtaining exclusive rights to license their affiliated copyright owners' works – thereby preserving the right of users such as local television stations to secure performance rights licenses directly from composers and music publishers. As explained by Professor Jaffe, this

[13] The rate court also provides a forum in which the parties to a rate dispute can exchange sensitive and confidential information, subject to an appropriate protective order, thereby promoting the possibility of settlement.

allows for at least the possibility of competition alongside the collective license. Jaffe Analysis at 10.

Fourth, the Consent Decrees require that ASCAP and BMI offer local stations (and others) economically viable and more flexible alternatives to the PRO-favored fixed-fee all-or-nothing blanket license. The express purpose of these provisions is to enable local stations and others to engage in licensing transactions directly with composers and music publishers where feasible, and to do so without having to pay twice for the same rights – once directly to the rightsholder and then again to the PRO. As the Antitrust Division has noted, this protection allows for at least some degree of actual competitive market transactions to take place alongside the blanket license, so as to provide music users with "important protections against supra-competitive pricing of the [PRO] blanket license ...." Memorandum of the United States in Response To Motion of Broadcast Music, Inc. To Modify the 1966 Final Judgment Entered In This Matter, *United States v. BMI*, 64 Civ. 3787, dated June 20, 1994 (S.D.N.Y.), at 10-11, 12; *see also Buffalo Broad. Co., Inc. v. ASCAP*, 744 F.2d 917, 925 (2d Cir. 1984) (noting the importance of license alternatives); Jaffe Analysis at 10.

Fifth, the Consent Decrees require that ASCAP and BMI license similar users similarly, thereby preventing ASCAP and BMI from price discriminating within a group of users.

Finally, the Consent Decrees require that ASCAP and BMI offer through-to-the-audience licenses to local television stations (and others), thereby preventing ASCAP and BMI from collecting license fees at multiple stages of a distribution chain and allowing for "more licensing decisions to be made by the entities that control the musical content

of programs or other broadcasts, and thus are in the best position to benefit from potential competition among PROs or individual rights holders." Memorandum of the United States In Support of the Joint Motion to Enter Second Amended Final Judgment, *United States v. ASCAP*, Civ. No. 41-1395 (WCC), dated Sept. 4, 2000 (S.D.N.Y.), at 21.

The long experience of local television stations (and other ASCAP and BMI licensees) attests to the significance and importance of these provisions of the Consent Decrees. Indeed, ASCAP and BMI themselves recently acknowledged the importance of several of these very provisions in a joint letter. *See* BMI President & CEO Mike O'Neill and ASCAP CEO Elizabeth Matthews Issue Open Letter to the Industry on Consent Decree Reform, February 28, 2019, *available at* https://www.ascap.com/press/2019/02/02-28-ascap-bmi-announcement (noting the importance of provisions guaranteeing: (i) a license on request; (ii) the ability to turn to the rate court to set reasonable fees; (iii) that publishers and composers can issue direct licenses; and (iv) alternatives to the blanket license, including the per program license).

a. The Consent Decrees Continue to Mitigate The Monopoly Pricing Power of ASCAP and BMI

The foregoing key provisions, as enforced by the courts, have played a pivotal role in affording local stations (as well as other music users) with continued relief from the monopoly pricing power possessed by ASCAP and BMI.

Historically, local television stations were required by ASCAP and BMI to accept traditional blanket licenses conveying the rights to their entire repertories of music, and to pay those PROs a percentage of their revenue, despite the fact that "there can be little doubt that the stations' revenues are not a direct function of the ASCAP music that they utilize in their programming." *Buffalo Broadcasting,* 1993 WL 60687, at *32. Moreover,

the pricing structure of these blanket licenses was not related to either the extent of a television station's actual use of a given PROs' music or a station's success in obtaining performance rights to a portion of the music it used through other licensing mechanisms (which should result in a fee reduction), including licensing directly from composers and publishers under competitive market conditions.

By turning to the ASCAP and BMI rate courts, the local television industry succeeded in securing some license fee relief from ASCAP and BMI. *See Buffalo Broadcasting*, 1993 WL 60687, at *86. Through the rate-setting process, the local television industry was able to: (i) secure a ruling that determined that the value of ASCAP's license to local television broadcasters is not a function of their revenue, thereby terminating percentage-of-revenue licenses between local television stations and ASCAP; (ii) secure license fees at levels dramatically below those sought by ASCAP; and (iii) (as more fully addressed below) establish the parameters of a per program license that was designed, for the first time, to offer the "genuine choice" between per program and blanket licenses guaranteed to broadcasters under the ASCAP Consent Decree. With this relief, local television stations have been able to bring music performance licensing fees down closer to competitive levels and have been able to engage in actual competitive market transactions to secure at least a portion of their performance rights license needs.

To be sure, it is not just the local television industry that has had to turn to the rate courts to rein in the abuse of market power by ASCAP and BMI. Other music users similarly have been forced to turn to the rate courts when ASCAP and BMI have demanded exorbitant license fees and onerous terms. In such situations, the rate courts

have placed the check on the market power of these PROs, as the Decrees intend, by rejecting the supra-competitive fee proposals proffered by ASCAP and BMI in favor of significantly lower fees that are more reflective of competitive market rates. Some of the more salient examples include:

- *ASCAP v. Showtime/The Movie Channel, Inc.,* 912 F.2d 563 (2d Cir. 1990): setting fees for cable television program services at 60% of those sought by ASCAP.

- *ASCAP v. MobiTV, Inc.*, 681 F.3d 76 (2d Cir. 2012): rejecting ASCAP's $15.8 million fee proposal for content aggregator, and instead setting fees at $405,000 - some 2.5% of the fee sought by ASCAP.

- *BMI v. DMX, Inc.*, 683 F.3d 32 (2d Cir. 2012): setting fees based on actual competitive market data at 33% of those sought by ASCAP and 45% of those sought by BMI.

- *In re Petition of Pandora Media, Inc.*, 6 F.Supp.3d 317 (S.D.N.Y. 2014): rejecting ASCAP's proposal of fee increases of more than 60% over a five year license term.

b. The Alternative License Forms Required by the Consent Decrees Provide Local Stations with Some Ability to Secure Performance Rights in Competitive Market Transactions

By turning to the rate courts, local stations also have been able to secure a meaningful alternative to the PROs' favored all-or-nothing blanket license that is designed to open up at least some degree of competition between composers to have their works performed on local television. These license alternatives, as the DOJ has previously recognized, "ensure that a music user has an incentive to try to license some of its music directly even if it must license other music from the PRO." Memorandum of the United States In Support of the Joint Motion to Enter Second Amended Final Judgment, *United States v. ASCAP,* Civ. No. 41-1395 (WCC), dated Sept. 4, 2000 (S.D.N.Y.), at 15. The Antitrust Division has noted the importance of such licensing alternatives "to assure

that music users have competitive alternatives to the blanket license, including direct and per-program licensing ... ," so as to provide such users with "important protections against supra-competitive pricing of the ... blanket license ...." Memorandum of the United States in Response to Motion of Broadcast Music, Inc. To Modify The 1966 Final Judgment Entered In This Matter, *United States v. Broadcast Music, Inc.*, 64 Civ. 3787, dated June 20, 1994 (S.D.N.Y.), at 10-11, 12.

For the most part, the emergence of economically viable alternatives to the blanket license has come about only through court intervention over strenuous objections from ASCAP and BMI. In dealings with local television stations, those PROs fought at every turn either to deny access to such license alternatives, or to make them economically non-viable. By way of example, it took years of rate court litigation by the local television industry to establish the parameters of a per program license that would embody the ASCAP Consent Decree's guarantee of a "genuine choice" to local television stations between per program and blanket licenses. *See, e.g., Buffalo Broadcasting,* 1993 WL 60687, at *57 ("ASCAP's per-program proposal is designed to further its aim of keeping the per-program license technically available, but practically illusory for virtually all stations."). As noted by the Antitrust Division, "notwithstanding the [Consent Decree] requirement that ASCAP [and BMI] offer broadcasters a genuine economic choice between the per-program and blanket license, ASCAP has resisted offering a reasonable per-program license, forcing users desiring such a license to engage in protracted litigation, and often successfully dissuading users from attempting to take advantage of competitive alternatives to the blanket license." Memorandum of the United

States in Support of the Joint Motion to Enter Second Amended Final Judgment, *United States v. ASCAP*, Civ. No. 41-1395 (WCC), dated Sept. 4, 2000 (S.D.N.Y.), at 28.

In recognition of the competitive significance of the *Buffalo Broadcasting* ruling, the DOJ subsequently incorporated the core structural and pricing formulation of the per program license into what is now the current ASCAP Consent Decree. This decree modification was necessary as "the per-program provisions of [the prior ASCAP Consent Decree] have proved to be less effective than intended in facilitating direct licensing." Memorandum of the United States In Support of the Joint Motion to Enter Second Amended Final Judgment, *United States v. ASCAP*, Civ. No. 14-1395 (WCC), dated Sept. 4, 2000 (S.D.N.Y.), at 24.[14]

The availability of this competition-inducing alternative to the all-or-nothing pricing structure of the blanket license has enabled many local stations to take advantage of the workings of a competitive marketplace for some of their licensing needs. Currently, approximately 500 local television stations (out of roughly 1,200) have availed themselves of the per program license from either of ASCAP and BMI (or both), and have at least partially controlled their music expense by, for example, entering into direct licensing transactions for the public performance rights to the musical works used in their locally-produced programming – the programming over which the station has control over the music used. The availability of a viable per program license has allowed local stations and rightsholders to negotiate license fees and terms under competitive market

[14] BMI, whose own consent decree contemplates similar access to a per program license, thereafter generally followed suit in its dealings with local television stations.

conditions, cumulatively resulting in the payment of millions of dollars in license fees directly to composers and publishers, all outside of the blanket license process.

In addition to the per program license, local stations and other licensees secured entitlement to an adjustable-fee blanket license ("AFBL").[15] As the DOJ explained, the AFBL serves, at least to some degree, to:

> enable[] a music user to pit rights holders against one another in direct licensing competition. This competition would make the music licensing market more similar to other competitive markets in our economy where a user negotiates directly with sellers and will choose to buy more from those sellers that offer the best terms. As a group, the BMI rights holders would prefer to avoid bidding against each other to offer the best direct licensing terms. Yet, this type of competition would put pressure on each rights holder to lower its prices for its directly licensed music, in turn putting downward pressure on and producing lower-priced competitive benchmarks for BMI's blanket licenses.

Memorandum of the United States on Decree Construction Issues, *BMI* v. *DMX, Inc.*, 08 Civ. 216 (LLS), dated Apr. 13, 2010, (S.D.N.Y.), at 3.

This alternative to the traditional blanket license also came about only as a result of the existence of the Consent Decrees and only after costly rate court litigation to secure it. Even following the Second Circuit's determination that BMI is obligated to offer an AFBL, *United States v. BMI (In re Application of AEI Music Network, Inc.)*, 275 F.3d 168 (2d Cir. 2001) *("AEI")*, BMI refused to voluntarily offer one to the local television industry, forcing it to litigate over, and prevail on, what should have been a settled issue. *WPIX, Inc. v. BMI*, Opinion and Order, 09 Civ. 10366 (LLS) (S.D.N.Y. Apr. 28, 2011).

[15] An AFBL provides credits for works the performance rights to which have been separately acquired in direct licensing transactions. Unlike with the per program license, there is no need to clear an entire program of the PRO-affiliated works for the station to receive a credit.

