



**Regulatory
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Unlocking Innovation & Opportunity

De-Regulating the Songwriting Business

Intellectual Property

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I. Introduction

Most people would be surprised to discover that music is among the most regulated of all the products and services they enjoy every day. Most U.S. businesses in most industries are free to set their own prices and determine how they do business. This freedom generally exists even for businesses that supply the necessities of life or sell potentially dangerous products.

The music industry does not enjoy this freedom.

Through a combination of historical accidents, momentum, and politics the U.S. government has ended up strictly controlling the prices that radio stations, streaming services, and others pay to use music, and also regulating the terms of sale. The government's controlling hand lays heavily on the music business. Contrary to the glamorous image of entertainment law and business, getting paid for music is governed by dense, arcane laws and regulatory procedures that rival the tax code in complexity.

What is particularly galling is that some of this strict control was not even put in place by Congress through democratic processes. Rather, courts have been running part of the music business since 1941 as a result of special court settlements called "consent decrees." Unlike ordinary settlements, which end the court's involvement in a lawsuit and let the parties move on, a consent decree is a settlement that the court continually oversees. As a result, a handful of judges determine how songwriters and composers get paid for the use of their music and how they can do business.

How did judges end up setting licensing fees for songwriters? In 1941, following antitrust lawsuits brought by the U.S. government, the two major entities that then represented songwriters and composers – ASCAP and BMI – settled with the U.S. government. The resulting consent decrees assigned a judge the authority to set prices for performing, broadcasting, and, much later, streaming songs. Under the consent decrees, judges also govern many of the aspects of how songwriters, composers, and the entities that represent them do business.

The 77-year-old consent decrees were originally designed to regulate a marketplace that faded into history a long time ago. They pre-date streaming services, the internet, commercial FM radio, and even the birth of rock, hip-hop, and most other modern popular music genres. The music business has evolved and changed many times in the intervening years, but the consent decrees march on determining how songwriters are compensated.

This level of government regulatory control is unusual for any U.S. industry, but is especially incongruous when applied to the relatively innocuous music industry. In the years since the consent decrees, the U.S. has deregulated airlines, phone service, interstate shipping and other key industries.

Even worse, the regulation of songwriters is done by unelected judges. By contrast, most regulation is overseen by administrative agencies, such as the Food and Drug Administration and the Environmental Protection Agency. Typically, these agencies address very technical issues, which are often essential to health and safety. Agencies offer technical expertise on complex issues and keep important social protections up to date without the constant need for contentious legislative

bargaining. Meanwhile, they remain at least somewhat accountable through presidential appointment and Senate confirmation.

In this regard, the 77-year-old ASCAP and BMI consent decrees have it backwards. The federal judges who oversee them have no particular expertise on the economics of the music industry or on the continual technological modernization of music distribution platforms. As federal judges have lifetime tenure, they are also democratically unaccountable for their decisions, even though their decisions are as far-reaching as any agency regulation.

Not only have the consent decrees put a few unelected and unaccountable judges in charge of the businesses and careers of generations of songwriters, they have also interfered with the market's need to evolve. The music business has changed dramatically over the past 20 years, but the judges and government lawyers who oversee the consent decrees have refused to allow songwriters and copyright owners the freedom and flexibility to try new business models.

Fortunately, there is some reason to be optimistic. The Department of Justice, which has long been a key player in these consent decrees, has recently announced a review of aged consent decrees, recognizing the need to account for changes in industry structure, economic understanding, and the law itself. Assistant U.S. Attorney General Makan Delrahim, who currently heads the DOJ Antitrust Division, has targeted the ASCAP and BMI consent decrees for particular scrutiny. These efforts should be supported. Still, there are signs that these consent decrees may not go quietly into the night, as recent legislation requires that notice be given to Congress before any termination of the consent decrees so that Congress may review the decision.

The long history of the ASCAP and BMI consent decrees is an entrenched problem that may require sustained effort to correct. How did such an odd form of regulatory control arise, why has it persisted for so long, and what can be done to fix it?

