Fordham Intellectual Property, Media and Entertainment Law Journal

Volume 26 *Volume XXVI*
Number 2 *Volume XXVI Book 2*

Article 5

2016

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"It's Been a Hard Day's Night" for Songwriters: Why the ASCAP and BMI Consent Decrees Must Undergo Reform

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INTRODUCTION

Christina Aguilera's hit song, "Beautiful," topped the international music charts,[1] won the 2003 Grammy Award for "Best Female Pop Vocal Performance,"[2] and received international critical acclaim for its lyrics about self-acceptance and inner beauty.[3] Aguilera earned a GLAAD Media Award,[4] and Stonewall, a UK-based LGBT-rights organization, labeled it the number one most empowering song of the decade.[5] As the track's recording artist, Aguilera's financial gains reflected the song's success when her album sold more than 4.3 million copies.[6] The same can't be said, however, for Linda Perry—the woman who wrote and published the hit.[7] In one fiscal quarter of 2012, Pandora played "Beautiful" approximately 12.7 million times and yet Perry made less than $350 dollars in streaming royalties.[8] While record labels and recording art-

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1 *See Christina Aguilera—Chart History*, BILLBOARD, http://www.billboard.com/artist/299251/christina-aguilera/chart?page=1&f=379 [http://perma.cc/F3TM-9MPV] (last visited Oct. 3, 2015) ("Beautiful" peaked at number two on the Billboard Hot 100 in the United States); *see also Stripped—Christina Aguilera*, ALLMUSIC, http://www.allmusic.com/album/stripped-mw0000662221 [http://perma.cc/98YJ-9PSF] (last visited Oct. 3, 2015) (showing that "Beautiful" reached the top spot on the Canadian Singles Chart).

2 *See Christina Aguilera*, RECORDING ACADEMY, http://www.grammy.com/artist/christina-aguilera [http://perma.cc/9R5Q-BSDR] (last visited Oct. 3, 2015).

3 *See, e.g.*, MARY ANNE DONOVAN, CHRISTINA AGUILERA: A BIOGRAPHY 58 (2010) (discussing the singer's critical acclaim for "Beautiful" in comparison with her other songs).

4 *See* MARGARET R. MEAD, CHRISTINA AGUILERA 10 (2012). GLAAD stands for Gay & Lesbian Allegiance Against Defamation. *Id.*

5 *See Christina Aguilera's 'Beautiful' Named Most Empowering Pop Song*, STAR PULSE (Apr. 8, 2011, 10:32 AM) http://www.starpulse.com/news/index.php/2011/04/08/christina_aguileras_beautiful_named_mo [http://perma.cc/K65E-N8NR].

6 *See* Gary Trust, *Ask Billboard: Taylor Swift Out-'Shake's Mariah Carey*, BILLBOARD (Sept. 1, 2014, 10:05 AM), http://www.billboard.com/articles/columns/chart-beat/6236538/ask-billboard-taylor-swift-out-shakes-mariah-carey [http://perma.cc/X5KV-4QYF] (noting that the song "Beautiful" has been digitally purchased more than 1.5 million times.); *see also* DONOVAN, *supra* note 3, at 58 (noting that Aguilera was the number one Billboard Female Artist in 2003 for both the album and its singles with an overall total of twelve million copies sold worldwide).

7 *See Songwriting and Production*, LINDA PERRY, http://www.lindaperry.com [http://perma.cc/JZV5-BMPL] (last visited Oct. 2, 2015) ("Christina Aguilera—'Beautiful'—Written & Produced by L. Perry").

8 Perry's paycheck was for a mere $349.16; songwriters earn approximately eight cents for every thousand times Pandora plays one of their songs. *See* Burt Bacharach,

ists receive up to ninety-seven percent of a song's revenue through royalties when the song streams over "new media,"[9] such as Internet radio services like Pandora or Spotify, songwriters are often paid as little as three percent.[10] The inequality in compensation between recording artists and songwriters has never been as extreme as it is today.[11]

Songwriters are paid through Performing Rights Organizations ("PROs").[12] These organizations negotiate license agreements for the use of songs, collect any royalties the works generate, and then

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What the Songwriting World Needs Now, WALL ST. J. (Jan. 22, 2014, 7:12 PM), http://www.wsj.com/articles/SB10001424052702304603704579325053186123012 [http://perma.cc/FQD7-MK2E].

[9] *See* Bailey Socha & Barbara Eber-Schmid, *What is New Media?*, NEW MEDIA INST., http://www.newmedia.org/what-is-new-media.html [http://perma.cc/4ZSW-SZSN] (last visited Oct. 2, 2015) ("New Media is a 21st Century catchall term used to define all that is related to the Internet and the interplay between technology, images, and sound.").

[10] The International Council of Music Authors published the "Study Concerning Fair Compensation for Music Creators in the Digital Age" in 2014 to address the issue of compensation inequality for music copyright holders with respect to digital streaming services. *See* Pierre-E. Lalonde, *Study Concerning Fair Compensation for Music Creators in the Digital Age*, INT'L COUNCIL OF MUSIC AUTHORS (Oct. 22–23, 2014), http://www.ciamcreators.org/wp-content/uploads/2014/11/CIAM14-1172_Study_fair_compensation_2014-05-01_EN.pdf [http://perma.cc/G2S4-T3T6]. A main conclusion of the study was that while major record labels are paid up to ninety-seven percent of digital streaming revenues, songwriters, music publishers, and other rights holders and administrators share "as little as 3%." *Id.* at 3. The study labeled the revenue split between recording artists and songwriters as "grossly inequitable." *Id.*; *see also* Rick Carnes, *Developing a Copyright System That Works for Songwriters*, 38 COLUM. J.L. & ARTS 309, 313 (2015) (noting that songwriters are "suffering deeply unfair financial discrimination" due to the current revenue split for digital streaming services).

[11] The introduction of digital streaming services has significantly widened the gap in compensation inequality. With respect to "mechanical royalties," songwriters receive 9.1% of a song sale's revenue. This covers "physical phonorecords" (i.e. physical copies of the sound recording, such as when a consumer purchases a compact disc) or "permanent downloads" (such as when a consumer downloads an MP3 of a sound recording). *See Mechanical License Royalty Rates*, COPYRIGHT ROYALTY BOARD, http://www.copyright.gov/licensing/m200a.pdf [http://perma.cc/5M55-AEP4] (last visited Feb. 4, 2016); *see also infra* Parts I, II. As previously mentioned, songwriters make as little as three percent with respect to digital streaming services. *See* Lalonde, *supra* note 10.

[12] Three major performing rights organizations exist in the United States: the American Society of Composers, Authors and Publishers ("ASCAP"); Broadcast Music, Inc. ("BMI"); and SESAC, Inc.

distribute the royalties back to the songwriters.[13] In the 1940s, the Department of Justice ("DOJ") investigated the two largest PROs in the United States for allegedly engaging in anti-competitive conduct.[14] To avoid the threat of prosecution, both organizations signed governmental consent decrees establishing various licensing requirements and restrictions.[15] The decrees have not been updated, however, in more than fifteen years.[16] Neither decree has been revised to account for the introduction of digital technology, including the recent advent of Internet radio. Consequently, these antiquated decrees restrict the organizations' ability to secure reasonable licensing rates for performance rights in new media. As the music licensing system stands, record companies and recording artists are making considerably more money than their counterparts in songwriting, composing, and publishing, with respect to new media services.[17]

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[13] Michael R. Cohen, 25B WEST'S LEGAL FORMS, INTELLECTUAL PROPERTY § 23:22 (2014) ("Since it would be virtually impossible for publishers or songwriters to monitor and control the large numbers of users of their songs, the enforcement and control of such performance rights usually falls to one of three performing rights organizations . . . .").

[14] *See, e.g.*, Noel L. Hillman, *Intractable Consent: A Legislative Solution to the Problem of the Aging Consent Decrees in* United States v. ASCAP *and* United States v. BMI, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 733, 743 (1998) (detailing how and why the two largest domestic PROs—ASCAP and BMI—entered into governmental consent decrees).

[15] The government often settles civil antitrust litigation outside of trial by having defendants enter into a consent decree to remedy the alleged anti-competitive conduct. *See* United States v. Am. Soc'y of Composers, Authors & Publishers, Civ. Action No. 41-1395 (WCC) (S.D.N.Y. Jun. 11, 2001) (Second Amended Final Judgment), [hereinafter ASCAP Consent Decree]; United States v. Broadcast Music, Inc., No. 64-Civ-3787 (S.D.N.Y. Nov. 18, 1994) (Amended Final Judgment), [hereinafter BMI Consent Decree]; *see also* JEFFREY L. KESSLER & SPENCER WEBER WALLER, INTERNATIONAL TRADE AND U.S. ANTITRUST LAW § 4:8 (2d ed.).

[16] The ASCAP Consent Decree was last updated in 2001, whereas BMI's was last updated in 1994. *See* ASCAP Consent Decree, *supra* note 15; BMI Consent Decree, *supra* note 15.

[17] Taylor Swift pulled her newest album, *1989*, from Spotify out of fear that allowing free listening through the service would hurt sales. *See* Doug Gross, *Songwriters: Spotify Doesn't Pay Off . . . Unless You're a Taylor Swift*, CNN (Nov. 13, 2014, 11:58 AM), http://www.cnn.com/2014/11/12/tech/web/spotify-pay-musicians [http://perma.cc/Y9ER-BNR8]. She was on track, however, to make approximately six million dollars in 2014 from allowing her songs to play on the platform. *Id.* Comparatively, the songwriters of Jon Bon Jovi's famed hit, "Livin' on a Prayer" made only $110.00 for more than 6.5 million plays on the same platform. *Id.*

In order to guarantee reasonable fees for songwriters, composers, and publishers, the consent decrees[18] must undergo critical reform to account for how music is licensed in new media.[19] Part I of this Note will provide background on the mechanics of music licensing, both traditional and through modern mediums, in order to explain why the two largest PROs initially entered into governmental consent decrees. Part II will discuss recent judicial determinations of "reasonable" licensing rates for public performances in new media and demonstrate the discrepancy in compensation between songwriters and their sound recording counterparts, namely record companies and recording artists. Finally, Part III will argue that the solution to this problem is through consent decree reform. The decrees should be modified to allow songwriters to withdraw their digital rights in order to separately license songs in new media. A new PRO should then emerge in the market place to account solely for public performance rights in new media, leaving traditional licensing to the existing PROs. Additionally, the current judicial process for setting rates, known as the "rate court" system, should be replaced with expedited, binding arbitration. Making these important changes to the music-licensing system will work towards bridging the gap in compensation inequality between songwriters and recording artists.

I. BACKGROUND: THE MECHANICS OF MUSIC LICENSING

A. *Copyrighting Music*

Copyright protection is at the core of music licensing and has evolved over time with the technological developments in music

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18 The ASCAP and BMI consent decrees are substantially similar. This Note will address making substantive changes to both decrees and will refer to them collectively as "the consent decrees." The Antitrust Division of the DOJ solicited public comments on reforming the decrees in 2014 and is currently considering modification. *See* ANTITRUST CONSENT DECREE REVIEW, DEP'T OF JUSTICE, http://www.justice.gov/atr/cases/ascap-bmi-decree-review.html [http://perma.cc/M8AA-YW3L] (last visited Sept. 26, 2015).

19 For ease of reference, the types of artists represented by PROs (namely songwriters, lyricists, composers, and publishers) will be referred to in this Note collectively as "songwriters."

distribution.[20] Under the United States Constitution, Congress has the authority to pass legislation to "promote the Progress of Science and useful Arts" by providing authors and inventors with exclusive rights to their works for a limited period of time.[21] Although the first federal copyright act passed in 1790, the only way songwriters could legally protect their work at the time was by physically printing the composition on paper and then copyrighting the paper as a "book."[22] The term "musical compositions" was not added to the list of statutorily protected works until Congress amended the copyright legislation in 1831.[23]

Decades later, in 1897, further legislative reform allowed for the protection of "public performances" of musical compositions, namely when someone other than the copyright holder performs the work in a public or private venue.[24] As technology evolved and these performances could be recorded and distributed through "phonorecords," Congress accordingly amended the law again in 1909 to account for "mechanical" reproductions of music.[25] Consequently, there is a legal distinction between "musical works" and "sound recordings" and the type of protection each musical category is granted under modern copyright law.

