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Patching Up Problems: The Predicted Impact Of The Music Modernization Act's Random Judicial Assignment On Public Performance Licensing Rates

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Erratum

Since the writing of this Note, BMI has become a for-profit commercial enterprise. The change in BMI's status does not change any analysis herein.

PATCHING UP PROBLEMS: THE PREDICTED IMPACT OF THE MUSIC MODERNIZATION ACT'S RANDOM JUDICIAL ASSIGNMENT ON PUBLIC PERFORMANCE LICENSING RATES

*Lindsay Meisels**

As emphasized by the European Commission Vice President for the Digital Single Market, “the way people enjoy culture and entertainment has completely changed- and this is good. But it is important that we don’t leave creators in the cold.”¹ In response to pleas from songwriters, publishers and performing rights organizations (“PROs”) to allow free-market bargaining for public performance licenses of the PROs’ members’ musical compositions, the unanimously passed Orrin G. Hatch-Bob Goodlatte Music Modernization Act (“MMA”) was signed into law on October 11, 2018. Title I of the MMA, the Musical Works Modernization Act (“MWMA”), strives to alleviate several concerns regarding public performance licensing rates, while still upholding the near eighty-five-year-old consent decrees in which ASCAP and BMI operate under.²

This Note first explores the parties that make up the predominant players to the music industry. Next, this Note will elaborate on the system in place for valuing and distributing licensing royalties to songwriters and other associated copyright owners for the public performance of any owned musical compositions, both prior to and after the MMA was enacted. It will then explain, in detail, the responsibilities of judges in reasonable rate-setting determinations. Finally, it will critique the effect that bargaining in the shadow

* Law student, Loyola Law School, Loyola Marymount University. My many thanks to Professor Justin Hughes, Sasha Meyer, and Peter Meisels for insightful and helpful comments on various aspects of this Note.

1. Andrus Ansip (@Ansip_EU), TWITTER (Feb. 13, 2019, 12:28 PM), https://twitter.com/Ansip_EU/status/1095781861501083648 [<https://perma.cc/P4XH-S6W4>]; *see generally The Creation of the Music Modernization Act*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/music-modernization/creation.html?loclr=eamma> [<https://perma.cc/RG5N-AJYS>].

2. *See generally* U.S. COPYRIGHT OFF., *supra* note 1.

of rate-setting proceedings has on predictability of outcomes and private negotiations, a controversial topic that became the subject of the MWMA amendment.

While predictability is often sought after for purposes of conformity and consistency, this Note concludes that the amendment to random judicial assignment will create more unpredictability in how and what rates will be determined, which is ultimately, a positive outcome. Furthermore, this Note concludes that increasing unpredictability encourages private negotiations amongst parties, negotiations that are more likely to result in an agreement that resembles free market agreements than court determined rates. Unpredictability in the judicial process encourages parties to work together, rather than be adversarial, and helps keep arrangements out of judges' hands who are not properly equipped to be determining rates. Finally, this Note will propose possible solutions to anticompetitive practices amongst the PROs and judicial assignment if the random judicial assignment amendment fails to reach its intended goal.

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I. INTRODUCTION

Songwriting is one of the most regulated industries. While protection of artists' copyrightable works is an important concern and at the forefront of many lobbyists' minds, the aim of copyright legislation is less focused on protecting artists, and rather, more focused on promoting the progress of science and useful arts.³ Congress first enacted the copyright statute in 1790.⁴ Following the copyright statute, musical compositions were afforded copyright protection for reproduction and distribution for the first time in 1831.⁵ However, this copyright protection did not extend to performances.⁶ Congress extended the right of public performance, but not licensing, to musical compositions in 1897 for the reason that there was, "no market mechanism to bring creators and users together."⁷ A market mechanism is often referred to as a free market system "in which the power of supply and demand determines the price and quantity of goods traded."⁸ The right to public performance was then conveyed through the sale of sheet music and became the only source of income for nondramatic musical works.⁹

As recorded music emerged, the number of venues publicly performing music increased exponentially, making it increasingly impossible for individual composers to enforce their right of public performance.¹⁰ Performing

3. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991) (alteration in original) (quoting U.S. CONST. art. I, § 8, cl. 8); see also U.S. CONST. art. I, § 8, cl. 8 (The U.S. Constitution gives Congress the power to "promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.").

4. Fred Koenigsberg, *Performing Rights in Music and Performing Rights Organizations, Revisited*, 50 J. COPYRIGHT SOC'Y U.S.A. 355, 359 (2003).

5. Koenigsberg, *supra* note 4, at 359; see also *Copyright and the Music Marketplace: A Report of the Register of Copyrights*, U.S. COPYRIGHT OFF., 17 (2015), <http://copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf> [<https://perma.cc/62QY-DA76>].

6. Koenigsberg, *supra* note 4, at 359.

7. Koenigsberg, *supra* note 4, at 360.

8. Ahmad Nasrudin, *Market Mechanism: Meaning, How It Works*, PENPOIN (April 12, 2022), <https://penpoin.com/market-mechanism/> [<https://perma.cc/ZAR5-UXFN>].

9. Koenigsberg, *supra* note 4, at 360.

10. *Id.* at 375.

rights organizations (“PROs”) arose to solve the problem through collective licensing.¹¹ Through collective licensing, a PRO could keep track of its members’ copyrights and function to collect and facilitate members’ licensing needs.¹²

The PROs function as more than a clearing house by allowing for music users to obtain a single bulk license for the right to perform all works in their respective repertoires.¹³ Further, the PROs operate as watchdog entities, using undercover agents to track unauthorized public performances of their members’ music more efficiently than a single composer is able to.¹⁴ With the rapid innovation of technology and streaming services, the amount of pressure placed on the music industry and Congress to keep up with how digital technological advances affect artists and copyright owners has increased astronomically.¹⁵ The recent passage of the MMA was the first major amendment to the original 1976 Copyright Act that we’ve seen in a long time, and will likely be the last for the foreseeable future. While the MMA contains three different Titles, this Note will solely focus on Title I of the MMA, which will hereinafter be referred to as the MWMA when discussing judicial assignment.

Following the enactment of the MWMA, the two judges who have historically held jurisdiction over the two Consent Decrees, Judge Cote for the American Society of Composers, Authors and Publishers (“ASCAP”) and Judge Stanton for Broadcast Music, Inc. (“BMI”), are no longer allowed to hear the respective rate court proceedings.¹⁶ Instead, they will merely be permitted to *interpret* the Consent Decrees.¹⁷ Judges from the Southern District of New York (“S.D.N.Y.”) will now be randomly assigned to such cases

11. *See generally id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *See generally Orrin G. Hatch–Bob Goodlatte Music Modernization Act*, H.R. DOC. NO. 1551, at 13 (2018), https://www.copyright.gov/legislation/mma_conference_report.pdf [<https://perma.cc/DSSC-FUAN>].

16. Music Modernization Act, H.R. 5447, 115th Cong. § 104 (2018).

17. H.R. 5447, 115th Cong. § 104 (2018); *see also* Eric Goldman, *An Analysis of Title I and Title III of The Music Modernization Act, Part 2 of 2 (Guest Blog Post)*, TECH. & MKTG. L.

using the “wheel” method, in accordance with the court’s rules for dividing business amongst the judges.¹⁸

The issue of whether the Consent Decrees are still necessary, and effective, for avoiding antitrust competition and gross monopolization is questionable. This Note explores the question of whether the shift to random judicial assignment helps eliminate actual or perceived bias and what effect the MWMA has on public performance licensing negotiations between PROs and music users. Through a careful analysis of the judicial rate-setting process, this Note will (1) explain how the shadow of rate courts affect private bargaining and (2) explore the effect ‘predictability’, or lack thereof, has on rate-setting outcomes. Additionally, this Note will discuss how random judicial assignment assists in reducing the number of rate court proceedings, or rather, helps to *increase* the number of private negotiations between parties.

II. BACKGROUND

Before delving into how the antitrust Consent Decrees affect the PROs’ operations, a brief explanation of the parties, along with an overview of the antitrust laws involved in this, for lack of a better word, mess, is helpful for context.

A. Parties in the Music Industry

The primary players that predominate the music industry are frequently motivated by differing goals and interests as related to the other parties’ that make up the industry. For starters, a songwriter’s job is to either create the

BLOG (Jan. 23, 2019, 9:01 AM), <https://blog.ericgoldman.org/archives/2019/01/an-analysis-of-title-i-and-title-iii-of-the-music-modernization-act-part-2-of-2-guest-blog-post.htm> [https://perma.cc/LA8U-V7U3].

18. H.R. 5447, 115th Cong. § 104 (2018); *see also* Eric Goldman, *An Analysis of Title I and Title III of The Music Modernization Act, Part 2 of 2 (Guest Blog Post)*, TECH. & MKTG. L. BLOG (Jan. 23, 2019, 9:01 AM), <https://blog.ericgoldman.org/archives/2019/01/an-analysis-of-title-i-and-title-iii-of-the-music-modernization-act-part-2-of-2-guest-blog-post.htm>. [https://perma.cc/LA8U-V7U3]; Orrin G. Hatch–Bob Goodlatte Music Modernization Act, H.R. DOC. NO. 1551, at 13 (2018), https://www.copyright.gov/legislation/mma_conference_report.pdf [https://perma.cc/DS5C-FUAN].

music or lyrics for a musical composition or to write a fully formed composition.¹⁹ Many songwriters sign deals with music publishing companies where the publisher will market the writer's songs, as well as issue licenses and collect royalties for the songs included in the deal.²⁰ The largest music publishers in the industry are currently Sony Music Publishing, Universal Music Publishing Group ("UMPG"), and Warner Chappell Music ("WCM").²¹ Both songwriters and publishers are members of PROs, and many songwriters make the majority of their income from performance royalties.²² Some songwriters- the very successful ones- "self-publish," meaning they form their own publishing company in order to receive a bigger percentage of the royalties.²³

PROs, such as ASCAP and BMI, are non-profit societies, formed to represent artists and distribute performance royalties to songwriters for their compositions.²⁴ The PROs act as intermediaries between the copyright holders, such as songwriters or publishers, who are registered members of the individual PRO, and anyone who needs a public performance license.²⁵ Moreover, the "PROs provide crucial legal assistance to artists through lob-

19. *Copyright and the Music Marketplace: A Report of the Register of Copyrights*, U.S. COPYRIGHT OFF., 18 (2015), <http://copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf> [<https://perma.cc/62QY-DA76>].

20. DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 220–21 (10th ed. 2019).

21. *Id.* at 224.

22. *How Much for a Song?: The Antitrust Decrees that Govern the Market for Music: Hearing Before the Subcomm. on Antitrust, Competition Pol'y & Consumer Rts.*, 114th Cong. 14 (2015) (statement of Lee Thomas Miller, President, Nashville Songwriters Association International), <https://www.govinfo.gov/content/pkg/CHRG-114shrg42757/pdf/CHRG-114shrg42757.pdf> [<https://perma.cc/XLM7-QA49>].

23. Jason Blume, *How to Start Your Own Music Publishing Company*, BMI (Feb. 19, 2005), https://www.bmi.com/news/entry/how_to_start_your_own_music_publishing_company [<https://perma.cc/MD69-HKS6>].

24. Spencer Paveck, *All the Bells and Whistles, but the Same Old Song and Dance: A Detailed Critique of Title 1 of the Music Modernization Act*, 19 VA. SPORTS & ENT. L. J. 74, 79–80 (2019).

25. *Id.* at 79.

bying on behalf of their members and initiating copyright infringement lawsuits.”²⁶ ASCAP and BMI are the largest PROs, representing 90% of the industry.²⁷ When any one, or two, organizations represent nearly all of the market in a given industry, it is impossible for the organizations to escape receiving strict scrutiny as fears of gross monopolization cause other industry players to hesitate on entering the marketplace.

B. The Antitrust Historical Record Governing the PROs

The first PRO, ASCAP, was founded in 1914 to fight copyright infringement, including unauthorized public performances of music.²⁸ It was clear to ASCAP that most composers lacked capital to single-handedly go after restaurant and bar owners, who threatened to boycott any composer who challenged them, for copyright infringement.²⁹ The courts continually found for the copyright holder and refused to excuse infringement, “due to the expense of locating and bargaining with the copyright holders.”³⁰ Furthermore, “most law-abiding music users would find it practically impossible to seek out individual copyright owners and negotiate individual licenses with them.”³¹ Following in ASCAP’s footsteps, a prominent competitor, BMI, was founded in 1939.³² The PROs, being national organizations, are able to effectively license uses on both an international and nationwide basis while also serving as a clearing house for music users and policing unauthorized uses.³³ Both PROs provide blanket licenses for public performances to

26. *Id.*

27. See Danielle Ely, *Amending the Consent Decrees to Bring Musical Composition Licensing Into the Free Market*, 35 CARDOZO ARTS & ENT. L. J. 605, 612 (2017).

28. Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CAL. L. REV. 1293, 1328–29 (1996).

29. *Id.* at 1329-30.

30. *Id.* at 1331-32.

31. Koenigsberg, *supra* note 4, at 375.

32. *BMI’s Timeline Through History*, BROAD. MUSIC, INC., <https://www.bmi.com/about/history> [<https://perma.cc/6SFY-9ZW3>].

33. Koenigsberg, *supra* note 4, at 375.

music users.³⁴ These blanket licenses authorize licensees, in one transaction, to perform every musical composition in the PRO's repertoire of all members of the organization, domestic and foreign, "without burdensome administrative and recordkeeping requirements."³⁵ An efficient and cost-effective system of marketing music serves as a useful tool in incentivizing composers and lyricists to create music while also incentivizing publishers to take more risks in promoting music.³⁶

Competition is vital to today's market. Antitrust laws are put in place to protect the competition process for consumers, keeping strong incentives for businesses to operate efficiently - keeping prices down and quality up - of high importance.³⁷ Notably, while ASCAP and BMI are two of the largest PROs, neither are currently allowed to negotiate the rates set for performance royalties in a free market.³⁸

Several complaints from businesses alleging that the PROs engaged in anticompetitive practices under American antitrust law prompted the DOJ to investigate the PROs' licensing operations, starting with ASCAP in 1941.³⁹ Following the antitrust lawsuits against ASCAP and BMI, the DOJ decided that both PROs "were monopolies and could use their market power to bully the fledgling broadcast industries of television and radio."⁴⁰ In turn, the DOJ

34. *Id.* 375, 385-87.

35. *See* Ely, *supra* note 27, at 613; *see also* Koenigsberg, *supra* note 4, at 375 ("This right of access to a vast repertory of music, without burdensome and expensive administrative and recordkeeping requirements, is extremely valuable to the user — indeed, it is more valuable than the cumulative rights to perform individual compositions would be.").

36. Koenigsberg, *supra* note 4, at 375.

37. *The Antitrust Laws*, FED. TRADE COMM'N, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws> [<https://perma.cc/G2TK-R8A2>].

38. *See generally* Ely, *supra* note 27, at 612-13 (discussing the make-up of each PRO, who is and is not bound to a consent decree, and the implications this has on rate bargaining).

39. *See* Ely, *supra* note 27, at 613; *see also* Memorandum of the U.S. in Support of the Joint Motion to Enter Second Amended Final Judgment at 2, *U.S. v. AM. SOC'Y OF COMPOSERS AUTHORS AND PUBLISHERS*, No. 41-1395 (S.D.N.Y. Sept. 4, 2000) ("The Complaint in Civil Action 41-1395, filed February 26, 1941, alleged that ASCAP and certain of its members had agreed to restrict competition among themselves in the licensing of music performance rights, and had restrained competition by allowing certain members of ASCAP to control the Society and to favor themselves in the apportionment of its revenues.").

40. Adam Gorgoni, *The Music Modernization Act: A Songwriter's Perspective*, SOC. SCI. RSCH. NETWORK (July 1, 2021), <https://ssrn.com/abstract=3898192>; *see Antitrust Consent Decree*

established consent decree oversight of both PROs and the rates set for public performance licenses, which are to be handled by the S.D.N.Y.⁴¹ The provisions within the Consent Decrees are designed to “prevent anticompetitive effects arising from [ASCAP’s] collective licensing of music performance rights.”⁴² Music users and members feared that ASCAP would prevent its’ members from engaging in direct licensing practices by requiring members to sign exclusive contracts with ASCAP.⁴³ This concern was alleviated when the 1941 decree was superseded by a new Consent Decree entered on March 14, 1950, making ASCAP’s rights explicitly non-exclusive.⁴⁴ In line with promoting competition within music licensing, members of the PROs have a right to directly license their songs with music users.⁴⁵

1. Provisions and Requirements of the ASCAP and BMI Consent Decrees

While not identical, the Consent Decrees which ASCAP and BMI currently operate under share many of the same features and have often been interpreted as containing, *mostly*, the same substantive language.⁴⁶ Moreover, the smaller PROs, the Society of European Stage Authors and Compos-

Review - ASCAP and BMI 2014, THE U.S. DEP’T OF JUST. (Dec. 16, 2015), <https://www.justice.gov/atr/ascap-bmi-decree-review> [<https://perma.cc/3PRV-NECB>].

41. *Copyright and the Music Marketplace: A Report of the Register of Copyrights*, *supra*, note 19.

42. *Justice Department Settles Civil Contempt Against ASCAP for Entering into 150 Exclusive Contracts with Songwriters and Music Publishers*, U.S. DEP’T OF JUST. (2016), <https://www.justice.gov/opa/pr/justice-department-settles-civil-contempt-claim-against-ascap-entering-150-exclusive> [<https://perma.cc/F4EG-N45Y>].

43. *Id.*

44. Koenigsberg, *supra* note 4, at 383.

45. *Justice Department Settles Civil Contempt Against ASCAP for Entering into 150 Exclusive Contracts with Songwriters and Music Publishers*, *supra* note 42 (In 2016, ASCAP was ordered to pay \$1.75 million and reform its licensing practices after the organization entered into approximately 150 contracts with songwriter and publisher members, obtaining, what were for all practical purposes, exclusive rights from its members, precluding any direct licensing outside of ASCAP).

46. *Copyright and the Music Marketplace: A Report of the Register of Copyrights*, *supra* note 19, at 36.

ers (“SESAC”) and Global Music Rights (“GMR”), are not subject to consent decree oversight.⁴⁷ While the Consent Decrees have been around for nearly eighty-five years, they have been reviewed and amended several times.⁴⁸ The terms of the Consent Decrees impose a variety of restrictions and obligations on the PROs.⁴⁹ The Decrees lay out how the PROs can operate in the music industry regarding the issuance of and rate-setting for blanket licenses for the music in their given repertoires.⁵⁰ The following is a non-exhaustive list of the relevant Consent Decree provisions to this note:

- ASCAP and BMI must offer non-exclusive public performance blanket licenses to users on equivalent terms. They cannot favor or discriminate one similarly situated user over the other (i.e., the PROs cannot discriminate between two bars that are roughly the same in terms of size, music use, etc.).⁵¹
- The PROs must accept any qualifying songwriter or music publisher as a member and grant a license to anyone who asks for one.⁵²
- The PROs are required to offer alternative licenses to the blanket license, such as what is known as an “adjustable fee blanket license.”⁵³
- The PROs are prohibited from granting any license that exceeds five years in duration.⁵⁴
- If the PRO, as the licensor, and the music user, as the licensee, fail to reach an agreed upon rate, the licensees can petition the

47. *Id.* at 34.

