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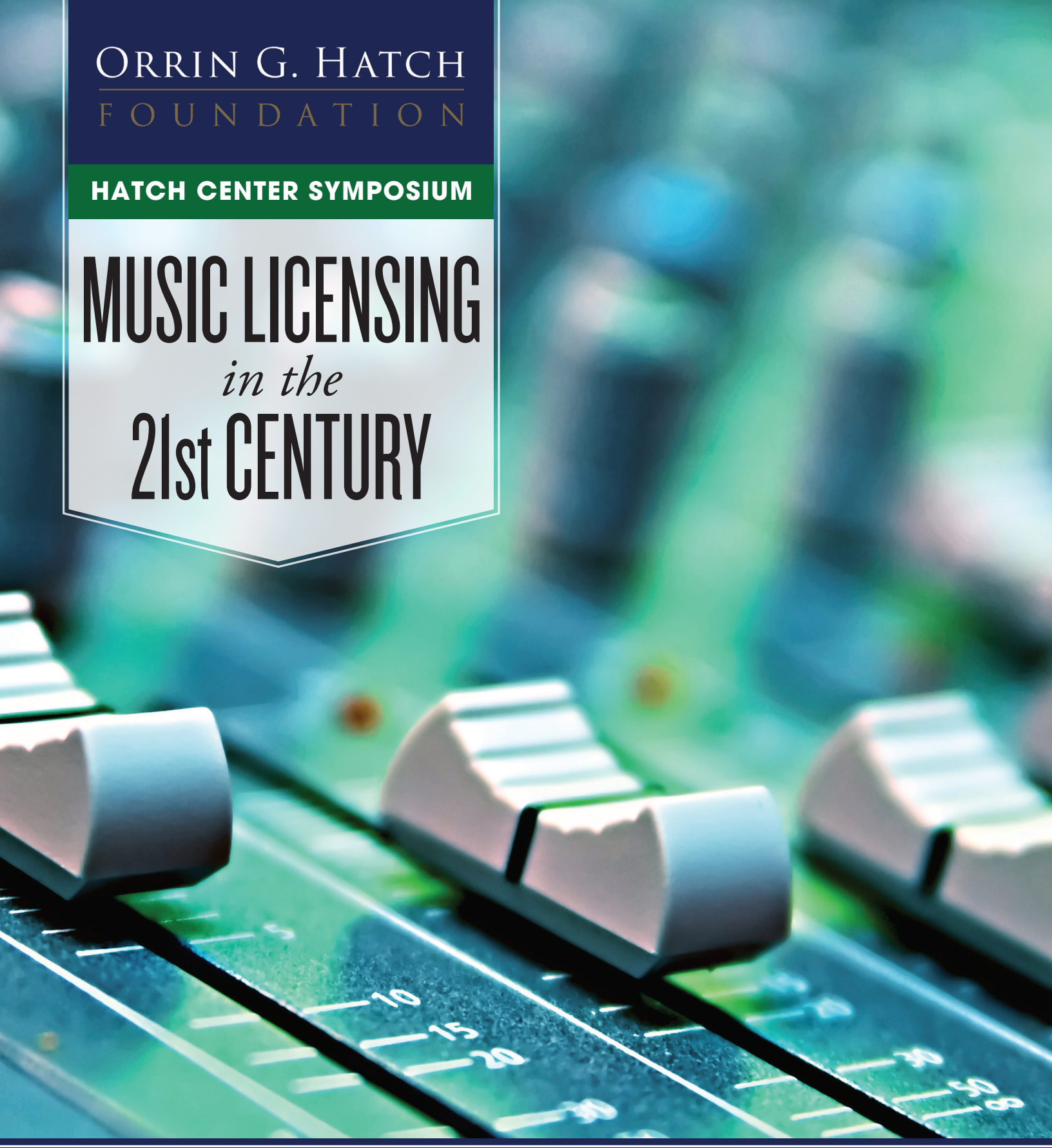
FOUNDATION

HATCH CENTER SYMPOSIUM

MUSIC LICENSING *in the* 21st CENTURY



Symposium Report

August 2019

Music Licensing, Consent Decrees, and Performing Rights Organizations

Music is everywhere. Setting aside our favorite playlists, radio stations, or streaming services, we interact with music daily—whether watching TV, going to stores, or even riding in elevators. Behind each of these songs lies a complex web of laws, regulations, and judge-ordered decrees regulating the music industry, much of which was created over a half-century ago. In light of the technological advances and rapid changes in the way we consume music, members of the music industry and the federal government have engaged in a debate that may change the foundations and structure of the industry going forward.