The most recent major reform of U.S. copyright law occurred in 1976 with the Copyright Act, and the legislation remains largely unchanged to date.[26] Eight types of "works of authorship" are expressly listed as receiving protection, two of which are "musical

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20 *See generally* COPYRIGHT AND THE MUSIC MARKETPLACE, U.S. COPYRIGHT OFF. (Feb. 2015), http://copyright.gov/docs/musiclicensingstudy/copyright-and-the-music-marketplace.pdf [http://perma.cc/44KE-W4GE] [hereinafter MUSIC MARKETPLACE].

21 U.S. CONST. art. I, § 8, cl. 8.

22 *See* Copyright Act of 1790, ch. 15, 1 Stat. 124; *see also* Clayton v. Stone, 5 F. Cas. 999, 1000 (C.C.S.D.N.Y. 1829) ("A book within the statute need not be a book in the common and ordinary acceptation of the word . . . it may be printed only on one sheet, as the words of a song or the music accompanying it.").

23 *See* Copyright Act of 1831, ch. 16, 4 Stat. 436.

24 *See* Zvi S. Rosen, *The Twilight of the Opera Pirates: A Prehistory of the Exclusive Right of Public Performance for Musical Compositions*, 24 CARDOZO ARTS & ENT. L.J. 1157, 1158 (2007) (providing a comprehensive history of how public performances gained copyright protection in the 1880's and noting "the right to exclusive public performance of a musical composition was established by statute in 1897").

25 Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075–76.

26 17 U.S.C. §§ 101–1332 (2006); *see also* Kurt E. Kruckeberg, *Copyright "Band-AIDS" and the Future of Reform*, 34 SEATTLE U.L. REV. 1545, 1548 (2011).

works" and "sound recordings."[27] The "musical works" classification pertains to the song's composition and any accompanying lyrics, as created by the songwriter and/or publisher.[28] Conversely, a "sound recording" is an individual performance of the "musical work" recorded in a fixed medium, such as a compact disc ("CD") or digital MP3 file.[29] These two forms of authorship, although both included in the "musical works" category, receive different copyright protections and can be owned collectively by one party, or individually by separate parties.[30]

Copyright holders of "musical works" obtain certain exclusive rights, including the right to authorize others to make reproductions of their work.[31] Known as the "mechanical right," this includes such methods of reproduction as reprinting sheet music of the composition or creating a CD.[32] Copyright holders of "musical works" can also authorize others to create derivatives of their work, such as writing a new song based on the original composition or creating a musical arrangement containing the work.[33] Although a "synchronization right" is not expressly listed in the Copyright Act, it is an accepted form of derivative work within the music industry.[34] It involves synchronizing a musical work in timed relation to another medium, such as setting a song to audiovisual material

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[27] 17 U.S.C. § 102(a) ("Works of authorship include . . . (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works."); *see also* Joshua P. Binder, *Current Developments of Public Performance Rights for Sound Recordings Transmitted Online: You Push Play, but Who Gets Paid?*, 22 LOY. L.A. ENT. L. REV. 1, 3 (2001) (providing an in-depth explanation of the difference between "musical works" and "sound recordings").

[28] *Id.*

[29] 17 U.S.C. § 114.

[30] *See* MUSIC MARKETPLACE, *supra* note 20, at 18.

[31] 17 U.S.C. § 106(1).

[32] *See id.*; MUSIC MARKETPLACE, *supra* note 20, at 34.

[33] 17 U.S.C. § 106(2); *see also* COPYRIGHT IN DERIVATIVE WORKS AND COMPILATIONS, U.S. COPYRIGHT OFF. (Oct. 2013), http://copyright.gov/circs/circ14.pdf [http://perma.cc/4BNV-VZ77].

[34] 17 U.S.C. § 106(2); *see, e.g.*, Buffalo Broad. Co. v. Am. Soc'y of Composers, Authors & Publishers, 744 F.2d 917, 920 (2d Cir. 1984) ("The 'synch' right is a form of the reproduction right also created by statute as one of the exclusive rights enjoyed by the copyright owner.").

to create a music video.[35] Copyright holders can also authorize public display of a musical work, such as printing song lyrics in an advertisement or posting them to a webpage.[36] The right to perform a work publicly, either live or by broadcasting a recording, is known as the "public performance right" and is the main focus of this Note.[37]

The copyright owner of a "sound recording" was not originally entitled to any type of performance right.[38] This changed with the 1995 Digital Performance Right in Sound Recordings Act ("DPRSRA"), which added a new exclusive right known as the "digital performance right."[39] The change was enacted in response to how music users were consuming music in relation to emerging technology (i.e., listening to streaming services online rather than actually purchasing physical copies or downloads of songs).[40] Consequently, copyright owners of sound recordings now have many of the same exclusive rights under the Copyright Act as those owning "musical works," including the right to make or distribute copies and/or to create derivative works.[41] If, for example, Prince's hit song, "Stand Back" plays over digital radio, Stevie Nicks is entitled to collect royalties for the performance right because she wrote it.[42] Thanks to the DPRSA, Prince and his record label can also collect royalties for the digital performance right because he is the featured artist on the track.[43]

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35 *See* MUSIC MARKETPLACE, *supra* note 20, at 25.

36 *See id.*; *see also* AL & BOB KOHN, KOHN ON MUSIC LICENSING 692–93 (4th ed. 2010); 17 U.S.C. § 106(3).

37 *See* 17 U.S.C. § 106(6).

38 *See* Eric M. Jenniges, *Waves of Concern: Copyright Issues in Satellite Radio*, 22 GA. ST. U.L. REV. 969, 973 (2006).

39 Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, § 4, 109 Stat. 336, 344–48; *see, e.g.*, Tomomi Harkey, Bonneville International Corp. v. Peters*: Considering Copyright Rules to Facilitate Licensing for Webcasting*, 20 BERKELEY TECH. L.J. 625, 633–36 (2005) (outlining the evolution of the "digital performance right").

40 *See* Jenniges, *supra* note 38, at 973–74.

41 17 U.S.C. § 106(1)–(3), (6).

42 *See* Tia Williams, *Wait, Who Wrote That? 15 Shocking Songwriters Behind Pop Hits*, VH1 (Mar. 27, 2013, 9:05 AM), http://www.vh1.com/celebrity/2013-03-27/surprising-songwriters [http://perma.cc/7YF2-PTZJ].

43 *Id.*

The chart below demonstrates the type of licenses generally required for common forms of music usage:

Music Usage	***Required License(s)*** *Mechanical (a.k.a. Print)*	*Synchronization*	*Public Performance*	*Digital Performance*
Creating a CD	●			
MP3 Distribution	●			●
Internet Radio			●	●
Karaoke		●	●	●
Live Performance			●	
Music Video	●	●	●	
Printing Sheet Music	●			
Publishing Song Lyrics	●			
Ringtones				●
Traditional AM/FM Radio[44]	*No license required in the United States*			
Use in Film	●	●	●	
Use in Television		●	●	

[44] Transmitting a musical work over radio is considered exempt from copyright infringement and thus does not require the payment of royalties because such performances are deemed to be "promotional tools" used to drive sales. Copyright law has a "non-subscription broadcast" exception. 17 U.S.C. § 114(d)(1)(A)(iii); *see also* Bonneville Int'l Corp. v. Peters, 347 F.3d 485, 485 (3d Cir. 2003) ("[S]tatutory exemption of 'nonsubscription broadcast transmissions' from digital audio transmission performance copyright coverage does not cover station's simultaneous Internet streaming of its AM/FM broadcast signals."). Even after the 1995 DPRSRA, traditional and radio broadcasters continue to perform sound recordings without having to pay royalties for digital performance rights "even if they convert their signal to digital form." ROBERT P. MERGES, INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 574–78 (4th ed. 2006).

B. The Multifaceted Licensing Process

As a result of having two separate types of musical works and various exclusive rights attached to each under the law, there are numerous ways in which such works can be licensed.[45] The music industry relies on a variety of different organizations and entities to license these works and thus to administer the respective rights and royalties.[46] As previously mentioned, the "public performance right" for musical works first gained legal protection in 1897.[47] Even at a time when publicly performing a song was the only way in which a copyright holder could derive profit from this right (in comparison to modern day where songs can be broadcast through multiple mediums to constitute a public performance), the "sheer number and fleeting nature" of such public performances made it extremely difficult for copyright owners to negotiate individually with each user or to detect possible infringement.[48] Resultantly, PROs were established to simplify the process and address the logistical issue of having each performance venue negotiate separately with each copyright holder.[49] The first major PRO, the American Society of Composers and Music Publishers ("ASCAP"), was established in 1914.[50] Two others, Broadcast Music, Inc. ("BMI")[51] and SESAC, Inc. ("SESAC"),[52] were created in the 1930s. Today,

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45 *See* MUSIC MARKETPLACE, *supra* note 20, at 18 (noting that the "musical work" and "sound recording" are separately protected works of authorship and can thus be separately owned and licensed under copyright law).

46 *Id.* at 32.

47 *See* Rosen, *supra* note 24.

48 *See* MUSIC MARKETPLACE, *supra* note 20, at 32.

49 *See, e.g.*, Meredith Corp. v. SESAC LLC, 1 F. Supp. 3d 180, 188 (S.D.N.Y. 2014) ("[T]here are far too many musical works . . . to make it realistic to undertake individual negotiations; and as to some works, the copyright holder may not be identified easily.").

50 American Society of Composers, Authors and Publishers, Comment Letter Regarding Review of the ASCAP and BMI Consent Decrees (Aug. 6, 2014), http://www.justice.gov/atr/cases/ascapbmi/comments/307803.pdf [http://perma.cc/PH2C-F8ZX] [hereinafter ASCAP Comment].

51 BMI was created in 1939. *See* Broadcast Music, Inc., Comment Letter on Review of Consent Decree in United States v. Broadcast Music, Inc. (Aug. 6, 2014), http://www.bmi.com/pdfs/advocacy/bmi_public_comments_to_doj.pdf [http://perma.cc/UEQ6-JHKV] [hereinafter BMI Comment].

52 *See About Us*, SESAC, http://www.sesac.com/About/About.aspx [http://perma.cc/6XCC-PYSJ] (last visited Oct. 2, 2015).

the three PRO repertories account for the licensing of nearly every copyrighted musical composition in the United States.[53]

Traditionally, the music licensing process was fairly straightforward. Songwriters would join a PRO, which would negotiate license agreements with various venues for the use of their music, including entities such as bars, restaurants, live performance venues, and television stations (in order to use songs in programming and commercials).[54] The PROs would then collect the fees generated by any public performances and distribute the money back to the songwriters.[55] The process has since become more complicated, however, with the advent of technology and the corresponding creation of new mediums for broadcasting music. Today, for example, an Internet radio service must be licensed in order for consumers to play any copyrighted songs.[56]

To address varying needs, PROs provide different types of licenses.[57] Collective Licenses, known as Blanket Licenses, are the most common type and allow a licensee to perform all of the songs in the particular PRO's repertory an unlimited amount of times and for a fixed fee.[58] This type of license is common for venues like bars, restaurants, retail stores, and television stations.[59] Per-program or per-segment licenses ("PPL") also authorize the use of all songs, but are effectively a discount off the Blanket License.[60] The licensee is authorized to use all songs in the PRO's repertory for specific programs or parts of programming, in exchange for a flat fee or percentage of that program's advertising revenue.[61] The

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53 *See Meredith Corp.*, 1 F. Supp. 3d at 188. Individuals and entities are still free, however, to obtain "direct licenses" straight from the copyright holder and/or "source licenses" sold directly from the song's producer. *Id.* at 190.

54 *See* MUSIC MARKETPLACE, *supra* note 20, at 20.

55 *See id.*

56 *See id.*

57 *See id.*

58 *See Meredith Corp.*, 1 F. Supp. 3d at 190; *see also* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1 (1979).

59 *See Meredith Corp.*, 1 F. Supp. 3d at 189–90.

60 *See* United States v. Am. Soc'y of Composers, Authors & Publishers, 157 F.R.D. 173, 178 (S.D.N.Y. 1994).

61 *Id.* ("[The PPL] amounts to a mini-blanket license in that it permits the licensee to use as much ASCAP music as it wishes . . . [while] . . . pay[ing] fees only for those programs that actually use such ASCAP music.").

