

# Deregulating the Music Industry: A Push to Give Power Back to the Songwriters

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# **Deregulating the Music Industry: A Push to Give Power Back to the Songwriters**

*By: Scott Hanus\**

## I. INTRODUCTION

In today's digital world, music is available to a wide population on many different platforms. Gone are the days of buying albums and listening to CDs on the stereo. Today, there are streaming services like Apple Music and Spotify, internet radio websites like Pandora, and even streaming websites like Youtube that can play full songs and albums for free. Most music listeners in 2018 will get their music on a website where they can stream it for free, and I am willing to bet that many people could not tell you the last time they stepped foot in a record store. As a musician, one question I often wonder is how do the bands and songwriters get paid when no one actually purchases music anymore? The answer lies in copyright law. If a songwriter or band wants to make money on the song itself, bands sign contracts with performing rights organizations ("PROs") who license out the rights of those songs to digital service providers (like Apple, Spotify, and Pandora) who then pay the PROs a licensing fee to use the music. Obviously, this was not always the case. Before music streaming overtook the business, artists and bands would make a percentage of each album or individual song they sold. Now, artists, bands, and songwriters make a percentage of every stream of a song. However, because of government mandated licensing regulations and an out of date streaming royalty payout system, streaming services have greatly disrupted the music industry and led to tremendous declines in the revenue paid to songwriters.

Songwriters' hands are mostly bound when it comes to the rate they receive per stream because the federal government's Consent Decree of the two biggest PROs mandates how songwriters can be paid.<sup>1</sup> Furthermore, when the PRO and the digital service provider cannot agree on a percentage rate, the dispute will then go to a rate court and a judge

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<sup>1</sup> See *United States v. ASCAP*, No. 41-1395, 2001 WL 1589999 (S.D.N.Y. June 11, 2001). See also *U.S. v. Broadcast Music, Inc.*, No. 64-3787 (S.D.N.Y. November 18, 1994).

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will come up with the final percentage. For example, if Pandora only wants to pay 8% of one cent per stream, but a PRO thinks Pandora should pay 10% of one cent per stream, then a rate court will determine the percentage. To make matters even worse for musicians, in 2016, the Department of Justice (“DOJ”) decided that when a PRO cannot offer music services a full license of a song, the PRO is required to license the song anyway, even if they do not own all the rights to that song.<sup>2</sup> This often happens when there are multiple authors and writers of the music. This new rule has the potential to deter songwriting collaboration between multiple artists, as well as drive down the value of each stream. Although legislation that will provide songwriters with more favorable rights is currently being introduced to Congress,<sup>3</sup> more action needs to be taken in order to balance this broken system.

## II. HOW DO SONGWRITERS MAKE MONEY: PERFORMANCE RIGHTS ORGANIZATIONS AND THE LICENSES THEY OFFER

Generally, when a songwriter signs with a publisher, the songwriter will sign over the copyright of the song to the PRO. There are various copyrights that are available for musicians and songwriters. Two of the most common copyrights in a piece of recorded music include the sound recording (recordings of music or sounds captured- what you hear when you listen to a song) and the composition recording (music notes and lyrics on paper).<sup>4</sup> In exchange for the copyright, the PRO will issue licenses, collect money, and pay the songwriter.<sup>5</sup> In the U.S., profits from the performance of musical compositions are collected and distributed by the Performing Rights Organizations. These include: ASCAP, SESAC, GMR, and BMI.<sup>6</sup> Of these, ASCAP and BMI are by far the largest and most successful PROs in the U.S.<sup>7</sup> Together, ASCAP and BMI have signed

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<sup>2</sup> Jon Healey, *Opinion Justice Department rocks music industry with ASCAP-BMI decision*, LOS ANGELES TIMES (August 4, 2016, 10:20 A.M.), <http://www.latimes.com/opinion/opinion-la/la-ed-ascap-bmi-justice-department-20160804-snap-story.html>.

<sup>3</sup> Music Modernization Act of 2017, H.R. Res. 4706, 115th Cong. (Introduced in House, Dec. 21, 2017).

<sup>4</sup> See U.S. COPYRIGHT OFFICE, COPYRIGHT REGISTRATION OF MUSICAL COMPOSITIONS AND SOUND RECORDINGS, 1, <https://www.copyright.gov/circs/circ56a.pdf>. (last visited Apr. 9, 2018).

<sup>5</sup> DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 300 (Simon & Schuster, 9th ed. 2015).

<sup>6</sup> *Id.* at 241.

<sup>7</sup> *Id.*

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about 90% of the industry.<sup>8</sup> ASCAP describes itself as “a professional organization of 650,000 songwriters, composers and music publishers.”<sup>9</sup> BMI describes itself as the “bridge between songwriters and the businesses and organizations that want to play their music publicly.”<sup>10</sup> As a global leader in music rights management, BMI serves as an advocate for the value of music, representing nearly 13 million musical works created and owned by more than 800,000 songwriters, composers and music publishers.<sup>11</sup> Together they represent tens of millions of copyrighted works with over a one million members.