II. Regulating a Bygone Marketplace

To understand the problem, it is helpful to begin with the 1941 lawsuit itself. The federal government sued two companies: ASCAP and BMI. These companies were providing a market solution to a complex problem. However, the very reason they could do this effectively was that they were large companies with influence in the market. The government was more concerned with these companies' market power than with the benefits of their solution, hence the lawsuit.

The solution itself goes like this. ASCAP and BMI are two successful examples of performance rights organizations, or PROs. Each manages a large portfolio of copyrights over a wide variety of songs. The songwriters, composers, and others who own these copyrights allow the PRO to negotiate on their behalf in the sprawling landscape of music users. This includes television and radio stations, restaurants and bars, and, in the modern age, streaming services and other internet music distributors.

The PRO is an intermediary. It typically offers a user a blanket license over the entire portfolio, meaning the user has permission to perform any of the millions of songs in the PRO's repertory for

a set time period. It may also offer licenses per program or per segment, which may be better suited for the user's particular needs. Finally, the PRO collects royalty payments and distributes to the artists their respective shares according to an apportionment formula.

This was much simpler than each artist negotiating with each music user individually, to say nothing of obtaining a desirable royalty payment. It was also cheaper. Each negotiation costs time and money to conduct, and a radio station or a restaurant is unlikely to choose songs or even artists individually. Dealing in bulk delivers the result in a single transaction, or in just a few, which is far more preferable for music users. The scale of a large portfolio also allows a PRO to negotiate a more favorable rate for the artists' shares than artists could negotiate for themselves.

Unmoved by these economic benefits, the federal government took issue with the size and market power of ASCAP and BMI. To them, these companies' ability to secure higher royalty rates for artists was an antitrust problem to be solved because it resulted in higher prices for companies who sought these valuable blanket licenses. In the end, ASCAP and BMI settled with the government through the 1941 consent decrees. The PROs could continue to operate and fill an important market need, but only under the supervision of federal judges. Ironically, this resulted in an even more stark antitrust problem. Rather than a market price for blanket licenses, as had been the case, ASCAP and BMI would be subject to artificial price-fixing by the judges.

The consent decrees also imposed other restrictions. When songwriters and music publishers wanted to increase prices or change business models, they had to get court approval. They had to negotiate or overcome the objections of their customers (who naturally wanted to pay as little as possible) and government lawyers. Each time, the judge decided the case without any real knowledge of music's actual market value. The same is true today, though the technological, economic, and even artistic modes of music have evolved past the marketplace of 1941.

It is time to reevaluate these consent decrees against the modern marketplace for music. This extensive degree of regulatory control continuing for almost eight decades is unusual for any U.S. industry, and all the more harmful because it lacks even the administrative state's basic benefits and expertise or basic safeguards of accountability. If it cannot be justified for any other reason than the inertia of history, then the music industry is well rid of it.

III. Trying to Promote Competition through Consent Decrees

The intent of the Justice Department, which brought the lawsuits against ASCAP and BMI and continues to keep the consent decrees in place, has been to promote competition. In that pursuit, larger and larger companies often become more and more suspicious targets. Performance rights organizations are big business. ASCAP and BMI hold over 10 million works in their respective repertoires.¹ Each accounts for close to 45 percent of the domestic music licensing market or, taken

¹ A third PRO, [SESAC](https://www.sesac.com/About/About.aspx), initially existed to serve European artists whose works are performed in America, but now licenses the rights of American songwriters, composers, and publishers as well. It is a much smaller PRO than ASCAP or BMI and not the subject of a DOJ consent decree. See <https://www.sesac.com/About/About.aspx>. It nevertheless operates in the shadow of the consent decrees and has been subject to private antitrust litigation

together, almost 90 percent of the music licensed in the U.S. And although they compete with each other otherwise, these two PROs both charge the same price for their blanket licenses.