Similarly, in its rate-setting proceeding with background music supplier DMX, ASCAP took the position that it was not required to offer an AFBL, notwithstanding the materially identical provisions of its Consent Decree to those undergirding the *AEI* decision and the compelling competitive benefits an AFBL affords users. ASCAP's position was rejected by the ASCAP rate court. *In re Application of THP Capstar Acquisition Corp.*, 756 F. Supp. 2d 516, 541 (S.D.N.Y. 2010). As the Court noted: the ASCAP Consent Decree "is an antitrust consent decree providing a mechanism for the setting of reasonable license fees in a unique market in which ASCAP indisputably exercises market power. While ASCAP may be unwilling to offer a blanket license with a carve-out for a direct licensing program, the terms of [its Decree], the decisions interpreting and applying [its Decree], and the record evidence from this trial each indicate that such a license is appropriate and justified here. Indeed, DMX has shown that such a license will add competition to the marketplace." *Id.*

While this latest alternative license structure has yet to create a more competitive market in which local stations secure at least some performance rights directly from composers and publishers, as in the early years of the per-program license, the currently available AFBL does not appear to be economically viable, it does offer promise, similar to the per program license, of loosening ASCAP's and BMI's monopoly grip over the music licensing marketplace. As with the per program license, this opportunity to inject competition into the market would not have come about in the absence of the Consent Decrees.

In addition to the local television experience with the per program license, the importance of meaningful alternatives to the PROs' preferred fixed-fee blanket license

has also been demonstrated by the experience of DMX, a background music supplier. In the aftermath of the *AEI* decision confirming users' entitlement to an AFBL, DMX, which is in the somewhat unusual position of controlling all of the music it programs, secured hundreds of licenses directly from music publishers, licensing upwards of 30% of its performances in competitive market transactions. In so doing, DMX created a marketplace in which composers and publishers could compete with each other on the basis of price to secure a greater share of performances on the DMX service.

Both the ASCAP and BMI rate courts, and later the Second Circuit, recognized that these direct licenses entered into under more competitive market conditions not only provided a check on the ability of ASCAP and BMI to exercise their considerable market power, but also provided the best evidence of the competitive price for musical works public performance rights licenses.[16] Using these competitive market direct licenses as "benchmarks," and providing for a license fee formula such that DMX would not pay twice for its direct license efforts (once directly to publishers and then again to the PROs), both rate courts set fees substantially below those sought by ASCAP and BMI and well below those that ASCAP and BMI had historically been able to secure from the background music industry.[17]

The DMX experience – one of the few in which the forces of competition have been able to take hold on a significant scale – demonstrates the degree to which markets that have not been opened up to competitive licensing transactions are subject to significant price overcharges at the hands of the PROs. Jaffe Analysis at 12-13. As the

[16] *BMI v. DMX Inc.*, 683 F.3d 32 (2d Cir. 2012); *BMI v. DMX Inc.*, 726 F. Supp. 2d. 355 (S.D.N.Y. 2010); *In re Application of THP Capstar Acquisition Corp.*, 756 F. Supp. 2d 516 (S.D.N.Y. 2010).

[17] *Id.*

above demonstrates, the suggestion on the part of the PROs and music publishers that such rate court supervision is no longer necessary or that the impartial federal district court and appellate judges who oversee this process have deprived owners of musical works of fair compensation are unfounded. Quite instead, the pattern of price corrections and other decree enforcement measures implemented by the federal judiciary following vigorously contested trials and appeals is testimony to the continuing need for judicial supervision of ASCAP and BMI.

c. Evidence That The Protections Afforded by The Consent Decrees are Still Needed Today Is Found in The Local Television Experience with SESAC

The local television industry's experience with SESAC, a currently unregulated U.S. PRO, provides further confirmation that the Consent Decrees are still every bit as vital today as they ever have been. Despite the fact that it has a significantly smaller repertory than both ASCAP and BMI, SESAC has been able to amass, through the aggregation of the copyrights of thousands of otherwise competing composers and publishers, monopoly power. With this monopoly power, as judicial findings in two separate antitrust litigations attest, SESAC engaged in essentially the same activities that prompted the government to sue ASCAP and BMI decades ago, culminating in the Consent Decrees. *Meredith Corp., et al. v. SESAC, LLC*, 1 F.Supp.3d 180 (S.D.N.Y. 2014); *Radio Music License Committee, Inc. v. SESAC Inc.*, No. 12-cv-5087, Report and Recommendation (E.D. Pa. Dec. 20, 2013). These activities included (among others): (i) extracting supra-competitive fees for its blanket license; (ii) refusing to offer any viable alternatives to its all-or-nothing blanket license; (iii) eliminating any opportunity to secure public performance rights for musical works in the SESAC repertory other than through the SESAC blanket license, including by entering into *de facto* exclusive

licensing arrangements with its key affiliates; (iv) revoking interim licensing authorizations and then threatening copyright infringement lawsuits if music users did not acquiesce to SESAC's license fee demands; and (v) refusing to provide music users with complete and up-to-date information on all of the works in its repertory in any usable form, thereby eliminating the user's ability to definitively determine if a particular work is in the SESAC repertory.

SESAC's persistence in engaging in this course of conduct compelled members of the local television industry to bring a class action antitrust suit against SESAC in an effort to rein in its abuse of market power. SESAC's efforts to have the case dismissed were rejected. First, in 2011, SESAC's motion to dismiss was denied. In doing so, the district court held that the local television station plaintiffs plausibly stated antitrust claims under the modern antitrust pleading precedent of *Bell Atlantic v. Twombly*. *Meredith Corp., et al. v. SESAC, LLC,* 09 Civ. 9177 (NRB), 2011 WL 856266, at **5, 15 (S.D.N.Y. Mar. 9, 2011).

More recently, in 2014, in an opinion from the federal district court denying SESAC's motion for summary judgment following full fact and expert discovery, the court observed, among other key findings, that:

- "[t]he evidence would ... comfortably sustain a finding that SESAC ... engaged in an overall anti-competitive course of conduct designed to eliminate meaningful competition to its blanket license." *Meredith Corp., et al. v. SESAC, LLC*, 1 F.Supp.3d 180, 196 (S.D.N.Y. 2014).

- "there is strong evidence that [SESAC's] [per-program license] is, in fact, illusory" such that "a jury could find that a local station cannot avoid SESAC's blanket license, because no alternative to it is realistically available." *Id*. at 217.

- the *de facto* exclusive licensing arrangements with key affiliates "effectively eliminated direct licensing as a means by which stations could

license these affiliates' music" and that the penalties for direct licensing in the *de facto* exclusive agreements constitute "substantial evidence ... [from] which a jury could find that SESAC effectively forced local stations to buy its blanket license." *Id*. at 196, 216.

- the confidentiality provisions in these *de facto* exclusive licensing agreements could reasonably be viewed as serving to keep "the huge penalties for direct licensing – penalties that might be viewed as 'red flags' of anti-competitive intent – from catching the eye of an antitrust regulator." *Id*. at 213.

- the effective elimination of licensing alternatives to SESAC's blanket license means that "stations must pay supra-competitive prices for the one license that is available – SESAC's blanket license." *Id*. at 220.

- "the evidence is more than sufficient" for a jury to find that "SESAC's conduct harmed competition, and that this harm outweighed any pro-competitive benefits of that conduct." *Id*.

- "it is undisputed that SESAC possesses monopoly power in [the relevant] market" and that "[i]t also appears undisputed that SESAC has the power to control prices over that market as currently structured." *Id*. at 222.

In the aftermath of this summary judgment decision, the parties were able to reach a settlement agreement. In addition to awarding the local television industry $58.5 million, $16 million of which went to cover legal expenses, SESAC agreed to significant conduct restrictions through December 31, 2035 in its dealings with the local television industry. Tellingly, these conduct restrictions are modeled in large part on those contained in the ASCAP and BMI Consent Decrees. Among others, SESAC has agreed: (i) to offer a per-program license as a meaningful alternative to the blanket license, the terms of which are to be set through arbitration in the event SESAC and the TVMLC are not able to agree on reasonable terms; (ii) to provide interim licenses while negotiations and/or arbitration over final license fees and terms are ongoing, preventing SESAC from using "gun-to-the-head" licensing tactics and threatening copyright infringement suits to secure whatever fee it demands; (iii) subject itself to binding arbitration for the setting of

license fees and terms in the event that the TVMLC and SESAC are not able to reach such an agreement; and (iv) not to enter into any agreements with its affiliates that prevent, or otherwise interfere, with an affiliates ability to grant a direct license to a local station.

The radio industry brought a similar antitrust suit against SESAC. In late 2013, Magistrate Judge Lynne Sitarski conducted an evidentiary hearing on the radio industry's preliminary injunction motion, with fact and expert economic witnesses testifying for both sides. With the benefit of this testimony, the Magistrate Judge concluded that the radio industry had a likelihood of success on the merits of its antitrust claims. This ruling was later adopted by District Judge C. Darnell Jones, II. Among the key findings of the Court were that:

- "there is no evidence to support the conclusion that SESAC's blanket license has been the customer's preferred choice in the face of available alternatives. To the contrary, SESAC's blanket license is the user's *only* choice." (emphasis in original). *Radio Music License Committee, Inc. v. SESAC Inc.*, No. 12-cv-5087, Report and Recommendation, at 29 (E.D. Pa. Dec. 20, 2013)

- "the only representative broadcaster who attempted to forego SESAC's blanket license was threatened with an infringement suit by SESAC before eventually agreeing to the license." *Id.* at 30.

- "the current record suggests there is *no* restriction on SESAC's ability to raise its prices. This ability, coupled with SESAC's 100% market share of the unique product – the collection of songs in its repertory – further supports a finding that the challenged conduct has produced anticompetitive effects in the relevant market." (emphasis in original). *Id.*

- "SESAC has engaged in exclusionary conduct by failing to disclose its repertory and ensuring that users have no alternatives but to purchase their licenses." *Id.* at 33.

- "A station cannot bypass a SESAC license by obtaining a bundle of direct licenses for all of the works in SESAC's repertory because they cannot

accurately and reliably determine the content of SESAC's repertory." *Id.* at 15.

More recently, in June 2014, the district court denied in part SESAC's motion to dismiss. In the aftermath of this decision, the radio industry was able to reach a settlement agreement with SESAC that also is modeled in large part after the Consent Decrees.

These findings of multiple federal district court judges demonstrate that the monopoly power that results from aggregating a critical mass of public performance rights into a single blanket license is deeply problematic and that such monopoly power can and has been exploited in the very ways the Consent Decrees aim to protect against. Were the protections contained in the ASCAP and BMI Consent Decrees relaxed or eliminated, those PROs would almost certainly engage in the very sorts of practices that SESAC has. That the local television industry (and many others) has had to go to the lengths discussed above just to secure from ASCAP and BMI reasonable license fees and workable alternatives to the all-or-nothing blanket license provides a very good indication of how these PROs would act if unregulated.[18] Indeed, just a few years ago, ASCAP attempted to do what its Decree prohibits. As DOJ noted, "[d]espite provisions in its Decree prohibiting ASCAP from interfering with its members' ability to directly license their songs, ASCAP entered into approximately 150 contracts with songwriter and publisher members that made ASCAP the exclusive licensor of their performance rights." *See* Justice Department Settles Civil Contempt Claim against ASCAP for Entering into 150 Exclusive Contracts with Songwriters and Music Publishers, dated May 12, 2016,

[18] If ASCAP and BMI were to begin to exploit their market power in the absence of the Consent Decrees, that would likely lead to an exceptionally costly era of antitrust litigation – a prospect that, as Professor Jaffe explains, would be highly inefficient and serve no public interest. Jaffe Analysis at 18-20.

available at https://www.justice.gov/opa/pr/justice-department-settles-civil-contempt-claim-against-ascap-entering-150-exclusive. To settle the matter, ASCAP agreed to pay a $1.75 million fine and reform certain of its licensing practices, including prohibiting music publishers from overseeing ASCAP's licensing. As the then head of the Antitrust Division put it, "[b]y blocking members' ability to license their songs themselves, ASCAP undermined a critical protection of competition contained in the consent decree." *Id*.