PROs provide licenses to users, which allows the users to publicly perform the musical works of the PRO’s thousands of members.<sup>12</sup> If a band or songwriter wants to make any money on their work, they need to license their music out so it can be used commercially. The license that the performing rights organizations give each music user is called a blanket license.<sup>13</sup> The blanket license gets its name because it “blankets” all of the compositions that the specific organization represents.<sup>14</sup> These licenses allow users to access millions of songs without entering into or negotiating for an individual license with each composer or organization.<sup>15</sup> Thus, a user can gain unlimited access and the right to perform all the compositions controlled by publishers affiliated with that PRO for a simple license fee.<sup>16</sup> Traditionally, all income will be split evenly between the publisher and the writer.<sup>17</sup>

However, because a blanket license provides the right to play many separately owned and competing songs from various artists and publishers

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<sup>8</sup> *Id.*

<sup>9</sup> *About Us*, ASCAP, <https://www.ascap.com/about-us> (last visited Mar. 28, 2018).

<sup>10</sup> *About*, BMI, <http://www.bmi.com/about> (last visited Mar.28, 2018).

<sup>11</sup> *Id.*

<sup>12</sup> DEP’T OF JUSTICE, STATEMENT OF THE DEPARTMENT OF JUSTICE ON THE CLOSING OF THE ANTITRUST DIVISION’S REVIEW OF THE ASCAP AND BMI CONSENT DECREES, 2, (August 4, 2016) (users can include bar owners, television and radio stations, and internet music distributors.)

<sup>13</sup> DONALD S. PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 242 (Simon & Schuster, 9th ed. 2015).

<sup>14</sup> *Id.*

<sup>15</sup> DOJ, STATEMENT OF THE DEPARTMENT OF JUSTICE ON THE CLOSING OF THE ANTITRUST DIVISION’S REVIEW OF THE ASCAP AND BMI CONSENT DECREES, 2, (Aug. 4, 2016).

<sup>16</sup> DONALD S. PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 242 (Simon & Schuster, 9th ed. 2015).

<sup>17</sup> *Id.* at 236.

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for a single price, PROs have been subject to antitrust criticism.<sup>18</sup> Of these organizations, ASCAP and BMI are governed by “consent decrees” issued by the DOJ. This was created as a means to resolve any anticompetitive conduct within the industry.<sup>19</sup> ASCAP and BMI are subject to consent decrees that resolved antitrust lawsuits brought by the United States in 1941.<sup>20</sup> The allegations were that each organization had unlawfully captured control of the market through the accumulation of public performing rights.<sup>21</sup> This was seen as a violation of Section 1 of the Sherman Act.<sup>22</sup> The consent decrees were created to promote competition and to uphold the benefits of blanket licensing.<sup>23</sup> In the decades since the ASCAP and BMI consent decrees were entered, the industry has benefitted from unlimited access to songs that each PRO’s blanket license provides.<sup>24</sup>

The consent decree did a number of things that have a negative effect on ASCAP and BMI, but the biggest problem in the digital world is that ASCAP and BMI cannot refuse to issue a license to someone who wants to use their music.<sup>25</sup> If a music platform like Pandora wants to use their songs, but Pandora and ASCAP don’t agree on the price, ASCAP still has to let Pandora use the music while they resolve the dispute about price.<sup>26</sup> This dispute takes place in a federal rate court, where a judge listens to evidence from both sides and determines a reasonable price.<sup>27</sup>

To make matters even more difficult, the DOJ recently ruled that each PRO is required to license 100 percent of the rights to a song.<sup>28</sup> This is required even if they do not control 100 percent of that song.<sup>29</sup> To illustrate

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<sup>18</sup> DOJ, STATEMENT OF THE DEPARTMENT OF JUSTICE ON THE CLOSING OF THE ANTITRUST DIVISION’S REVIEW OF THE ASCAP AND BMI CONSENT DECREES, 2, (Aug. 4, 2016).

<sup>19</sup> *ASCAP - BMI Consent Decrees: Fact Sheet*, FUTURE OF MUSIC COALITION (Aug. 4, 2016), <https://futureofmusic.org/article/fact-sheet/ascap-bmi-consent-decrees>.

<sup>20</sup> DOJ, STATEMENT OF THE DEPARTMENT OF JUSTICE ON THE CLOSING OF THE ANTITRUST DIVISION’S REVIEW OF THE ASCAP AND BMI CONSENT DECREES, 2, (Aug. 4, 2016).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* citing *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 20 (1979).

<sup>25</sup> DONALD S. PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 247 (Simon & Schuster, 9th ed. 2015).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> DOJ, STATEMENT OF THE DEPARTMENT OF JUSTICE ON THE CLOSING OF THE ANTITRUST DIVISION’S REVIEW OF THE ASCAP AND BMI CONSENT DECREES, 12-13, (Aug. 4, 2016).