Just last year, Senator Orrin G. Hatch was pivotal in bringing competing parties together for the passage of the Music Modernization Act—a law that is now revolutionizing certain aspects of the music industry. And with the Department of Justice currently taking steps to review legacy antitrust decrees that regulate two of the biggest players in the music industry,[1] Senator Hatch, through the Orrin G. Hatch Foundation, has again taken steps to foster compromise and help chart a path forward. This report provides both a brief overview of the legal framework surrounding the music industry and a summary of the Foundation's August symposium, which featured four key players in the licensing debate.

Creation of performing rights organizations

The United States Constitution gives Congress the authority to "promote the Progress of Science and useful Arts, by securing" certain intellectual property rights for a limited period of time.[2] In 1897, Congress used this power to create copyrights, or the ability of songwriters and composers to license the performance of their works and be fairly compensated in return.[3] But because every musical work is covered by at least two copyrights—one for composition (e.g., lyrics and music) and one for sound recording—and because these rights are often held by multiple owners in partial shares,[4] early twentieth century radio broadcasters found it increasingly difficult to acquire licenses and perform songs publicly on the radio or at various venues.[5] Songwriters, composers, and publishers also faced significant challenges in attempting to negotiate licenses with each licensee for each musical work, to ensure fair compensation, and to identify any unauthorized uses of their works.[6] In 1914, members of the music industry responded to these challenges by forming the American Society of Composers, Authors, and Publishers (ASCAP), a performing rights organization (PRO) designed to collectively negotiate copyright licenses for public performance rights, collect royalties, and distribute them back to the rights holders.[7] Most importantly, ASCAP offered blanket licenses—a flat rate that allows a licensee to

publicly perform every song in a PRO's repertoire without needing to obtain an individual license for every song.[8]

For nearly three decades, ASCAP was the only PRO in the music industry. But in 1939, responding to ASCAP's stringent membership requirements and attempts to double its licensing rates, broadcast leaders formed their own PRO: Broadcast Music, Inc. (BMI).[9] BMI was created to decrease licensing rates and relax membership requirements. But at its core, the PRO also functioned as a collective licensing organization that negotiated licenses, collected royalties, and distributed them to the rights holders.[10] BMI too offered a blanket license.[11] Over time, other PROs formed such as the Society of European Stage Authors and Composers (SESAC) and Global Music Rights (GMR),[12] but today ASCAP and BMI license roughly 90% of the public performance rights for all songs in the United States.[13]

Antitrust Implications and Consent Decrees

Around the time that BMI was created, ASCAP was facing significant allegations of U.S. antitrust violations.[14] Specifically, parties alleged that ASCAP's blanket license violated the Sherman Antitrust Act's prohibition on price-fixing.[15] When the Department of Justice sued ASCAP for this alleged violation, the parties settled the case by entering into a consent decree,[16] or an agreement that would structure ASCAP's licensing system to prevent "the aggregation of public performance rights" while "preserving the transformative benefits of blanket licensing."[17] And because BMI's similar business model implicated the same antitrust concerns, BMI voluntarily entered into a consent decree with the Department of Justice later that same year.[18] These consent decrees, first created in 1941 and slightly modified in the years following, still govern ASCAP and BMI today.

Put simply, these decrees "ensure that new entrants can obtain licenses, that those licenses will be set at fair rates, and that there won't be discrimination between similarly situated music users."[19] More specifically, the 1941 consent decrees required that the PROs allow songwriters and producers to make independent agreements with broadcasters and venues—previously, the PROs maintained the exclusive rights to license these works and PRO members could not deal directly with licensees.[20] Under the decrees, PROs also could not discriminate between "similarly situated" licensees, and they had to distribute royalties to copyright holders in a "fair and nondiscriminatory manner."[21] The decrees also limited PROs to licensing *only* public performance rights (e.g., a performance occurring in or being transmitted to the public).[22] Other related rights, such as recording, print, synchronization, or mechanical rights, would be licensed separately.[23] Perhaps most relevant to the current debate, the decrees prohibited rights holders from partially withdrawing portions of their rights. For example, rights holders could not use PROs to license the performance rights to broadcasters or venues while separately negotiating digital transmission rights outside the consent decrees.[24] Either PROs would "administer *all* public performance rights for a given composition . . . or none of them."[25]

After several lawsuits against ASCAP in the late 1940s, the Department of Justice amended the consent decrees to include a rate court that would guarantee users an automatic license and provide a venue to determine "reasonable" rates should a PRO and a licensee be unable to reach an agreement.[26] BMI's consent decree was then amended in 1994,[27] and ASCAP's in 2001[28] with little substantive changes. And though the Department of Justice has not amended the PROs' consent decrees since, it did review them in 2014[29] and 2015,[30] but decided not to change the decrees. Both these reviews are key to the current debate.