For all of these reasons, the Consent Decrees continue – just as they always have – to serve critically important competitive purposes and must be maintained to ensure that the musical works performance rights licensing marketplace continues to function reasonably well – free of the rampant abuse of PRO monopoly power.

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

While, for the reasons discussed above, the Consent Decrees have placed a check on the ability of ASCAP and BMI to fully exploit their market power, there are modifications to the Decrees that would enhance competition and efficiency – by improving the benefits of collective licensing while, at the same time, providing further protections against abuse of the market power generated through such collective licensing.

a. Explicitly Prohibiting Fractional Licensing Will Enhance Competition and Efficiency

First, and most significantly, the Decrees should be modified to explicitly prohibit fractional licensing. As the DOJ concluded just three years ago, "permit[ting] fractional licensing would not be in the public interest." Closing Statement at 16.

As explained by Professor Jaffe, fractional licensing serves no procompetitive purpose and does nothing to enhance efficiency. It does precisely the opposite: it undermines the efficiencies created through collective licensing and, at the same time, exacerbates the market power problems associated with such licensing. Jaffe Analysis at 20-22. As a result, if allowed to continue, fractional licensing would call into serious question whether collective licensing of the type engaged in by ASCAP and BMI should be allowed to persist at all. As the Antitrust Division acknowledged just three years ago in its Closing Statement, "only full-work licensing achieves the benefits that underlie the courts' [including the Supreme Court's] descriptions and understandings of ASCAP's and BMI's licenses." Closing Statement at 12.

Fractional licensing undermines the efficiencies created through collective licensing by requiring music users to secure, before the time of performance, all of the fractional interests to works in the ASCAP and BMI repertories, including those that can be licensed through ASCAP and BMI and those that cannot. Under a fractional rights licensing regime, ASCAP and BMI would no longer provide music users with the full set of rights necessary to actually perform all of the works in their respective repertories and no longer provide indemnification from copyright infringement lawsuits for all of those works. Instead, those PROs would only provide a subset of the what is needed to actually perform works and indemnification only as to those fractional shares, leaving it to the music user to ensure that it has secured whatever remaining rights are no longer available from ASCAP and BMI before any "split works" can actually be performed – a near impossible task given the transparency issues endemic to the music industry. As a result, ASCAP and BMI licenses, as they relate to these split works, would provide the music

user with precisely no value until such a time as the music user is able to identify and negotiate with each and every non-ASCAP and BMI affiliated co-owner of these split works (or their unregulated PRO). Until this happens, these works, that are in the ASCAP and BMI repertories, cannot be performed. As the above makes plain, a fractional licensing regime increases transactions costs faced by licensees. And, this increase in transaction costs is not trivial – the number of co-written works and the numbers of writers and publishers for each such work has increased significantly over time. *See, e.g.*, https://www.digitalmusicnews.com/2017/08/02/songwriters-hit-song/; https://www.bbc.com/news/entertainment-arts-39934986. These higher transactions costs faced by music users, in turn, harm overall consumer welfare. Jaffe Analysis at 21. Simply put, as a result of fractional licensing, the immediate access to all of the works in the repertories of ASCAP and BMI and the protection from copyright infringement liability that comes along with such access – the foundational reasons for allowing collective licensing of the sort engaged in by ASCAP and BMI to survive antitrust scrutiny in the first place – are no longer present.

In its recent review of the Decrees, the Antitrust Division recognized exactly this. As the DOJ put it:

> [F]ractional 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.

Closing Statement at 14 (emphasis in original).[19]

At the same time, as a result of fractional licensing, the ASCAP and BMI Decrees now afford users lesser protections than they did under the prior full works licensing regime. As noted above, the Consent Decrees obligate ASCAP and BMI to provide a license to any user immediately upon request, thereby eliminating the ability of those PROs to engage in "gun-to-the-head" licensing tactics by threatening copyright infringement lawsuits in the event that the licensee fails to accede to these PROs' license fee demands. Requiring a licensee to secure not only a license from each of ASCAP and BMI, but also a license from each copyright owner of a split work that is unaffiliated with ASCAP and BMI, just to perform works that are in the ASCAP and BMI repertories, diminishes this protection, as it gives each such non-ASCAP and BMI affiliate "hold-up" power over the performance of the work. Such a system creates strong incentives for copyright owners with partial ownership interests (and their PROs) to exploit this hold-up power by engaging in precisely the "gun-to-the-head" licensing tactics that the Decrees aim to prevent. In short, fractional licensing devalues the efficiencies and protections

[19] *See also* Closing Statement at 12 ("If the licenses were fractional, they would not provide *immediate* use of covered compositions; users would need to obtain additional licenses before using many of the covered compositions. And such fractional licenses would *not* avoid the delay of additional negotiations, because users would need to clear rights from additional owners of fractional interests in songs before performing the works in the ASCAP and BMI repertories.") (emphasis in original).

from copyright infringement the Decrees offer, in favor of affording musical works rightsholders with a vehicle to exploit market power. Jaffe Analysis at 21.

The Antitrust Division, after its recent multi-year investigation into the Decrees agreed with as much. After extensive investigation, the DOJ determined that "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." Closing Statement at 15-16.

These potential adverse effects are particularly acute for licensees that utilize pre-recorded programming and advertisements. As discussed above, the music in such programming is selected by third parties, and the licensee typically has no choice but to play the music that has been pre-selected for it. Requiring such licensees to identify and to engage in after-the-fact negotiations with every co-owner of split works embodied in their programming would be particularly onerous. Indeed, these licensees could well have to forego broadcasting programming containing such split works as a result of the hold-up power of one co-owner of one composition.[20] Jaffe Analysis at 21-22.

With this, the DOJ agreed as well. It concluded that:

[20] In addition to pre-recorded programming, many stations also air live syndicated and sports programming. The challenges associated with licensing all of the works in such programming can be even greater, as a live syndicated programming can present all of the same problems as pre-recorded syndicated programming, but also can add the additional complication of performances of works without any advance notice.

> music users publicly performing music are often using music selected by others – for example, by the producer who placed a song in a television show … These users rely on blanket licenses to allow them to perform music without first determining whether they have cleared the rights in a work. Unlike a movie or television producer, these music users cannot switch to a different song if they lack the rights to publicly perform a song. *Their only recourse under a fractional licensing regime*, under which their PRO blanket licenses leave them exposed to infringement liability, *might be to simply turn off the music*.

Closing Statement at 14-15 (emphasis added).

While the Second Circuit has ruled, based solely on the express language of the BMI Consent Decree, that that Decree is silent as to whether BMI can engage in fractional licensing, and therefore the language of the BMI Decree does not prohibit fractional licensing, the Second Circuit explicitly did not consider the merits of the public interest analysis undergirding the Antitrust Division's prior evaluation. Rather, the Court indicated that the proper course for the Division to take if fractional licensing "raises unresolved competitive concerns" is to move to amend the Consent Decrees to prohibit such practices expressly. *U.S. v. Broadcast Music, Inc.*, 720 Fed. Appx. 14, 18 (2017).

For all of the reasons set forth above, and for those that led the DOJ to conclude just three years ago that fractional licensing is not in the public interest, the TVMLC respectfully submits that the DOJ must take up the Second Circuit's invitation and seek to modify the Consent Decrees to explicitly prohibit fractional licensing.

b. ASCAP and BMI Should be Required To Provide Complete Transparency As To The Works in Their Repertories

As noted above, and as explained by Professor Jaffe, one major stumbling-block in creating a more efficient and competitive marketplace is a lack of transparency. Jaffe Analysis at 22. Currently, both ASCAP and BMI maintain databases that identify the PRO affiliations of composers and publishers as well as the music content of thousands

of television (and other) programs. In addition, there is an international database that identifies the PRO affiliations of composers and publishers that is compiled by the International Confederation of Societies of Authors and Composers ("CISAC"), with the financial support of the U.S. PROs (among others). The PROs, however, have gone to great lengths to ensure that users do not have real-time and complete access to any of these databases.[21] This anticompetitive practice, which further entrenches PRO blanket licensing and discourages licensing transactions between individual copyright owners and music users under more competitive conditions, should be eliminated.

There is no rational reason why real-time access to information revealing just which composers and musical works are affiliated with which PROs, as well as which PRO's music is contained in users' programming, should not be made publicly available. Nowhere else are local stations asked to pay for intellectual property that is unidentified. In fact, the federal district court overseeing the radio industry antitrust litigation against SESAC has recognized the need for, and competitive benefits of, complete repertory transparency. *RMLC v. SESAC Inc.*, 12-cv-5807, Report and Recommendation, (E.D. Pa. Dec. 20, 2013), at 33 ("SESAC has engaged in exclusionary conduct by failing to disclose its repertory and ensuring that users have no alternatives but to purchase their licenses."). The ASCAP rate court came to a similar conclusion with respect to the repertories of the publishers that attempted to partially withdraw from ASCAP and BMI. *In re Petition of Pandora Media, Inc.*, 6 F.Supp.3d 317 (S.D.N.Y. 2014).

[21] While ASCAP and BMI now provide more information on the works in their repertories than they have in the past, these publicly available databases are not sufficient. For example, BMI requires the user of its repertory search function to agree that he or she "will only run manual queries through the interface that BMI provides" – BMI does not make its complete repertory available in a format that would allow local stations to systematically identify what they are actually licensing from BMI. BMI Terms and Conditions of Use, *available at* https://www.bmi.com/legal/entry/terms_and_conditions_of_use. Moreover, both databases are incomplete – they do not provide complete information as to fractional interests.

c. Improvements to the Rate Court Process

While the local television industry supports the continued availability of rate court litigation before federal judges conducted pursuant to the Federal Rules of Civil Procedure and Evidence, they do support a modification to current practice that can be made to meaningfully increase the efficiency of rate court proceedings.

Rather than having to engage in separate rate proceedings against ASCAP and BMI, it should be made explicit that a PRO licensee can bring a rate-setting litigation against both ASCAP and BMI in a single proceeding. There is simply no rationale for maintaining separate rate courts. The rate-setting standards of the respective rate courts are the same and the relevant provisions of the ASCAP and BMI Consent Decrees are likewise comparable. Moreover, increasingly, the same licensees and licensee groups are faced with litigating simultaneously with ASCAP and BMI in their respective rate courts before different judges. The duplication of effort is both extremely costly and serves no useful purpose. The TVMLC found itself in precisely that posture not long ago – responding to, among other things, separate sets of discovery demands from ASCAP and BMI and internally inconsistent claims of market share put forward by each PRO. Other users, such as the RMLC, Pandora, and DMX, have found themselves litigating against both BMI and ASCAP at the same time as well.

Allowing for a single rate proceeding to set both ASCAP and BMI license fees and terms for a particular user would, among other benefits: (i) streamline the costs of rate court proceedings for users facing the prospect of litigating with both ASCAP and BMI; (ii) minimize the potential for conflicting decisions as to the "reasonable" rates for fundamentally identical BMI and ASCAP licenses to the same users; and (iii) avoid the

prospect of a given licensee paying over 100% of the reasonable value of its combined public performances of ASCAP and BMI music. With respect to this last point, in the TVMLC's experience (and that of many other music users), ASCAP and BMI invariably inflate their claimed market shares and utilize incompatible methodologies for arriving at them. A unitary rate proceeding that can take account of the contentions of both PROs could rationalize such competing claims and determine both the reasonable values of their respective repertories and the relative shares of a "total pie" for public performance rights license fees to which each is entitled.