48. *Justice Department Settles Civil Contempt Against ASCAP for Entering into 150 Exclusive Contracts with Songwriters and Music Publishers*, *supra* note 42.

49. *Copyright and the Music Marketplace: A Report of the Register of Copyrights*, *supra* note 19, at 36-37.

50. *Id.*

51. *Id.*

52. *Id.* at 36.

53. *Id.* (an adjustable fee blanket license is, “a blanket license with a carve-out that reduces the flat fee to account for music directly licensed from PRO members.”).

54. *Am. Soc’y of Composers, Authors & Publishers*, 2001 WL 1589999 (S.D.N.Y. June 11, 2001).

court and a federal judge in the S.D.N.Y will handle the dispute and set a rate for a specific term.⁵⁵

- ASCAP is expressly limited to licensing public performance rights. While BMI's consent decree does not contain language of this limitation, BMI only licenses public performance rights.⁵⁶
- Publishers are prohibited from partially withdrawing portions of their rights- such as those for digital transmission- from ASCAP and BMI- meaning the PROs administer all public performance rights for a given composition.⁵⁷

Not all music users are treated equally, and many are subject to different rates depending on their size and how they operate.⁵⁸ As this Note will point out, there are many implications of the above-mentioned Consent Decree provisions, and regardless of whether you are a songwriter, publisher, or music user, there are valid arguments both in favor and against the existence of the Consent Decrees nearly eighty-five years after their introduction.

2. Implications of the Existing Consent Decrees and Differing Perspectives on Their Significance

It is important to remember that without the Consent Decrees, there is no mandated judicial rate-setting process for public performances, and ASCAP and BMI would be uninhibited from negotiating in a free market. As with anything else, there are two sides to every story and the truth, *usually*, lies somewhere in the middle. The argument regarding the necessity, or lack thereof, of the ASCAP and BMI Consent Decrees and how rate-court proceedings are held is no different. On one hand, the PROs, publishing companies, and several songwriters would like to see the Consent Decrees

55. *Copyright and the Music Marketplace: A Report of the Register of Copyrights*, *supra* note 19, at 37.

56. *Id.*

57. Future of Music Coal., *ASCAP - BMI Consent Decrees*, FUTURE OF MUSIC COALITION (Aug. 4, 2016), <http://futureofmusic.org/article/fact-sheet/ascap-bmi-consent-decrees> [https://perma.cc/9E3T-6R66]; *see also In re Pandora Media, Inc.*, No. 12 CIV. 8035, 2013 WL 5211927, at *5-7 (S.D.N.Y. Sept. 17, 2013) and *Pandora Media, Inc. v. Am. Soc'y. of Composers, Authors & Publishers*, 785 F.3d 73, 74 (2d Cir. 2015); *see also Broad. Music, Inc. v. Pandora Media, Inc.*, No. 13 CIV. 4037, 2013 WL 6697788, at *4 (S.D.N.Y. Dec. 19, 2013).

58. *See* 17 U.S.C. § 513.

eliminated.⁵⁹ On the other hand, radio stations and broadcasting networks, digital service providers (“DSPs”), and small music venues would like to keep them in place as they feel the Decrees provide a cap on how much they can be required to pay for blanket licenses.⁶⁰

a. The Consent Decrees Were Initially Enacted Over Eighty Years Ago

One of the major concerns is the age of the Consent Decree themselves.⁶¹ The first of the Consent Decrees was put in place in 1941,⁶² a time when people mostly listened to music through radio. PROs and their members argue that the state of competition in the marketplace has evolved so drastically that the Consent Decrees hold very little value today.⁶³ “New technologies, means of content delivery, and market entrants” such as additional PROs, have all drastically changed and impacted the licensing of public performance rights.⁶⁴

59. See generally *ASCAP’s Response to the Department of Justice’s June 5, 2019 Request for Public Comments Concerning the ASCAP and BMI Consent Decrees* (August 9, 2019), <https://media.justice.gov/vod/atr/ascapbmi2019/pc-043.pdf> [<https://perma.cc/C3CG-ZNEQ>].

60. Letter from David Matthews, Gen. Couns., Exec. Vice President, Nat’l Rest. Ass’n, to Jacqueline C. Charlesworth, Gen. Couns. and Assoc. Reg. of Copyrights (May 23, 2014), https://www.copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/National_Restaurant_Association_MLS_2014.pdf [<https://perma.cc/L8W5-Z76H>] (talking about the effect the rate-court system of proceedings has on restaurants wanting to obtain a license for public performances.); see also Sam Lefebvre, *Pandora’s New Corporate Parents Gave Millions to Trump*, KQED (Jan. 29, 2019), <https://www.kqed.org/arts/13849625/pandoras-new-corporate-parents-gave-millions-to-trump-gop> [<https://perma.cc/BV8C-2E69>]; *Copyright and the Music Marketplace: A Report of the Register of Copyrights*, *supra* note 19.

61. See *Copyright and the Music Marketplace: A Report of the Register of Copyrights*, *supra* note 19, at 37.

62. Dep’t of Justice, *Mem. of the United States in Response to Public Comments on the Joint Motion to Enter Second Amended Final Judgment*, at 1, UNITED STATES V. AM. SOC’Y OF COMPOSERS, AUTHORS & PUBLISHING, No. 41-1395 WCC (S.D.N.Y. Sept. 4, 2000).

63. See generally *ASCAP’s Response to the Department of Justice’s June 5, 2019 Request for Public Comments Concerning the ASCAP and BMI Consent Decrees*, U.S. DEP’T OF JUST. (August 9, 2019), <https://media.justice.gov/vod/atr/ascapbmi2019/pc-043.pdf> [<https://perma.cc/C3CG-ZNEQ>].

64. *Id.* at 3 (“ASCAP is now one of four domestic performing rights organizations. [...] technology has changed-and improved-how licensees of all kinds, and of varying resources, can monitor and control their music use.”).

In 1950, ASCAP's 1941 Consent Decree was substantially amended and became what is known as the "Amended Final Judgment," or "AFJ".⁶⁵ On September 5, 2000, the plaintiff and ASCAP filed, *inter alia*, a "Joint Motion to Enter Second Final Judgment," known as, "AFJ2."⁶⁶ The AFJ2 would reduce the S.D.N.Y.'s oversight over ASCAP's relationships with its members and alter the current licensing prohibitions imposed on ASCAP.⁶⁷ The United States ultimately agreed with ASCAP on some, but not all, of the points made, and agreed that some of the proposed changes made by ASCAP would "enhance the procompetitive features of the AFJ2 and thereby further the public interest."⁶⁸ The AFJ2 made clear that, "ASCAP may not license or administer any other right in a "musical composition," but is not enjoined from administering other rights."⁶⁹ Additionally, "the Court has existing authority to establish a fee or fee structure on any basis it deems appropriate."⁷⁰ ASCAP bears the burden of establishing the reasonableness of its proposed fees and must be able to establish that there is a legitimate "cost of administering the license" in order for ASCAP to receive an administrative fee.⁷¹

Potential conflict arises when the use of a rate court proceeding to set a blanket license rate results in a rate that no longer resembles the rate that would have been agreed to by the parties outside of the courtroom. Rather than eliminate the Consent Decrees, Congress may have intended the change

65. Dep't of Justice, *supra* note 62.

66. *Id.*

67. *Id.* at 1.

68. *Id.* at 1, 4 ("Revised AFJ2 would further the public interest in encouraging competition among PROs to serve both music users and copyright holders, encouraging competition between ASCAP and its members to license performances, eliminating ineffective and costly regulation of ASCAP's activities, and reducing the costs to the Court, ASCAP, and music users of resolving fee disputes.")("The United States—not any individual third party—represents the public interest in Government antitrust cases [...] No third party has a right to demand that the Government's proposed modification be rejected or modified simply because a different decree would better serve its private interests.").

69. *Id.* at 7.

70. *Id.* at 8, 22-23 (Further, the AFJ2 clarified that the language contained in the consent decree, "authorizes the Court, at the very least, to determine the appropriate payment scheme under its "reasonable fee" authority, which may include any discount system the Court feels is reasonable.").

71. *Id.* at 14.

in judicial assignment under the MWMA to act as a way for music users to receive rates that more closely resemble free market rates.⁷² The efficacy of random judicial assignment on the rate-setting process will be discussed later in this Note.

b. Gaps and Disintegration Stemming from the Decrees Regarding Withdrawal and Licensing Rights Has Forced Supplemental Legislation

Sometimes a song has multiple songwriters or publishers who are not all affiliated with the same PRO. In 2014, 2015 and 2019, at the request of ASCAP and BMI, the Antitrust Division of the DOJ opened an inquiry and requested comments from industry participants regarding the operation and effectiveness of the Consent Decrees governing ASCAP and BMI, and the current licensing structure for performance royalties.⁷³ The comments from industry parties, extensively discuss the need, or lack thereof, for continued existence of the Consent Decrees and the effect partial withdrawal of the publishers from ASCAP and BMI would have on performance licensing.⁷⁴ Such withdrawal, as noted above, has been deemed prohibited by the Consent Decrees.⁷⁵ Furthermore, while not expressly prohibited, comments from ASCAP and BMI ask that the Consent Decrees be modified to explicitly permit them to offer fractional licenses.⁷⁶

As previously mentioned, the ASCAP and BMI Consent Decrees are not identical. One of the differences between the two Consent Decrees is that the BMI Consent Decree has been interpreted to permit fractional licensing while ASCAP's Consent Decree has been interpreted as to only allow full-work licensing.⁷⁷ Moreover, the licenses that ASCAP and BMI provide

72. See generally *Free Market Definition & Impact on the Economy*, INVESTOPEDIA, <https://www.investopedia.com/terms/f/freemarket.asp> [<https://perma.cc/AW8U-MFUG>] (stating that a free-market rate is one that is “based on competition, with little or no government interference”).