This is not necessarily a hindrance to competition, however. Even an agreement on price can promote market efficiency that might not otherwise come about, such as the convenience of one-stop shopping that a blanket license enables. To make informed judgments about these and related economic facts, antitrust law has come to recognize the “rule of reason,” by which courts must consider not only the costs of a business model but also its benefits. The 1941 Justice Department lawsuit’s reflexive focus on costs and summary condemnation of various business practices as “per se” illegal is a remnant of long-outdated economic thinking.

Since then, each consent decree has been amended only twice: ASCAP’s most recently in 2001 and BMI’s in 1994. Along the way, the Supreme Court has concluded that the two PROs’ blanket licenses are not per se illegal price-fixing.² In the 1979 *CBS* case, the Court specifically noted that the blanket licenses provided valuable benefits that no individual copyright holder could match, including the aggregation of copyrights into a single grant of permission, efficiencies in royalty distribution, and “the immediate use of covered compositions, without the delay of prior individual negotiations.”³ The Court also highlighted that the licenses issued under these plans were all nonexclusive, so that any member could “retain the rights individually to license public performances, along with the rights to license the use of their compositions for other purposes.”⁴

Still, the consent decrees continue to constrain the ability of PROs to innovate beyond the status quo. Even in the event of a disagreement, though the two parties can go before the court to seek renegotiated fees, the burden of proof remains on ASCAP or BMI. In short, rather than promote competition, the consent decrees enshrine economic assumptions that are slow to be updated and legal obstacles that are hard to overcome.

IV. Attempting and Failing to Modernize the Consent Decrees

As the music market changed, songwriters and music publishers started seeking new licensing arrangements. In particular, they sought to partially withdraw their rights from the control of ASCAP and BMI in order to negotiate separately with streaming services such as Pandora and Spotify.

The logic behind partial withdrawal was simple: ASCAP, BMI, and other PROs are absolutely necessary to avoid the essentially impossible task of negotiating with tens of thousands of radio stations and other music users choosing among millions of songs. PROs are needed to bundle rights and offer simple, uniform pricing to all comers. However, in dealing with a handful of identifiable streaming services – today, they would be Apple Music, Spotify, Tidal, Pandora, and a handful of lesser known rivals – songwriters and publishers could effectively negotiate with these known

² *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979).

³ *Id.*

⁴ *Id.*

entities. Moreover, given their digital and centralized models, services such as Spotify can easily include or exclude material from their catalogs.

When publishers and songwriters tried to make this move, however, they discovered just how much an obstacle the consent decrees could be to modernizing music licensing. First, one of the courts governing the consent decrees prohibited partial withdrawal, a decision that was later affirmed by the U.S. Court of Appeals for the Second Circuit. The court held that publishers had to remain either “all in” or “all out” of ASCAP. They could not use the PRO to license to some entities, while cutting separate deals with others. The court’s decision was arguably understandable, as it simply explained that it could not re-interpret the consent decree agreed to by the parties, which required that ASCAP be able to license the entire catalog to all licensees.

ASCAP’s next move was to ask the U.S. Department of Justice to agree to a modification of the consent decree to allow partial withdrawal. What it got instead was not only a rejection of partial withdrawal, but a bold demand by DOJ that would have further regulated the music business and interfered with existing arrangements.

Thus, in August 2016, DOJ decided to increase regulation rather than to relax it. It announced a new interpretation of the consent decree interpretation that required ASCAP and BMI to license on a so-called “full-work” basis. By this, the DOJ meant that BMI and ASCAP must grant blanket licenses that cover 100 percent of the rights to works in the PROs’ respective repertoires, whether it controlled 100% of those rights or not. In many instances, songs are written by more than one songwriter. Those songwriters might belong to different PROs, and thus the PRO would seem to be able to license only the fraction it actually controlled. Customers thus need to go to multiple PROs to ensure they have the full license needed.