PPL requires more detailed reporting information, such as specifying the music selected, the usage dates and program-specific information.[62]

When previews for Universal Pictures' *Fifty Shades of Grey* played on television, for example, each station that featured the advertisement needed to ensure that the songs included in the preview were within its licensing agreements. One of the trailers featured Beyoncé's "Haunted," and because she is a member of ASCAP, the stations were required to have some type of ASCAP licensing agreement in place.[63]

Whereas PROs are charged with the public performance right with respect to "musical works," a separate entity covers the right for "sound recordings."[64] Copyright holders for sound recordings are entitled to public performance royalties, but only for digital audio transmissions.[65] This includes Internet services that "stream" or "webcast" music, meaning a platform that allows a user to listen to a song without leaving a useable copy on his or her computer.[66] These transmissions are then licensed differently, according to whether they are transmitted through interactive or non-interactive streaming services.[67] A section 114 statutory license applies to non-interactive digital music services, such as free and paid Internet radio services.[68] Royalty rates and terms for such licenses are handled by the Copyright Royalty Board ("CRB"), which is comprised of three administrative judges appointed by the Librarian of Con-

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[62] *See* MUSIC MARKETPLACE, *supra* note 20, at 33.

[63] *See, e.g.*, *ASCAP Members Win Big at the Grammys*, ASCAP, http://www.ascap.com/playback/2015/02/action/2015-ascap-grammy-winners [http://perma.cc/8ZXC-27PZ] (last visited Oct. 2, 2015) (noting that Beyoncé won three Grammys, the most of any ASCAP member in 2015).

[64] *See* *About*, SOUNDEXCHANGE, http://www.soundexchange.com/about [http://perma.cc/B3SR-2U2P] (last visited Feb. 4, 2016).

[65] *See* Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, § 4, 109 Stat. 336.

[66] *See* 17 U.S.C. § 114(f), (g) (2006).

[67] *See id.* §§ 112, 114.

[68] It also applies to "preexisting" satellite radio services and music subscription services, meaning those that existed prior to July 1, 1998. *See* 17 U.S.C. § 114(b), (c). Sirius XM is the only preexisting satellite service, and Music Choice and Muzak are the only preexisting subscription services. *See* MUSIC MARKETPLACE, *supra* note 20, at 49.

gress.[69] Similarly, a section 112 statutory license addresses server reproductions of such sound recordings, known as "ephemeral recordings," and is also governed by the CRB.[70] Limitations on these licenses include not being able to announce in advance a schedule of songs that will be played, nor the ability to play a certain song more than a specified number of times in a particular time limit.[71]

The CRB does not, however, function as a PRO to collect and distribute royalties.[72] The Recording Industry Association of America created a non-profit PRO called SoundExchange in 2000.[73] It became an independent entity in 2003 and is designated by the U.S. Copyright Office to "collect and distribute digital performance royalties" for all digital audio transmissions of sound recordings.[74] The Copyright Act specifies royalty distribution in section 114: 50% to the copyright owner of the sound recording, 45% to the recording artist, 2.5% to an agent representing non-featured vocalists on the record, and 2% to an agent representing the featured vocalists.[75] Under section 112, royalties go directly to the sound recording's copyright owner.[76] The distinction between interactive and non-interactive (i.e., radio-style) services has, however, been the subject of considerable debate. Section 114 provides that a service is interactive if it allows the user to access the transmission of a program "specifically created for the recipient," or the transmission of a recording "which is selected by or on behalf of the reci-

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69 *See* 17 U.S.C. §§ 801–805; *see also* Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, 118 Stat. 2341.

70 *See* 17 U.S.C. § 112; *see also* 1 HOWARD B. ABRAMS, THE LAW OF COPYRIGHT § 5:63 (2014) (defining "ephemeral recordings" as "copies or phonorecords of a work made for purposes of later transmission by a broadcasting organization legally entitled to transmit the work").

71 *See* 17 U.S.C. § 114(d)(2)(B)–(C).

72 *See* MUSIC MARKETPLACE, *supra* note 20, at 47.

73 *Id.*

74 SoundExchange deducts its costs before distributing royalties. *See id.*; *see also* Erich Carey, *We Interrupt This Broadcast: Will the Copyright Royalty Board's March 2007 Rate Determination Proceedings Pull the Plug on Internet Radio?*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 257, 268 (2008).

75 *See* 17 U.S.C. § 114(g)(2); *see also* *About Digital Royalties*, SOUNDEXCHANGE, http://www.soundexchange.com/artist-copyright-owner/digital-royalties/ [http://perma.cc/7SUL-A55T] (last visited Sept. 26, 2015).

76 *See* 17 U.S.C. § 112(e).

pient."[77] In *Arista Records, LLC v. Launch Media, Inc.*, a group of record companies filed suit against a webcasting service providing an Internet radio platform to listeners.[78] The action challenged whether the radio service, which provided users with "individualized radio stations" created based on the users' listening habits and the user's ratings of songs and artists, was interactive within the meaning of the statute.[79] Although users of the service are not directly able to select songs, the court considered whether or not the service could be considered "specially created" for the user based on the rating-scheme.[80] The United States Court of Appeals for the Second Circuit held that the service was not "interactive," because the webcasting service did "not provide sufficient control to users such that playlists are so predictable that users will choose to listen to the webcast in lieu of purchasing music."[81] As a result of the ruling, Internet radio services such as Pandora are able to obtain statutory licenses as noninteractive services for public performances of sound recordings.[82]

Every five years, the CRB conducts rate-setting procedures for sections 112 and 114 statutory licenses.[83] These rates are appealable to the United States Court of Appeals for the District of Columbia.[84] To facilitate voluntary industry agreements, the CRB first allows parties to negotiate and attempt to reach a settlement.[85] The CRB can then accept the settlement either partially or in full, or proceed to conduct its own rate-setting determination in the event that the parties cannot reach an agreement.[86] Services that don't fall under sections 112 or 114, and are thus "interactive," must obtain direct licenses from copyright holders, which are negotiated

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77 *See id.* § 114(j)(7).

78 578 F.3d 148, 150 (2d Cir. 2009).

79 *Id.* at 149–50; *see also* 17 U.S.C. § 114(j)(7).

80 *See Arista Records*, 578 F.3d at 161.

81 The Second Circuit noted Congress' intent in making the distinction was to ensure that services which ran the risk of diminishing record sales be subject to stricter licensing arrangements. *Id.* at 162.

82 *See* MUSIC MARKETPLACE, *supra* note 20, at 49.

83 *See* 17 U.S.C. § 804(b).

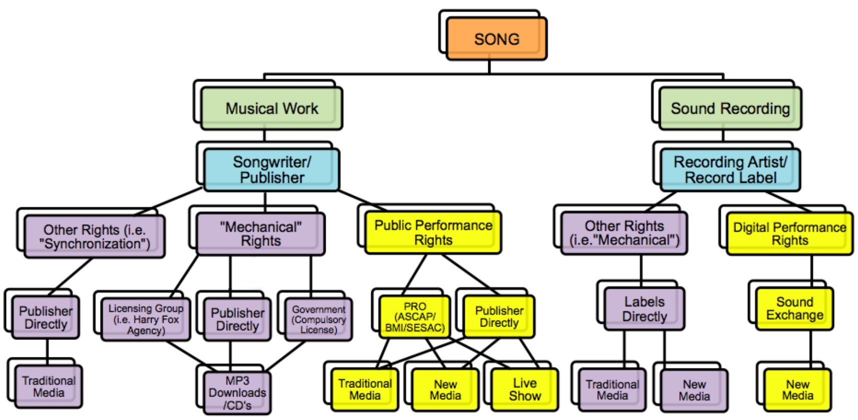
84 *See id.* § 803(d)(1).

85 *See id.* § 803(b)(1)–(3).

86 *See id.* §§ 801(b)(7), 803(b)(6).

independently from the CRB.[87] Consequently, the terms of such licenses can be vastly different from those reached under statutory agreements.[88] This allows record companies to negotiate for incentives such as fee advances and company stock as contract consideration.[89]

The chart below demonstrates the many facets of the music licensing process. The performance rights categories are highlighted in yellow as they are the focus of this Note:



C. Governmental Intervention: ASCAP & BMI's Consent Decrees

ASCAP and BMI, the two largest American PROs, are subject to governmental oversight through the form of consent decrees.[90] A consent decree is an agreement between the government and a

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87 *See id.* § 114(d)(3)(C).

88 *See* MUSIC MARKETPLACE, *supra* note 20, at 52.

89 Major record companies collectively received eighteen percent of Spotify shares as consideration in negotiating direct licensing agreements for the interactive service. *See* Helienne Lindvall, *Behind the Music: The Real Reason Why the Major Labels Love Spotify*, GUARDIAN (Aug. 17, 2009), http://www.theguardian.com/music/musicblog/2009/aug/17/major-labels-spotify [http://perma.cc/7VLR-FMPN]; *see also* Hannah Karp, *Artists Press for Their Share*, WALL ST. J. (July 21, 2014), http://www.wsj.com/articles/artists-press-for-their-share-1405905178 [http://perma.cc/5MAL-25B4] (noting that Google, Inc. paid Warner Music Group an advance of $400 million to license the label's free YouTube site and a paid YouTube subscription service, which had not yet been released).

90 *See* ASCAP Consent Decree, *supra* note 15; *see also* BMI Consent Decree, *supra* note 15.

party accused of committing some type of unlawful conduct.[91] The party accused of committing the unlawful conduct signs the decree, and thus agrees to its terms, without admitting liability.[92] This type of agreement has the same "force and effect" as any other judgment.[93] The DOJ distinguishes between two types of consent decrees: "perpetual final judgments," which are namely consent decrees entered into before 1979, and decrees with "sunset provisions," which are post-1979 decrees that automatically terminate on a certain date.[94]

ASCAP started as a non-profit in 1914 and its repertory grew substantially in the 1920s when the radio started broadcasting music.[95] A second PRO, SESAC, was established in 1930 as a for-profit entity but remained small and did not pose substantial competition in the industry.[96] Consequently, the radio industry created BMI, a third PRO, as direct competition for ASCAP in 1939.[97] For many years, ASCAP and BMI only offered blanket licenses to their repertoires and had the exclusive rights to their members' public performance rights, prohibiting members from negotiating any direct licensing agreements.[98] Soon, however, the DOJ grew concerned that the PROs were engaging in anticompetitive conduct and initiated antitrust proceedings against both organizations.[99]

In 1941, the DOJ filed a complaint against ASCAP, alleging that its blanket license was an illegal restraint of trade under section 1 of the Sherman Act, "eliminating competition among ASCAP's

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91 *See* 35B C.J.S. *Federal Civil Procedure* § 1149 (2015).

92 *See id.*

93 *See id.*; *see, e.g.*, Paycom Payroll, LLC v. Richison, 758 F.3d 1198, 1202 (10th Cir. 2014).

94 Modern consent decrees typically terminate within ten years. *See* ANTITRUST DIVISION MANUAL III-146, DEP'T OF JUSTICE ANTITRUST DIV. (5th ed. 2015), http://www.justice.gov/atr/file/761166/download [http://perma.cc/WKQ4-69S6] (last visited Sept. 26, 2015).

95 *See* Michael A. Einhorn, *Intellectual Property and Antitrust: Music Performing Rights in Broadcasting*, 24 COLUM.-VLA J. L. & ARTS 349, 354 (2001).

96 *See id.*

97 *See id.*; *see also* BMI Comment, *supra* note 51 (discussing the history of BMI).

98 *See* MUSIC MARKETPLACE, *supra* note 20, at 35–36.