In 2014, the Department of Justice considered whether the decrees allowed the partial withdrawal of licensing rights for certain mediums.[31] With the advent of internet radio, the PROs and copyright holders felt that rates were too low for digital streaming services. So in 2011, several large publishers continued licensing songs through the PROs in traditional mediums (e.g., radio, restaurants, elevators), but withdrew the licensing rights for "new media" or digital streaming.[32] This partial withdrawal forced digital streaming services to negotiate directly with publishers and songwriters outside the regulated confines of the decrees.[33] But this strategy failed when the courts overseeing ASCAP and BMI held that the decrees barred such practices.[34] When the PROs approached the government asking to amend the decrees, the Department of Justice reaffirmed that PROs would either license all public performance rights or none of them.[35]

In 2015, the Department of Justice considered whether the decrees allowed fractional licensing.[36] Fractional licensing forbids a copyright owner from licensing more of a copyright than he or she owns, and often in the United States, a copyright is held by any number of individuals.[37] Because a licensee must acquire a 100% or full-work license to avoid liability,[38] under a fractional licensing strategy, a 1% owner could veto the entire license by refusing to license its share.[39] To the licensees' benefit, the default copyright rule in the United States is that any partial owner may license the entire work regardless of how small its partial share may be.[40] But copyright holders may still contract around this default rule and engage in fractional licensing.[41] In the digital streaming services context, if PROs and publishers used fractional licensing in connection with a digital streaming service licensee, each partial owner (especially the publisher) would have considerable leverage over that licensee.[42] But when members of the music industry asked the Department of Justice to clarify whether the decrees allowed fractional licensing, the Department also rejected this approach, concluding that the decrees require full-work licensing.[43] Shortly thereafter, BMI and other publishers litigated the Department's interpretation and secured a judgment in their favor that was recently affirmed by the Second Circuit in a non-precedential order.[44] As a result, BMI affiliates can now engage in fractional licensing.[45] Because the Second Circuit's order was non-precedential, however, ASCAP and its members are still required to adhere to the Department of Justice's full-work interpretation.[46]

Today, the consent decrees have several clear benefits. For copyright holders, the smallest songwriter is treated the same as the largest publisher, as PROs are required to value the songs of both equally and distribute royalties based on fair revenue shares.[47] The collective model also allows independent songwriters and publishers to make deals with broadcasters or venues (through the PROs) that they otherwise would not have had the clout or capital to negotiate with.[48] Moreover, under the decrees, ASCAP and BMI are required to pay songwriters their fair share of the royalties—not just the publisher or the songwriter's employer.[49] For licensees, the PROs cannot favor one service over another. Instead, new radio stations or alternative music platforms can easily enter the marketplace.[50] The blanket license also allows emerging services and small venues to play a broader repertoire of music without having to individually negotiate with every rights holder over every public performance.[51] And finally, the decrees ensure that licensees do not have to pay premiums on any particular song.[52]

The current decrees are not without drawbacks, however. They only cover ASCAP and BMI while other PROs like SESAC or GMR are not equally regulated.[53] ASCAP and BMI are limited to licensing public performance rights and cannot diversify their license offerings to include other rights, like mechanical or synchronization rights. Other PROs, however, can be a "one-stop licensing source to meet the needs and match the pace of the digital marketplace."[54] Furthermore, disagreements over rate-setting can lead to expensive litigation, which inherently favors the better leveraged PROs over licensees.[55] Songwriters and publishers also may be undercompensated for the digital

performance of their works without the ability to engage in partial withdrawal or (at least for ASCAP) fractional licensing. Even BMI's ability to fractionally license works, while potentially benefitting its affiliates, nonetheless burdens broadcasters and venues in their efforts to acquire full-work licenses.[56] The Department of Justice's current review of the consent decrees focuses on all aspects of these benefits and drawbacks.[57]

Contemporaneous with the back and forth between the Department of Justice, the PROs, and the courts, Congress and the Copyright Office conducted independent reviews of U.S. Copyright law and any portions that may be outdated.[58] The reports concluded that "copyright law has not kept pace with changing consumer preferences and technological developments in the marketplace"—i.e., the rise of digital streaming services like Spotify, Pandora, or Apple Music.[59] To remedy these deficits, Representative Bob Goodlatte in the House and Senator Hatch in the Senate introduced the initial bills that later became the Music Modernization Act (MMA or "the Act"). Unlike

many of its stalemated contemporaries that focused on health care, immigration, and government shutdowns, the MMA passed with unanimous support in both houses.[60] The President signed the bill on October 11, 2018.[61]

The Act garnered not only unanimous approval from Congress, but also the support of songwriters, publishers, and digital service providers—a group often "more comfortable suing each other than shaking hands."[62] As BMI put it, "[i]t used to be a 'given' in Washington that copyright reform was next to impossible because the various creators and users [of music] could never get along. The MMA proved that theory wrong . . . ."[63] It was "a watershed moment for the industry," serving not only the interests of all those involved, but also providing "a template for future consensus in addressing other industry issues" in the future.[64]

While the MMA primarily creates a comprehensive licensing collective for *mechanical* rights (i.e., the right to record and distribute a song) in the context of digital streaming services,[65] there are several key provisions also applicable to ASCAP, BMI, and the licensing of public performance rights.