III. Question 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 – whether immediately or after a sunset period – would unquestionably not be in the public interest. A mere three years ago the Antitrust Division concluded "that it would not be in the public interest to modify the consent decrees," rejecting calls from music publishers and PROs to terminate or sunset them. Closing Statement at 17. In so concluding, the DOJ noted that the Consent Decrees fill important and procompetitive roles in the music licensing industry through the various provisions discussed above, such as granting a license upon request. *Id*. at 10, 13 (noting that "immediate access to the works in the organizations' repertories" is a "key procompetitive benefit[]" of the Consent Decrees). 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." *Id*. at 15. Nothing has changed in the past

three years that could support a contrary conclusion today regarding the public interest or the continued need for the Consent Decrees.

Most fundamentally, the PROs today perform exactly the same function as they always have – they provide a vehicle through which their affiliated composers and publishers avoid the rigors of competition by aggregating all of their rights into a single all-or-nothing blanket license. Until that practice changes, the protections afforded to users from the market power created through such collective licensing must be maintained.

Moreover, as Professor Jaffe explains, the Consent Decrees should only be abandoned if doing so would result in a more efficient market for licensing music performance rights. Jaffe Analysis at 15-18. That would almost assuredly not happen. While it is impossible to state with certainty what a world without the Consent Decrees would look like, the most likely outcome, by far, would be that ASCAP and BMI would continue to license the works in their repertories through all-or-nothing fixed-fee blanket licenses and local stations would continue to need them in order to operate. But without the protections afforded by the Consent Decrees, local television stations and other music users would be at the mercy of ASCAP and BMI, having no choice (short of shutting down) but to agree to the license fees and terms demanded by those monopolist PROs. As a result, ASCAP and BMI would be able to extract greatly increased license fees, resulting in increased costs to consumers, reductions in payments to other creative contributors to audiovisual programming, and reductions in program variety and music content – none of which is in the public interest. Jaffe Analysis at 17-18. This alone counsels against eliminating the Consent Decrees.

With respect specifically to whether it is appropriate to sunset the Decrees after some set period of time, while it may be the case that there is now a general presumption that consent decrees should eventually sunset, that presumption does not apply in the present circumstances. As the DOJ has long recognized, this presumption is wholly inappropriate when there has been long-standing and continued reliance on the consent decree at issue by industry participants. *See, e.g., Memorandum of the United States in Response to Defendant Honeywell International's Motion for Order Terminating the Final Judgment, United States v. Allied Chemical & Dye Corp., et al.*, Civ. Action No. 41-320 at n. 7 (S.D.N.Y. Aug. 8, 2007), available at https://www.justice.gov/atr/case-document/file/484216/download ("Among the circumstances where continuation of a decree entered more than ten years ago may be in the public interest are ... a continuing need for the decree's restrictions to preserve a competitive industry structure; and longstanding reliance by industry participants on the decree as an essential substitute for other forms of industry-specific regulation where market failure cannot be remedied through structural relief.").

Moreover, as detailed by Professor Jaffe, in most markets, companies that manage to establish some kind of monopoly position will not be able to sustain any such dominance over time if prohibited from engaging in anticompetitive behavior by means of a Consent Decree (or otherwise). In such circumstances, a sunset provision may be entirely appropriately. But the market power associated with the collective licensing by ASCAP and BMI is fundamentally different. It is not the result of a narrow or temporary set of circumstances – it is inherent in the licensing structure that ASCAP's and BMI's affiliated composers and publishers have chosen to establish, and around which the

industry has organized itself for decades. Jaffe Analysis at 15. In a world without Consent Decrees, ASCAP and BMI licenses would be just as necessary as they are today. No competition would emerge in the absence of the Decrees that will somehow constrain ASCAP and BMI – their licenses are and will remain "must have" to every music user.

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

While the two Consent Decrees are not identical, they have generally been understood to call for the same set of restrictions on ASCAP and BMI. For example, as noted above, in the wake of the *Buffalo Broadcasting* decision setting forth an appropriate structure for the local television ASCAP per program license, the DOJ subsequently incorporated the core structural and pricing formulation of the per program license into the ASCAP Consent Decree. While the BMI Decree was not similarly amended to explicitly make the same changes, BMI's Decree has nevertheless been understood to require BMI to offer a per program license along the same lines that ASCAP does. Indeed, for years, both the ASCAP and BMI local television station per program licenses have contained the same formula for arriving at per program license fees.

That being said, there have been times when music users have had to turn to the Judges supervising the Consent Decrees to ensure that the Decrees do, in fact, provide the same protections to users. By way of example, and as also noted above, in its rate-setting proceeding with background music supplier DMX, ASCAP took the position that it was not required to offer an AFBL, notwithstanding the fact that it was already judicially determined that BMI was obligated to provide such a license type to background music suppliers (and others). While this position of ASCAP's was rejected by the Judge

overseeing the ASCAP Consent Decree, DMX still had to expend significant resources litigating what should have been a settled issue. *In re Application of THP Capstar Acquisition Corp.*, 756 F. Supp. 2d 516, 541 (S.D.N.Y. 2010).

Accordingly, while in the TVMLC's view, it is not necessary to amend the Decrees just to harmonize the language, if DOJ does intend to modify the Decrees, there is certainly no harm, and likely some benefit, in ensuring that the full set of restrictions imposed on ASCAP apply with equal force to BMI, and vice versa.

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

The music licensing marketplace is unquestionably harmed by the fact that there are PROs that are not subject to Consent Decrees. As the local television and radio industry SESAC antitrust litigations have demonstrated, a PRO need not have a repertory the size of either ASCAP or BMI for it to have monopoly power. Any PRO that secures a repertory that is sufficiently large such that a license from it becomes "must have" to a music user has monopoly power. This stems from the fact that the PROs do not compete against each other in licensing users – a SESAC license is complementary to, and not a substitute for, an ASCAP or BMI license. Jaffe Analysis at 7-8.

Allowing unregulated PROs to exist alongside ASCAP and BMI distorts competition in at least two ways. First, composers and music publishers are able to get out from under the protections afforded users by the Consent Decrees simply by moving to an unregulated PRO. These PROs can offer to pay their affiliated composers and publishers at higher levels, not because their music has somehow become more valuable as a result of switching their PRO affiliation, but because the unregulated PRO is able to secure monopoly rents from music users, and pass at least some of those rents on to their

affiliates. With composers and publishers moving away from ASCAP and BMI to unregulated PROs in an effort to get a piece of these anticompetitive rents, the protections afforded users by the Consent Decrees become less and less valuable.

This is precisely what happened with SESAC. Beginning in the 1990s, SESAC recognized that it could lure key composers and publishers with music embedded in local television programming away from ASCAP and BMI and grow its repertory such that a license from SESAC became necessary for every local station. Once it succeeded in doing so, SESAC exploited the resulting monopoly power by demanding and securing ever increasing royalties from local stations. Moreover, SESAC was able to effectively eliminate alternatives to its favored fixed-fee blanket license. Judge Englemeyer, in his decision denying SESAC's motion for summary judgment, recognized exactly this. *Meredith*, 1 F.Supp.3d at 218-219 ("[T]here is evidence that, despite a material increase in the price of a SESAC blanket license during 2008–2012, the relevant consumers (local television stations) did not respond by substituting another product (ASCAP or BMI licenses); [i]ndeed, essentially 100% of local television stations continued to license performance rights from SESAC despite this increase, rather than switching to some other product.") (internal citations omitted).

Second, by having multiple unregulated PROs in the market, market distorting inefficiencies arise. Rather than secure all of the rights necessary to publicly perform music through two-stop shopping, and under conditions in which the potential for abuse of market power is mitigated, music users need to secure licenses from every PRO that

has become sufficiently large such that using its music is unavoidable.[22] With the prospect of securing monopoly rents, more and more PROs are emerging. Indeed, since 2013 alone, two new PROs have emerged – Global Music Rights and PRO Music Rights – each of which appears to be following the anticompetitive playbook established by SESAC.

At the same time that the protections afforded users by the Consent Decrees have become less valuable as a result of the rise of unregulated PROs, there has been no offsetting decline in the market power of ASCAP and BMI. ASCAP and BMI are still monopolists, and a license from each of these PROs is just as necessary for local stations today as it was before the rise of new unregulated PROs.

Worse, should these new unregulated PROs follow in the footsteps of SESAC and become "must have" for local stations – and there is every indication that is exactly what they intend – the music licensing landscape will become even more fractionalized and anticompetitive. Rather than having to secure licenses from two monopolists regulated by Consent Decrees and one monopolist regulated pursuant to a private antitrust settlement, local stations will have to negotiate with these same entities and will be forced to secure a license from one or two additional wholly unregulated monopolists. As the economics literature has recognized for well over a century, when a licensee is faced with securing a license from multiple monopolists, the resulting rates paid by the licensee are expected to be above those rates that would emerge if there was a single

[22] This problem is exacerbated by the lack of information on music embedded in third-party produced programming and the fact that there is no authoritative database to which users can turn to identify the rightsholders to particular works.

monopolist that licensed all musical works public performance rights licenses in a single blanket license.[23] Jaffe Analysis at 9.

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

As the TVMLC and radio industry experiences with SESAC demonstrate, existing antitrust statutes and applicable caselaw will not be sufficient to protect competition in the absence of the Consent Decrees. It took many years and some $16 million in legal fees and costs before the local television industry was able to secure from SESAC some of the protections afforded users against the abuse of market power by ASCAP and BMI. And that settlement agreement, unlike the Consent Decrees, only provides protection to local television stations. The radio industry had to bring its own antitrust lawsuit, separately expending millions of dollars to secure similar protections, and all other SESAC licensees, including music streaming services, restaurants, bars, concert venues, and many others, continue to be unprotected from the abuse of market power by SESAC.

If the Consent Decrees are eliminated, as discussed above, there is every reason to believe that ASCAP and BMI will engage in the very activities that the Decrees aim to protect against. Indeed, ASCAP and BMI may be emboldened by the fact that the Decrees have been eliminated, viewing that as tacit permission from the DOJ to engage in such activities. Under such circumstances, music users would have little recourse but to bring antitrust lawsuits against each of ASCAP and BMI, but only those that are sufficiently well funded would be able to do so. For many, the cost of litigation would likely be prohibitive.

[23] This is what is referred to in the economics literature as the Cournot Complements problem. Jaffe Analysis at 9.

The likely resulting patchwork of protections afforded to some users and not to others that would arise out of a series of costly and time consuming litigations – litigation that is far more costly and time-consuming than a rate proceeding – is clearly inferior to the set of uniform regulations currently in place that protect all manner of licensees. Jaffe Analysis at 18-20. And, as the SESAC experience demonstrates, for those that are able to bring antitrust lawsuits, the resulting settlements have been variations of the very Consent Decrees that are in place today. To force music users to resort to costly and time consuming antitrust litigation to simply end up with a variation of what is already in place today would be an enormous waste of resources. And even then, many users – including the smallest and most vulnerable to abuses of market power by ASCAP and BMI – would lose all of the protections that they have today. Such an outcome is unquestionably inferior to the system currently in place, and would in no way serve the public interest.

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The TVMLC thanks the Antitrust Division for this opportunity to present its views on the importance of maintaining the Consent Decrees and stands ready to supplement these comments if requested.