99 *See id.* at 36; *see, e.g.*, United States v. Broad. Music Inc., 1966 Tr. Cas. (CCH) ¶ 71,941 (S.D.N.Y. 1966) (settling the dispute by consent decree); United States v. Am. Soc'y Composers, Authors & Publishers (*United States v. ASCAP*), 1941 Tr. Cas. (CCH) ¶ 56,104 (S.D.N.Y. 1941) (settling the matter by consent decree).

member-affiliates and allowing them to fix prices for their music."[100] Rather than conceding liability, ASCAP agreed to enter into a non-sunset provision "perpetual final judgment" consent decree.[101] The decree imposed three requirements: (1) to offer a PPL as an alternative to the blanket license; (2) to allow broadcasters to enter into license agreements, upon request; and (3) to allow membership to any artist who had composed at least one musical work.[102]

The decree was amended in 1950 in response to two lawsuits, each involving music licensing for movie theatres. In the first, *Alden-Rochelle v. ASCAP*,[103] 164 plaintiffs operating more than 200 movie theatres brought suit against ASCAP, alleging violations of both sections 1 and 2 of the Sherman Act,[104] for restraint of trade and monopolistic conduct. ASCAP had entered into agreements with its members that prohibited them from assigning their performing rights directly to movie producers instead of forcing them to go through the PRO.[105] Further, the agreements with movie distributors only allowed a film, with ASCAP licensed material to be shown for profit in theatres that also held ASCAP licenses.[106] The Court boldly held that "[a]lmost every part of the [ASCAP] structure, almost all of [ASCAP]'s activities in licensing motion picture theatres, involve a violation of the anti-trust laws."[107] The plaintiffs were awarded injunctive relief.[108]

The second case, *M. Witmark & Sons v. Jensen*, was conversely brought by members of ASCAP against a group of movie thea-

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100 *See* Meredith Corp. v. SESAC LLC, 1 F. Supp. 3d 180, 197–98 (2014) (providing a history of the early antitrust litigation against ASCAP). Price-fixing agreements, whereby competing sellers agree to maintain the same prices, are per se violations of the Sherman Act. *See* Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 351 (1982) ("The anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some.").

101 *See Meredith Corp.*, 1 F. Supp. 3d at 197.

102 United States v. Am. Soc'y of Authors, Composers & Publishers, 870 F. Supp 1211, 1212–13 (S.D.N.Y. 1995) (citing *United States v. ASCAP*, 1941 Tr. Cas. (CCH), ¶ 56,104).

103 80 F. Supp. 888, 890 (S.D.N.Y. 1948), *amended by* 80 F. Supp. 900 (S.D.N.Y. 1948).

104 15 U.S.C. §§ 1–2 (2004).

105 *Alden-Rochelle*, 80 F. Supp. at 891.

106 *Id.* at 892.

107 *Id.* at 893.

108 *Id.* at 900.

tres.[109] The plaintiffs sought damages and injunctive relief against the theatres for showing films featuring their material without first obtaining an ASCAP blanket license.[110] The Court denied relief on the grounds that ASCAP was violating both sections 1 and 2 of the Sherman Act, and thus, even the plaintiffs were violating antitrust law.[111]

The first amendment to ASCAP's decree, which occurred in 1950, added a provision of particular importance to this Note.[112] It provided that, if ASCAP and one of its licensees could not reach an agreement with respect to setting a rate, the licensee could apply for a "rate court" proceeding for a judicial determination of a reasonable fee, with ASCAP bearing the burden of proof as to reasonableness.[113] BMI did not sign its consent decree until 1966, but the decree's creation followed a similar path as ASCAP's.[114] The decree's terms are virtually identical and also provide for judicial rate setting, with BMI also bearing the burden of proof as to reasonableness.[115]

Despite both PROs entering into consent decrees with nearly identical terms, parties continued to bring antitrust challenges based on the propensity of blanket licenses. In 1975, Columbia Broadcasting System sued ASCAP, BMI, and all respective members and affiliates.[116] Although the district court upheld the blanket

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[109] 80 F. Supp. 843, 844 (D. Minn. 1948).

[110] *Id.*

[111] *Id.* at 850.

[112] *See* United States v. Am. Soc'y of Composers, Authors & Publishers, No. Civ. A. 42-245, 1950 WL 42273, at *4 (S.D.N.Y. Mar. 14, 1950).

[113] These "rate courts" sit in the Southern District of New York. *See id*; *see also* Meredith Corp. v. SESAC LLC, 1 F. Supp. 3d 180, 198 (2014).

[114] For a historical detail of BMI's path towards signing its DOJ consent decree as well as further background on both decrees, see Janet L. Avery, *The Struggle over Performing Rights to Music: BMI and ASCAP vs. Cable Television*, 14 HASTINGS COMM. & ENT L.J. 47, 49 (1991).

[115] BMI's consent decree also requires granting PPLs as an alternative to blanket licenses, admitting any songwriter with more than one published work, and prohibiting the prevention of direct licensing. It was amended in 1994 to allow either BMI or its licensees to apply to the rate court for a judicial determination of a reasonable fee. *See* United States v. Broad. Music, Inc., No. 64 Civ. 3787, 1994 WL 901652, at *3 (S.D.N.Y. Nov. 18, 1994); BMI Consent Decree, *supra* note 15.

[116] *See* Columbia Broad. Sys., Inc. v. Am. Soc'y of Composers, Authors & Publishers, 400 F. Supp. 737, 737 (S.D.N.Y. 1975).

licenses, the Second Circuit reversed, holding that they constituted illegal price fixing and were a per se violation of federal antitrust law.[117] The Supreme Court reversed again, however, agreeing with the district court that blanket licenses were a practical solution to an incredibly complex marketplace where thousands of copyright holders and millions of compositions must be efficiently licensed.[118] On remand, the Second Circuit held that the blanket licenses were not anti-competitive because viable alternatives, such as the PPL, were guaranteed to licensees through the two consent decrees.[119]

The third American PRO, SESAC, is considerably smaller than both ASCAP and BMI and operates as a for-profit entity owned fully by investors.[120] Although information is not publicly reported, SESAC is understood to have a market share in the single digit range.[121] SESAC faced its first antitrust dispute in 2014 when fifty local television stations filed a class action lawsuit against the PRO.[122] The plaintiffs argued it was unfeasible to avoid obtaining licenses for SESAC's repertory because its body of musical works had grown so large and included many "ubiquitous" songs that these compositions were inevitably among those the TV shows the stations wanted to air.[123] The plaintiffs further contended that SESAC did not offer a viable alternative to its blanket license, as

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117 *See* Columbia Broad. Sys., Inc. v. Am. Soc'y of Composers, Authors & Publishers, 562 F.2d 130 (2d Cir. 1977).

118 *See* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1 (1979).

119 *See* Columbia Broad. Sys., Inc. v. Am. Soc'y of Composers, Authors & Publishers, 620 F.2d 930 (2d Cir. 1980); *see also* Buffalo Broad. Co. v. Am. Soc'y of Composers, Authors & Publishers, 744 F.2d 917 (2d Cir. 1984) (holding the blanket license is not a restraint on trade because viable alternatives, such as PLLs and direct licensing, exist); Nat'l Cable Television Ass'n, Inc. v. Broad. Music, Inc., 772 F. Supp. 614 (D.D.C. 1991) (holding a "realistically available alternative" to the blanket license exists).

120 *See* Meredith Corp. v. SESAC LLC, 1 F. Supp. 3d 180, 188 (S.D.N.Y. 2014).

121 *See In re* Application of MobiTv, Inc. (*MobiTV I*), 712 F. Supp. 2d 206, 212 (S.D.N.Y. 2010) *aff'd sub nom.* Am. Soc'y of Composers, Authors & Publishers v. MobiTV, Incorporation (*MobiTV II*), 681 F.3d 76 (2d Cir. 2012).

122 *See Meredith Corp.*, 1 F. Supp. 3d at 185–86.

123 From 1995 to 2000, SESAC offered an industry-wide blanket license to television stations. The license was extended from 2001 to 2004 but included a provision that any disputes would be settled through arbitration. In 2005, when negotiations couldn't be reached with the stations, SESAC started negotiating individually with licensees. The new licenses increased in price by ten percent and modified the PLL alternative. Consequently, no station continued with a PLL prior to the lawsuit, compared with 180 stations that used it in 2005. *Id.* at 186, 190–94.

the cost of obtaining a PPL had drastically increased and the PRO imposed penalties for engaging in direct licensing.[124] In October 2014, SESAC entered into a settlement agreement with the stations.[125] Terms included the payment of $58.5 million to the television stations and for SESAC to include a viable PPL as an alternative to the blanket license, beginning in 2016.[126]

II. The "Rate Courts": Setting "Reasonable" Rates to License Performance Rights in New Media

According to both ASCAP and BMI's consent decrees, parties can request a judicial determination of rates if they cannot reach a negotiated agreement.[127] Although the "rate court" system has been in place for decades, it was not until recent years that it became a commonly used venue.[128] With the advent of new media, an increasing number of license-seekers have relied upon judicial rate setting.[129] These parties have taken claims to the United States District Court for the Southern District of New York ("S.D.N.Y.") (and some, on appeal, to the Second Circuit) to seek rate court intervention in setting licensing fees with both ASCAP and BMI.[130] Consequently, the S.D.N.Y. has been instrumental in deciding what a "reasonable" license fee should be in the online world.[131]

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124 *Id.* at 192–93.

125 *See* Memorandum of Law in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Settlement at 1–2, 5, *Meredith Corp.*, 1 F. Supp. 3d at 180.

126 The S.D.N.Y. approved the settlement in February 2015. Approximately $16 million was designated towards reimbursing attorneys fees and expenses while the remaining $42.5 million was allocated to the local stations in the settlement class as compensation for the "alleged overcharges they paid since 2008." *See* Meredith Corp. v. SESAC, LLC, 87 F. Supp. 3d 650, 657 (S.D.N.Y. 2015).

127 *See* ASCAP Consent Decree, *supra* note 15; BMI Consent Decree, *supra* note 15.

128 Prior to 2000, ASCAP had only experienced seven rate court proceedings. BMI's first proceeding was in 2001. *See* Daniel A. Crane, *Bargaining in the Shadow of Rate-Setting Courts*, 76 ANTITRUST L.J. 307, 310 (2009).

129 *See* Todd Brabec & Jeffrey Brabec, *Online Music Licensing*, 29 ENT. & SPORTS LAW. 1, 35 (2011); *see also* United States v. Broad. Music, Inc. (*Music Choice II*), 316 F.3d 189, 194 (2d Cir. 2003) (noting that BMI's first rate court case to appeal to the Second Circuit was in 2003).

130 *See* Brabec & Brabec, *supra* note 129, at 35.

131 *Id.*

The ASCAP and BMI consent decrees do not expressly define "reasonable" or the process by which the PROs must prove that their determination of rates is reasonable.[132] Consequently, the judicial determination is often a complicated task:

> The challenges of [determining a fair market rate for a blanket music license] include discerning a rate that will give composers an economic incentive to keep enriching our lives with music, that avoids compensating composers for contributions made by others either to the creative work or to the delivery of that work to the public, and that does not create distorting incentives in the marketplace that will improperly affect the choices made by composers, inventors, investors, consumers and other economic players.[133]

Additionally, the fact that judicial rate setting is extremely rare with respect to intellectual property matters does not make the task any easier, as judges lack analogous standards for rate calculation and justification.[134]

A well-established procedure has, however, developed through recent rate court precedent in proceedings with both PROs.[135] To determine a reasonable fee, the court attempts to make a determination of the fair market value (i.e., "the price that a willing buyer and a willing seller would agree to in an arm's length transaction.").[136] Each party sets forth a benchmark and the court assigns a rate by considering factors such as: the parties' comparability, the comparability of the rights in question, and the similarity in economic circumstances affecting each party and the earlier litigants

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132 *See* ASCAP Consent Decree, *supra* note 15; BMI Consent Decree, *supra* note 15.

133 *See In re* Pandora Media, Inc. (*In re Pandora II*), 6 F. Supp. 3d 317, 321 (S.D.N.Y. 2014) (quoting *MobiTV I*, 712 F. Supp. 2d 206, 209 (S.D.N.Y. 2010), *aff'd sub nom. MobiTV II*, 681 F.3d 76 (2d Cir. 2012)); *see also* MOBITV, https://www.mobitv.com [http://perma.cc/S9U9-7UBF] (last visited Oct. 2, 2015).

134 *See* Crane, *supra* note 128, at 312.

135 *See Music Choice II*, 316 F.3d 189, 194 (2d Cir. 2003) (finding no reason why the approach for determining a BMI license's reasonable rate should differ from the procedure for determining an ASCAP rate court case).

136 Am. Soc'y of Composers, Authors & Publishers v. Showtime/Movie Channel, Inc. (*ASCAP v. Showtime*), 912 F.2d 563, 569 (2d Cir. 1990).

on which they are basing their calculations.[137] The issue the court often faces is that these benchmarks are vastly different.[138] The "most important"[139] factor for courts to consider is "the degree to which the assertedly analogous market under examination reflects an adequate degree of competition to justify reliance on agreements that it has spawned."[140] If either party is dissatisfied, the case can go to the Second Circuit on appeal, where the court will determine if S.D.N.Y. used an "erroneous standard" by either: (1) relying on legally impermissible factors; (2) failing to give consideration to legally relevant factors; (3) applying incorrect legal standards; or (4) misapplying correct legal standards.[141] Three recent rate court cases have been particularly significant in demonstrating how the judiciary is setting licensing rates for new media services. In all three cases, the rate court assigned rates far below what the PROs ideally requested and provided as their benchmarks.