<sup>29</sup> *Id.*

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that point, if a song is co-written by an ASCAP writer and a BMI writer, either of the PROs could license the entire song. This is in contrast to how traditional partial licensing rights would operate in that both ASCAP and BMI would have to partially license the rights of the song.<sup>30</sup>

### III. RATE COURTS AND THE CONSENT DECREE: WHAT HAPPENS WHEN TWO PARTIES DISAGREE ON A RATE?

The two largest PROs are governed by consent decrees. In *Pandora Media, Inc.*, the Southern District court of New York discussed how ASCAP has operated under a consent decree stemming from a DOJ antitrust lawsuit. This consent decree has been modified since its creation in 1941.<sup>31</sup> The Second Amended Final Judgment (“AFJ2”) was the most recent change to the consent decree and was issued in 2001.<sup>32</sup> In an attempt to resolve any anti-competitive concerns, AFJ2 restricts how ASCAP may issue licenses in a variety of ways.<sup>33</sup>

First, when ASCAP and an applicant for a license cannot reach an agreement, AFJ2 provides a mechanism that allows a rate court to determine a reasonable fee for ASCAP.<sup>34</sup> Second, AFJ2 requires ASCAP to grant a license to perform any musical compositions in ASCAP's catalogue to any user upon request of such a license.<sup>35</sup> Third, AFJ2 prevents ASCAP from discriminating based on price or to other terms and conditions between "similarly situated" licensees.<sup>36</sup>

The consent decree allows for rate courts to set fees for licenses that ASCAP and BMI give out. This has caused streaming services to attempt to obtain different licensing fees with different PROs. For example, Pandora pays different amounts of fees for BMI licenses than they do for ASCAP licenses. This results in the artists, who are a part of those PROs, to get paid differently. The court held that the headline rate for the ASCAP-Pandora license for the years 2011 through 2015 is set at 1.85% of revenue for every year of the license term.<sup>37</sup> The court turned to the consent decree to determine this outcome in *Pandora Media, Inc.*<sup>38</sup> Section IX of AFJ2

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<sup>30</sup> DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 248 (Simon & Schuster, 9th ed. 2015).

<sup>31</sup> *In re Pandora Media, Inc.*, 6 F. Supp. 3d 317, 323 (S.D.N.Y. 2014).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *In re Pandora Media, Inc.*, 6 F. Supp. 3d 317, 354 (S.D.N.Y. 2014).

<sup>38</sup> *See In re Pandora Media, Inc.*, 6 F. Supp. 3d 317, (S.D.N.Y. 2014).

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requires a reasonable fee for a requested license to be set by the rate court.<sup>39</sup> The court concluded that a “1.85% license rate is the reasonable rate for the entirety of the five-year term of the ASCAP-Pandora license.”<sup>40</sup>

In a completely separate suit, *Broad Music, Inc. v. Pandora Media, Inc.*, the court determined the rate for the BMI-Pandora license should be set at 2.5% of revenue for the years 2013 through 2016.<sup>41</sup> This left a disparity between the BMI and ASCAP percentages granted by the court. This occurred because the prevailing method to determine a reasonable fee is by using “benchmarks.”<sup>42</sup> Benchmarks are when the courts look at other similar transactions and uses their fees to determine the fees in the current dispute.<sup>43</sup> As the Second Circuit explained in *United States v. Broadcast Music, Inc.* 316 F.3d 189, 194 (2d Cir. 2003):

In making a determination of reasonableness (or of a reasonable fee), the court attempts to make a determination of the fair market value - ‘the price that a willing buyer and a willing seller would agree to in an arm's length transaction.’ This determination is often facilitated by the use of a benchmark - that is, reasoning by analogy to an agreement reached after arms' length negotiation between similarly situated parties. Indeed, the benchmark methodology is suggested by the BMI consent decree itself.<sup>44</sup>

Using the court’s own language, the percentage is to be set by benchmarks from similarly situated parties. Seeing as how ASCAP and BMI offer the exact same services as one another, it would be reasonable to say that they are similarly situated parties. Yet, the rate court has determined two separate percentages for these two PROs. Even though the BMI-Pandora rate court knew the percentage that was set forth a year earlier for the licensing agreement between ASCAP and Pandora, it still established a different percentage. What is even more concerning is that both courts used the same method of “similarly situated parties” to determine each PROs percentage with Pandora. The question that must be raised then is how can one PRO get a more favorable percentage than the other if they are both offering the exact same service to Pandora? The court in both cases determined that the burden of proof is on ASCAP and BMI to establish the reasonableness of the fee it seeks.<sup>45</sup>

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<sup>39</sup> *In re Pandora Media, Inc.*, 6 F. Supp. 3d 317, 353 (S.D.N.Y. 2014).

<sup>40</sup> *Id.* at 355.

<sup>41</sup> *Broad Music, Inc. v. Pandora Media, Inc.*, 140 F. Supp. 3d 267, 270 (S.D.N.Y. 2015).

<sup>42</sup> *Id.* at 270.

<sup>43</sup> *Id.*

<sup>44</sup> *United States v. Broadcast Music, Inc.* 316 F.3d 189, 194 (2d Cir. 2003).

<sup>45</sup> *In re Pandora Media, Inc.*, 6 F. Supp. 3d at 354.