Respectfully submitted,

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APPENDIX A

ECONOMIC ANALYSIS OF THE ASCAP AND BMI CONSENT DECREES

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August 9, 2019

I. Introduction

My name is Adam Jaffe. I am Fred C. Hecht Professor in Economics Emeritus and Research Professor at Brandeis University in Waltham, Massachusetts and Senior Lecturer at the Sloan School of Management at the Massachusetts Institute of Technology. I am also the Chair of the Board on Science, Technology and Economic Policy ('STEP Board') of the National Academies of Science, Engineering and Medicine. From 2013-2017, I was Director of Motu Economic and Public Policy Research in Wellington, New Zealand. From 2003-2011, I was Dean of Arts and Sciences at Brandeis. Before becoming Dean, I was the Chair of the Department of Economics. Prior to joining the Brandeis faculty in 1994, I was on the faculty of Harvard University. During the academic year 1990-1991, I took a leave of absence from Harvard to serve as Senior Staff Economist at the President's Council of Economic Advisers in Washington, D.C. At the Council, I had primary staff responsibility for science and technology policy, regulatory policy, and antitrust policy issues.

I have authored or co-authored over one hundred scholarly articles and two books. I am an Editor of *Research Policy*, the leading scholarly journal of the economics and management of science, technology and innovation. I have served as a member of the Board of Editors of the *American Economic Review*, the leading American academic economics journal, as an Associate Editor of the *Rand Journal of Economics*, and as a member of the Board of Editors of the *Journal of Industrial Economics*. At M.I.T., Brandeis and Harvard, I have taught graduate and undergraduate courses in microeconomics, antitrust and regulatory economics, industrial organization, law and economics, and the economics of innovation and technological change.

I have studied and written extensively on the economics of intellectual property, including copyrights. With respect specifically to the licensing of music performances involving performing rights organizations (PROs), I have prepared written expert reports and presented testimony on behalf of local television stations, cable television channels, and a background music service in ASCAP and BMI "Rate Court" proceedings, conducted pursuant to Consent Decrees between these entities and the U.S. Department of Justice, Antitrust Division (DOJ), in federal court in the Southern District of New York. I

assisted in the design and development of a television music use survey that the Television Music License Committee, LLC (TVMLC) continues to use today. In 2010, I testified on behalf of the background music service DMX in separate cases in the BMI and ASCAP Rate Courts. My testimony in both cases was to the effect that: (1) the traditional method of licensing music performance rights through a "blanket license" that aggregates rights held by numerous different copyright owners confers market power on BMI and ASCAP; (2) the fees paid by DMX in direct licensing contracts with music publishers demonstrated that the historical blanket license fees charged by ASCAP and BMI were well above the competitive level; and (3) an Adjustable Fee Blanket License (AFBL) could mitigate that market power if designed correctly. My testimony was used by both Judge Stanton and Judge Cote in their decisions, both of which established an AFBL as an alternative to the traditional ASCAP and BMI blanket licenses, using the formula I recommended, and at a license fee level tied to the direct-license benchmark that I recommended. These decisions were affirmed by the Second Circuit in 2012.

I also submitted an expert report on behalf of the plaintiff local television stations in their Section 1 and Section 2 antitrust lawsuit against SESAC. My opinions regarding the appropriate definition of the market for antitrust analysis, SESAC's market power in that market, and the anticompetitive consequences of SESAC's actions were positively cited by Judge Engelmayer in his 2014 decision on SESAC's motion for summary judgment.

The TVMLC asked me to prepare this white paper to provide an analysis of the economic functioning of the ASCAP and BMI Consent Decrees, and to comment from an economic perspective on some of the issues raised in the DOJ's Request for Comments. I am being compensated for my time in doing so. I do not have any economic interest in the decisions to be made by the Department of Justice with respect to ASCAP and BMI.

II. Economics of music use in audiovisual programs

a) Multiple rights needed for musical compositions in audiovisual programs

When a program is broadcast by a local television station, that station is deemed to be making a public performance of the music embedded in the program. The making of any such public performance without the permission of the copyright holder constitutes copyright infringement. For an audiovisual program, there are typically multiple distinct copyrights involved. The focus of this paper is the copyrighted musical works that are frequently embedded in television programs. As I understand it, the right to allow or deny the public performance of a musical work, including those performed when audiovisual programs are watched and heard, lies in the first instance with the composer(s) of the

musical work. Composers may (but do not always) grant their publishers the right to license the use of their works. As discussed further below, rights holders (both composers and publishers) generally further delegate the right to license their works to PROs.

It is worth noting in this context that there is another right, distinct from the performance right, that comes into play with respect to music in certain audiovisual programs. At the time the program is created, its producer needs the permission of the rights owner(s) to incorporate a musical work in that program, even if the program is never broadcast. If the music is incorporated in the audiovisual work by use of a previous audio-only recording (as, for example, when a previous recording is made part of the soundtrack of a movie), a "sync" right license is obtained from the rights holder or an agent at the time the audiovisual program is created.

To understand the economics of music performance rights on local television, it is useful to distinguish two broad categories of programs. Some programs aired by stations are produced by the stations themselves. The music in these programs is typically a mixture of works composed for the program as a work for hire, works from generic music libraries, and specific previously composed works. The station can try to secure the right to the subsequent public performance of the music when the work for hire is contracted, the music library is acquired or licensed, or the existing work is incorporated. If the performance rights are secured at this time, the station then has the right to publicly perform the music in these programs and does not need a separate license from a PRO to make such performances. One might think that acquiring the performance rights at this time would be straightforward, since this is the time at which the producer is securing the sync right or other permission to incorporate the music in the audiovisual recording from the party or parties that hold the rights in the musical work. In practice, however, there are a number of challenges faced by the station in securing such licenses. First, there are certain rightsholders who simply will not license public performance rights directly to local stations – preferring instead to have the PRO with which they are affiliated negotiate a license on their behalf. Second, because all stations have no choice but to secure a license from each PRO, in many cases the station, were it able to secure public performance rights directly from the composer or publisher, will end up paying twice for those rights – once directly to the composers or publisher and then again to the PRO with which the rightsholder is affiliated.

The other broad category of programs is often described as programs 'in the can', an expression derived from the time when programs were recorded on film and the films were transported to different users in a metal can. In this case, the local station acquires from the producer the right to make available a previously recorded audiovisual work. The station does *not* secure—and the producer

typically does not control—the right to publicly perform the music in these pre-recorded programs. This right needs to be secured through some other licensing mechanism in order to avoid copyright infringement. The marketplace has evolved in such a way that the standard means of securing such rights, for decades, has been by obtaining blanket licenses from each of ASCAP, BMI, and SESAC.

From an economic perspective, this marketplace could have evolved differently. In principle, the right to future public performances could be acquired by the producer along with the sync right at the time the audiovisual program is produced, and then conveyed to local stations along with the other rights involved in the use of the program. As discussed further below, such licenses for pre-recorded audiovisual programs are very rarely secured. This means that for all of its 'in the can' programming, local stations must obtain music performance rights on an ongoing basis.

Of course, music is only one aspect of the copyrighted creative work represented by an audiovisual program. Interestingly, actors, directors and other creative contributors to audiovisual programs routinely transfer to the program producer their rights to control the performance of their contributions as part of the contracts surrounding the production of the program. Composers are the only creative contributors who routinely reserve a residual right to control performances. (Other contributors do in some cases contractually reserve a right to a payment of royalties in some way when the work is performed, but they do not typically reserve any decision-making power over the licensing of the work.)

b) Information needs for ongoing licensing of music performance rights in audiovisual programing.

Every time a viewer watches a program on local television, multiple distinct musical works may be performed, and copyright law obligates the station to secure permission for these performances. For programs created by the station, there is at least the possibility that such permission could be secured when the program is made, although as noted, there are significant impediments that prevent such licensing by many stations. And for all other programs, the station needs to secure the permission after the time when the program was made (in some cases long after). One could imagine identifying all musical works in every program and commercial that the station broadcasts, identifying who controls performance rights for those works, and contracting with them to obtain the necessary permission. In practice, this is not possible.

'Cue sheets' are typically created when a program is first recorded. In principle, the cue sheet for a program should identify each musical composition in the program, and its composer(s) and publisher(s) along with their PRO affiliation. But some of this critical information is often missing from the cue sheets.

Moreover, for many programs (particularly older programs), cue sheets simply do not exist or are not available to local stations. There is no registration process or central repository for cue sheet information. Further, there is no registration system for composers. Knowing the name of the composer is not necessarily enough information to be able to contact that composer to seek a performance right license. For example, according to ASCAP, there are nine different composers named 'Brian Smith' (no middle name), plus many additional composers with first name Brian and last name Smith with various middle names. The latter include two distinct composers named 'Brian David Smith' (https://www.ascap.com/repertory#ace/search/writer/Brian%20Smith). As a general rule, cue sheets do not contain any kind of unique numeric code or other identifier that would allow an automatic or reliable link to the specific composer, so there would be no way to know from looking at the cue sheet which 'Brian Smith' composed a particular work.

Finally, if more than one composer or publisher holds rights to a joint composition, permission from all of the rights holders may be necessary in order to perform the work. As a practical matter, this means that even if all but one of the composers or publishers can be identified and contacted but one cannot, the local station is not able to secure effective permission to perform the work.

If the composer or publisher is affiliated with a PRO, permission to perform the work could be secured through that PRO, although it is my understanding that PROs are no longer granting "full works" licenses with indemnification from copyright infringement for all of the works in their repertories. Instead PROs are now granting "fractional" licenses – providing licensees with some, but not all, of the necessary permission to perform the works in their repertories that are co-written with composers that are affiliated with a different PRO or no PRO at all (the significance of this is discussed in detail below). The PRO affiliations of the composers and publishers should be identified on the cue sheet, but as noted above this is not always the case. Further, the composer or publisher can change their PRO affiliation over time, so that the PRO indicated on an old cue sheet may be incorrect when the program is performed at a later date. There is no central registry that indicates which composers or publishers are affiliated with which PRO, and, as a result of license-in-effect provisions, a rightsholder can be affiliated with one PRO for certain purposes and a different PRO for others.[1] In addition to older pre-recorded programs for which cue sheets may not exist, local stations also needs permission to perform the music in commercials that are broadcast. Cue sheets are not typically made for commercials.

[1] 'License in effect' provisions ensure that the works of composers affiliated with a particular PRO remain in the repertory of that PRO for the duration of a licensee's license term even if the composer or publisher of the work decides to join a different PRO during the license term.

Even if the broadcaster does have a cue sheet for a given program, there are significant informational hurdles to any attempt to secure performance rights for that music. First, for some specific composers identified by name, it may not be possible to determine what, if any, PRO that composer may be affiliated with. This means that it is not at all clear how the local station would go about securing performance rights directly from these composers. Second, for the remaining composers, the reported PRO affiliation is typically their affiliation at the time the program was created. If they subsequently changed affiliations, it might be possible to track such changes, but there is no systematic way to do so. Finally, it is important to emphasize that liability for an unauthorized public performance of a musical work occurs as soon as the performance occurs, so to avoid infringement liability any effort to license works cue-by-cue would have to be undertaken *before* a program is broadcast. Compiling this kind of information typically takes weeks or months of work even with good cue sheet information. There is no way it could be routinely undertaken before programs are broadcast.