First (and perhaps most important), the MMA partially repealed the evidentiary limitations placed on the PROs' rate court judges.[66] Again, every song has two basic copyrights (recording and composition rights), and ASCAP and BMI are only allowed to license the public performance of composition rights.[67] Before the MMA, rate court judges could not consider licensing rates for recording rights. This at times led to inequitable results as the recording artist could receive six to ten times more in royalties than the songwriter.[68] After the MMA, however, PRO rate court judges can now consider the licensing fees for sound recordings when determining appropriate rates for composition licenses.[69] Importantly, this evidentiary change *only* applies in the digital streaming services context—not in more traditional contexts like radio broadcasting.[70]

Second, whereas before the same judge would adjudicate all ASCAP- or BMI-related cases, the MMA alters the selection process for those judges. Instead, a judge will be randomly selected from a pool for rate-related cases.[71] For all other cases, the same ASCAP- and BMI-designated judges will adjudicate any other disputes (e.g., interpreting consent decrees).[72] And third, the MMA requires the DOJ to inform Congress each time it reviews a PRO consent decree.[73]

Hatch Center Symposium: Music Licensing in the 21st Century

In light of the Department of Justice's current review of the ASCAP and BMI consent decrees,[74] the Hatch Center—the policy arm of the Orrin G. Hatch Foundation—held a symposium on August 13, 2019, focused exclusively on PRO consent decrees and music licensing in the 21st century. Just as compromise and respecting differing viewpoints were the lodestars of Senator Hatch's public service, this symposium was no different.

On the one side, Elizabeth Matthews, CEO of ASCAP, and Michael O'Neill, President and CEO of BMI, advocated for the modification and eventual termination of the decrees. On the other side, former Senator Gordon H. Smith, President and CEO of the National Association of Broadcasters, argued that Congress should intervene with a compulsory licensing scheme, or that consent decrees should be either left alone or modified only slightly. And in the middle was Makan Delrahim, Assistant Attorney General for the Antitrust Division of the Department of Justice, still in the process of determining which direction the government will take. Each participant spoke first individually and then as part of a panel discussion.

The Honorable Makan Delrahim

Assistant Attorney General Antitrust Division, U.S. Department of Justice

Mr. Delrahim has served as Assistant Attorney General of the Antitrust Division of the Department of Justice since September 27, 2017. Previously, Mr. Delrahim served as Deputy Assistant to the President and Deputy White House Counsel. From 2004 to 2007, Mr. Delrahim was a Commissioner on the Antitrust Modernization Commission, and prior to that, he served as the antitrust counsel—and later Staff Director and Chief Counsel—of the U.S. Senate Judiciary Committee under Senator Hatch.[83]

Assistant Attorney General Makan Delrahim[75]

Mr. Makan Delrahim centered his remarks on the importance of and the government's role in fostering competition and innovation in America. From the Founding, figures like Thomas Jefferson and James Madison recognized the social value of songwriters' and composers' contributions, as well as the importance of ensuring fair compensation for those contributions. To this end, "our country's unique combination of expressive freedom and capitalism provides an incubator for songwriters to flourish." The Antitrust Division's focus is, therefore, to ensure that innovation, regulation, and competition remain in the proper balance. Should regulation threaten to reduce innovation or competition, "change must occur to restore the proper balance."

As part of its broader balancing efforts, the Department of Justice has been actively engaged in its Judgment Termination Initiative—a years-long effort aimed at removing legacy antitrust judgments that clog the courts and impede competition. Already, the Department has successfully terminated nearly 600 outdated judgments in 68 of the 79 district courts. Against this backdrop, the Department announced yet another review of ASCAP's and BMI's consent decrees.[76] Though the Department made no changes following its prior two reviews, Mr. Delrahim suggested that this review is different: In 2016, the Department decided to take no action due to the pending Second Circuit appeal on fractional licensing—but the Department expressed then its desire to revisit the existence of the decrees after the appeal concluded. Shortly after the Second Circuit's ruling, the Department began the current review.

Mr. Delrahim still did not indicate how the Department would act. As of his remarks, the sixty-five day comment period had just ended, members of the Department were still reviewing the almost 900 comments submitted, and they had not yet decided whether the decrees should be left unchanged, modified, immediately terminated, or eventually terminated through a sunset provision. But when pushed for a rough timeline, Mr. Delrahim did clarify that he expects the Department to take some action before the end of this year.