73. *Statement of the Department of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees*, U.S. DEP'T OF JUST., 2-3 (Aug. 4, 2016) [<https://perma.cc/R542-EK2K>].

74. *Id.* at 8-9.

75. *Id.*

76. *Id.* at 9.

77. Makan Delrahim, “*And the Beat Goes On*”: *The Future of the ASCAP/BMI Consent Decrees*, U.S. DEP'T OF JUST. (Jan. 15, 2021), [<https://perma.cc/3JQE-MPDS>] (the U.S. Court of Appeals for the Second Circuit affirmed a district court decision that the BMI consent decree, which

allow users to avoid having to obtain individual licensing agreements with every songwriter or publisher whose music they want to use.⁷⁸ While this may be the most efficient way for users to have access to music quickly,⁷⁹ it is unknown whether this is the most viable method of licensing for the majority of music users.

Because the majority of music users obtain a license from ASCAP, BMI and SESAC that is paid based on fractional market shares, it was, historically, deemed unnecessary to definitively determine if the Consent Decrees governing ASCAP and BMI explicitly allowed for fractional licenses.⁸⁰ Under the idea of fractional licensing, a PRO licenses only that portion of the work that the PRO controls, meaning that a licensee must obtain a license from all the PROs affiliated with the work (or from the songwriters or publishers directly) to legally perform it.⁸¹ According to former Assistant Attorney General, Makan Delrahim, “ASCAP and BMI, along with some songwriters and publishers, favor this approach because it allows the PROs to grant a partial license to works with multiple ownership where the songwriter or publisher owners affiliated with the PRO lack the ability to grant a license to the entire work.”⁸² Conversely, with full-work licensing, a PRO is only allowed to grant rights to a musical work with multiple copyright owners

contained similar language to that of ASCAP’s consent decree, permits fractional licensing while ASCAP is limited to full-work licensing.).

78. Makan Delrahim, Attorney General, *Statement of the Department of Justice on the Closing of the Antitrust Division’s Review of the ASCAP and BMI Consent Decrees, Remarks of Assistant Attorney General Makan Delrahim* (Jan. 15, 2021), <https://www.justice.gov/atr/page/file/1355391/download> [<https://perma.cc/SS64-8BHA>].

79. *Id.*

80. *Statement of the Department of Justice on the Closing of the Antitrust Division’s Review of the ASCAP and BMI Consent Decrees*, U.S. DEP’T OF JUST., 9-10 (Aug. 4, 2016), <https://www.justice.gov/atr/file/882101/download> [<https://perma.cc/R542-EK2K>] (“If PROs offer fractional licenses, a music user, before performing any multi-owner work in a PRO’s repertory, would need a license to the fractional interests held by each of the work’s co-owners. A full-work license from a PRO, on the other hand, would provide infringement protection to a music user seeking to perform any work in the repertory of the PRO.”).

81. *Id.*

82. Delrahim, *supra* note 78, at 3.

when each copyright owner agrees.⁸³ Licensees, such as bars, restaurants, radio stations, and digital streaming services, favor this approach, because in theory, full-work licensing would allow music users to perform works in both ASCAP and BMI's repertoires without having to locate any additional rights holders.⁸⁴

Even though several of the PROs and publishers purport that the Consent Decrees are no longer vital to promoting competition, there is a, *seemingly*, valid argument from licensees that for the most part, the Consent Decrees, are working. While multiple licensees have stated that they have been able to reach agreements with the PROs and have not needed to litigate, broadcasting companies and DSPs, like SiriusXM and Spotify, claim that ASCAP and BMI are still monopolies today.⁸⁵ However, unlike SiriusXM, Spotify believes that while the Consent Decrees still serve their intended purpose, they "limit the ability of music publishers to act collectively in a manner that harms competition by charging supra-competitive rates."⁸⁶

In 2019, the Antitrust Division of the DOJ asked for public comments regarding whether the consent decrees governing ASCAP and BMI continue

83. David O. Hartman, *Music Licensing in 2019: The US Department of Justice Reviews the Rules*, MUSIC BUS. J. 2 (2019), <http://www.thembj.org/2019/11/music-licensing-in-2019-the-us-department-of-justice-reviews-the-rules/> [<https://perma.cc/CE79-G93N>].

84. Delrahim, *supra* note 78, at 3.

85. *Music Licensing Study: Notice and Request for Public Comment, Comments of Sirius XM Radio Inc., No. 2014-3*, at Exhibit A, Pg. 6, U.S. COPYRIGHT OFF. (May 23, 2014) https://www.copyright.gov/policy/musiclicensingstudy/comments/Docket2014_3/extension_comments/Sirius_XM_Radio_Inc.pdf [<https://perma.cc/M67K-MD26>] (Changing times do not change the fact that ASCAP and BMI remain monopolies, coordinating otherwise rivalrous publishers to set a single price for licenses covering nearly 50% of the market each. What was true in the 1940s when the consent decrees were adopted, and reiterated throughout the decades, is just as true now: the PROs' blanket licensing practices are "inherently anti-competitive," reflecting their exercise of "disproportionate power over the market for music rights.;" *United States v. Broad. Music, Inc.* (In re Application of Music Choice), 426 F.3d 91, 93, 96 (2d Cir. 2005); *see also* *United States v. ASCAP* (In re Application of RealNetworks, Inc.), 627 F.3d 64, 76 (2d Cir. 2010) (explaining that "ASCAP, as a monopolist, exercise[s] disproportionate power over the market for music rights") (alteration in original) (citation and internal quotation omitted) [<https://perma.cc/M67K-MD26>]; *see also* *Music Licensing Study: Notice and Request for Public Comment, Comments of Spotify, No. 2014-3 13*, U.S. COPYRIGHT OFF. (May 23, 2014), https://www.copyright.gov/policy/musiclicensingstudy/comments/Docket2014_3/Spotify_USA_Inc_MLS_2014.pdf [<https://perma.cc/KB63-Y2WZ>] (Spotify claims that fees paid for musical works and sound records "should not be set in a vacuum.")).

86. *Music Licensing Study: Notice and Request for Public Comment, Comments of Sirius XM Radio Inc., supra* note 85, at 13.

to protect and advance competition.⁸⁷ At the conclusion of the DOJ's review of the consent decrees in 2021, the DOJ announced that the Decrees should remain in place and be reviewed every five years to assess whether their existence is still needed to protect competition and whether modifications are needed.⁸⁸ While the Decrees may be very old, the policy that requires them to be reviewed and evaluated every five years does offer some layer of protection for ensuring that they are not objectively outdated or inadequate.

Congress went a step further in protecting any potential inadequacies posted by the Consent Decrees as well as to combat, allegedly, unfair licensing terms by its enactment of the MWMA.⁸⁹ The MWMA resulted from the recognition that updates to the music licensing landscape were needed to improve methods of legal music licensing by digital services.⁹⁰ The DOJ seems optimistic that the amendments contained in the MWMA will help alleviate some of the negative impacts of operating under a consent decree rather than negotiating in a free market.⁹¹ While whether this is true or not remains to be seen, music industry parties can bet on the complexity of licensing not being simplified any time soon.

III. THE MWMA'S CHANGES TO JUDICIAL ASSIGNMENT AND PROCESS UNDER THE ASCAP AND BMI CONSENT DECREES

Under Title I, Congress addressed the operation of rate-court proceedings in the event that a music user, the licensee, and the respective PRO cannot reach a license rate agreement.⁹² Provisions contained in the MWMA addressed the respective roles of judges in determining reasonable rates for

87. *Antitrust Consent Decree Review Public Comments - ASCAP and BMI*, DEP'T OF JUST. 1, <https://www.justice.gov/atr/antitrust-consent-decree-review-public-comments-ascap-and-bmi-2019> [<https://perma.cc/5LAA-SHCY>].

88. Delrahim, *supra* note 78, at 6.

89. *See generally* Orrin G. Hatch–Bob Goodlatte *Music Modernization Act*, H.R. DOC. NO. 1551, at 13 (2018), https://www.copyright.gov/legislation/mma_conference_report.pdf [<https://perma.cc/DSSC-FUAN>].

90. *Music Modernization: Frequently Asked Questions*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/music-modernization/faq.html> [<https://perma.cc/28X4-D8MS>].

91. *See generally* Delrahim, *supra* note 78.

92. *Copyright and the Music Marketplace: A Report of the Register of Copyrights*, *supra* note 19, at 37.

public performance licenses and moreover, amended the judicial process by changing which judges are permitted to hear rate-setting proceedings. The MWMA represents carefully thought-out negotiation and cooperation between a wide range of artists and business interests.⁹³ Section 104(b)(1)(B) of the MWMA intends to address any “actual or perceived” bias stemming from proceedings being conducted under the same judges who have had jurisdiction over the respective Consent Decrees since their enactment.⁹⁴

Section 104 of The MWMA amends Section 137 of title 28, United States Code, by adding a new subsection, “(b) Random Assignment of Rate Court Proceedings. This amendment is as follows:

“(1) IN GENERAL.—

“(A) DETERMINATION OF LICENSE FEE.—Except as provided in subparagraph (B), in the case of any performing rights society subject to a consent decree, any application for the determination of a license fee for the public performance of music in accordance with the applicable consent decree shall be made in the district court with jurisdiction over that consent decree and randomly assigned to a judge of that district court according to that court’s rules for the division of business among district judges currently in effect or as may be amended from time to time, provided that any such application shall not be assigned to—

“(i) a judge to whom continuing jurisdiction over any performing rights society for any performing rights society consent decree is assigned or has previously been assigned; or

“(ii) a judge to whom another proceeding concerning an application for the determination of a reasonable license fee is assigned at the time of the filing of the application.