*A. What is a Reasonable Fee?*

In *Pandora Media, Inc.*, ASCAP relies principally on the three direct licenses negotiated between Pandora and EMI, Sony, and UMPG in the wake of the April 2011 Compendium modification.<sup>46</sup> “ASCAP arrives at proposed rates of 1.85% for 2011-2012 (the Pandora-EMI license rate), 2.50% for 2013, and 3.00% for 2014-2015.”<sup>47</sup> Relying on the fact that it is the same rate at which Pandora was licensed from 2005-2010, the court determined that ASCAP had carried its burden of demonstrating that its rate proposal of 1.85% is reasonable for the years 2011 and 2012.<sup>48</sup> However, the court determined that ASCAP had “failed to carry its burden of demonstrating that its rate proposals of 2.50% and 3.00% for the years 2013 and 2014-2015, respectively, are reasonable.”<sup>49</sup>

The court came to the conclusion that the 1.85% ASCAP-Pandora license rate is the reasonable rate for the entirety of the five-year term through the following means:

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. Second, the historical division between interactive and non-interactive internet music services requires that Pandora be licensed well below the 3.0% rate at which ASCAP licenses interactive music services. Third, the circumstances under which Sony imposed upon Pandora an implied ASCAP headline rate of 2.28% confirm that any reasonable rate for an ASCAP-Pandora license is below 2.28% by a measurable margin.<sup>50</sup>

In *Broad. Music, Inc. v. Pandora*, BMI offered five direct licensing agreements between Pandora and major music publishers Sony, EMI, and UMPG to serve as benchmarks in the years 2012 and 2013.<sup>51</sup> During that time period, the settled rates range from 2.25 to 5.85% of Pandora's revenue.<sup>52</sup> As benchmarks, BMI proposed their licenses with Pandora's competitors from 2010-2013, which have a range of effective rates from 2.5 to 4.6% of revenue.<sup>53</sup> The court held that the 2.5% percentage of

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<sup>46</sup> *Id.* at 331.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 355.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Broad. Music, Inc. v. Pandora Media, Inc.*, 140 F. Supp. 3d 267, 271 (S.D.N.Y. 2015).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*



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revenue rate offered to Pandora by BMI was reasonable.<sup>54</sup>

The consent decree has allowed for a rate court to determine two different payouts for songwriters who license their music to the same corporation. ASCAP and BMI are both governed consent decrees and they essentially have a monopoly in the performing rights organizations field, yet the rate court that is supposed to enforce honesty and fair market tactics has given BMI a more favorable ruling. This causes the songwriters who have signed with ASCAP to lose money due to less favorable payouts.

In regard to the rate courts that determine the percentages between PROs and streaming services, it is clear that the songwriters are the ones being hurt from this. Not only are songwriters getting taken advantage of in the court system, but according to the U.S. Copyright Royalty Board, non-interactive online streaming services (Pandora) will only have to pay 0.17 cents in royalties per streamed song.<sup>55</sup> The difference in the judicial decisions between ASCAP and BMI and their relationship with Pandora creates an issue for the songwriters who are on ASCAP as opposed to BMI. A songwriter that signed with ASCAP who has the exact same amount of plays of their song on Pandora as a songwriter who signed with BMI gets paid less than the other songwriter.

The fact that these disputes even must go to rate courts in the first place is unsettling. Although ASCAP and BMI should not be able to dictate the market for percentage payouts in music streaming, their dominance results in an inconsistent system within the exact same industry. Both of these organizations provide the exact same service and are governed by consent decrees, so there is no reason why the artists signed to one organization get paid more for the same service than the artists on the other organization. The discrepancy in licensing fees and outcomes of the rate courts between the two PROs is only hurting the songwriters who are contractually obligated to be a part of the PRO.

#### IV. DEPARTMENT OF JUSTICE'S 100% LICENSING MANDATE

In 2016, the DOJ ruled that the consent decrees require ASCAP and BMI to issue full licenses to all the songs in their catalogs, including the ones whose songwriting teams they do not fully represent.<sup>56</sup> If this decision

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<sup>54</sup> *Id.* at 270.

<sup>55</sup> Chris Leo Palermino, *Copyright Royalty Board: Pandora Required to Pay 21 Percent More in Royalties*, DIGITAL TRENDS (December 16, 2015, 6:37 P.M.), <http://www.digitaltrends.com/music/copyright-royalty-board-pandora/>.

<sup>56</sup> Jon Healey, *Opinion Justice Department rocks music industry with ASCAP-BMI decision*, L.A. TIMES (August 4, 2016, 10:20 A.M.),

is not overturned, the only winner will be the online music services as the artists will be creatively limited and financially hurt due to these full licenses. Requiring that ASCAP and BMI offer full licenses to all who seek them will force the industry to rethink its approach to some of the most popular genres of music, such as Top 40 and hip hop, where songs are frequently crafted by a grab bag of unaffiliated producers and writers.<sup>57</sup>

Regarding the 100% licensing issue, the DOJ states that if the organizations were allowed to grant a partial license for the right to play a certain song, music users seeking to avoid infringement liability would face the “daunting task” of hunting down all partial owners and getting licenses from them.<sup>58</sup> The consequence of 100% licensing has the potential to raise a serious issue with songwriting and creativity in the future. One possible issue is that songwriters who once collaborated with others may now have to decide whether to write and create music by themselves or run the potential risk of not being able to license their songs out to music distributors.