DOJ decided that this longstanding business practice of granting fractional licenses had to end. PROs could no longer license on a fractional basis (i.e., provide a license that covered only partial interests in those works). DOJ stated:

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.

There was no adequate explanation for this powerful assertion. Indeed the proposed loss of flexibility appeared to offer no antitrust advantage, but it did compromise the efficiency of their licensing arrangements.

PROs objected that this interpretation would increase administrative costs and hurt songwriters by discouraging them from collaborating with songwriters from other PROs.

By way of example, consider a band of five composer-musicians, each of whom has a fractional interest in the copyright of a song on the band’s new album. Previously, each composer could grant his or her partial interest in the work to his or her PRO; each composer’s PRO could include its members’/affiliates’ fractional interests in its blanket license; and through blanket licenses from each

of the PROs, a user could aggregate the necessary fractional interests in order to cover the whole work.

Under DOJ's new interpretation, however, a song like the one described above could have been included in the ASCAP and BMI repertoires only if the PROs could license it on a full-work basis, and BMI and ASCAP would have been prevented from including only their members' or affiliates' fractional interests in the song in the blanket licenses they sell to users. As the two PROs have noted, this approach had the potential to "cause unnecessary chaos in the marketplace and place unfair financial burdens and creative constraints on songwriters and composers." According to ASCAP President Paul Williams, "It is as if the DOJ saw songwriters struggling to stay afloat in a sea of outdated regulations and decided to hand us an anchor, in the form of 100 percent licensing, instead of a life preserver."

As BMI later observed, "[i]n the world proposed by the DOJ, iconic songwriting teams like John Lennon and Paul McCartney might have worked with each other only if they agreed to join a single PRO. To impose these kinds of restrictions cannot be in the public interest." A quick search of ASCAP and BMI's repertoires reveals that songwriters do indeed spread partial rights among the PROs to many of the same songs. These include some of the top selling singles of all time, including "Call Me Maybe" (performed by Carly Rae Jepsen), which is divided between BMI, ASCAP, and others, and "Thinking Out Loud" (performed by Ed Sheeran), which is divided between ASCAP and BMI.

These views were bolstered by a January 2016 U.S. Copyright Office report, which concluded that "an interpretation of the consent decrees that would require 100-percent licensing or removal of a work from the ASCAP or BMI repertoire would appear to be fraught with legal and logistical problems, and might well result in a sharp decrease in repertoire available through these [performance rights organizations'] blanket licenses."

DOJ's reasoning would have expanded the consent decree's constraints without regard to free market principles, by reducing competition between the PROs to attract members and affiliates. It also would drive musical collaborations away from artistic interests towards commercial ones, because it would incentivize BMI affiliates to collaborate only with fellow BMI affiliates and ASCAP members to collaborate only with other ASCAP members.

BMI challenged the DOJ's interpretation in court. It won, first in September 2016, the District Court agreed with BMI's position, rejecting the government's interpretation and thereby reaffirmed BMI's (and, by necessary implication, ASCAP's) ability to enter into fractional licenses under the terms of the consent decrees. BMI later won an appeal of that decision in December 2017.

While this legal victory must have been somewhat satisfying for BMI, ASCAP, and their members, it was unfortunately nothing more than preservation of the status quo. They originally sought a measure of modernization and deregulation, first from the courts, and then DOJ. What they got instead for their troubles was an attempt by DOJ to impose greater regulation and interference with

their business. Instead of making things better, they spent energy and resources beating back an attempt to make things worse.

Merely keeping the status quo is not a win for songwriters or consumers. It is hard to imagine what an unregulated music marketplace would look like, given that music licensing has been heavily regulated on a worldwide basis for years. Still, we can see some glimpses of innovation from newer parts of the business that are less comprehensively regulated. Thus, there is some variety among streaming services, such as Apple Music, Spotify, and Tidal, which offer some differences and variety to consumers and to creators.