“(B) EXCEPTION.—Subparagraph (A) does not apply to an application to determine reasonable license fees made by individual proprietors under section 513 of title 17.

“(2) RULE OF CONSTRUCTION.—Nothing in paragraph (1) shall modify the rights of any party to a consent decree or to a

93. *The Creation of the Music Modernization Act*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/music-modernization/creation.html?locl=eamma> [<https://perma.cc/RG5N-AJYS>].

94. H.R. 5447, 115th Cong. § 104 (2018); see also Eric Goldman, *An Analysis of Title I and Title III of The Music Modernization Act, Part 2 of 2 (Guest Blog Post)*, TECH. & MKTG. L. BLOG (Jan. 23, 2019, 9:01 AM), <https://blog.ericgoldman.org/archives/2019/01/an-analysis-of-title-i-and-title-iii-of-the-music-modernization-act-part-2-of-2-guest-blog-post.htm> [<https://perma.cc/LA8U-V7U3>].

proceeding to determine reasonable license fees, to make an application for the construction of any provision of the applicable consent decree. Such application shall be referred to the judge to whom continuing jurisdiction over the applicable consent decree is currently assigned. If any such application is made in connection with a rate proceeding, such rate proceeding shall be stayed until the final determination of the construction application. Disputes in connection with a rate proceeding about whether a licensee is similarly situated to another licensee shall not be subject to referral to the judge with continuing jurisdiction over the applicable consent decree.”

Unsurprisingly, the changes applied to the conduction of rate court proceedings are controversial, at best. Congress, attesting to the purpose of this change, believes that “rate decisions should be assigned on a random basis to judges not involved in the underlying consent decree cases.”⁹⁵ From the PROs’ perspective, elimination of this alleged bias, the PROs’ members, such as songwriters and publishers, would receive fairer compensation for public performance of their copyrighted works.⁹⁶ However, this change to judicial assignment does not apply to everyone. For reasons later discussed, individual proprietors owning less than seven publicly traded companies are excluded from the judicial assignment amendments contained within the MWMA.⁹⁷

A. The Use of Sound Recording Royalty Rates in Determining Reasonable Performance Royalty Rates Prior to and After the MWMA

Prior to the MWMA, section 114(i) of the Copyright Act prevented “rate courts from considering sound recording royalty rates as a relevant benchmark when setting performance royalty rates.”⁹⁸ ASCAP and BMI

95. *Orrin G. Hatch–Bob Goodlatte Music Modernization Act*, H.R. DOC. NO. 1551, at 13 (2018), https://www.copyright.gov/legislation/mma_conference_report.pdf [<https://perma.cc/DS5C-FUAN>].

96. *Licensing Reform Legislation Wins Unified Support of Key Music Leaders*, NAT’L MUSIC PUBLISHERS’ ASS’N (Jan. 8, 2018), <https://www.nmpa.org/licensing-reform-legislation-wins-unified-support-of-key-music-leaders/> [<https://perma.cc/5PWM-VC7V>].

97. 17 U.S.C. § 513.

98. Wallace Collins, *Understanding The Music Modernization Act: Highlights And Benefits For Artists, Songwriters*, HYPEBOT (Sept. 24, 2018), <https://www.hypebot.com/hypebot/2018>

could not introduce evidence of what the “licensee pays the record labels and artists as a comparative purpose to the value for the songwriters.”⁹⁹ The MWMA partially repeals section 114(i),¹⁰⁰ now allowing ASCAP and BMI to introduce evidence of sound recording royalty rates in rate court proceedings.¹⁰¹ The repeal came from the claim that barring rate court judges from “considering sound recording royalty rates as a relevant benchmark when setting performance royalty rates for songwriters and composers” created a level of unfairness in royalty determinations, with songwriters getting the short end of the stick.¹⁰² Being able to consider sound recording royalty rates when determining public performance rates moves the industry towards a fairer system under which PROs and songwriters would have the opportunity to present evidence about the other facets of the music ecosystem to judges for their consideration.¹⁰³

As it stands, rate courts are allowed to consider what, if any, work is being directly licensed to the music user when setting a rate for a blanket license with a pro.¹⁰⁴ In *Broadcast Music, Inc. v. DMX, Inc.*, the U.S. Court of Appeals for the S.D.N.Y. concluded that a rate structure including an adjustable carve-out for music that is directly licensed to the music user is permissible and does not conflict with the Consent Decree because it represents

/09/understanding-the-music-modernization-act-highlights-and-benefits-for-artists-songwriters.html [https://perma.cc/7XVX-CNJ9]; *Music Modernization: Frequently Asked Questions*, *supra* note 90.

99. Dale Kawashima, *NMPA CEO David Israelite Discusses The Passing Of The Music Modernization Act, And Its Benefit To Songwriters & Music Publishers*, SONGWRITERSUNIVERSE (Oct. 22, 2018), <https://www.songwriteruniverse.com/david-israelite-nmpa-mma-2018.htm> [https://perma.cc/DUG3-3J7Y] (For example, “before the MMA, ASCAP and BMI could not introduce evidence that Pandora is paying the labels roughly 50% of their revenue.”).

100. *Music Modernization: Frequently Asked Questions*, *supra* note 90.

101. Kawashima, *supra* note 99.

102. *The Music Modernization Act (MMA) Has Passed The United States Senate*, A2IM (Sept. 18, 2018), <https://a2im.org/music-modernization-act/> [https://perma.cc/MCR3-XP58].

103. See generally Kawashima, *supra* note 99.

104. *Rate Courts May Consider Direct Licensing Programs When Setting Music Licensing Fees: Second Circuit*, PLC INTELL. PROP. & TECH. (June 15, 2012), [https://1.next.westlaw.com/5-519-9074?_lrTS=20201031022447818&transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://1.next.westlaw.com/5-519-9074?_lrTS=20201031022447818&transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1).

a blanket fee with a different fee basis, rather than a new type of license.¹⁰⁵ The second circuit also noted that prior rates set with users that, on the surface, are similarly situated to DMX could not form the basis of a license agreement because DMX was in a different economic position than the company's competitor, Muzak, due to its direct licensing program.¹⁰⁶ There is a presumption that a determined rate that was set for the first years of the five-year license period will continue to be reasonable for the entire license period.¹⁰⁷ When determining rates for a music user asking for an Adjustable Fee Blanket License ("AFBL") from BMI, the court takes into consideration that the AFBL is more expensive for the PRO to administer and may uphold an administrative fee in addition to the rate fee.¹⁰⁸ It is up to the PRO, ASCAP or BMI, to fulfill its burden of proving to the court why its proposed rate, for either part of or the whole five-year license period, is reasonable. If the PRO can't fulfill this burden, the Court has no obligation to find the proposed rate by the PRO reasonable.¹⁰⁹

105. *Id.*

106. *Id.*

107. *Pandora Media, Inc. v. Am. Soc'y Composers, Authors, Publishers*, 6 F. Supp. 3d 317, 355 (S.D.N.Y. 2014) ("In conducting an independent inquiry into a reasonable rate, this Court is guided by the following parameters. First, having determined a reasonable rate for the first years of the five-year license period, there is a presumption that that rate will continue to be a reasonable rate for the entire license period.").

108. *Broad. Music, Inc. v. Pandora Media, Inc.*, 140 F. Supp. 3d 267, 293 (S.D.N.Y. 2015) ("BMI should also be paid an incremental administrative fee equal to 3% of the traditional blanket fee. This Court upheld an administrative fee in *DMX* because an AFBL is "more expensive for BMI to administer than its traditional blanket license." [...] The administrative fee covers the additional costs of BMI to administer the AFBL because BMI must track direct licenses to ensure that all performed works are licensed through BMI or a direct license and then calculate and process credits to Pandora for performances of directly licensed works. It is reasonable to allocate these costs to Pandora.").

109. *Pandora Media, Inc. v. Am. Soc'y of Composers, Authors & Publishers*, 785 F.3d 73, 78 (2d Cir. 2015) ("Although ASCAP challenges the district court's presumption that a rate found to be reasonable for part of a license term remains reasonable for the duration thereof, the district court expressly observed that its holding did not depend on the existence of such a presumption. ASCAP failed to carry its burden of proving that its proposed rate was reasonable. Under these circumstances, it was not clearly erroneous for the district court to conclude, given the evidence before it, that a rate of 1.85% was reasonable for the years in question.").

IV. WHAT THE MWMA DOES FOR ASCAP AND BMI LICENSING OF MUSICAL COMPOSITIONS FOR THE RIGHT OF PUBLIC PERFORMANCE

Switching to random judicial assignment may affect the court-set rates that result from judicial proceedings when parties cannot reach an agreement privately. The MWMA's introduction of random judicial assignment will likely encourage private negotiations and deter parties from bringing disputes in front of the relevant judicial proceedings unless it becomes a final resort. This is due, at least in part, to the fact that random judicial assignment reduces predictability in rates and thus exposes disputing parties to a higher level of risk. Prior to the MMA, because the same two judges handled the relevant rate court proceedings, the process of determining rates became established and predictable due to the systematic repetition inherently involved.