Layered on top of these enormous informational challenges is a profound economic problem with securing performance rights for musical works embedded in programs 'in the can'. At the time a program is made, the producer has choices over what music to use. If, hypothetically, performance rights could be secured at that time, the producer would have flexibility to respond to a composer or publisher who demanded an unreasonable license fee by substituting different music. That is, at the time of program creation, competition can operate to discipline license fee demands. But once the program has been recorded, competition does not operate because substitution is not an option. Each of the multiple rights holders whose permission is needed can 'hold up' the station that wishes to broadcast it for a large fraction of the total value of the entire program, demanding much more than the value of the music itself.

c) Statutory penalties for infringement

Given the difficulty of identifying the music in its programs, finding the rights holders that control it, and securing performance rights, any local station that attempted to secure performance rights work-by-work would without any doubt end up performing some number of musical works for which it does not have all of the necessary performance rights. In doing so, it would face penalties for copyright infringement, and, as I understand it, statutory penalties for such infringement are significant. They are not tied to the magnitude of harm that may have been suffered by the rights holder, and are not scaled to the context or duration of the infringing performance. Accidental or unintentional infringement is not a defense, nor is Ignorance of the identity of the rightsholder or the difficulty or inability to secure performance rights. The magnitude of statutory penalties and the lack of knowledge of the identity and/or rights status of music in much of its programming would therefore create an

unacceptable level of risk for any local television station that attempted to secure music performance rights work-by-work or composer-by-composer for all of its performances.

III. Economics of ASCAP and BMI

The unacceptable risk created by the interaction of missing information and statutory penalties means that local stations need some kind of 'blanket' license that gives them the right to broadcast their programs without having to worry about securing the rights to the specific musical works in those programs. ASCAP and BMI provide such blanket licenses under rules established by their consent decrees.

PROs sign affiliation agreements with composers and publishers giving the PRO the non-exclusive right to license the performance of musical works. This gives the PRO a 'repertoire' of musical works for which it can license performances--ASCAP and BMI each have repertoires containing on the order of 10 million musical works. PROs issue blanket licenses to local stations and others, giving the licensee the right to perform any or all of the music in the PRO repertoire, in return for an annual license fee. In connection with the blanket license, the PRO indemnifies local stations (and other licensees) against the risk of a copyright infringement claim with respect to any musical work in the PRO's repertoire. Having such indemnities from the PROs is what makes it possible for local stations to engage in literally billions of public performances without fear of infringement litigation, despite the inability to identify the underlying owners of the music copyrights.[2]

The PRO distributes the license fee revenue it receives (minus an administrative overhead) to its composers and publishers based on the actual or estimated relative frequency of performance of different works (and other factors).

As noted above, local stations need some form of blanket coverage for any unidentified and unidentifiable music they might cause to be performed. Because each PRO has its own repertoire, this means that local stations and other music users must secure a blanket license from *each* PRO. PROs do not compete with each other for licensees, because their repertoires are not substitutes for each other—failure to secure a license from any of the PROs leaves an unacceptable risk that unidentified music performed by the licensee will turn out not to be covered by the blanket licenses that have been

[2] As I discuss below, fractional licensing has led to a significant change in these indemnification provisions. These provisions no longer protect against the risk of a copyright infringement claim with respect to any musical work in the PRO's repertoire. They are now limited to just those fractions of works that are being licensed by the PROs.

secured, opening the licensee up to statutory infringement penalties. This means that ASCAP and BMI are monopolists with respect to blanket licensing of their respective repertoires.[3]

It is important to emphasize that ASCAP's and BMI's monopoly power is over and above and wholly distinct from the market power that is intentionally conferred on music creators by the copyright itself. Each individual composer has an absolute right to withhold the performance rights for his/her own works. Depending on the composer's popularity, this confers a degree of market power. In principle--and putting aside for the moment the problem of in-the-can music for content produced by third parties, over which local stations have no control--if a specific composer demanded an astronomical license fee for performance of his/her music, the local station would have a decision to make whether it wanted to pay such a fee or try to craft its own offerings to avoid that composer's music. For some composers, eliminating their music might make some of the programming aired by a particular station less attractive to at least some viewers, so such a composer would certainly have some market power. Market power of this kind is, from an economic perspective, the expected and appropriate consequence of the principle of copyright.

The market power of ASCAP and BMI is of a wholly different character. On the simplest level, each PRO represents millions of musical works created by tens of thousands of composers, each of which is granted by copyright *individual* control of his/her own works. Those works could, at least in principle, compete with each other for inclusion in audiovisual programming. For many individual composers to put their works in the hands of a single agent and empower that agent to negotiate for the licensing of the overall repertoire is a form of collusion that greatly amplifies whatever market power each composer possesses acting on their own.

But this simple picture of ASCAP and BMI as increasing market power by collusion still significantly understates the degree of market power they possess. Imagine a hypothetical world in which every musical composition were registered by its owner in a public database that made clear who had the right to license that work for performance, and how to contact them to secure such a license. Imagine further that every audiovisual program ever created was similarly identified in a public database, which indicated every musical work in the program, with a unique identifier that provided a

[3] As discussed below, SESAC is a third PRO from which local stations must secure licenses. SESAC is not subject to a consent decree, but in a private antitrust suit brought against SESAC by local television stations, Judge Engelmayer determined that SESAC's repertoire—which is smaller than but analogous to ASCAP's or BMI's—was an appropriate market definition for antitrust analysis. Judge Engelmayer reached this conclusion, at least in part, because he determined that the repertoires of ASCAP and BMI were not effective substitutes for SESAC's. Judge Englemayer went on to conclude that SESAC possessed market power in that defined market, as argued above.

link to the other database on musical works. In that (very hypothetical) world, if ASCAP, negotiating on behalf of all its rights holders, asked a local station (or any other provider of audiovisual programming) for an exorbitant license fee, the station could at least think about saying 'no'. True, it would lose a lot of value by losing access to a very large number of musical works (and associated programs already 'in the can'); this is the market power inherent in the collusion effect described in the previous paragraph. But it could, in this hypothetical, at least determine what programs that it has produced or licensed would now be worthless. It could balance that loss against the demanded license fee, which would put some limit on the market power of the ASCAP cartel. In the *real* world, however, in which there are no databases as described, a local station has no way of determining with certainty all of the in-the-can programs it would have to abandon if it lost its ASCAP or BMI license. It would have no ability to balance the value of a knowable set of programs against the license fee being demanded. With so much information unavailable, and facing statutory infringement penalties for even unintentional infringement, a local station simply cannot operate without holding licenses from both ASCAP and BMI. It has no ability to engage in economic balancing of the value of the specific music licensed by the PRO against the magnitude of the license fee demanded. The ASCAP and BMI licenses are necessities of doing business. This is the ultimate in monopoly power.[4]

IV. The ASCAP and BMI Consent Decrees

As I understand it, the ASCAP and BMI Consent Decrees came about because the Antitrust Division challenged the above noted collusive behavior in which those PROs monopolized the combined works of many creators. The logic of the Decrees is that appropriate restrictions on the behavior of the PROs can allow them to engage in collusive pricing while mitigating the anticompetitive consequences that would otherwise flow from such behavior. From an economic perspective, the Decrees function to allow a solution to the overwhelming problem of securing a huge number of poorly documented music performance rights, while mitigating the monopoly power that the need for blanket protection confers on the PROs.

The nature of the restrictions imposed by the Consent Decrees is directly tied to this function, that is, the restrictions mitigate the ability that the PROs would otherwise have, by virtue of collusive

[4] Indeed, the existence of multiple distinct inputs, each of which is needed for production, can create greater overall market power than if a single input were monopolized. This is what is referred to in the economics literature as the problem of 'Cournot complements', because Augustin Cournot was the first to analyze it formally.

pricing, to elevate licensing fees above the level that would result from competition among different music rightsholders. Specifically:

1. ASCAP and BMI must grant a license to anyone who requests one, because restricting access to the collective product is the mechanism by which a cartel (i.e., the PRO) elevates the price.

2. If ASCAP or BMI cannot reach agreement with a licensee on the license fee, that fee is determined by a neutral party (the "Rate Court"), because otherwise the PROs' control of the repertory of thousands of composers would allow them to insist on license fees far in excess of what those composers could individually negotiate.

3. ASCAP and BMI are prohibited from restricting their affiliated rightsholders' ability to negotiate individually to license their works, in order to mitigate their collusive market power by allowing for the possibility of competition alongside the collective licensing.

4. ASCAP and BMI are required to offer licensees "genuine alternatives" to the blanket license, and to allow licensees to adjust to some limited extent their blanket license fees to reflect works for which they have secured performance rights directly from the rightsholders, again in order to mitigate the collusive market power of blanket licensing by allowing competing mechanisms to operate in parallel with the collective blanket license.

The combined effect of these provisions is that local stations can secure licenses from ASCAP and BMI at reasonable cost. When a license expires, the station is entitled to a renewal license that cannot be withheld by the PRO. If the local station and the PRO cannot agree on the fee for that license, either of them can ask the Rate Court to determine a reasonable fee. Rate Court jurisprudence has evolved such that the 'reasonable' license fee standard is interpreted as seeking to replicate the music performance license fees that would be secured by copyright holders, given the market power that their copyrights convey, in an otherwise competitive market. *United States v. ASCAP (In Re Applications of Real/Networks, Inc. and Yahoo! Inc.)*, 627 F.3d 64, 76 (2d Cir. 2010) ("fundamental to the concept of 'reasonableness' is a determination of what an applicant would pay in a competitive market."); *United*

States v. ASCAP (In Re Application of Buffalo Broad. Co.), No. 13-95 (WCC), 1993 WL 60687, *16 (S.D.N.Y. Mar. 1, 1993) ("[T]he rate court must concern itself principally with defining a rate ... that approximates the rates that would be set in a competitive market."). That is, the Rate Courts seek to award music rights holders the value of their works conferred by copyright, but not any additional value deriving from the inherently anticompetitive nature of their collective pricing of blanket licenses.

Since both parties know that Rate Court is always an option, they have limited incentive to demand an unreasonable license fee. In most cases, the Rate Court operates only in the background—the parties' mutual knowledge of that option causes them to agree on a license fee through negotiation. Indeed, while the local television industry has found itself in rate court proceedings with ASCAP and BMI, the rate court has not had to set rates for the industry for decades, as the stations and ASCAP/BMI have ultimately been able to reach negotiated agreements. And the vast majority of ASCAP and BMI licensees never find themselves in rate court proceedings, as most users are able to reach an agreement, with the rate courts' mere presence being sufficient to bring about agreement.

While one can imagine regulatory or legal regimes that might be hypothetically more efficient than that created by the Consent Decrees, the status quo works reasonably well. The operation of the decrees normally requires little oversight by the Justice Department. Other than in the context of specific reviews, most of the activities governed by the Decrees are carried out either exclusively by private parties, or by private parties using the Federal Court without Justice Department involvement.

In terms of the use of the Federal Courts, the Decrees are again extremely efficient. The mere fact that Rate Court is *available* to both parties as an option, with the expectation that its use will result in 'reasonable' license fees, facilitates the parties' reaching agreement on license terms without *actual* resort to Rate Court. There is language in the Consent Decrees that requires ASCAP and BMI to charge the same license fees to different licensees if they are 'similarly situated'. This means that any fee determination that is made by the Rate Court immediately creates a benchmark that shows both the PROs and their licensees what is likely to be considered a reasonable fee for all licensees similar to the one for which a reasonable fee determination has been made.