A. ASCAP Versus MobiTV

MobiTv, Inc. ("MobiTV") is an entity that purchases programming from cable networks and then transmits it to wireless carriers so consumers can access the content on mobile devices, like cellphones and tablets.[142] In 2003, MobiTV applied to ASCAP for a "through-to-the-audience" ("TTTA")[143] blanket license to

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[137] United States v. Am. Soc'y of Composers, Authors & Publishers, No. Civ. 13-95 (WCC), 1993 WL 60687, at *18 (S.D.N.Y. Mar. 1, 1993), *aff'd in part, vacated in part*, 157 F.R.D. 173 (S.D.N.Y. 1994).

[138] *Id.*

[139] *Id.*

[140] *ASCAP v. Showtime*, 912 F.2d at 577.

[141] *Id.* For example, in *Music Choice II*, BMI's benchmark was 3.75% of wholesale revenue and the S.D.N.Y. rate court set the licensing fee at 1.75% (approximately half of what the parties had agreed to in their existing contract and half of what BMI had recently agreed to with a competitor). 316 F.3d. 189, 190 (2003). The Court reasoned that basing the rate on wholesale revenue was inappropriate. On appeal, the Second Circuit reversed the S.D.N.Y. decision stating, "what retail customers pay to receive the product or service in question . . . seems to us to be an excellent indicator of its fair market value." *See id.* at 195.

[142] *See MobiTV I*, 712 F. Supp. 2d 206, 209 (S.D.N.Y. 2010), *aff'd sub nom. MobiTV II*, 681 F.3d 76 (2d Cir. 2012).

[143] Cable networks and over-the-air broadcasters are entitled to seek a TTTA from ASCAP. The Second Circuit has held that cable program suppliers are "telecasting networks" within the meaning of ASCAP's consent decree and are entitled to seek licenses that cover content transmitted not only to local cable system operators but also

cover its content, including songs featured in music videos and on radio-style audio channels.[144] The parties were unable to agree on which revenue base the fee should be calculated, disagreeing over whether the fee should be based upon the retail revenue received by the wireless carriers MobiTV contracts with, or the amounts MobiTV pays to its content providers.[145] Further, their benchmark proposal of the rates to be applied to the revenue base differed by tens of millions of dollars.[146]

ASCAP petitioned the rate court in 2008 and both sides presented testimony in support of their respective benchmarks.[147] ASCAP argued that the rate should be based on total revenues, including revenue that wireless carriers receive from data plans because consumers are enticed to buy the data plans in order to view audiovisual content on their mobile devices.[148] In support of MobiTV, an expert witness calculated its benchmark based on a fee established in a comparable proceeding with AOL.[149] ASCAP's proposal conformed to the traditional three-tiered system used in traditional TTTA's in the early 1990s, which is established based on the music intensity of the programming and classifies it as either (1) music intensive; (2) general entertainment; or (3) news and sports.[150] MobiTV did not disagree with the three-tiered system, but argued that the rates should be based on wholesale revenue, namely what it pays networks for content and receives in return from wireless carriers to feature its services.[151]

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directly to the viewer. *See* United States v. Am. Soc'y of Composers, Authors & Publishers, 782 F. Supp. 778, 808–17 (S.D.N.Y. 1991), *aff'd*, 956 F.2d 21 (2d Cir. 1992).

144 *See MobiTV I*, 712 F. Supp. 2d at 209.

145 *Id.* at 209.

146 *Id.*

147 ASCAP presented testimony from four of its employees, two expert witnesses and two composers. MobiTV countered with testimony from five employees and three expert witnesses. *Id.* at 210.

148 *Id.* at 237.

149 The rate court set a fee of 2.5% for an ASCAP blanket license for AOL, RealNetworks, and Yahoo. *See* United States v. Am. Soc'y of Composers, Authors & Publishers, 559 F. Supp. 2d 332, 414–15 (S.D.N.Y. 2008), *vacated and remanded*, 627 F.3d 64 (2d Cir. 2010).

150 Traditional TTTA licenses are set at rates of 0.9% for "music intensive," 0.375% for "general entertainment," and 0.1375% for "news and sports." *See MobiTV I*, 712 F. Supp. 2d 206, 222 (S.D.N.Y. 2010), *aff'd sub nom. MobiTV II*, 681 F.3d 76 (2d Cir. 2012).

151 *Id.* at 249.

The Court agreed with both parties and ordered the rates to follow the three-tiered licensing system, calling it a "ready-made benchmark."[152] It sided with MobiTV, however, on the issue of revenue base:

> Mobi has shown that the value of the public performance of the music at the retail level is indeed captured at the wholesale level, not just theoretically by the concept of derived demand, but also functionally from the fact that the cable television networks principally generate their revenues by measuring the number of subscribers for their programming. To the extent that a channel's content becomes popular among consumers, the seller of content demands a higher rate of compensation from advertisers and from purchasers of the content. And, Mobi's payments to the cable television networks for the programming it distributes are driven by the subscriber data that Mobi tracks and conveys to the networks.[153]

Although the Second Circuit had previously faulted the rate court for not relying on retail revenues, it affirmed the ruling in 2012 by reasoning that MobiTV offered services that were sufficiently differentiable from those discussed in prior cases.[154] The Court relied heavily on MobiTV's expert testimony and disregarded a similar rate it had set between ASCAP and AOL.[155] Resultantly, while ASCAP requested $41 million for a six-year licensing period, the Court awarded only $400 thousand.[156]

B. BMI Versus DMX

A few years later, the rate court was again faced with a licensing dispute between a PRO and new media music service. DMX Hold-

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[152] *Id.* at 247.

[153] *Id.* at 246.

[154] Part of the court's argument was that it would be too difficult to determine what part of a wireless customer's fee could account for the music when the total fee was for a package of both audio and visual programming. *See MobiTV II*, 681 F.3d 76, 86–88 (2d Cir. 2012).

[155] *See* RAYMOND J. DOWD, COPYRIGHT LITIGATION HANDBOOK § 17:9 (2d ed. 2014).

[156] *Id.*

ings, Inc. ("DMX"),[157] a commercial music provider that prepackages programming for sale to a variety of business establishments, applied for an "adjustable-fee blanket license" ("AFBL") from BMI for 2005–2012.[158] An AFBL differs from a blanket license in that it allows the licensee to reduce its fee by also entering into direct licensing agreements with songwriters represented in the PRO's repertory.[159] The license has three components: (1) the "blanket fee," which the licensee would pay to the PRO if it did not enter into any direct licensing agreements; (2) a "floor fee," which it would pay even if it directly licensed all of the material from the PRO's repertory that it performed; and (3) a "direct license ratio," which reduces the blanket fee based on the percentage of its total performances of the PRO's music that is covered by any direct licenses.[160] BMI and DMX were unable to reach an agreement on virtually all components of the AFBL, including rates for the blanket fee and the floor fee as well as for the scope of performances to include in the direct license ratio.[161]

The parties presented "strikingly different" benchmarks: BMI proposed a blanket fee of $41.81 per location whereas DMX proposed $11.32.[162] BMI based its benchmark on the rate of its traditional blanket license with Muzak, DMX's main competitor, which was set at approximately $41.[163] DMX calculated its benchmark

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157 DMX serves business establishments such as retailers, hotels, casinos and fitness centers. *See About Us*, DMX, http://www.dmx.com/about [http://perma.cc/BUS7-RVAY] (last visited Sept. 26, 2015). DMX was acquired by Mood Media Corporation on March 20, 2015. *See DMX Acquired by Mood Media Corporation*, DMX (Mar. 20, 2015), http://www.dmx.com/images/DMX_Mood_Acquisition_Announcement.pdf [http://perma.cc/VDY7-CXU2].

158 Broad. Music, Inc. v. DMX, Inc. (*BMI v. DMX I*), 726 F. Supp. 2d 355, 355 (S.D.N.Y. 2010).

159 *Id.* at 355. The rate court did not have to determine whether DMX was entitled to the AFBL because it previously held that BMI was required to provide it to licensees as an alternative to the blanket license. *See* United States v. Broad. Music, Inc., 275 F.3d 168, 171 (2d Cir. 2001).

160 The blanket fee represents the maximum in the range of potential fees to be paid to BMI and the floor fee represents the minimum. *BMI v. DMX I*, 726 F. Supp. 2d at 355–56.

161 *Id.*

162 *Id.* at 357.

163 BMI also had similar agreements with other competitors ranging from $41 to $45 per location. *See* Broad. Music, Inc. v. DMX Inc. (*BMI v. DMX II*), 683 F.3d 32, 39 (2d Cir. 2012).

using several factors.[164] DMX had entered into more than 550 direct licensing agreements with music publishers, including major players Sony and Universal, at $25 per location.[165] DMX argued that $10 of each direct licensing agreement represented music present in BMI's repertory.[166] Subtracting the $10 from the per-location fee, and then applying a proposed floor fee of 11.7%, resulted in a $11.32 per location rate.[167]

The rate court decided that DMX's calculation reflected a more appropriate benchmark and set the AFBL at $18.91 per location for the blanket fee and $8.66 per location for the floor fee, with the direct license ratio to be calculated "using DMX's off-premises performances as a proxy for all of its performances."[168] The Second Circuit affirmed the ruling, reasoning that the disparity between rates set by the rate courts and the rates PROs have historically obtained in similar agreements, "is of no moment given ASCAP and BMI's longstanding market power and the industry's changing economic landscape."[169] Despite the fact that BMI presented evidence that various other agreements with DMX's main competitors were set at the $41 to $45 range and negotiated independently, the rate court held that these were not reasonable benchmarks because they did not reflect a "competitive market."[170] Much like in *MobiTV I*, the court relied heavily on the music service provider's proposal as support for its determination and set a rate less than half of what BMI had requested.[171] Consequently, even the interim fees DMX was paying to both ASCAP and BMI were significantly reduced.[172]

164 DMX argued it was compensating BMI for two components of the relationship: for the right to perform works in the repertory, and for BMI's value in assembling the repertory and offering a blanket license. *See BMI v. DMX I*, 726 F. Supp. 2d at 357.

165 *Id.*

166 *Id.*

167 *Id.*

168 *Id.* at 367.

169 *BMI v. DMX II*, 683 F.3d 32, 48 (2d Cir. 2012).

170 *See* CORPORATE COUNSEL GUIDE TO COPYRIGHT LAW § 11:28 (2015).

171 *See* Carly Olson, *Changing Tides in Music Licensing?* BMI v. DMX *and* In Re THP, 10 NW. J. TECH. & INTELL. PROP. 277, 283–84 (2012).

172 *See* Todd Brabec, *The Performance Right—A World in Transition*, 31 ENT. & SPORTS LAW. 37, 38 (Winter 2015).

C. In re Pandora Media, Inc.

Pandora, a customized Internet radio service, requested a TTTA blanket license from ASCAP for the period of 2011–2015.[173] In September 2011, the parties agreed to an interim rate of 1.85% of revenue as they continued negotiating.[174] During the course of negotiations, however, an unprecedented event occurred. EMI, one of the largest music publishers at the time,[175] warned it was considering withdrawing entirely from ASCAP in order to increase efficiency by only using one institution for all digital licensing purposes.[176] Out of fear of losing EMI's business, ASCAP modified its Compendium[177] to permit members to withdraw their rights to licensed works in new media.[178] ASCAP justified the decision based on the fact that licensees only needed to obtain both a public performance license and a sound recording license when dealing with rights in new media.[179] ASCAP also offered to handle the administrative side of collecting royalties for any member withdrawing its digital rights, given that the PRO already distributes royalties from similar licenses and has one of the lowest operating ratios in the United States.[180] Ten days after the modification's enactment, EMI both withdrew its digital rights and entered into an adminis-

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173 *See In re Pandora II*, 6 F. Supp. 3d 317, 320 (S.D.N.Y. 2014); *About Pandora*, PANDORA MEDIA, INC., http://www.pandora.com/about [http://perma.cc/Y9N7-KGJK] (last visited Sept. 26, 2015).