It is true that the MWMA is a recent enactment, and there is limited to no case law following the enactment that can be analyzed to determine what effect, if any, random judicial assignment is having on these rates. That said, the newly introduced uncertainty, due to the MWMA's impact in decreasing predictability in licensing rates, certainly has inherent potential to sway parties towards reaching private agreements and away from deciding to bear the risk of receiving a rate that is less favorable than the rate they could have negotiated privately. Decreased litigation creates more availability for federal judges to hear claims with significant issues that the parties cannot resolve amongst one another. While the MWMA's enactment is too recent to conclude whether it will have this effect on curbing excessive litigation over rates and other licensing issues, its potential to have that effect is clearly there.

A. Varying Perspectives and Reactions of PROs, Publishers, Individual Proprietors and Record Labels on the MWMA's Changes to Judicial Assignment Under the Consent Decrees

There are a variety of differing perspectives on the potential impact of the MWMA's relevant changes to determining public performance licensing rates. ASCAP proposed that rate-setting resolved through expedited private arbitration and "establishing an evidentiary presumption that direct non-compulsory licenses voluntarily negotiated by copyright holders who have withdrawn rights from a PRO and similar licensees provide the best evidence of reasonable rates," would result in more efficient and effective licensing

by the PROs.¹¹⁰ On the other hand, record labels fear that they will receive lower mechanical licensing rates resulting from an increase in public performance rates being paid to songwriters and publishers.¹¹¹

1. The Inverse Relationship Between Mechanical Licensing and Public Performance Licensing

With the focus on rate-setting, it is important to understand how rates for public performance and mechanical rates work in an inverse relationship. Mechanical Royalties or “Mechanicals” are paid to copyright holders for the right to reproduce a song in a recording, for which the rate for is often determined by statute.¹¹² For interactive services, the Copyright Royalty Board (“CRB”) sets what is called an “all-in royalty pool.”¹¹³ Because an all-in royalty rate is reflective of the combined total of the mechanical licensing rate and the public performance licensing rate, the rate acts as a “ceiling” for how much a service is required to pay for musical works.¹¹⁴ As of June 2022, the combined rate has been increased from 10.5% to 15.1%.¹¹⁵ If public

110. Jay Cohen & Darren W. Johnson, *Comments of the American Society of Composers, Authors, and Publishers* (2014), 4 https://www.copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/ASCAP_MLS_2014.pdf [<https://perma.cc/Z4L3-AJ9S>].

111. Tim Ingham, *Songwriters Are Already Fighting For Better Pay. But in 2021, They Face an Even Bigger Battle*, ROLLINGSTONE, (June 15, 2020), <https://www.rollingstone.com/pro/features/songwriters-spotify-amazon-crb-royalties-war-1015116/>. [<https://perma.cc/4U2H-P22B>].

112. Manatt, Phelps & Phillips, LLP, *U.S. Music Streaming Royalties Explained a/k/a How Do Artists Get Money From Spotify and Apple?* (2016) <https://www.manatt.com/Manatt/media/Media/PDF/US-Streaming-Royalties-Explained.pdf>. [<https://perma.cc/FQF8-MHML>].

113. *Id.*

114. Meredith Filak Rose, *Spotify's Copyright Royalty Board Appeal, Decoded*, PUBLIC KNOWLEDGE (Apr. 10, 2019), <https://publicknowledge.org/spotify-s-copyright-royalty-board-appeal-decoded/> [<https://perma.cc/9X4M-QSRJ>].

115. Ed Christman, *Songwriters Earn 15.1% Streaming Royalty Rate in Long-Awaited CRB Ruling*, BILLBOARD (July 1, 2022), <https://www.billboard.com/pro/songwriter-streaming-royalties-crb-ruling/> [<https://perma.cc/2B8T-28P3>].

performance rates increase and take up more of the all-in rate, rates for mechanical licenses will likely decrease.¹¹⁶ The opposite is also true.¹¹⁷ At the core of the argument – in determining what percentage of the all-in rate publishers and labels should receive, respectively – is how rates for public performance licenses and mechanical licenses are decided. While publishers have royalty rates dictated to them, record labels are free to negotiate royalty rates with the various streaming services.¹¹⁸ The CRB sets the rates that copyright holders receive from streaming services while the Consent Decrees govern the public performance rates copyright holders receive from streaming services.¹¹⁹ Remember, because the publishers cannot partially withdraw their digital rights and negotiate themselves, they *have* to be all in or all out. Because the royalty pie is only so big, an increase in the public performance rate being paid to publishers and songwriters would be followed by a decrease in the rate being paid to record companies.¹²⁰ However, it is interesting that this is worrisome to the labels considering that “the world’s three biggest music publishers are owned by the same parent firms of the world’s three biggest record companies.”¹²¹

2. The Effect of Rate-Setting by Courts on the Process of Private Negotiations

As noted earlier, ASCAP and BMI pushed for the random judicial assignment legislation to be passed in the MWMA. Because what is a “reasonable” rate has not been clearly defined, there are a lot of controversial opinions about how a “reasonable” rate is determined under the respective Consent Decrees. ASCAP and BMI pushed for random judicial assignment

116. See Rose, *supra* note 114; see also Ingham, *supra* note 111.

117. See *id.*

118. Tim Ingham, *Songwriters Are Already Fighting For Better Pay. But in 2021, They Face an Even Bigger Battle*, ROLLINGSTONE (June 15, 2020), <https://www.rollingstone.com/pro/features/songwriters-spotify-amazon-crb-royalties-war-1015116/> [<https://perma.cc/4U2H-P22B>].

119. *Id.*

120. *Id.*

121. *Id.*

under the MWMA because they felt that it would help alleviate any potential bias in rate-setting and would afford fairer rates for their members.¹²²

While the jury is still out, so to speak, the theory that random judicial assignment would be more beneficial to the PROs comes from the belief that it would eliminate any bias that the two judges overseeing the Consent Decrees previously may have had stemming from years of experience setting rates because of prior proceedings. However, this is where things get interesting. Congress notes, “[t]his change is not a reflection upon any past actions by the Southern District of New York – rather, it is believed that rate decisions should be assigned on a random basis to judges not involved in the underlying consent decree cases.”¹²³ If the change isn’t due to, *obvious*, unhappiness or inefficiencies with the way the judges assigned to the consent decrees were conducting proceedings and setting rates, it’s perplexing to decipher a policy reason for the change. The answer may be as simple as random assignment is assumed to be the norm.¹²⁴ Assigning cases randomly, in conjunction with the business rules of that state, divvies up a district’s docket and prevents any judge from lobbying for a particular case, i.e., having a particular interest in the outcome.¹²⁵ The high likelihood of impartiality created by nonrandom case assignment is reason enough to stop the practice of it.¹²⁶

122. Dale Kawashima, *NMPA CEO David Israelite Discusses The Passing Of The Music Modernization Act, And Its Benefit To Songwriters & Music Publishers*, SONGWRITERSUNIVERSE (Oct. 22, 2018), <https://www.songwriteruniverse.com/david-israelite-nmpa-mma-2018.htm> [<https://perma.cc/DUG3-3J7Y>]; see also *The Music Modernization Act (MMA) Has Passed The United States Senate*, A2IM (Sept. 18, 2018), <https://a2im.org/music-modernization-act/> [<https://perma.cc/MCR3-XP58>].

123. *Orrin G. Hatch–Bob Goodlatte Music Modernization Act*, H.R. DOC. NO. 1551, at 13 (2018), https://www.copyright.gov/legislation/mma_conference_report.pdf [<https://perma.cc/DS5C-FUAN>].

124. Katherine Macfarlane, *The Danger of Nonrandom Case Assignment: How the S.D.N.Y.’s ‘Related Cases’ Rule Has Shaped the Evolution of Stop-and-Frisk Law*, 115 *LSU L. DIGIT. COMMONS*, J. ARTICLES 4 (2014).

125. *Id.* at 5-6, 8 (“A generalist docket permits the cross-fertilization of ideas; a judge may ‘look [] at cases from one field and realize [] how an earlier decision in which [she] participated from a different field may suggest a creative answer to the problem.’”) (“the absence of ‘objective standards to govern the rule’s use’, made ‘both actual and perceived abuses’ possible.”).

126. *Id.* at 3.

3. Purported Rationales for Random Judicial Assignment

Another aspect of judicial assignment that should be evaluated is the impact that the legal system has on negotiations and the role courts play in the bargaining process. To what extent should the law permit and encourage people to work out their own arrangements outside of the courtroom?¹²⁷ The advantages of private negotiations over litigation include substantial financial savings, relief from the heavy burden of litigation, and avoidance of the substantial delays that often accompany judicial proceedings.¹²⁸ Also, a “consensual solution” is by definition more likely to be consistent with the preferences of each party, and acceptable over time, than would a rate imposed by the court.¹²⁹ Not only is an agreement preferable over an outcome that declares a ‘winner’ and a ‘loser’,¹³⁰ but while parties may make mistakes in determining what factors should come into play when negotiating a “reasonable rate,” judges, especially due to their little knowledge and experience in the industry, also make mistakes.¹³¹ However imperfect, most parties to the music industry have some self-awareness, and third parties, including judges, will generally not have access to any information regarding the music user’s or copyright holder’s interests that is more substantive than what the parties have.¹³²

Whether a licensee chooses to negotiate with a licensor privately or bring their claim to court can be assessed by knowing the characteristics that determine bargaining behavior.¹³³ Lawsuits are generally emotionally burdensome, especially considering if a party loses, it affects their reputation

127. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950, 951 (1979).

128. *Id.* at 956.

129. *Id.* at 956-57.

130. *Id.* at 958.

131. *Id.*

132. *Id.* at 967-68.