The full license decision will have a disruptive effect on the music business. Taking the example of a song that is co-written by ASCAP, BMI, and SESAC authors, every user (restaurant, bar, streaming service, etc.) would take the position that they get 100% of the song from whichever PRO has the cheapest rate.<sup>59</sup> For instance, BMI may have the cheapest rate and they license 100% of the song. Even though BMI only represents one of the three songwriters, BMI still must pay every writer. In this situation, Don Passman, author of “All You Need to Know About the Music Business”, suggests that because BMI does not have the addresses of all the writers, they pay ASCAP and SESAC for those writers.<sup>60</sup> This poses an issue as BMI would be deducting its overhead charges before making payments, then ASCAP and SESAC would deduct their overhead before paying the writer.<sup>61</sup> So, the writer is financially penalized twice and gets half of what he would normally be paid.<sup>62</sup> This type of scenario creates a disincentive for songwriters to work with one another. There is less likely

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<http://www.latimes.com/opinion/opinion-la/la-ed-ascap-bmi-justice-department-20160804-snap-story.html>.

<sup>57</sup> *Id.*

<sup>58</sup> Kevin Penton, *Judge Sides With BMI Over DOJ On Music Licensing Deals*, LAW360 (April 13, 2017) <https://www.law360.com/articles/841250/judge-sides-with-bmi-over-doj-on-music-licensing-deals>.

<sup>59</sup> DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 249 (Simon & Schuster, 9th ed. 2015).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

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a desire to collaborate on a piece of music when you can potentially make twice as much money if you write the song by yourself. As more authors take this approach to songwriting, the industry may suffer from the stifling of artistic creativity.

This puts songwriters in a difficult position. It is not as though they are going to go on strike and refuse to write music or refuse to collaborate with other songwriters. The full license decision is only hurting the songwriters by paying them less. In a digital world where the musicians and songwriters are already getting paid the bare minimum for listeners to stream their music, a full license mandate is only hurting them even more.

Another collaboration issue arises when one author wishes to license to certain publishers that the other author(s) might not agree with. If one author of the song decides he wants the song played and advertised for a certain political campaign, he can do so without permission from his co-author. Similarly, if one author is a pacifist, but the other wishes to license the song to a movie production company who makes war movies and documentaries, he does not need permission from his pacifist co-author. There are ways to avoid this issue and the most common is to sign a contract whereby the song cannot be licensed without each songwriter agreeing to the license. If this issue arises and no contract was signed, but one author is adamant that he does not want his music licensed to a specific platform, the moving party can attempt to get a court order issuing a take-down of the work from said advertisement.

Co-authors not agreeing on who to license their work to could lead to a number of potential law suits between songwriters who collaborated on music. When one party wishes to license out the work to certain companies and one party does not want to license out the music, the conflict can be remedied through a court order to have the music removed. The 100% licensing mandate has the possibility of stifling creativity and collaboration between songwriters.

#### *A. How the 100% Licensing Mandate Impacts Songwriters*

The government regulations that inadvertently dictate how songwriters are paid in the music business could potentially have a significant impact on the industry in the future. The pay decrease could diminish the creative effort that musicians strive for during the song writing process. These regulations that are placed on the PROs, most of which stem from outdated government guidance and industry standards, should be abolished or amended. Although they were originally intended to stop ASCAP and BMI from becoming powerful monopolies within the industry, their current

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form does nothing but destroy the organizations and the artists that are affiliated with them.

The music industry and the way that songs are written are completely different than they were a just a few short decades ago. In recent years, we are seeing less artists who write their own music. Gone are the days of John Lennon and Paul McCartney writing all twelve songs on the album and having three of those songs be hit singles. As discussed above, in today's popular music, it takes an entire team of songwriters to create and compose the next hit single on the radio. Many questions still remain in the months following the Justice Department's 100% licensing mandate. What is a songwriter's incentive to collaborate with other songwriters if they are not going to be paid justly for their work? Why collaborate when they could make more money writing music on their own? Is the Justice Department willing to sacrifice creativity and quality of music for the convenience of PROs? Although these questions still persist, there are viable solutions.

#### V. SOLUTIONS: WHAT CAN BE DONE TO BRING POWER BACK TO THE SONGWRITERS?

##### *A. Abolish 100% Licensing and Bring Back Fractional Licensing*

Those financial issues regarding the 100% licensing fees face two possible solutions: First, let songwriters and copyright holders choose whether they want to license their music via full work or fractional licenses. Second, the market should return to the traditional fractional licensing regulation. If the consent decrees are amended in this area, songwriters and copyright holders would be able to decide for themselves whether their work can be licensed under 100% licensing or fractional licenses where each licensee is required to obtain a license from each fractional owner. On its face, the 100% licensing option may seem like it would be the best solution for everybody. However, this may be difficult to regulate and could potentially lead to disputes. Many songwriters who collaborate with other writers are either unaware that they own part of the copyright or forget that they own part of the work until the other copyright holder has already licensed out the work. Therefore, the best possible solution is to go back to the traditional system of fractional licensing.

There are arguments against the return to the fractional system. Thomas Lenard and Lawrence White believe:

[t]here is no need for licensees to negotiate with every fractional owner, some of whom may be difficult to find. An inability to negotiate a license with even a small fractional owner would make the work unusable.