174 Pandora pays over half its revenue to record labels for the right to license sound recordings. *See In re Pandora II*, 6 F. Supp. 3d at 333.

175 EMI joined forces with Virgin Records in 2013, becoming "Virgin EMI Records." *Who We Are*, VIRGIN EMI RECORDS, http://www.virginemirecords.com/who-we-are [http://perma.cc/C76W-BVPZ] (last visited Sept. 26, 2015).

176 *See In re Pandora II*, 6 F. Supp. 3d at 333.

177 *Id.* at 323 ("In addition to operating under a consent decree, ASCAP is governed by a series of internal rules and contracts. The most important internal rule set for purposes of this litigation is the ASCAP Compendium. The ASCAP Compendium can be modified by the ASCAP Board and reflects many of the important rules that govern ASCAP's obligations to its copyright holder members and vice versa.").

178 *Id.* at 331. ASCAP had never before permitted partial withdrawal of licensing rights. *Id.* The modification defined "new media" services transmitting musical compositions "made available or accessible (i) exclusively by means of the Internet, a wireless mobile telecommunications network, and/or a computer network and (ii) to the public, whether or not, in exchange for a subscription fee, other fee or charge." *Id.* at 337.

179 *Id.* at 333.

180 *Id.* at 337–38.

tration agreement with ASCAP.[181] Pandora immediately negotiated with EMI for a licensing rate of 1.85% of its revenue, the same rate as Pandora's interim agreement with ASCAP.[182]

In July 2012, Sony also notified ASCAP that it would be withdrawing its digital rights.[183] Knowing Pandora could not survive without its catalogue of music,[184] Sony argued in negotiations that if the company could pay fifty percent of its revenues to record labels for sound recording licenses, it should be paying more for musical works.[185] The parties negotiated a one-year deal for Sony's pro-rata share of an industry-wide rate of five percent.[186]

When a third major publisher, Universal Music Publishing Group ("UMPG"), announced it would be withdrawing its digital rights, UMPG demanded an even higher rate—8% of Pandora's revenue.[187] Pandora eventually reached a six-month agreement with UMPG, agreeing to pay a rate of 7.5% of its revenue.[188]

Meanwhile, Pandora had already initiated proceedings against ASCAP, arguing that the Compendium Modification violated the terms of its consent decree.[189] The district court granted summary judgment, holding that the terms of the consent decree did not allow ASCAP "the right to permit the partial withdrawals of rights . . . and thereby acquiesce to a regime in which some music users could not obtain full public performance rights to works in the ASCAP repertory."[190] Consequently, EMI, Sony, and UPMG's withdrawal of new media rights became inoperative.[191]

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181 *Id.*

182 The agreement also included a clause that the rate would decrease to 1.70% if Pandora could negotiate a better agreement with a catalogue equal in size or larger to EMI's. *Id.* at 340.

183 *Id.* at 342.

184 In 2012, Sony was the world's largest music publisher with approximately twenty-five to thirty percent market share. *Id*. at 342–43.

185 *Id.* at 343.

186 *Id.* at 346.

187 *See id.* at 347.

188 *Id.* at 350.

189 *See In re* Pandora Media, Inc. (*In re Pandora I*), No. 12 Civ. 8035 (DLC), 2013 WL 5211927, at *1 (S.D.N.Y. Sept. 17, 2013).

190 *Id.* at *7.

191 *See In re Pandora II*, 6 F. Supp. 3d at 350–51. BMI followed ASCAP's lead and modified its terms to allow members to withdraw their digital rights in 2013. *See* Broad.

In the rate court proceeding, ASCAP proposed a rate of 1.85% of the revenue for 2011–2012, 2.50% for 2013, and 3.00% for 2014–2015.[192] Pandora countered with a flat rate of 1.70% for all five years.[193] Judge Cote, ASCAP's rate court judge, set the rate at 1.85% for all five years, holding that if ASCAP felt the rate was reasonable for the first two years, "there is a presumption that that rate will continue to be a reasonable rate for the entire license period."[194]

In all three cases, the rate court declined to use the benchmarks put forth by the PROs.[195] ASCAP pointed out, on appeal to the Second Circuit in its rate-setting trial with Pandora, that Universal Music, Sony/ATV Music, and EMI Music had all independently negotiated direct license deals in excess of the judicially set rate of 1.85%.[196] Apple also negotiated a higher rate directly with ASCAP for its iTunes radio license.[197] Nevertheless, these independently negotiated licenses were not deemed reflective of "arms-length willing buyer and willing seller agreements," as ASCAP argued, and the Second Circuit confirmed the 1.85% rate.[198]

III. PROPOSAL TO REFORM THE PRO CONSENT DECREES

The music industry's technological landscape is undeniably different today than it was at the turn of the century.[199] Notable miles-

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Music, Inc. v. Pandora Media, Inc. (*BMI v. Pandora*), No. 13 CV. 4037 (LLS), 2013 WL 6697788, at *2 (S.D.N.Y. Dec. 19, 2013). Pandora also challenged the modification and the Court ruled in the same manner as it did for ASCAP's case, reasoning BMI's consent decree forbade the PRO from allowing partial withdrawal of rights. *See id.* at *4.

192 *See In re Pandora II*, 6 F. Supp. 3d at 320.

193 *Id.*

194 *Id.* at 355.

195 *See* Brabec, *supra* note 172, at 39, 40.

196 *Id.* at 40.

197 *Id.*

198 *Id.* at 39, 40; *see also* Pandora Media, Inc. v. Am. Soc'y of Composers, Authors & Publishers, 785 F.3d 73, 78, 79 (2d Cir. 2015).

199 *See generally* Callie Taintor, *Chronology: Technology and the Music Industry*, FRONTLINE (May 27, 2004), http://www.pbs.org/wgbh/pages/frontline/shows/music/inside/cron.html [http://perma.cc/QD6V-ES85]; Rob Wile, *Watch the American Music Industry Splinter into Bits over 30 Years in 30 Seconds*, BUSINESS INSIDER (Aug. 21, 2014, 9:16 AM), http://www.businessinsider.com/music-industry-evolution-chart-2014-8 [http://perma.cc/8LUE-YM8N].

tones include both the introduction of Apple's iPod, which has been purchased more than 300 million times worldwide,[200] and the advent of Internet radio, which is becoming increasingly pervasive as a form of music distribution.[201] Popular services such as iTunes Radio, Pandora, and Spotify provide music consumers with access to vast libraries of songs, available through computers, tablets, and cell phones alike.[202] Music is more accessible today than ever before, as online streaming services facilitate worldwide song sharing with relative ease and speed. Ironically, while the technological advances have created vast sources of revenue for both recording artists and record companies, the same cannot be said for songwriters. As previously discussed in the Introduction of this Note, Linda Perry, the songwriter behind Christina Aguilera's hit song, "Beautiful," only made a few hundred dollars despite the song playing tens of thousands of times over Pandora.[203] Perry's experience is just one of countless stories of compensation inequality with respect to new media royalties. Aviici's hit, "Wake Me Up!" is the most streamed song in Spotify history as well as the thirteenth most played song on Pandora.[204] Despite the hit's vast popularity, the work's three songwriters have each made less than five thousand dollars in domestic royalties since the song's release in 2013.[205]

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[200] *See* Jordan Crook, *Apple Has Sold 300 Million iPods in Ten Years, 45 Million Just Last Year*, TECHCRUNCH (Oct. 4, 2011), http://techcrunch.com/2011/10/04/apple-has-sold-300-million-ipods-in-ten-years-45-million-just-last-year [http://perma.cc/2BMF-DM7Z].

[201] *See The Infinite Dial 2014*, EDISON RES., http://www.edisonresearch.com/wp-content/uploads/2014/03/InfiniteDial2014-18-34-and-18-49-1.pdf [http://perma.cc/G82C-CPHV] (last visited Sept. 26, 2015) (finding that 66% of 18–34 year-olds in the United States listened to an online radio streaming service in January/February 2014; also finding Pandora was the most well known of the Internet radio services surveyed, with four in five 18–49 year-olds answering they were "aware" of Pandora).

[202] *See About Pandora*, *supra* note 173; *About Us*, SPOTIFY, https://www.spotify.com/us/about-us/contact [http://perma.cc/D3NC-67ST] (last visited Feb. 4, 2016); *see also Discover*, APPLE, http://www.apple.com/music/discover [http://perma.cc/6MT3-B2YF] (last visited Feb. 4, 2016).

[203] *See supra* note 8.

[204] *See* Aloe Blacc, *Streaming Services Need to Pay Songwriters Fairly*, WIRED (Nov. 5, 2014, 6:30 AM), http://www.wired.com/2014/11/aloe-blacc-pay-songwriters [http://perma.cc/L97R-85FV].

[205] *See id.* As previously mentioned, Pandora pays over half of its revenue to record companies for licensing sound recordings. Pandora pays over half its revenue to record

The direct cause of the industry-wide discrepancy in revenue received by record labels and recording artists in comparison to songwriters, lies within the DOJ-mandated PRO consent decrees. BMI and ASCAP's decrees each last saw reform in 1994 and 2001, respectively.[206] The propensity of new media has created new licensing challenges—challenges that these PROs have been unable to successfully adapt to due to the increasingly obsolete terms of their decrees. In order to change the industry standards to ensure songwriters are adequately compensated, these consent decrees must undergo comprehensive reform.

A. Reform Rather than Terminate the Decrees

As previously mentioned, the DOJ distinguishes between two types of consent decrees: "perpetual final judgments," which do not have a date of termination, and decrees with "sunset provisions," which automatically terminate on a certain date.[207] This change in decree logistics was "based on a judgment that perpetual decrees were not in the public interest" and accordingly, the DOJ has encouraged modifying or terminating perpetual decrees when justified by a change in circumstance or the ability to better serve the public interest.[208] The Supreme Court has agreed with the DOJ, having held that when there is a "significant change in facts or law," a consent decree warrants revision and the proposed modification must be "suitably tailored to the changed circumstances."[209]

When the PROs signed their decrees, vinyl records were the hot new technology while CDs, which now seem prehistoric in comparison to the iPod, were still decades from invention.[210] There

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labels for the right to license sound recordings. *See supra* note 174. Comparatively, the ASCAP rate court set the PROs rate at 1.85% of Pandora's revenue. *See supra* note 194.

[206] *See* ASCAP Consent Decree, *supra* note 15; BMI Consent Decree, *supra* note 15.

[207] Both ASCAP and BMI's consent decrees are "Final Judgments" and consequently can only be modified or terminated in court. *See* ANTITRUST DIVISION MANUAL, *supra* note 94.

[208] *Id.*

[209] Rufo v. Inmates of Suffolk Cnty. Jail, 502 U.S. 367, 368 (1992).

[210] CDs and CD players became available to consumers in 1982. *See* Hans B. Peek, *The Emergence of the Compact Disc*, IEEE COMM. MAG. 16 (Jan. 2010), http://www.research.philips.com/technologies/projects/cd/pdf/The-Emergence-of-the-Compact-Disc_v2.pdf [http://perma.cc/7C5E-UXY6].

has not merely been a "significant change" in technology but rather a complete technological revolution.[211] In present times, the decrees do, however, continue to serve an important competitive purpose, and as a result should be modified rather than terminated.[212] Music licensing is both multi-faceted and incredibly complex, and the PROs work towards ensuring songwriters license their musical works effectively and efficiently.[213] ASCAP and BMI share ninety percent of the market and resultantly, any entity that wants to play popular songs without violating copyright law has to obtain a license from one, or likely both, of these PROs.[214] That power, in and of itself, warrants consumer protection under the Sherman Act, which prohibits anti-competitive conduct.[215] Furthermore, the decrees continue to work well in respect to traditional licensing needs.[216] The blanket license, while controversial with respect to antitrust principles, is a longstanding recognizable need in the music-licensing marketplace.[217] It is how the decrees restrict

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[211] *See Rufo*, 502 U.S. at 368; *see generally* Taintor, *supra* note 199; Wile, *supra* note 199.

[212] *See* United States v. Armour & Co., 402 U.S. 673, 681 (1971) ("[C]onsent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms."). In order for decrees to remain precise and carefully negotiated, they must be revised based on changes in circumstance and environment—for example, the technological revolution that has taken place since the PRO consent decrees came into fruition. *See id.*

[213] As previously mentioned in Part I, it would be logistically impossible for songwriters to negotiate directly with each entity wanting to play their musical works. Thus, PROs play a crucial role in ensuring songwriters both get paid for the public performances of their works and can detect when copyright infringement occurs. *See supra* note 13.