133. *Id.* at 966 (noting the characteristics include (1) the preferences of bargaining parties, (2) bargaining endowments created by legal rules that indicate the particular allocation a court will impose if the parties fail to reach an agreement, (3) the degree of uncertainty concerning the legal outcome if the parties go to court, which is linked to the parties’ attitudes towards risk, (4) the transaction costs and the parties’ respective abilities to bear them, and (5) the strategic behavior of

moving forward. Transaction costs may be financial or emotional and tend to be higher when there is a broad range of possible outcomes in court.¹³⁴ Additionally, actual or expected costs can influence negotiation and the outcome of the bargaining process and may be used by one party as leverage over another.¹³⁵ Importantly, the participation of lawyers in the rate-setting process may lead to more disputes and higher costs without improving the fairness of outcomes.¹³⁶

However, judgments do not necessarily involve a court in ever setting a rate.¹³⁷ The licensor already comes to the bargaining table without the power to impose monopolistic royalty rates, given that the licensee can always appeal to a court to set a monopoly-free rate. And while judges are not equipped to be “good rate setters,”¹³⁸ the effect on the bargain between the licensor and the licensee when operating in the shadow of a rate-setting court needs to be taken into consideration.

The fate of rate-setting provisions in consent decrees and the fate of liability regimes in intellectual property, more generally, are directly tied.¹³⁹ In order to avoid antitrust liability, intellectual property rights holders are choosing to morph liability and remedy together by stipulating that a court can set the rate for their intellectual property, so long as “the hammer of

each party when negotiating. We must take into consideration possible altruism or spite when negotiating).

134. *Id.* at 972.

135. *Id.* at 972-73 (claiming that the parties may use strategic behavior during negotiations such as using accurate and inaccurate information to support claims, promise, threaten or bluff, or they may intentionally exaggerate their chances of winning in court in the hope of persuading the other side to accept less).

136. *Id.* at 986 (“Lawyers may make negotiations more adversarial and painful, and thereby make it more difficult and costly for the parties to reach an agreement”).

137. Daniel A. Crane, *Bargaining in the Shadow of Rate-Setting Courts*, 76 ANTITRUST L. J. 307, 308 (2009) <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2506&context=articles> [<https://perma.cc/EC6M-2PME>] (explaining that “instead, the mere threat of rate setting frames future licensing negotiations.”).

138. *Arsberry v. Ill.*, 244 F.3d 558, 562 (7th Cir. 2001) (stating that rate setting is “a task [courts] are inherently unsuited to perform competently”).

139. Crane, *supra* note 137, at 309.

antitrust liability for damages or injunction is kept from striking.”¹⁴⁰ Due to rates rarely being set by courts, maybe the DOJ was wrong for thinking there was a need for antitrust intervention in the first place.¹⁴¹ However, a better theory may be that actual rate setting is rare because, “the shadow of the rate-setting court frames the bargain sufficiently to eliminate the defendant’s ability to charge an unfettered monopoly price.”¹⁴² Rates set in court directly affect future liability for antitrust damages.¹⁴³ The truth of the matter may be that when it comes to controlling monopolistic behavior, the consent decree itself is holding the whip, not the court.¹⁴⁴

Courts, sometimes, act as rate regulators for licensing or sale of assets when granting remedies for monopolistic abuse of intellectual property.¹⁴⁵ The first rate-setting decision under the 1994 amendment—in which the district court set a rate for a licensee’s performance of music via cable and satellite—occurred in 2001.¹⁴⁶ It’s important to note that courts are not necessarily setting rates under the consent decrees. Rather, there is a *potential* for rate setting as the antitrust remedy.¹⁴⁷ Nonetheless, the threat of rate setting sets the stage for future licensing negotiations.¹⁴⁸ Knowing that the licensee can appeal to a court to set a rate, the licensor comes to the negotiation table

140. *Id.*

141. *Id.* at 310-12.

142. *Id.* at 312.

143. *Id.*

144. *Id.* at 313.

145. *Id.* at 308.

146. See *United States v. Broad. Music, Inc.*, 426 F.3d 91, 92-93 (2d Cir. 2005) (In 2001, the District Court fixed the rate at 1.75%, reasoning that “the price paid for music by retail customers that was the basis for the rate set under BMI’s agreement with DMX did not reflect the fair market value of the music to the extent that price included both the cost of the music itself as well as the cost of actually delivering the music to retail customers.”).

147. Crane, *supra* note 137, at 308 (“Here, the relevant judgment requires the defendant to license on reasonable (or reasonable and nondiscriminatory-RAND) terms and reserves jurisdiction for any potential licensee who is unhappy with the rate offered by the defendant to petition the court to set a rate.”).

148. *Id.*

without the power to impose monopolistic royalty rates.¹⁴⁹ While it is well established that judges may not make competent rate-setters, the concern lies with how the potential for a rate set by courts affects the bargain between a licensor and the licensee. The effect is usually one of equality in the licensing of intellectual property which, “[h]owever egalitarian the general impulse of liberal society, it is not clear that equality is such a desirable norm when it comes to the licensing of intellectual property.”¹⁵⁰

While the rate-setting court for ASCAP has been relatively active, the BMI court has had only two rate-setting proceedings in its first fourteen years, and it would be a mistake to generalize about the effects of rate-setting provisions from the amount of activity under the PRO consent decrees.¹⁵¹ Furthermore, while it is true that rate-setting is relatively rare, rate-setting courts are not irrelevant to the negotiations between intellectual property rights holders and potential licensees.¹⁵²

The PRO’s goal in pushing for random judicial assignment was to increase fairness in rate determinations by bringing ‘new eyes’ to proceedings. On one hand, assigning the proceedings randomly to judges who have no experience with the ASCAP or BMI Consent Decrees and likely little to no experience setting rates may only *increase* the likelihood of, allegedly, unfair results. On the other hand, new judges may be better equipped to consider advancements in streaming and other technology that has affected consumption of music. It is well-established that most judges are not well-versed in calculating an appropriate rate.¹⁵³

149. *Id.*

150. *Id.*

151. *Id.* at 311 (“Even though the ASCAP rate-setting court has been relatively active in recent years and the BMI court has had two rate-setting proceedings in its first fourteen years, ASCAP and BMI engage in thousands of licensing transactions on behalf of hundreds of thousands of composers, songwriters, lyricists, and music publishers, and only a small fraction of those end up in rate-setting proceedings.”); *see also About ASCAP*, ASCAP, <http://www.ascap.com/about/> [<https://perma.cc/H8RP-PRCQ>] (reporting that ASCAP represents more than 875,000 members); *see also About BMI*, BMI, <http://www.bmi.com/about/?link=navbar> [<https://perma.cc/9AA5-6B3A>] (reporting that BMI represents 1.2 million members).

152. Crane, *supra* note 137, at 312.

153. *Id.* at 313 (describing the rate-setting court for the ASCAP and BMI consent decrees).

B. Why Exclude the Determination of Reasonable License Fees Made by Individual Proprietors Under Section 513 of Title 17

One of the issues we run into frequently with addressing small businesses is the cost of litigation. While most businesses and other music users are subject to the random judicial assignment change included in the MWMA, Congress explicitly exempted individual proprietors under 17 U.S.C. Section 513 when it comes to securing a license for public performances.¹⁵⁴ Section 513 of Title 17 states that, an individual proprietor, for Title 17 purposes, is one who “owns or operates fewer than seven non-publicly traded establishments.”¹⁵⁵ Those falling within this statutory definition are given the opportunity to file claims related to any license agreement covered by a PRO, in the event an individual proprietor disputes the reasonableness of the associated licensing rates or fees.¹⁵⁶ The individual proprietor can utilize either the S.D.N.Y. court or a district court that is “the seat of the Federal circuit (other than the Court of Appeals for the Federal Circuit) in which the proprietor’s establishment is located.”¹⁵⁷

The rate set will be considered the “industry rate” and will be presumed to have been reasonable at the time the agreement was made or at the time the rate was determined by the court.¹⁵⁸ In this instance, the PROs are relieved of the nondiscrimination among similarly situated music users that is imposed by the Consent Decrees’ provisions.¹⁵⁹

154. 28 U.S.C. § 137(b)(1)(C); *see generally* U.S. COPYRIGHT OFF., MUSIC MODERNIZATION ACT, https://www.copyright.gov/legislation/2018_mma_amendments.pdf. [<https://perma.cc/5995-8VHH>].

155. 17 U.S.C. § 101 (defining that “for purposes of Section 513, a “proprietor” is an individual, corporation, partnership, or other entity, as the case may be, that owns an establishment or a food service or drinking establishment”); 17 U.S.C. § 513.

156. 17 U.S.C. § 513(1).

157. 17 U.S.C. § 513(2).

158. 17 U.S.C. § 513(9) (“[T]he term “industry rate” means the license fee a performing rights society has agreed to with, or which has been determined by the court for, a significant segment of the music user industry to which the individual proprietor belongs.”).

159. *Id.*; *see also* 17 U.S.C. § 513(7) (Additionally, this presumption shall in no way affect a determination of whether the rate is being correctly applied to the individual proprietor and a final holding will only be binding on that individual proprietor being addressed in the proceeding and will not be binding on other proprietors or PROs.).