Indeed, there have only been a handful of rate proceedings that have gone all the way through trial over the last decade. While these proceedings were probably individually expensive for the participants, no one is required to go to Rate Court. It can always be avoided by agreeing to the other side's terms. Further, the knowledge that Rate Court is always an option operates to move the parties towards agreement; even after filing an action in Rate Court the parties frequently settle without going to trial. These license negotiations, all of which benefit from the framework of competitive music

performance license fees created by the Rate Court, result in license revenues of more than $1 billion per year for each of ASCAP and BMI. Hence, from the perspective of society overall, the literal handful of individual Rate Court cases should be seen as representing the cost of effective management of many billions of dollars of license fees flowing under license agreements that ASCAP and BMI have signed with thousands of licensees over this 10-year period. The vast majority of these agreements came about without any specific Rate Court cost being incurred by anyone, but they still benefited from the *option* of Rate Court in order to keep the license fees below the monopoly level.

Not surprisingly, ASCAP and BMI would prefer to operate without these restrictions. But from a public policy perspective, the predicate for a performance-licensing regime without these restrictions should be independent licensing by distinct copyright owners, subject to action under the antitrust laws (for example, if they attempt jointly to set the price for portfolios of works from multiple distinct rightsholders). If, on the other hand, the rightsholders wish to continue to price performance rights jointly through blanket licenses, then the above restrictions are entirely appropriate to mitigate the market distortions of unrestricted collusion.

V. The Rate Courts have functioned to move license fees away from monopoly levels and towards the competitive level

As noted above, part of the compromise inherent in the Consent Decrees is that ASCAP and BMI are permitted to engage in collective licensing, but given the likely effect of such collusion on license fee levels, license fees are set by the Rate Courts if the parties cannot agree. As noted above, to fulfill this role, the Rate Court is charged with setting license fees that approximate rates that would prevail in a competitive market.

The available evidence from experience with the musical works performance license market itself suggests that while Rate Courts exert downward pressure, license fees generally remain above the competitive level. First, in circumstances where licensees have been able to utilize direct (non-collective) licensing on a significant scale in a reasonably competitive marketplace in which individual rightsholders were competing against each other on the basis of price to have their works performed, the resulting prices have been well below the rates of collective licenses. DMX provides packages of recorded music that retail stores and other businesses play in the "background" in their establishments. As such, DMX has direct control over which music is performed by its service, and the nature of the service is such that programmers have great flexibility as to which music to use. (That is, DMX does not face the problem of securing rights to performances in 'in the can' programs, described above.) While historically the rights

to these public performances were conveyed by blanket licenses from the PROs, in 2006 DMX embarked on a campaign to secure public performance rights directly from individual music publishers ("direct licenses"), with the explicit intention of using these directly acquired rights in place of those secured through the PROs at the blanket license rates.

Over a period of 5 years, DMX was able to secure hundreds of direct licenses from music publishers – both small and large – whose catalogs collectively accounted for upwards of 30% of the musical works performed by DMX. *In re Application of THP Capstar Acquisition Corp.*, 756 F.Supp.2d 516, 528 (S.D.N.Y. 2010). The effective rate in these publishers' licenses for the music in the ASCAP repertoire was the publishers' pro-rata share of about $11 per DMX location. *Id*. at 548. In contrast, the previously established ASCAP rate, based on ASCAP's license with Muzak, another background music service was, on a comparable basis, approximately $30-40 per location, depending on how specific features of the Muzak license are considered. *Id*. at 524.

This dramatically lower rate for the direct licenses was the result, at least in part, of publishers' expectations that DMX would favor the music owned by its direct licensees in formulating its programs, so that the lower rate would be offset by a larger share of the overall DMX royalty pie. *Id*. at 550. That is, while the blanket license eliminates any possibility of competition for performances, this direct license regime effectuated competition. If the Rate Court and the Consent Decree regime more generally were suppressing license fees below the competitive level, publishers should be unwilling to license directly at an even lower rate. The fact that publishers in this competitive regime chose to accept license fees considerably less than half the Rate-Court-influenced ASCAP rate suggests strongly that the Rate Court, at least in this case, was perceived to be willing to sanction rates well above the competitive rate.

This licensing experience of DMX provides an example of a competitive market for musical works performance rights at work, and demonstrates that in this context such competition produces license fees much lower than those produced by collective licensing. There is no way to know precisely how this experience would translate to other performance licensing contexts, but it is at least suggestive that the economic prediction that collective licensing elevates license fees is correct and is quantitatively significant.

A second source of evidence regarding the relationship between Rate-Court-influenced license fees and the competitive price level is at the opposite end of the competitive spectrum. SESAC – a third U.S. PRO and one that is not subject to a consent decree – also licenses local television stations. For many years, it was able to raise its license fees in a manner inconsistent with normal competitive market forces. Despite the fact that it is far smaller than both ASCAP and BMI, SESAC has been able to amass,

through collective licensing, monopoly power. With this monopoly power, SESAC, beginning in 2008 when it was freed from externally-imposed constraints, demanded from local television stations significant, ongoing license fee increases. This was so despite the fact that the data showed SESAC music use by local television stations declining, and the industry (and the economy generally) was in the throes of the "Great Recession." It is my understanding that SESAC dealt with radio stations in a similar fashion.

Nevertheless, because of the impossibility of cue-by-cue licensing discussed above, television and radio stations felt that they had no feasible alternative but to take a SESAC blanket license. Indeed some stations were informed by SESAC that it was withdrawing interim authorization for performance of its music and therefore the station would be subject to copyright infringement claims if it did not agree to the license terms demanded. *RMLC v. SESAC, Inc.*, Civ. No. 12-5807, Report and Recommendation, (E.D. Pa. Dec. 20, 2013*); Meredith Corp., et al. v. SESAC, LLC*, 1 F.Supp.3d 180 (S.D.N.Y. 2014). Eventually, all stations gave in to SESAC's demands. This ability to dramatically raise one's price, as SESAC was able to do, without suffering any loss in business is the hallmark of monopoly power. *Meredith Corp., et al. v. SESAC, LLC*, 09 Civ. 9177 (PAE), 1 F.Supp.3d 180 (S.D.N.Y. 2014).

As a result of SESAC's abuse of its monopoly power, private antitrust suits were brought against it by television stations and by radio stations. These suits were settled by agreements under which, interestingly, SESAC agreed to be bound by terms that have much in common with the Consent Decrees. In particular, its license fees are now subject to arbitration that operates much like the Rate Court to constrain SESAC's ability to charge unreasonable license fees.

VI. The ASCAP and BMI Rate Courts are reasonably flexible and appropriate mechanisms for the task of ensuring reasonable music performance license fees

The foregoing discussion shows that the problem the Consent Decrees are designed to solve is a real one. It is nonetheless fair to ask whether or not the decrees constitute a reasonable solution to this problem.

While the advent of digital technologies and the growth of the Internet have changed the modes of distribution by which music performances requiring licensing are delivered, they do not change the underlying reality that collective pricing for millions of compositions creates monopoly power that is not present in the individual composers' copyrights. Hence while conducting a review of the Consent Decrees may be appropriate, there is no analytically valid basis to suggest that these new technologies undermine the need for the oversight the Consent Decrees provide.

Another issue raised along these lines is whether the Consent Decrees – consistent with the general presumption applied to consent decrees – should "sunset" after some period of time. There are, however, good reasons why the general presumption that antitrust consent decrees should "sunset" after some time does not apply here. First, most antitrust enforcement actions emerge out of a particular set of market conditions at a point in time. In most markets, companies that manage to establish some kind of monopoly position can be expected to be unable to sustain any such dominance over time if prohibited from engaging in anticompetitive behavior. But the market power associated with the collective pricing by the PROs is fundamentally different. It is not the result of a narrow or temporary set of circumstances – it is inherent in the licensing structure they have chosen to establish, and around which the industry has organized itself for decades.

Second, the general presumption that consent decrees should be of finite duration in no way implies that when a consent decree ends the firms involved are subsequently somehow exempt from the antitrust laws. But while BMI and ASCAP appear to be advocating for the sunsetting of the Decrees, they do not seem to be proposing ending their practice of collective licensing. What they apparently seek is weakening or removal of the Consent Decree restrictions, while they would continue to be permitted to license collectively. The analogy to such a proposal is not "sunsetting" of a narrow consent decree, it is broad exemption from the antitrust laws that apply to everyone else.

VII. What would happen if the Consent Decrees were abandoned

a) Increased market power over music license fees

From an economic perspective, the Consent Decrees should be abandoned only if that would result in a more efficient market for music performance rights (including consideration of legal, administrative and other transactions costs). It is, of course, impossible to say for sure what will happen if the decrees were abandoned. In this section I explain why it is highly likely that the result would be a reduction in efficiency, with associated increases in costs and decreases in variety for consumers.

One might imagine that without the decrees, a competitive market would emerge in which the need for PROs would disappear. Hypothetically, one could imagine a market in which all music performance rights were acquired directly from composers, without the use of PROs. In this world, composers would have only the market power conferred by copyright, but no more.

One version of this hypothetical is a world in which all performance rights for the music in an audiovisual program, in perpetuity, are acquired by the producer of the audiovisual program at the time it is produced, and then sold to local stations as part of the bundle under which the program itself is sold

or licensed. The surface plausibility of this approach can be seen from the fact that at the time of program creation the producer is either contracting for the initial composition of the work, or else purchasing the 'sync' right for incorporating a previous audio recording into an audiovisual work. It would seem a simple matter to bargain over and agree to additional money to be paid to the composer for also including the performance rights.

But we must think about the incentives of the rights holders. If they grant the performance rights up front, they do so when they have the least bargaining power. Once the work is 'in the can' their bargaining power will be much greater, because the owner of the program cannot use it without their agreement. If the program has become very popular, the composer could demand a very high royalty to allow its performance, whether or not the popularity has anything to do with the music in the program. They would have the hold-up power discussed above—the ability to extract additional compensation from the fact that a counterparty has a sunk investment that they cannot utilize without the permission of the party engaging in hold up.

The relevance of this consideration is illustrated by the case of the music performance rights needed to show movies in movie theaters. Today, those rights are, indeed, acquired by the producer when the movie is made, and provided to the theaters as part of the movie license. But this only came to pass as the remedy of an antitrust case—previously performance rights were withheld, and theater owners had to secure music performance rights from ASCAP.

Were the Consent Decrees to be abolished, we would not be starting from a blank slate. The benefit to composers of having ASCAP or BMI collectively negotiate for performance license fees *after* programs are created are obvious. A handful of composers might agree to direct licensing of their works, but there would be strong pressure of precedent and collective benefit operating to prevent it (unless, as in the case of movie theater performances, they were somehow required to do so).

Finally, even if direct licensing did somehow emerge for performance rights in newly created programming, we would still have the entire existing body of audiovisual programs that do not have such rights attached to them. As discussed, local stations would face both the overwhelming information difficulties of securing rights to that music, and hold up for very high royalties in those cases where rights holders could be contacted.

A second version of the hypothetical no-PRO world would be one in which all performance rights were acquired directly from rights holders in an ongoing way, as the programs are made available to be broadcast on local stations. This takes us back to the hypothetical discussed above: *if* there were a complete public database of composers, and also a database of the music contained in audiovisual

programs, such a market might be possible. The number of transactions involved would be enormous and hence the transactions costs might be prohibitive. Local stations and others would continually face the problem that they need to secure rights *before* they permit a program to be aired, while the information might be delayed or ambiguous, so they would live in a perpetual state of possible infringement liability. But we don't need to take much time thinking about such practical difficulties, because the hypothetical databases do not exist. Perhaps they would emerge on a going-forward basis, though it is hard to see how the people who have the necessary data have an incentive to create such databases, if the alternative is the monopoly world discussed in the next section. And, even if the needed databases came into existence on a going forward basis, it would not solve the problem of the existing in-the-can programming.