Though Mr. Delrahim did not provide any clues as to which outcome the Department favored, he interestingly took time to explain his view of the Department's and Congress's roles in the matter:

[W]e are mindful of the lessons learned from hundreds of decrees reviewed as part of the Judgment Termination Initiative: ongoing enforcement by decree should not be the default for any industry. If there is permanent failure in the markets, then Congress is a better forum to address it. Regulation by Washington is not justified simply because it has been around for decades and has been the status quo.

Thus, while the future of PRO consent decrees is still unknown, Mr. Delrahim seemed to suggest that—should some ongoing regulation continue—Congress should and would be better served to do so.

Elizabeth Matthews, CEO, ASCAP[77]

Ms. Elizabeth Matthews focused on the procompetitive effects that PROs have on the music industry and the negative effects of the antiquated consent decrees. Regarding procompetitive effects, collective licensing yields high efficiency for licensees and rights holders. After all, the same efficiency considerations that justified collective blanket licensing in 1914 still hold true today: "no licensee in their right mind would want to transact with over 720,000 ASCAP members and 900,000 BMI affiliates separately to avoid claims of copyright infringement and figure out how to get all those people paid." This collective framework also provides high efficiencies for the PROs themselves, allowing ASCAP and BMI to run their businesses on only 10 percent of the royalties it collects, the other 90 percent going back to the copyright holders. Moreover, current market factors, including an increase in media platforms and low barriers to entry, foster competition among new and existing PROs.

But the outdated consent decrees, paired with technological innovations, do present several drawbacks. Foremost, Ms. Matthews agreed with Mr. Delrahim that ensuring fair compensation for artistic contributions is vital, and yet we often do not know who to thank for the lyrics or melody that move us to our core. Thus, PROs are "of, by, and for music creators," attempting to provide a collective framework that fairly compensates the "unsung heroes behind American music."

Today, however, consent decrees place limitations on PROs, making it harder for songwriters to make ends meet—even if they are receiving 90% of the licensing profits. Because of digital streaming services, consumers are delving deeper into PRO repertoires than they ever have before: over the course of five short years, ASCAP alone went from processing 250 million performances in 2013 to over a trillion in 2018. And yet copyright holder compensation has not tracked this exponential increase in consumption. Instead, consent decrees limit "songwriters and PROs, diluting royalties" and making a dollar worth only "fractions of pennies." Even more troubling, the current compensation structure provides less incentives for a songwriter to keep contributing their artistry to society.

In addition to their effects on compensation, the decrees do not treat PROs equally. Only ASCAP and BMI—not SESAC, GMR, or other PROs—are bound by consent decrees. According to Ms. Matthews, this severely hampers ASCAP's and BMI's abilities to compete effectively. For example, competitors can innovate by bundling other rights (e.g., mechanical or synchronization rights) along with public performance rights. Both ASCAP and BMI agree that competition is essential to a functioning market—but they want to be able to compete in the first place. Without at least amending the current consent decrees, ASCAP and BMI simply cannot strategically innovate and achieve the economies of scale necessary to adequately compete. Even when compared to each other, ASCAP and BMI are not treated equally. Thirty-three material differences exist between the ASCAP and BMI decrees—the most recent being BMI's permission and ASCAP's prohibition from engaging in fractional licensing.

To preserve procompetive effects and mitigate the drawbacks of the antiquated consent decrees, Ms. Matthews called for the government to help modernize the decrees, trust in the free market, and not "leave [ASCAP and BMI] in 1941" while the rest of the music industry adapts and advances in the 21st century.

Elizabeth Matthews

CEO, American Society of Composers, Authors & Publishers (ASCAP)

Ms. Matthews has been CEO of ASCAP since January 2015. Prior to that, she served as the Executive Vice President and General Counsel of ASCAP. Before joining ASCAP in 2013, Ms. Matthews worked as the Executive Vice President & Deputy General Counsel of Viacom Media Networks, focused on the legal affairs of several Viacom departments including advertising, content distribution, marketing, new business development, and global media. Ms. Matthews also currently serves on the Board of Directors for the International Confederation of Societies of Authors and Composers and for the Songwriters Hall of Fame.[86]

Mike O'Neill

President & CEO, Broadcast Music, Inc. (BMI)

Mr. O'Neill has served as President and CEO of BMI since 2013; however, he has been at BMI for 24 years. During that time, he served in various capacities. Prior to joining BMI in 1994, Mr. O'Neill was the Director of CBS Affiliate Relations at CBS-TV Network. Mr. O'Neill currently sits on the Board of Directors for the Songwriters Hall of Fame, the Broadcasters Foundation of America, and the National Association of Broadcast Leadership Foundation. He also serves as the Honorary Chair of the BMI Foundation.[87]