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Moreover, fractional owners may sometimes have excessive leverage (the holdup problem) in licensing negotiations, leading to higher royalties.<sup>63</sup>

What Lenard and White fail to consider are the negative effects of the 100% licensing scheme currently facing songwriters. The only way for a songwriter and copyright holder to be compensated through the use of public performance of their work is to have their music registered with a PRO.<sup>64</sup> There are many reasons why a songwriter would choose one PRO over another, one of which being royalty rates and availability of bonus payments.<sup>65</sup> BMI has recently implemented a bonus payment system for the most-played songs at some digital services, which will complement premiums the performance rights organization pays out to the top songs at radio and television.<sup>66</sup> ASCAP has similarly introduced a bonus payment program that will increase payments to songwriters and publishers of the most frequently performed songs on streaming services and satellite radio.<sup>67</sup> Because these bonuses are calculated completely different with regard to each PRO, a song would almost always command a different bonus payment amount depending which PRO its writer was affiliated with.<sup>68</sup>

Similarly, a 100% licensing mandate could disrupt and destroy the benefits offered by PROs.<sup>69</sup> If a PRO was required to license 100% of any song it had part ownership in, licensees would most likely swarm to the PRO charging the lowest licensing rates so as to pay less in music royalties.<sup>70</sup> The large demand for licensing from the PRO with the lowest

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<sup>63</sup> Thomas Lenard and Lawrence White, *Competition in Music Licensing—DOJ Has More To Do*, LAW360 (April 13, 2018)  
<https://www.law360.com/articles/882068/competition-in-music-licensing-doj-has-more-to-do>.

<sup>64</sup> DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 242 (Simon & Schuster, 9th ed. 2015).

<sup>65</sup> Danielle Ely, *In This Issue, A Law Student's Perspective: Don't Believe Me Just Watch: A 100% Licensing System Would Stifle Collaboration And Creativity Among Songwriters*, 32 ENT. & SPORTS LAW. 48, 51 (2016).

<sup>66</sup> Ed Christman, *BMI Launches a Bonus Payment System for Most-Streamed Songs*, BILLBOARD, (September 21, 2015),  
<http://www.billboard.com/articles/business/6700769/bmi-bonus-payment-system-streaming-most-played>.

<sup>67</sup> *ASCAP Expands Payments to Reflect Growth in Music Listening on Digital Platforms*, ASCAP, (March 13, 2015),  
[https://www.ascap.com/playback/2015/01/action/ascap\\_expands\\_payments](https://www.ascap.com/playback/2015/01/action/ascap_expands_payments).

<sup>68</sup> Ely, *supra* note 65.

<sup>69</sup> *Id.* at 51

<sup>70</sup> *Id.*

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rates could produce a “race to the bottom.”<sup>71</sup> This scenario could produce a situation where each PRO continuously lowers songwriter royalties to undercut the other PROs.<sup>72</sup> While some are of the opinion that this race to the bottom would benefit music licensees and ultimately consumers, driving royalty rates into the ground would negatively affect songwriters and lessen the motivation for the creation of quality music.<sup>73</sup>

With PROs offering less royalty payout and bonus payments, this could drive down the desire for songwriters to collaborate with each other. Collaboration between songwriters is growing as the average number of songwriters on a Billboard top 200 song in the late 2000s surpassed more than three credited songwriters.<sup>74</sup> Songwriting is no longer done by a single member of a band or a pop singer. Recent trends show that songwriters enjoy working together on material and the listeners clearly like this style of collaboration.<sup>75</sup> To take away the incentive for songwriters to collaborate would have a negative impact on not only creativity in songwriting, but the impact could potentially have a negative economic effect on the industry as well.

#### *B. Allow for Songwriters to Partially Withdraw from PROs*

Another possible solution is to allow publishers to partially withdraw their catalogs from the PROs for the purpose of negotiating directly with streaming music platforms like Pandora and Spotify.<sup>76</sup> However, the court in *Pandora Media Inc.* discussed how ASCAP granting partial withdrawal

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> Danielle Ely, *In This Issue, A Law Student's Perspective: Don't Believe Me Just Watch: A 100% Licensing System Would Stifle Collaboration And Creativity Among Songwriters*, 32 ENT. & SPORTS LAW. 48, 51 (2016); citing, Dan Kopf, *How Many People Take Credit for Writing a Hit Song?*, PRICEONOMICS (Oct. 30, 2015), <http://priceonomics.com/how-many-people-take-credit-for-writing-a-hit-song/> Using public data from Billboard's Top 100 charts, the blog Priceonomics put together a graph showing the average number of credited songwriters on songs that reached the Billboard Hot 100 between 1960 and 2008. The creators of the graph removed 19% of the songs on the chart as these songs lacked songwriter information.

<sup>75</sup> Dan Kopf, *How Many People Take Credit for Writing a Hit Song?*, PRICEONOMICS (Oct. 30, 2015), <http://priceonomics.com/how-many-people-take-credit-for-writing-a-hit-song/>

<sup>76</sup> Thomas Lenard and Lawrence White, *Competition In Music Licensing — DOJ Has More To Do*, LAW360, (January 20th, 2017), <https://www.law360.com/articles/882068/competition-in-music-licensing-doj-has-more-to-do>.