To speculate, perhaps the reason individual proprietors were excluded from the change to random judicial assignment in the S.D.N.Y is because of the hardships it would bring to small business owners. As it stands, litigation costs are extremely expensive to everyone involved. Individual proprietors don't have the financial resources to go to court every time they wish to settle a license fee with a PRO. Without being subject to the amendment, individual proprietors do not have to bring rate-setting cases in the S.D.N.Y Court, but rather, they can bring these claims in any district court in the United States (including where they are domiciled).¹⁶⁰ In these proceedings, the individual proprietor has the burden of proving why they should not be subject to the industry rate and any decision made will be reviewed by the judge holding jurisdiction over that given consent decree.¹⁶¹ While allowing them to bring suit in a jurisdiction that is geographically convenient for them, it does not change the fact that these cases are expensive to litigate, hence, the lack of utilization of this provision.¹⁶²

V. POSSIBLE SOLUTIONS IF RANDOM JUDICIAL ASSIGNMENT DOES NOT WORK AS INTENDED

While rate court proceedings are rare, the rate-setting outcomes are of public record. The parties involved in negotiations, whether judicial or private, will know what the outcome is regarding rates decided upon. While, as previously mentioned, licenses for public performance rights cannot exceed five years, PROs and their members argue that even within the five-year period, rates should be subject to increase. However, not all the judges hearing the rate court proceedings necessarily subscribe to the same school of thought.¹⁶³ The case can, potentially, be made for permitting fractional

160. 17 U.S.C. § 513(3).

161. *See also* 17 U.S.C. § 513.

162. Music Licensing For Businesses: Real or Scam?, EASYONHOLD (June 5, 2015) <https://easonhold.com/blog/music-licensing-for-businesses-real-or-scam/> [<https://perma.cc/XCN9-EKHS>]; *see also* Letter from Christian L. Castle, Founder, Christian L. Castle Attorneys, to Jacqueline C. Charlesworth, Gen. Counsel and Assoc. Reg. of Copyrights, USCO (May 23, 2014), http://www.copyright.gov/policy/musiclicensingstudy/comments/Docket2014_3/Christian_L_Castle_MLS_2014.pdf [<https://perma.cc/853R-7VH6>].

163. Pandora Media, Inc. v. Am. Soc'y Composers, Authors, Publishers, 6 F. Supp. 3d 317, 355 (S.D.N.Y. 2014) ("In conducting an independent inquiry into a reasonable rate, this Court is guided by the following parameters. First, having determined a reasonable rate for the first years

licensing in that it may help PROs meet their burden of proving that their proposed rates are reasonable.¹⁶⁴ The question we need to ask is not whether there *are* technological advances occurring in the music industry, but *how fast* these advances are impacting the ways in which people consume music and the quantity of which they consume.

Because the enactment of the MWMA is recent, it is currently unclear whether random judicial assignment will accomplish what the PROs and Congress planned for, including reducing the number of judicial rate-setting proceedings. As of now, we have not seen a negotiation go to court under the new provision. This may be a sign that this amendment is accomplishing what it intended to, or it may just be a coincidence. It will take time to fully assess the effect the provision has on private negotiations between parties.

In the event rates remain inconsistent across the board, Congress will have to re-think random judicial assignment. There are a few possible paths to a solution that Congress could take. We could revert to having set judges, but rather than granting judges all-encompassing jurisdiction over the consent decrees in perpetuity, a new judge would be assigned to interpret the respective Consent Decrees every five years. This would allow some conformity while also possibly preventing parties from experiencing the negative effects of potential impartiality, or rather, actual, or perceived bias. To go one step further, the judges can be picked amongst a pool of SDNY judges with experience hearing rate-setting proceedings, intellectual property licensing disputes, or antitrust proceedings.

Having Judge Stanton and Judge Cote continue to interpret the consent decrees has proven useful. In July 2022, BMI pushed back against a bid by radio stations to have the same judge set licensing rates for both BMI and ASCAP.¹⁶⁵ The Radio Music Licensing Committee (“RMLC”) argues that the MWMA change to the process of assigning judges allows for one judge

of the five-year license period, there is a presumption that that rate will continue to be a reasonable rate for the entire license period.”).

164. See generally Dale Kawashima, *NMPA CEO David Israelite Discusses The Passing Of The Music Modernization Act, And Its Benefit To Songwriters & Music Publishers* SONGWRITERSUNIVERSE (Oct. 22, 2018), <https://www.songwriteruniverse.com/david-israelite-nmpa-mma-2018.htm> [<https://perma.cc/DUG3-3J7Y>].

165. See generally, Matthew Perlman, *BMI Hits Back Against Radio Group’s New Rate Request*, LAW360 (July 11, 2022 7:18 PM), <http://www-law360-com.etrn.lls.edu/articles/1510256> [<https://perma.cc/LJ4P-GCSF>].

to be designated to hear both ASCAP and BMI proceedings in a joint proceeding.¹⁶⁶ Radio stations and broadcasters would benefit greatly from joint proceedings because they would essentially be cutting their litigation costs in half. The joint proceedings would also cause “pitting ASCAP and BMI against each other when arguing about market share and other relevant matters.”¹⁶⁷ However, if the RMLC wants to reduce its litigation costs, then it can engage in private negotiations with the two PROs, separately, reaching an agreement and avoiding litigation altogether.¹⁶⁸ While BMI and the RMLC are still waiting for a ruling from Judge Stanton on whether the MWMA allows for joint proceedings under the Consent Decrees, this is a perfect example of why taking Judge Stanton and Judge Cote off these proceedings completely would not be the best move. The consent decrees are complex, and the MWMA is even more complex. At the end of the day, the parties have chosen to go to court instead of reaching a private agreement. In other words, they have chosen to subject themselves to the uncertainty and unpredictability of the judicial system and will have to bear the burdens of litigation that come with that decision.

In considering alternative options for adequate antitrust oversight, one solution may be to change the ways in which songwriters and copyright holders can license their music with PROs, i.e., permitting fractional licensing, which could help alleviate competitive issues without needing to limit the reach of the Consent Decrees. Another solution floated by ASCAP and BMI was to move the rate-setting process from the courts to private arbitrations. Songwriters and their legal advocates argue alternative methods to litigation such as private arbitration would combat the negative effects that lengthy rate-setting litigation has on the copyright holder’s rights while the litigation is pending.¹⁶⁹ Arbitration may also provide a speedier resolution than court

166. *Id.*

167. Rachel Stilwell & Lindsay Meisels, *AM/FM Trade Organization Asks Court to Ignore MMA in Effort to Reduce Songwriter Royalties*, STILLWELL LAW (June 2022), <http://www.rmslawoffices.com/uncategorized/am-fm-trade-organization-asks-court-to-ignore-mma-in-effort-to-reduce-songwriter-royalties/> [<https://perma.cc/NYX5-CBGU>].

168. *Id.*

169. *Letter from Christian L. Castle, Founder, Christian L. Castle Attorneys, to Jacqueline C. Charlesworth, Gen. Couns. and Assoc. Reg. of Copyrights*, U.S. COPYRIGHT OFF. (May 23, 2014), (on file with U.S. Copyright Office) (“The consent decree also inhibits the market from developing robust alternative dispute resolution mechanisms that will reduce transaction costs for all concerned.”) http://www.copyright.gov/policy/musiclicensingstudy/comments/Docket2014_3/Christian_L_Castle_MLS_2014.pdf [<https://perma.cc/853R-7VH6>].

proceedings. The right to appeal arbitration awards often “eliminates an appeal process that can delay finality of the adjudication.”¹⁷⁰ Additionally, arbitration is often more cost-effective than litigation because of the more compressed schedule for completion of the trial process.¹⁷¹ But, while private arbitration may seem like a more cost-effective option, it will create a shield of confidentiality from public disclosure of the rate-setting process, which in turn, will “exacerbate anticompetitive effects.”¹⁷²

VI. CONCLUSION

A strong case can be made that within the framework for “actual or perceived bias” that Congress gave, having only one judge per PRO hear the rate setting cases could lead to bias based on past rates set under different circumstances. However, court-set rate determinations, or the mere threat of, leading to unpredictable outcomes, may be the incentive parties need to reach an agreement through private bargaining and negotiations. Parties, outside of a court, are more likely to reach an agreement that closely resembles the result of a free-market negotiation. Furthermore, by negotiating out of court, it may be easier to apply flexibility to rates as technological advances in streaming and changes in how people consume music affect the quantity and method of public performances.

With the already-existing burdensome length and costs of litigation, the ‘newness’ of these judges to rate-setting may, unintendedly, exaggerate the burden by dragging litigation on longer while also asking judges to set rates on no prior experience. As methods of licensing and copyright protection continue to evolve, direct licensing is likely to become more prevalent. If songwriters and other copyright holders gain more leverage in their abilities to negotiate with music users by permitting fractional licensing and partial withdrawal, withdrawal by the publishers from PROs may lead to more evenly distributed repertoires. This would effectively remove the need for the Consent Decrees to prevent monopolization and other antitrust issues.

170. *The Advantages and Disadvantages of Arbitration vs. Court Litigation*, TUCKERLAW (Feb. 13, 2015), <http://www.tuckerlaw.com/2015/02/13/advantages-disadvantages-arbitration-vs-court-litigation/#:~:text=Arbitration%20typically%20provides%20a%20speedier,delay%20finality%20of%20the%20adjudication> [<https://perma.cc/ZRU7-G3JJ>].

171. *Id.*

172. *Public Comment on the Review of Antitrust Consent Decrees entered against ASCAP and BMI*, ELECTRONIC FRONTIER FOUNDATION (2019), http://www.eff.org/files/2019/08/21/eff_comment_on_ascap_bmi_consent_decree_review_2019.pdf [<https://perma.cc/C688-5R9A>].

Allowing members to split the licensing of their catalogs amongst various PROs may be one of the best options we have in helping to eliminate the monopoly power of ASCAP and BMI, while providing the best shot at achieving, objectively speaking, “reasonable” licensing rates. While almost all parties can agree on free-market rates being the goal, there is a strong argument that, as the Consent Decrees have been interpreted today, the Decrees are by no means a perfect solution but continue to be effective at promoting competition in music industry and encouraging private agreements to be made between the industry participants.