The most inspiring example of the innovation and creative diversity that less regulation could unleash comes from another part of the entertainment business – movies and television. There, content delivery is less regulated, and both consumers and creators are reaping the benefits. Movie theaters, Netflix, Hulu Prime, HBO, broadcast TV, cable, satellite and other venues offer a vast number of ways to enjoy creative works. Innovation has blossomed, as both creators and content delivery services are free to experiment with new business models. Moreover, it is widely acknowledged that creativity is flourishing – consumers have more and better choices than ever.

What more freedom in the music business would yield is hard to predict, but it would almost certainly be more innovative and dynamic than what we have now. Fifteen years ago, nobody could have predicted that the Netflix DVD delivery service would become not only an innovative global streaming service, but also one of the most acclaimed producers of original TV shows and movies. At the very least, lifting the heavy hand of 1940s consent decrees and other regulation would create the possibility for such innovation and creativity. Creators and consumers deserve no less.

V. Another Chance to Improve Things

A new head of DOJ's Antitrust Division has brought a new perspective to consent decrees. In April 2018, Assistant U.S. Attorney General Makan Delrahim ordered a review and termination of “outdated” consent decrees, noting that some were nearly 100 years old. He said then that “The vast majority of them no longer protect competition because of changes in industry conditions, changes in economics, changes in law, or for other reasons. The perpetual consent decrees call to mind the famous line from the Eagles song, ‘Hotel California’: ‘You can check out any time you like, but you can never leave.’” The ASCAP and BMI consent decrees were among a handful singled out for review in this announcement.

By October 2018, Delrahim's intention to terminate the BMI and ASCAP consent decrees had become clear. On October 4th, 2018, he testified to the Senate Judiciary Committee that he and his team intended to “provide a smooth transition towards a market-based solution for how songwriters are compensated.” As of this writing, Delrahim's consent decree review had resulted in DOJ filing 19 motions to end consent decrees in other industries, and it appeared that the BMI and ASCAP ones were soon to follow.

Delrahim made the case to the Judiciary Committee for moving toward a market-based solution. When asked by the Committee what had changed since the decrees were put in place, he pointed out the vast changes in the industry, including the invention of various media that had come and gone and today's reliance on downloads. Delrahim observed that "There is greater consumption of music. You now have streaming revenue outpacing any other form of revenue coming in to the artists . . . it's an area that's very fluid."

However, the end of the consent decrees is not assured. Congress recently passed the massive and consequential Music Modernization Act, which as of this writing awaits the President's signature. The MMA changes many things in the music industry, but it does not really modernize the consent decrees or their approach to royalties for publishers. It leaves them essentially untouched, except for some marginal rule changes.

Significantly, the bill requires 90 days notice of termination of the consent decrees by DOJ so that Congress can review the change. Broadcasters' associations applauded the oversight requirement in order to "prevent the marketplace chaos that would result from DOJ seeking termination of these decrees without a sufficient alternative framework in place."

Thus, songwriters and publishers will need to make the case for change before they are unshackled from the consent decrees. Doubtless there are some businesses who benefit from the consent decrees – what customer wouldn't want to force a seller to go to court every time it raises prices? However, there is no longer a rationale that serves competition and the public for continuing the consent decrees that serves competition and the public. It is long past due for this industry to outgrow these mid-20th Century restrictions on a dynamic 21st century business.

VI. Conclusion

The ASCAP and BMI consent decrees are long outdated relics, imposing heavy and often unpredictable regulation on songwriters and music publishers. DOJ's 2016 attempt to double down on regulating the industry instead of easing regulation shows just how problematic running an industry by consent decree can be. This over-reaching interpretation would have limited the flexibility of songwriters to determine their own creative and economic destinies.

DOJ's turn for the better under Assistant Attorney General Delarahim is quite laudable. As he rightly recognized, it's time to remove the dead hand of 20th Century consent decrees from modern business. In particular, ending the BMI and ASCAP consent decrees would free a well-loved and dynamic industry to meet the challenges and opportunities of the digital marketplace.