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rights to its members violated the terms of AFJ2.<sup>77</sup> AFJ2 requires that “ASCAP license to any applicant all of the works in its repertoire.”<sup>78</sup> Therefore, the only possible solution is for Congress to either amend the consent decrees to allow for partial withdraw or repeal them as a whole. Amending the consent decrees to allow for publishers to partially withdraw would allow for more direct bargaining between copyright holders and music users and platforms. There are major financial incentives as songwriters get paid a substantial amount less per stream, than payments made per song purchased/downloaded, or for a terrestrial radio station to play their song. There are two reasons why streaming platforms have reduced the transactional costs associated with music licensing: First, these platforms are global in scope — as opposed to the geographically based radio stations and other local users.<sup>79</sup> Second, the technology reduces the cost of monitoring which recordings and songs are being performed.<sup>80</sup>

With traditional radio stations in large markets like Chicago, when a song is played on the radio it could reach hundreds, if not thousands of listeners at one time. The idea that an artist’s work could be heard by such a large audience multiple times per day drives up the cost of the blanket license required by radio stations. With streaming services, there is only one person hearing that song, and unlike traditional radio, they have the ability to skip the song or not listen to it if they choose to. Streaming services are able to obtain the data of which songs are played and how many times they are played. With the reduced transaction costs for streaming services as opposed to terrestrial radio, the result has been to diminish the benefits of using a PRO as an intermediary, and why some publishers want to negotiate directly with the licensees.<sup>81</sup>

The partial withdrawal of artists from the current system would encourage more direct bargaining and is a prerequisite for a more competitive and less regulatory system.<sup>82</sup> The fact that there are multiple music streaming platforms offering the same service yet paying various PROs different percentages per stream is ethically wrong. The critique of the current system would be different if the artists were contracting and negotiating with the platforms for the payout rate. However, the artists

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<sup>77</sup> *In re Pandora Media, Inc.*, 6 F. Supp. 3d 317, 331 (S.D.N.Y. 2014).

<sup>78</sup> *Id.*

<sup>79</sup> Thomas Lenard and Lawrence White, *Competition In Music Licensing — DOJ Has More To Do*, LAW360, (January 20th, 2017), <https://www.law360.com/articles/882068/competition-in-music-licensing-doj-has-more-to-do>.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

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have no say in the contracts the PROs make. With the current system, some artists are gaining more of a profit simply due to luck and the fact that they are a part of one PRO as opposed to the other. The consent decree is crippling the power of songwriters and in order to encourage more bargaining and competition, there should be less regulation. The clearest way to eliminate regulation is for the DOJ's Antitrust Division to allow artists a partial withdrawal. More broadly, it does not make sense for songwriters to be regulated in this arena if the regulations are treating some copyright holders and PROs more fairly than others. In the effort of fairness, all songwriters should be subject to a set rate for PROs, or alternatively allowed to enter into direct negotiations with publishers. As the Antitrust Division regulates competition, Antitrust officials should encourage more direct bargaining between copyright holders and music users.<sup>83</sup> In order to encourage more direct bargaining, the division should permit partial withdrawal.<sup>84</sup>

*C. A Bright Future? The Music Modernization Act and the Need of Set Rates for Songwriters*

Prior to music streaming services, the music industry experienced a technological transformation as the industry went from selling physical CDs to selling music digitally via online stores like iTunes. On iTunes, listeners could either purchase entire albums or buy individual songs from an artist's album. Songwriters were paid a percentage of each song downloaded, equating to \$0.091 per download.<sup>85</sup> With the emergence of streaming services like Spotify, Apple Music, Google Play and others, purchasing music is less popular than ever. Many listeners now prefer to stream music for free or by paying for one of these streaming subscriptions. Since listeners are not buying music in the traditional sense, the payouts to songwriters work differently than they do for downloads. Spotify pays about \$0.006 to \$0.0084 per stream to the holder of rights.<sup>86</sup> The term

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<sup>83</sup> *Id.*

<sup>84</sup> Thomas Lenard and Lawrence White, *Competition In Music Licensing — DOJ Has More To Do*, LAW360, (January 20th, 2017), <https://www.law360.com/articles/882068/competition-in-music-licensing-doj-has-more-to-do>.

<sup>85</sup> Mechanical and Digital Phonorecord Delivery Date Determination Proceeding, 74 FR 4510.

<sup>86</sup> Kabir Sehgal, *Spotify and Apple Music should become record labels so musicians can make a fair living*, CNBC (Jan. 26, 2018), <https://www.cnbc.com/2018/01/26/how-spotify-apple-music-can-pay-musicians-more-commentary.html>.



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“holder” is a misnomer, as this can be split among the record label, producers, artists, and songwriters.<sup>87</sup> Although streaming is convenient for the listener, the songwriters are barely getting paid for their work.

Since each artist or songwriter is going to have a different contract between their record label and PRO, the numbers for the royalty payouts are going to vary between artists. One study shows that in general, one million streams of a song on Spotify equals about \$6,000-\$8,000.<sup>88</sup> Although that may seem like quite a bit of money, it takes an incredibly popular artist to reach one million streams. For many artists, their entire catalogue will never reach a combined one million streams. If listeners want to continue using digital service providers as their primary source of music consumption, then the royalty payouts to songwriters needs to increase and the system be amended.