Michael O'Neill, President & CEO, BMI[78]

Mr. Michael O'Neill touched on many of the same justifications for modifying ASCAP and BMI consent decrees, but he also pointed to specific action the PROs hoped the government would (and would not) take. He too cited increased competition in the music industry, the impact of technology, and the importance of fairly compensating the copyright holder. He also agreed with Ms. Matthews that the free market is the best way for music creators to be rewarded for their hard work—but to achieve those free-market results, the decrees would need to eventually be terminated, sunsetting them in a gradual and thoughtful manner to avoid chaos in the marketplace. Specifically, ASCAP and BMI want their decrees immediately terminated and replaced with new ones that would, like all post-1979 decrees, include a sunset provision. These new decrees would contain the following provisions, protecting the interests of creators and users alike:

1. Licensees would still have automatic access to PRO repertoires with the immediate right to public performance. This access, however, would be contingent upon a fairer, more efficient, less costly, and automatic mechanism for the payment of interim fees.
2. The decrees would retain the recent rate court reforms under the MMA (i.e., evidentiary and judge selection changes).
3. Writers and publishers could still independently deal with licensees if they desired.
4. The decrees would preserve the industry's current license forms (e.g., blanket license).

And though these decrees would eventually expire, Mr. O'Neill emphasized that antitrust laws would still be applicable, sufficiently keeping ASCAP and BMI in check. Notably, however, BMI has not once violated antitrust law since its inception.

Mr. O'Neill found one potential outcome clearly undesirable: Congress replacing consent decrees with compulsory licensing—in other words, removing all negotiations over licensing rates and appointing a body to collectively set rates (in much the same way mechanical rights are handled with a compulsory licensing regime under the MMA). According to Mr. O'Neill, compulsory licensing would only disadvantage songwriters further by depressing pricing. "Bottom line," the two PROs "see no scenario in which more government regulation of the music industry would benefit anyone."

Gordon H. Smith, President & CEO, NAB[79]

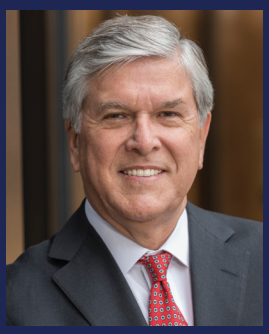
Senator Smith's remarks centered on the vital importance of broadcasters to our economy and the detrimental effects that removing the decrees would have to that industry. Broadcasting advertising moves more commerce than any other medium, making it an irreplaceable and indispensable platform for the American economy. Broadcasters are also critical in serving local communities. Just as songwriters need to make a living, so too do broadcasters—if nothing else for the communities and economies they serve.

But Senator Smith argued that the preservation of these crucial platforms depends on the existence of consent decrees or some replacement architecture like it. Without consent decrees, the market would be in chaos. PROs could use their vast market power to charge exorbitant prices (as ASCAP did before its original 1941 consent decree), and local broadcasters would have no practical way to avoid liability and compile the rights necessary to perform the works they do now. Without consent decrees, "a fair competitive market for the licensing of musical works would not exist." Senator Smith also worried that if new consent decrees automatically terminated after the sunset period, parties would be disincentivized to negotiate a better framework going forward—they could simply wait out the shelf-life of the new decree and move forward free of regulation.

Speaking of solutions, Senator Smith agreed with Mr. Delrahim: Congress is likely the best vehicle to accomplish long-term regulation of the music industry. Not only is Congress experienced in this area, but the MMA demonstrated that legislation can receive bipartisan support in this industry. Moreover, Congress's legislation would act as a stabilizing force in the industry, preventing the frequent ping-pong of policy differences from administration to administration. This would also ensure

that no PRO was treated unfairly as the laws would apply to *all* PROs, not just ASCAP or BMI.

But if the Department of Justice were to enforce some type of consent decree going forward, Senator Smith argued that the consent decrees should not sunset or be substantively different from the current decrees. A sunset provision would only be appropriate, argued Senator Smith, if the clause was conditioned on legislative action replacing the decrees. But without such a replacement, the decrees should remain in place. Again though, Senator Smith considered the best path forward for all interested parties to be the Department of Justice working with Congress to pass legislation.