[214] At a Senate Judiciary Committee Meeting on March 10, 2015, Mike Dowdle, Vice President and General Counsel of Bonneville International Corporation, voiced concern that if the decrees are terminated rather than modified, there will be no mechanism in place to protect fairness with respect to the potential for anti-competitive conduct. *See* John Eggerton, *Broadcasters to Senate: Keep ASCAP/BMI Consent Decrees*, BROADCASTING & CABLE (Mar. 10, 2015, 3:25 PM), http://www.broadcastingcable.com/news/washington/broadcasters-senate-keep-ascapbmi-consent-decrees/138663 [http://perma.cc/K7RG-HVAG].

[215] *See* 15 U.S.C. §§ 1–2 (2012).

[216] The propensity of rate court cases discussed in Part II occurred simultaneously to the introduction of new media services, namely Internet radio. The system remains unchanged, however, with respect to licensing musical works in traditional mediums: the circumstances in which the decrees were created to protect.

[217] *See, e.g.*, Mary Katherine Kennedy, *Blanket Licensing of Music Performing Rights: Possible Solutions to the Copyright-Antitrust Conflict*, 37 VAND. L. REV. 183, 213 (1984) (discussing the conundrum courts face in "either promoting competition by invalidating

licensing arrangements for new media services that must be taken into consideration in light of reform.

B. Allow for the Partial Withdrawal of New Media Licensing Rights

New Media streaming royalties represent the most significant disparity in compensation between songwriters (for licensing the public performance of musical works) and record companies (for licensing sound recordings).[218] In an attempt to remedy this discrepancy, ASCAP and BMI attempted to modify their terms to allow members to separately license new media rights.[219] Consequently, they were both deemed to be in violation of their consent decrees.[220] A modification allowing for the separate licensing of new media rights is precisely what the decrees need, however, in order to effectively adapt to modern music licensing.

The decrees should include a clause that allows members to maintain traditional licensing agreements with the respective PRO, but with the potential to withdraw the right to license musical works in new media.[221] Perpetuating an all in/all out rationale, reflected in the courts' interpretation of the current consent decrees,[222] could have a grave impact on the industry. Sony/ATV Music Publishing has threatened to withdraw from both ASCAP and BMI if the decrees are not soon modified to allow for partial

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blanket licensing systems at the expense of copyright holders, or protecting copyright holders by upholding potentially coercive blanket licenses at the expense of licensees").

218 *See supra* note 11 (describing the difference between songwriters receiving 9.1% for "mechanical royalties" in comparison to less than 3% for public performance royalties through streaming in new media).

219 *See BMI v. Pandora*, No. 13 Civ. 4037 (LLS), 2013 WL 6697788, at *2 (S.D.N.Y. Dec. 19, 2013); *In re Pandora I*, No. 12 Civ. 8035 (DLC), 2013 WL 5211927, at *2 (S.D.N.Y. Sept. 17, 2013).

220 *See BMI v. Pandora*, 2013 WL 6697788, at *9; *In re Pandora I*, 2013 WL 5211927, at *7.

221 The definition of "New Media," as presented by ASCAP in its compendium modification, is appropriate for use in the proposed partial withdrawal clause. It provided that "New Media Transmission of musical compositions is made available or accessible (i) exclusively by means of the Internet, a wireless mobile telecommunications network, and/or a computer network and (ii) to the public, whether or not, in exchange for a subscription fee, other fee or charge." *In re Pandora II*, 6 F. Supp. 3d 317, 337 (S.D.N.Y. 2014).

222 *See BMI v. Pandora*, 2013 WL 6697788, at *4 (holding BMI's decree prevents partial rights withdrawal); *In re Pandora I*, 2013 WL 5211927, at *7 (holding ASCAP's decree prevents partial rights withdrawal).

withdrawal.[223] A move such as this could threaten the viability of both PROs, given Sony's significant market share,[224] which in turn would threaten the livelihood of the individual songwriters and small publishing houses the PROs represent. These songwriters and small publishing houses may neither have the capabilities nor the resources to navigate the logistic and legal intricacies of music licensing.[225] Furthermore, songwriters, unlike recording artists, are often not famous and do not make added income through activities such as touring and selling merchandise.[226] Additionally, songwriters do not have set salaries and benefits, like workers in other industries, and thus they rely on public performance royalties to make a living.[227] Without songwriters, composers, and publishers, there would evidently be no new, original songs.

Copyright owners are not restricted to an all in/all out licensing scheme like the current consent decrees provide for—rather, they are free to divide, assign, and license their rights either in full or in part.[228] Modifying these decrees will not only make the decrees

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[223] *See* Ed Christman, *Sony/ATV's Martin Bandier Repeats Warning to ASCAP, BMI*, BILLBOARD (July 11, 2014, 3:04 PM), http://www.billboard.com/biz/articles/news/publishing/6157469/sonyatvs-martin-bandier-repeats-warning-to-ascap-bmi [http://perma.cc/BT8K-8GDM].

[224] *See In re Pandora II*, 6 F. Supp. 3d at 342–43 (noting that Sony had an estimated market share of twenty-five to thirty percent in 2012); *see also* ASCAP Comment, *supra* note 50, at 17 ("Even the largest music publishers lack the information, resources and experience necessary to negotiate with each of the numerous broadcasters, Internet services, nightclubs, restaurants, and other users that regularly perform publicly their copyrighted works.").

[225] ASCAP provided quotations from its members during its rate court trial with Pandora in support of its efficacy as a PRO. *See In re Pandora II*, 6 F. Supp. 3d at 335–36 (noting the "vital role ASCAP plays in protecting writers from the shark-infested waters of the music business."). ASCAP is premised on equality between songwriters and publishers, thus songwriters fear that if publishers start collecting money for traditional licensing rights, the splits won't be as fair as they are now (with a 50/50 between songwriter and publishers). *Id.* at 336–37.

[226] *See, e.g.*, *ASCAP CEO Elizabeth Matthews Testifies for Senate Judiciary Subcommittee*, MARKETWIRED (Mar. 10, 2015, 10:35 AM), http://www.marketwired.com/press-release/ascap-ceo-elizabeth-matthews-testifies-for-senate-judiciary-subcommittee-1999036.htm [http://perma.cc/GQ4U-J5GK].

[227] *Id.*

[228] *See* 17 U.S.C. §§ 106, 201(d) (2006) (stating that rights afforded to copyright owners can be transferred separately).

more attune to modern music licensing but it will also harmonize the licensing process with federal copyright law.[229]

Executives from Pandora argue that the same "corporate parents" own many of the biggest publishers and record companies, thus the discrepancy in payment can be fixed internally, rather than through licensing reform.[230] This argument fails to take into consideration that both ASCAP and BMI represent many smaller entities, including individual songwriters and boutique publishing houses, both of which would not benefit from the proposed solution.[231] Rather, songwriters would have to join a large publisher in order to ensure adequate compensation, which is simply an unfeasible option for many.[232] If Internet radio services are unable to adequately compensate songwriters because the bulk of their revenue goes towards licensing sound recordings, that is a problem the Internet radio services must solve in order to remain in business.[233] Songwriters should not suffer to enable their sound-recording counterparts to reap the benefits of licensing music through new media.

C. *Create a New PRO Equivalent to SoundExchange for Performance Rights*

Amending the consent decrees to allow for partial withdrawal of new media rights could allow for the creation of a new PRO—an entity dedicated solely to collecting and distributing the royalties generated by performance rights in new media. The DPSRA of

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229 *Id.*

230 *See* Bill Donahue, *Pandora, ASCAP Spar In Senate Over Streaming Royalties*, LAW360 (Mar. 10, 2015, 3:40 PM), http://www.law360.com/ip/articles/623498?utm_source=rss&utm_medium=rss&utm_campaign=section [http://perma.cc/B5MN-F62V].

231 *See, e.g.*, Whitney Broussard, *The Promise and Peril of Collective Licensing*, 17 J. INTELL. PROP. L. 21, 24 (2009) ("Generally, there is little overlap between the sound recording catalog of a major record label and the musical composition catalog of its publishing affiliate.").

232 A large music publisher, like Sony, would have no economic justification to represent a songwriter with, for example, only one published song. In contrast, ASCAP and BMI operate as non-profits and accept any artist with at least one published work. *See* ASCAP Consent Decree, *supra* note 15; BMI Consent Decree, *supra* note 15.

233 *See* Donahue, *supra* note 230 (Chris Harrison, Vice President of Pandora, testified, "I understand that the disparity is a motivating factor to seek to modify the consent decrees, but at the end of the day, if Pandora is paying 50 percent to record labels and the solution is to pay 50 percent to the publishers, I can't make that up on volume.").

1995 and the Digital Millennium Copyright Act of 1998 leveled the licensing playing field by allowing copyright holders of sound recordings to collect royalties for digital performances.[234] A motivation for recognizing the digital performance right was to ensure artists were fairly compensated, as music users increasingly began streaming music through the Internet, satellite, and cable services rather than purchasing it.[235] The same consideration given to the digital performance right must now go to songwriters. SoundExchange, a non-profit PRO, was designated by Congress as the sole entity to collect and distribute digital performance royalties.[236] An analogous entity should emerge to tackle the same needs for songwriters licensing public performance rights in new media.

Establishing this new PRO could occur in a variety of ways. For example, SoundExchange could create a new division internally or spin-off a subsidiary that deals exclusively with performance rights in new media. Alternatively, ASCAP and/or BMI could put forth proposals for new entities, be it a sister company or subsidiary, tasked only with licensing performance rights in new media.[237] The government would then have the authority to examine each potential candidate for the new PRO and select one as the sole entity designated by Congress to collect and distribute the royalties—just as it did for SoundExchange with respect to digital performance rights.[238]

SoundExchange is efficient and effective, likely because "it is run by the people it pays."[239] Namely, the board consists of nine recording artist representatives and nine record company representatives.[240] Consequently, the non-profit's operating costs are low and the payments it distributes to artists have seen an extraordinary growth rate in recent years.[241] Further, new media licensing

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[234] See Michael Huppe, *"You Don't Know Me, but I Owe You Money": How SoundExchange Is Changing the Game on Digital Royalties*, 28 ENT. & SPORTS LAW. 3, 5 (2010).

[235] *Id.* at 4.

[236] *Id.* at 5.

[237] The consent decrees would, of course, have to be amended accordingly to allow this.

[238] *See* Huppe, *supra* note 234, at 5.