Given the implausibility of these 'competitive' possibilities, the most likely outcome if the Consent Decrees were abandoned would be that ASCAP and BMI would continue to offer blanket licenses, local stations would continue to need them, and ASCAP and BMI would be able to extract greatly increased monopoly license fees, with associated increases in cost to consumers, reductions in local stations' profits, reductions in payments to other creative contributors to audiovisual programming, and reductions in program variety and music content.

On day one of a new no-consent-decree world, local stations would be in pretty much the same position they are in today. Collectively, they would be facilitating billions of performances of thousands of programs, almost all of which contain music, and for many of which the stations cannot identify that music or who controls the right to license it. To avoid potentially crippling legal liability, each station would still need blanket licenses from ASCAP and BMI.

What would change is when its existing licenses expire. Under the Consent Decrees, local stations can simply ask for a license renewal, and BMI and ASCAP must grant renewal or extend license protection on an interim basis. Without the Consent Decrees, ASCAP and BMI could threaten to say 'no license for you', which would effectively be a threat to shut the local station down. It is impossible to say just how much the license fee demands would increase, but the only constraints that would operate on ASCAP and BMI would be those that operate on any monopolist. As discussed above, the Consent Decrees attempt to operate to align music performance license fees with what would prevail in a competitive market, meaning that music rights holders receive compensation for performance of their music that roughly reflects the economic value that the music contributes to the program. The essence of the hold-up problem is that without the constraints of the Consent Decree, BMI and ASCAP could demand compensation representing a much higher share of the *total* value of the program. Because

blanket licenses are essential to broadcast the program, and local stations do not have the option in most cases of excising any or all of the music from the programs, there would be no force constraining ASCAP and BMI demands to reflect the value of the music per se. In the short run, they could in effect appropriate a significant fraction of each stations' investments in existing programs as well as funds that stations have already committed to pay for future programming.

These losses and the cost increases they represent for local stations would ripple through the economics of broadcasting. Faced with costs for music performance rights that are not constrained in an effort to better reflect the competitive market value of the music, local stations would likely have to either increase the amount of commercials aired, reduce the amounts that they are willing to pay to create or license programs, or both – all of which will result in a reduction in quality. The reduction in quality would reduce demand, so that in the aggregate there would be reduced viewing of audiovisual programming. This reduction in use of the product is the source of the 'deadweight loss' that is the reason why monopoly outcomes are not socially desirable.

With respect to new programming, fewer new shows would be made, and the creators of non-musical elements would receive a reduced share of the overall program value. In effect, because ASCAP and BMI could use their monopoly power to demand more than the competitive market price for music performance rights, the payments to other contributors would have to go down. Thus actors, screenwriters, directors and others would take a double hit to their income, as they received a reduced share of shrinking overall revenue stream. As fewer programs were produced the variety of programming available would decline. I have discussed this scenario in terms of a local television station and its incentives, but the same forces would be operating on all entities that perform audiovisual content (including both ad-supported and subscription media), so the harmful effects would be across the board.

b) Private antitrust lawsuits as a solution to abuses of market power

It is possible that this inefficient monopoly outcome would generate private antitrust suits, as it did in the case of certain users and SESAC. It is possible that such suits could mitigate the inefficiencies generated by the loss of the decrees, but they would themselves be costly, and they are not likely to reproduce the benefits of the Consent Decrees.

First, antitrust suits are expensive, typically significantly more expensive than Rate Court cases, because they involve a much wider range and deeper complexity of factual issues.[5] Questions of market

[5] As one indication, in the television industry private antitrust suit against SESAC, the judge awarded the plaintiff $16 million for attorneys' fees and expenses. *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 671 (S.D.N.Y. 2015).

definition, market power and the competitive impact of specific behaviors would have to be addressed through discovery and expert testimony. All of this would be over and above the arguments over license fee levels that comprise a Rate Court case, but would also be part of an antitrust case. In other words, a private antitrust case requires almost everything a Rate Court case requires, plus a whole lot more.

At the same time that private antitrust litigation is more expensive, it offers greatly reduced certainty about the nature of the remedies that might be secured. While parties in Rate Court disagree about the *level* of the reasonable license fee, everyone operates under the understanding that determining that number or set of numbers is what the case is about. In a private antitrust case, even if monopolization or other legal violations are proven, there remains uncertainty about not just the level of damages, but the very nature of the remedies that a court may be willing to order.

The increase in litigation costs and increased uncertainty about remedies are a waste from society's perspective. They also would make the threat of private antitrust litigation a less effective discipline on prices than the threat of Rate Court litigation. Music rights holders would know that they could increase license fees up to the point where antitrust litigation became a major risk, and that point might be high because the litigation is so expensive and its outcome so uncertain.

There is no way to know exactly how the pattern of private actions would play out, but it is highly likely that the patchwork of resulting decisions would provide a less clear benchmark for market participants as to what license fee levels are acceptable than exists today under the Rate Court's reasonable fee standard. As a threshold matter, in the absence of the 'similarly situated' standard in the Consent Decrees, it is entirely unclear to what extent one licensee could rely on the outcome of another's private antitrust case as a benchmark for the likely outcome if it were to bring suit. This is illustrated by the case of SESAC; as noted above local television stations and radio stations have brought private antitrust action against SESAC. These plaintiffs now enjoy some benefit from that litigation, in the form of, amongst other things, a right to arbitration over fees. But no other SESAC licensees get any benefits from these outcomes—there is no mechanism by which they can leverage the case results for use in their own SESAC negotiations. The lack of ability to leverage private antitrust outcomes to achieve non-monopoly outcomes across markets would be exacerbated by likely forum shopping by different parties bringing suit in parts of the country that they think are most sympathetic to their perspective. It is possible that the Supreme Court would eventually need to intervene to resolve conflicting standards in different appellate courts.

In summary, as compared to the existing Rate Court regime, the possibility of private antitrust suits promises higher costs and more uncertainty for the parties involved, while yielding considerably reduced social benefit because other market participants would not benefit from the outcomes.

While all of these legal unknowns played out, music users would be living under greatly increased uncertainty about their ultimate cost of doing business, and music rights holders would face uncertainty about their incomes. It is likely that new projects would be discouraged or delayed, as producers and participants were unsure of the ultimate economics of the projects. Thus private antitrust cases are greatly inferior to Rate Court as a societal solution to the market power of the PROs.

Of course, it is possible that Congress will pass new legislation that changes the music licensing landscape. If so, it would then be appropriate to reevaluate if, under the new legislation, there is a continued need for the Consent Decree or if the legislation will lead to a more efficient market for music performance rights licensing. That analysis is very much dependent on the new legislation being passed. For the reasons discussed above, simply abandoning or sunsetting the Decrees in the absence of a new regime will almost certainly result in a far less efficient market – one ripe for abuse by PRO monopolists.

VIII. Potential improvements to the Consent Decrees

In addition to asking whether the Consent Decrees are an effective means of addressing the market power problems that arise as a result of collective licensing, it is also appropriate to considering whether there are improvements that can be made to the Decrees to further their underlying goals. In what follows, I discuss two potential modifications to the Decrees that, if implemented correctly, can further improve the functioning of the music licensing marketplace.

a) Fractional licensing

First, consideration should be given to whether the Decrees should be modified to explicitly prohibit "factional licensing." As I understand it, shortly after the DOJ concluded after its last review of the Decrees that fractional licensing was barred by the language of the decrees and should be prohibited as a matter of antitrust policy, BMI sought, and obtained, an order from the court that supervises its Consent Decree allowing it to license on a fractional basis. That ruling was affirmed by the Second Circuit, which concluded that nothing in the current BMI decree prohibits fractional licensing. That being said, the Second Circuit went on to note 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." *United States v. Broadcast Music, Inc.*,

720 Fed. Appx. 14 (2017). In my view, the DOJ should take the Second Circuit up on this offer and move to amend the Decrees to prohibit fractional licensing.

As noted above, the fundamental underlying economics of the Consent Decrees is that society accepts one undesirable—market power created by collective licensing—in order to reduce another undesirable—transaction costs. Fractional licensing undermines this beneficial tradeoff by simultaneously increasing both market power and transaction costs. Fractional licensing undermines collective licensing in that the efficiencies afforded users under existing PRO license arrangements are diminished. No longer do users enjoy all of the transaction cost efficiencies created by collective licensing, as they now face the prospect of having to ensure that there are no fractional interests in any of the works that are otherwise in the ASCAP and BMI repertories that are being performed that are not licensed by ASCAP and BMI. Attempting to identify and negotiate with each and every such co-owner of these "split works" increases costs faced by licensees, thereby leading to higher prices or lower quality for consumers, and harming overall consumer welfare.

The ASCAP and BMI Decrees also, as a result of fractional licensing, afford users lesser protections than they would under a full works licensing regime. As noted above, the Consent Decrees obligate ASCAP and BMI to provide a license to any user immediately upon request. Requiring a licensee to secure not only a license from each of ASCAP and BMI, but also a license from each copyright owner of a split work that is unaffiliated with ASCAP and BMI, just to perform works that are otherwise in the ASCAP and BMI repertories, diminishes this protection. This gives the rights holders that are not affiliated with ASCAP or BMI the hold-up power discussed above and makes a license from each such owner a necessary addition to ASCAP and BMI blanket licenses. Such a system creates strong incentives for copyright owners with partial ownership interests to exploit the market power created as a result of the ability of ASCAP and BMI to engage in fractional licensing. In short, fractional licensing devalues the efficiencies and protections from copyright infringement the Decrees offer, in favor of affording musical works rightsholders a vehicle to do precisely what the Decrees aim to prohibit.

These potential adverse effects are particularly acute for licensees that utilize "in the can" third-party produced programming and advertisements. As discussed above, the music in such programming is selected by third parties, and the licensee typically has no choice but to play the music that has been pre-selected for it. Requiring such licensees to identify and to engage in after-the-fact negotiations with every co-owner of split works embodied in their programming would be particularly impracticable. Indeed, these licensees could well have to forego broadcasting programming containing such split works as a result of the hold-up power of one co-owner of one composition. It is not uncommon, for example,

that a given television program will have dozens of cues, each controlled by various combinations of different copyright owners. Under such circumstances, not only would the licensee be harmed, but the co-owners that license through ASCAP or BMI would also be harmed, as they would no longer earn royalties for performances of their works.

b) Transparency

A final improvement that should be given careful consideration is modifying the Decrees to require ASCAP and BMI to be more transparent by making their databases of music use information publicly available. Both ASCAP and BMI maintain cue sheet databases that have significant (although by no means complete) information on what musical works are embedded in what programming, who the composers and publishers of those works are, and what the PRO affiliations of those composers and publishers are. Making such information publicly available will serve to lessen the informational issues discussed at length above, thereby increasing the transaction cost efficiencies created by blanket licensing.

IX. Overall summary

- It is intrinsic to music use in local television programming that blanket licenses for music performances are a necessity of doing business. In the absence of the Consent Decree protections, local stations would likely face significant cost increases, which would increase cost and diminish variety for consumers.
- While theorists and lawyers could discuss whether there is a better way to determine music license fees than the Consent Decree system, it has worked reasonably well, incurring relatively small costs as compared to the scale of licensing activity that it supports.
- Decades of life with the Consent Decrees in place has led to practices and investments that assume the Decrees' continued existence. Dissolution of the Decrees would create significant opportunistic behavior, in which parties would be able to 'hold up' other parties who have significant value locked up in investments for which they would suddenly and unexpectedly have to negotiate permissions.
- While it is impossible to know exactly how the world would evolve without the decrees, there is no reasonably likely scenario in which society would be better off.
- The Decrees can be modified so as to improve the overall efficiency of the music licensing marketplace.