The Honorable Gordon H. Smith

President & CEO, National Association of Broadcasters (NAB)

Former Senator Smith has served as president and CEO of the National Association of Broadcasters (NAB) since November 2009. The NAB is the premier trade association for radio and television broadcasters focused exclusively on advancing the interests of broadcasters in federal government, industry, and public affairs.[84] Prior to joining NAB, Senator Smith served in the Senate for two terms as the senator from Oregon and later as a senior advisor at Covington & Burling, LLP. While on the Hill, Senator Smith's committee assignments included the Senate Commerce, Science and Transportation Committee (the panel overseeing all broadcast-related legislation) and the Senate High Tech-Task Force (focused on new media and technology issues) of which he was chairman.[85]

Summary of Panel Discussion

Many of the same arguments were reiterated during the discussion between the four panelists. When asked whether sunsetting or congressional involvement was the right approach, Mr. Delrahim reiterated his concerns that the Department of Justice, as a law enforcement agency, is so heavily involved in the regulation of the music industry when Congress has not specifically delegated those powers. If there is no violation of antitrust laws, Mr. Delrahim was unsure of what role a law enforcement agency should play. But he also is mindful that working with Congress would be no simple task. Interestingly, he reiterated these separation of powers concerns in almost every answer. Senator Smith also wholeheartedly supported these separation of powers concerns, calling again for Congress to remedy the situation.

Mr. O'Neill and Ms. Matthews both generally disagreed on this point: Whether Congress or the Department should regulate is irrelevant—only the free market has the potential to fully compensate copyright holders and allow PROs, writers, publishers, and licensees to creatively deal with changing technologies and increased consumer demand. Specifically, Mr. O'Neill again cautioned that if Congress became involved, it would likely lead to compulsory licensing, depressed royalty rates, and the relegation of professional songwriting "to a mere hobby." Interestingly, Mr. Delrahim agreed that compulsory licensing would not be good for the music industry as ensuring the fair compensation of copyright holders is a high priority for the Department.

Senator Smith also reiterated that chaos would ensue should the consent decrees be removed. In response, however, Ms. Matthews discussed her confidence in the buoyancy and adaptability of the market. In her experience, the successful transition from full-work to fractional licensing was evidence of this market adaptability. And though many commentators warned that fractional licensing would result in chaos among licensees, chaos did not ensue, and the market is and will continue to deal with these changes effectively. Plus, by not immediately sunsetting new consent decrees, there would still be an interim period during which regulations would slowly transition the industry to a free-market approach. If the Department were to continue in this regulatory space, however, Mr. Delrahim agreed with the PROs: the Department could not simply "pull off the band-aid" and terminate the decrees as this would cause chaos, lawsuits, copyright infringements, and other inefficiencies.

To conclude the panel discussion, each panelist provided thoughts on why the MMA was so successful in garnering widespread support and how those principles could apply to the current debate: Senator Smith noted how well parties listened to and asked each other for help in crafting the perfect legislation; Mr. O'Neill acknowledged how many different parties were involved, many of which sacrificed their personal ideals for the greater good; Ms. Matthews cited the painstakingly long, yet rewarding, process of building consensus; and Mr. Delrahim discussed the importance of incentives, for only by incentivizing participation and compromise could a potential measure overcome legislative barriers.

The question remains: How, if at all, should the consent decrees change? The Department of Justice will soon act on the subject, but for now, the possible futures of the decrees can be summarized in four possible outcomes: (1) no change, (2) termination, (3) modification, or (4) congressional intervention.

No Change

It is, of course, possible that the Department of Justice will take no action, leaving the consent decrees as they are. As this outcome would present the same pros and cons already discussed above, they are not worth repeating here. The likelihood of this outcome is not clear, but the Department has at least recognized the shifting industry landscape, recent technological advances, and the possible need for change. As it stated in its June 2019 press release, the Department's current review focuses on "whether these decrees continue to serve the American consumer and whether they should be changed to achieve greater efficiency and enhance competition in light of innovations in the industry."[80] So, as long as a modification yields greater efficiency, enhanced competition, and consumer benefit, the Department is likely to effectuate at least some change.

Termination

In ASCAP and BMI's ideal world, PROs would operate in a free market absent regulation or limitation. Of course, none of the parties involved are expecting the decrees to be terminated immediately. Instead, they agree that immediate termination would either be unnecessary or that it could cause chaos in the market.

Rather than immediate termination, the PROs advocate an eventual termination or "gradual and thoughtful" sunsetting. On the one hand, this gradual approach would better prepare the industry to enter an unregulated space. But on the other hand, it is unclear what would become of the market without regulations after the decree sunsetted. The 90% market share of the two PROs could yield market power sufficient to significantly inflate costs or exclude new entrants. To be sure, antitrust laws could still provide an adequate venue for governmental and private parties to check the PROs' conduct. Similarly, the procompetitive efficiencies of ASCAP and BMI may outweigh the anticompetitive concerns of high market share. But the effects of a completely unregulated ASCAP and BMI on competition will certainly be a chief concern in the Department's determinations.

Modification

Rather than terminating or leaving the decrees intact, modification may provide a more moderate alternative. Many in the industry have suggested modifications, but these changes focus on a few key things: digital rights withdrawal/fractional licensing, rights bundling capacities, equalizing PROs, and arbitration. Both partial withdrawal and fractional licensing modifications would likely ensure that copyright holders are fairly compensated, but these modifications may significantly unbalance the market in favor of the PROs and copyright holders.