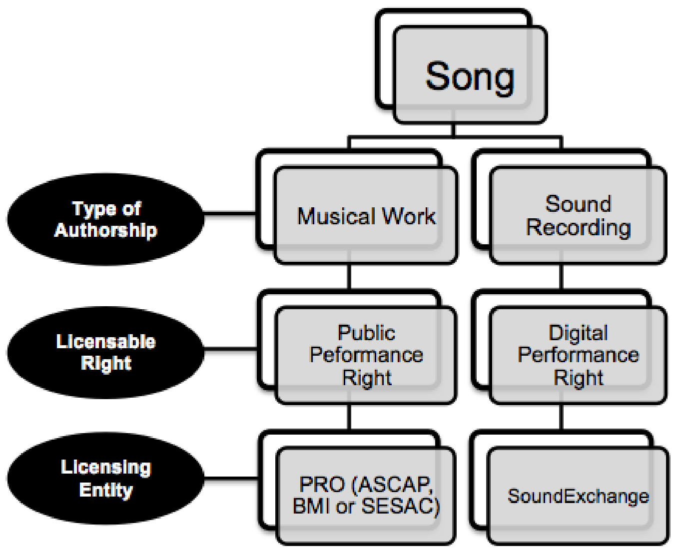
[239] *Id.*

[240] *Id.*

[241] *Id.*

is differentiable from traditional mediums in the sense that a ready-made system exists for tracking performances: digital technology. The system SoundExchange employs for tracking song plays (or something substantively similar) can have the same positive effect for licensing musical works as it has had for licensing sound recordings.[242] Creating an analogous non-profit PRO with the same principles (such as being staffed by both songwriters and music publishers as well as utilizing existing play-tracking technology) but geared entirely towards performance rights, could ensure the gap in compensation inequality between recording artists and songwriters is appropriately bridged.[243]

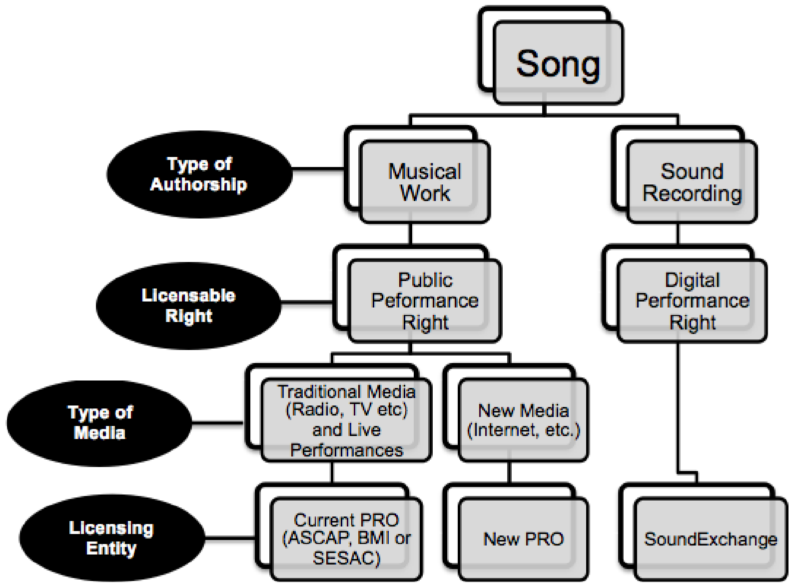
This graphic demonstrates the licensing system as it stands:



[242] SoundExchange functions by collecting "tens of millions of lines of data" reported and processed monthly to track when songs have been played through digital services. *See Our Work*, SOUNDEXCHANGE, http://www.soundexchange.com/about/our-work [http://perma.cc/485A-ASWJ] (last visited Sept. 26, 2015); *see also* Huppe, *supra* note 234, at 6 ("SoundExchange does not invoice services. Rather, the organization relies on services to provide data about what they've played and uses these playlists to divide and distribute royalties according to what's been played.").

[243] *See* Drew B. Hollander, *"Why Can't We Be Friends?" How Congress Can Work with the Private Sector to Solve the "Digital Sampling Conundrum,"* 18 VA. J.L. & TECH. 229, 272 (2014) (noting the efficacy of SoundExchange with respect to monitoring digital media royalty payments and proposing a similar system for monitoring "digital sampling").

This graphic indicates how the system would change with a new PRO designated solely for licensing performance rights in new media:



D. *Replace the Rate Courts with Arbitration*

Creating a new PRO may help with new media licensing concerns, but it won't change the system as it stands with respect to traditional licensing. Although this Note has proposed modifying rather than terminating the consent decrees as they apply to traditional media licensing, one part of the current system must change: the rate courts. As representatives for BMI aptly wrote in the PRO's public comments to the DOJ, the rate court system is "too slow, too expensive, and too legalistic to keep up with the speed of change in real-world markets today."[244]

The judiciary is not the appropriate venue for rate setting, particularly with respect to intellectual property licensing.[245] Not only

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[244] BMI Comment, *supra* note 51, at 2. ASCAP similarly called the rate court system "unduly costly and time consuming." ASCAP Comment, *supra* note 50, at 22–23.

[245] *See* Crane, *supra* 128, at 307 ("Judges will tell you that they are comparatively poor rate regulators."); *see, e.g.*, Arsberry v. Illinois, 244 F.3d 558, 562 (7th Cir. 2001) (referring to rate setting as "a task [courts] are inherently unsuited to perform competently"); *In re* Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust

is such a process extremely rare with respect to intellectual property, "Courts are not institutionally equipped to study a firm's cost structure in detail and figure out the difference between confiscatory, reasonable, and excessive rates."[246] The government has itself analogously argued that judicial rate setting is inappropriate with respect to patents, reasoning that judicial regulation of the industry is "incompatible with our system of free enterprise."[247]

Rate court determinations are based on precedent rather than market force and consequently do not accurately reflect the fair market value of music.[248] Neither consent decree defines the term "reasonable," and thus the procedure for determining reasonable rates has evolved as a "flawed judicial mechanism."[249] Essentially, courts are making a best guess as to the value of music.[250] The period during which ASCAP and BMI modified their decrees to allow for partial withdrawal was the first time in decades that negotiations reflected a willing-buyer/willing-seller transaction on the

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Litig., 906 F.2d 432, 445 (9th Cir. 1990) ("The federal courts generally are unsuited to act as rate-setting commissions."); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 294 (2d Cir. 1979) (rejecting "judicial oversight of pricing policies [that] would place the courts in a role akin to that of a public regulatory commission.").

246 Crane, *supra* 128, at 313.

247 *See* Brief for the United States at 42, United States v. Nat'l Lead Co., 332 U.S. 319 (1947) (No. 89).

248 Rate court determinations are often backward-looking rather than forward-looking. Instead of contemplating new market trends and evolving business circumstances, rates are based on past judicial decisions and agreements—all of which have been negotiated in conjunction with the rate court system. *See, e.g.*, Joan M. McGivern, *A Performing Rights Organization Perspective: The Challenges of Enforcement in the Digital Environment*, 34 COLUM. J.L. & ARTS 631, 635 (2011). Consequently, the reflected rates are circular and an ill-suited representation of actual market value. This has lasting effects as the consent decrees require the PROs to license similar users with similar fees. Nor does it translate well to new media services, where the industry is constantly changing and businesses strive to create unique technological services. Offering comparable licenses may be justifiable for traditional mediums, but not for new media services which are constantly evolving. P.F. Chang's, for example, uses music in the same way The Olive Garden does, but does Pandora offer an experience in exactly the same way as Spotify? The comparison of "similarity" is more complicated when it comes to new media services. *Id.*

249 Frederick C. Boucher, *Blanket Music Licensing and Local Television: An Historical Accident in Need of Reform*, 44 WASH. & LEE L. REV. 1157, 1178 (1987) (arguing the rate courts are "contrary to the purpose of copyright and antitrust laws" and are "a costly, cumbersome, and artificial substitute for a free market determination of the value of music").

250 *Id.*

open market.[251] The negotiations between Pandora and Sony, for example, demonstrated that licensing musical works in new media is a truly competitive business, worthy of reflective rates.[252] Record companies and recording artists are amassing a fortune through licensing sound recordings while at the same time, songwriters struggle to make a living—all because finders of fact, rather than the open-market, determine their licensing rates.[253] Furthermore, while licensees await rate court determinations (which often take years for litigation preparation, trial and appellate review), the licensees reap the benefits of "interim fees" which are set by the court based on any previous agreements between the parties.[254] The process incentivizes litigation, as licensees are free to abide by interim agreements and avoid negotiating while awaiting a judicial determination of the fee.[255] Each day licensees and PROs wait for a judicial determination of reasonable fees is another day songwriters aren't getting adequately compensated.[256] Thus, a solution to this problem is to replace the rate court system with binding, expedited arbitration.

Arbitration tribunals, unlike the rate court system, can adapt to meet time-sensitive deadlines by modifying and specifically tailor-

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[251] *See supra* Part II.C.

[252] *See supra* Part II.C.

[253] Both consent decrees provide that once the rate court has determined a "reasonable fee," the PRO must "offer a license at a comparable fee" to all other similar applicants who thereafter request a license. *See* ASCAP Consent Decree, *supra* note 15, at 15; BMI Consent Decree, *supra* note 15, at 9.

[254] *See* ASCAP Consent Decree, *supra* note 15, at 14 (stating that the rate court will fix an interim fee within ninety days of a licensee's written request for a license); BMI Consent Decree, *supra* note 15, at 12 (stating that the rate court will fix an interim fee within 120 days of a licensee's written request for a license).

[255] *See* McGivern, *supra* note 248, at 632 (discussing how the consent decrees allow licensees to delay paying PROs until the rate court has set a reasonable fee and rhetorically asking, "Why is ASCAP barred from exercising what is a copyright owners' normal right to sue for infringement if usage and payment terms have not been agreed upon?").

[256] *See, e.g.*, ASCAP Comment, *supra* note 50, at 24 (noting that some licensees have remained on interim licenses for decades while awaiting rate court rulings); BMI Comment, *supra* note 51, at 20 (whilst awaiting rate court decisions, "many music users are able to perform BMI music for years without paying BMI, and it is not unheard-of for a user to go out of business before paying even a dime to BMI for its use of music").

ing procedure.[257] This is particularly attractive in commercial disputes, such as music licensing negotiations, as both parties benefit from a quick determination of fees so the business relationship can proceed accordingly.[258] Abiding by an expedited arbitration process could also eliminate the need for interim fees, thereby simplifying the exchange of funds between parties. Although an argument exists that the number of rate court trials has not been substantial enough to amount to replacing the system, a number of proceedings have been terminated through settlements prior to litigation.[259] The expenses and time spent on these proceedings is nevertheless significant—particularly on behalf of the PRO who is likely engaged in various other negotiation disputes and settlements concurrently.[260]

A troubling aspect about recent rate court decisions, such as the three discussed in Part II, is the disparity in defining "reasonable" with respect to determining rates. Although the accepted precedent is to set a rate that represents "fair market value," the rate court in *In re Pandora I* rejected examples of direct licenses as appropriate benchmarks and set the rate significantly below what other similar parties have reached through negotiation.[261] Rejecting direct licenses as evidence of fair market value and consequently setting lower rates in the courtroom than in the open market incen-

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[257] *See* DAVID ST. JOHN SUTTON, JUDITH GILL & MATTHEW GEARING, RUSSELL ON ARBITRATION 1:5 (23d ed.).

[258] The Arbitration Act establishes federal policy favoring arbitration, particularly with respect to commercial disputes. *See* 9 U.S.C. § 1; *see, e.g.*, Preston v. Ferrer, 552 U.S. 346, 128 (2008) ("National policy favoring arbitration applies in state as well as federal courts."); Shearson/Am. Exp., Inc. v. McMahon, 482 U.S. 220, 226 (1987). The DOJ also supports arbitration in commercial disputes, particularly in technologically evolving industries. *See, e.g.*, United States v. Comcast Corp., 808 F. Supp. 2d 145, 148 (D.D.C. 2011) (the DOJ suggested non-appealable arbitration as a dispute resolution procedure for a decree enjoining a broadcaster and cable network from entering in a joint venture to provide video programming).

[259] *See* ASCAP Comment, *supra* note 50, at 24 ("There have in fact been a substantial number of rate court proceedings that have been terminated by settlement after significant expenses have been incurred in preparation for rate court litigation."); *see also* Brabec, *supra* note 172, at 37 (detailing rate court cases that have terminated by settlement, the details of which are almost always kept confidential).

[260] *See* Brabec, *supra* note 172, at 37.

[261] Despite evidence of direct licensing agreements reaching up to three percent of revenue, the Court set Pandora's ASCAP rate at 1.85%. *See In re Pandora I*, No. 12 Civ. 8035 (DLC), 2013 WL 5211927, at *2 (S.D.N.Y. Sept. 17, 2013).

tivizes parties to rely on the judiciary rather than negotiate amongst themselves. In the interest of both judicial economy and inherent fairness to songwriters, the licensing process for musical works in new media must change. Allowing expedited, binding arbitration to replace the rate court system will result in awards that mold the market and significantly improve the rate-setting process.

CONCLUSION

ASCAP and BMI are currently bound by consent decrees that have not evolved to suit the modern music industry. The technological dissemination of music is vastly different than it was when the PROs entered into their decrees and the industry has evolved, and continues to do so, at a rapid pace. Allowing outdated agreements to govern music licensing not only harms songwriters, but also the interests of the public at-large. The benefits of music are globally pervasive—songs can inspire happiness, encourage unity, and even support both mental and physical healing. If songwriters are not adequately compensated for their work, they will not be able to continue producing it. The Supreme Court has said, "The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."[262] Recording artists and record labels saw justice with the creation of digital performance rights, which had a lasting positive impact on the industry. A similar change must now occur with respect to licensing performance rights in new media. By burdening songwriters with financial uncertainty, the consent decrees stifle creativity rather than stimulate it. Amending the decrees to allow for partial withdrawal of new media rights, creating a new PRO, and replacing the rate courts with expedited, binding arbitration will reform the system to its benefit. The industry has evolved and so now must the decrees.

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[262] Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).