A partial withdrawal strategy would likely raise prices and yield greater (and possibly fairer) compensation for songwriters—but this would significantly increase the licensing rates for digital streaming services that would need to negotiate directly with the copyright holders. Fractional licensing would only exacerbate these benefits and drawbacks as a partial copyright holder would have even greater negotiating power, but all licensees would face the challenge and potential liability of failing to acquire a 100 percent license.

To Senator Smith's point, these practices could have a significant negative impact on local broadcasters that are vital to their local interests and economies. And as large digital streaming services like Spotify, Pandora, or Apple Music are unlikely to address local needs, protecting local broadcasters may also be necessary to protect local communities. The Department of Justice must also consider that the Constitution protects the "useful arts" of songwriters and composers, but not necessarily broadcasters or other licensees.

As an aside, there are three other considerations relating to these strategies. First, in partially withdrawing digital media rights, PROs would no longer be a one-stop licensing shop for licensees. Instead, PROs could be removing themselves from the negotiating (and compensation) table for licensing public performance rights with digital companies—an area of the industry that would likely generate significant revenue.

Second, by implementing fractional licensing, the PROs may open themselves up to significant antitrust liability. The Supreme Court's decision in *BMI v. Columbia Broadcasting, Inc.* seemed to assume that the blanket license drew its procompetitive justifications from a full-work licensing scheme.[81] The Department of Justice also operated off this assumption in its 2016 decision to read the decrees as requiring full-work licensing.[82] Interpreted this way, fractional licensing would not have the same justifications and thus would not protect the PROs from suit.

And finally, copyright holders and PROs may not need to use these strategies to leverage digital streaming services. Rate court judges may begin setting licensing rates higher in the context of digital streaming services anyway, as the MMA allows judges to consider the licensing rates for sound recordings—rates that traditionally are much higher.

Modifying the decrees to allow PROs to bundle other rights with public performance rights also has several benefits and drawbacks. Creators and licensees alike would benefit from the PROs providing all their licensing needs. Just as ASCAP and BMI provide the needed efficiencies for licensing public performance rights, bundling could allow PROs to increase efficiency and decrease the administrative costs of dealing with a different licensing organization for other types of rights. On the other hand, giving ASCAP and BMI more market influence could increase anticompetitive concerns. Whereas before their near monopoly was limited to public performance rights, allowing the PROs to bundle rights could increase their market power significantly.

Finally, as for rate-setting arbitration and equalizing the PROs, both modifications would bring significant benefits. Because the PROs are better leveraged, they are generally better positioned to engage in expensive litigation with a licensee. But in arbitration, the lower costs put licensees on a more even playing field. And as for equalizing the PROs, there may be justifications for only regulating ASCAP and BMI but not other PROs due to differences in market share. After all, big market players are more capable of improperly using market power, and thus could warrant more regulation. At the very least, however, there seems to be no justification for treating ASCAP and BMI differently.

Congressional Intervention

Finally, the Department of Justice could step back from the regulatory space and allow Congress to step in. Mr. Delrahim expressed throughout the symposium that he doubted whether an enforcement agency, absent a clearer delegation from Congress, should be involved in regulating ASCAP and BMI going forward. Indeed, both Mr. Delrahim and Senator Smith seemed to agree that Congress is the better vehicle for solving these issues. Legislation would standardize the licensing of public performance rights, much like the MMA has standardized the regulation of mechanical rights. It would also be insulated from the changing policies of different administrations, and it would apply equally to all PROs. The drawback, of course, is that a congressionally created rate-setting body would likely operate off of a compulsory licensing framework rather than the free market. This could drive down prices and undercompensate copyright holders further. But it is unclear whether the Department of Justice will pursue this outcome since Mr. Delrahim both supported the idea of Congress becoming involved but disagreed with the use of compulsory licensing—Congress's most likely remedy. If Congress could regulate PROs in a different manner, the Department of Justice may be more amenable to this outcome.

Overall, the debates surrounding PROs, consent decrees, and music licensing are anything but simple. For PROs and copyright holders, the goal is to increase compensation. Various modifications to the decrees could provide these benefits, but the end goal is to operate in a free market without regulation. Broadcasters on the other hand want to at least maintain the status quo or involve Congress in creating a compulsory collective licensing regime very similar to the mechanical rights licensing body under the MMA. As for the Department of Justice, it is now faced with a plethora of options, any combination of which has both benefits and drawbacks. But the outcome that best preserves competition, ensures fair compensation, accords with separation of powers, and fosters innovation is likely to win the day. Among all this uncertainty, one thing is clear: the debate is far from over.

Endnotes

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