For a number of years, songwriters have been adversely affected by this poorly designed system. In response, a number of professional songwriters and organizations have joined to fight for change through the Copyright Royalty Board and legislation against the steadily growing music streaming services sold by Apple, Google, Spotify, Pandora and Amazon. In January 2018, the U.S. Copyright Royalty Board (CRB) approved a 43.8% increase in streaming royalties paid to songwriters and their publishers over the next five years, the largest gain the CRB has ever approved.<sup>89</sup> The CRB’s decision will require digital service providers to pay 15.1% of their revenue to the songwriters and publishers, up from 10.5%.<sup>90</sup> The music publishers association hailed the ruling, even though the trade group estimates recording labels will still be receiving \$3.82 for every \$1 paid to songwriters and publishers.<sup>91</sup> Although the gap between the record labels and the songwriters is still largely imbalanced, the shift represents the most favorable move towards fairness between the two in the history of the industry.

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<sup>87</sup> *Id.*

<sup>88</sup> Michelle Castillo, *Is the Music Streaming Industry Destined to Leave Artists Unhappy?*, ADWEEK, (March 15, 2015), <http://www.adweek.com/digital/music-streaming-industry-destined-leave-artists-unhappy-163466/>. (last visited Mar. 1, 2018)

<sup>89</sup> Jonathan Berr, *Streaming music royalties just got sweeter*, CBS (Jan. 30, 2018), <https://www.cbsnews.com/news/streaming-music-royalties-rise-for-songwriters-publishers/>. (last visited Mar. 1, 2018)

<sup>90</sup> Copyright Board Boosts Songwriters’ Music Streaming Fees, CBS, ASSOCIATED PRESS, (Jan. 28, 2018), <http://sanfrancisco.cbslocal.com/2018/01/28/copyright-board-boosts-songwriters-music-streaming-fees/>.

<sup>91</sup> *Id.*

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Furthermore, groups like Songwriters of North America (“SONA”) and the National Music Publishers’ Association (“NMPA”) are leading the legislative fight to protect the value of songs in the digital music age. SONA and NMPA played an integral role in advocating for and bringing to life the Musical Modernization Act (“MMA”).<sup>92</sup> After months of back and forth negotiations between Digital Service Providers (like Spotify and Amazon), publishers, songwriters, and PROs, Congressman Doug Collins of Georgia introduced the MMA into the House of Representatives on December 20<sup>th</sup>, 2017.<sup>93</sup> On April 11, 2018, the United States House Judicial Committee voted unanimously to approve the MMA.<sup>94</sup> The bill now waits for full consideration by the House of Representatives, with the Senate expected to introduce its version in May, 2018.<sup>95</sup>

According to the NMPA, the MMA includes four major components. First, a new standard for mechanical royalties. Mechanical royalty rates will be based on what a willing buyer and a willing seller would negotiate in a free market.<sup>96</sup> Second, the MMA creates a single, centralized mechanical licensing entity called a Mechanical Licensing Collective to collect royalties for all songs played by Digital Service Providers (DSPs).<sup>97</sup> DSPs are now required to pay for all uses of works, even if they cannot find an owner, rather than avoiding payments for works that aren’t registered with the Copyright Office by sending large quantities of Notices of Intent to the Copyright Office.<sup>98</sup> Third, the MMA removes evidence

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<sup>92</sup> Music Modernization Act of 2017, H.R. Res. 4706, 115th Cong. (Introduced in House, Dec. 21, 2017).

<sup>93</sup> Nate Rau, *Songwriters, streaming companies strike landmark deal on music licensing*, TENNESSEAN, (Dec. 21, 2017), <https://www.tennessean.com/story/money/2017/12/21/songwriters-streaming-companies-strike-landmark-deal-music-licensing/970968001/> (last visited Mar. 5, 2018).

<sup>94</sup> Variety Staff, *Music Modernization Act Approved By House Judiciary Committee; Steven Tyler, Execs Weigh In*, VARIETY, (April 11, 2018), <http://variety.com/2018/biz/news/music-modernization-act-approved-by-house-judiciary-committee-1202750409/>.

<sup>95</sup> *Id.*

<sup>96</sup> Press Release, NMPA, NMPA Praises Introduction of Music Modernization Act (Dec. 21, 2017) (Media Contact Charlotte Sellmyer), [http://nmpa.org/press\\_release/nmpa-praises-introduction-of-music-modernization-act/](http://nmpa.org/press_release/nmpa-praises-introduction-of-music-modernization-act/).

<sup>97</sup> Music Modernization Act: A Breakdown, SONA, <https://static1.squarespace.com/static/558dbdb6e4b0c990426100ab/t/5a56b8e0419202b16994db17/1515632864537/Music+Modernization+Act+A+Breakdown.pdf> (last visited Feb. 15, 2018).

<sup>98</sup> *Id.*

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limitations for public performance royalties. The will allow rate courts to consider sound recording performance royalty rates when determining musical work performance royalties.<sup>99</sup> Fourth, the MMA reforms the rate court system. Currently ASCAP and BMI are subject to the same two judges presiding over their rate courts indefinitely. The bill gives the PROs the ability to have randomly selected judges decide their royalty rates.<sup>100</sup>

This new system ensures that songwriters are paid when digital music services use their music, improves transparency, provides for better royalty rates, and gives songwriters increased involvement in how mechanical rights are licensed.<sup>101</sup> The MMA is the first step towards a more fair and balanced system. However, there are long-standing issues that the MMA fails to address. Most significantly is a viable upgrade to the current system governing the per stream rate for the songwriters. A per stream rate would have shrunk the pay gap between songwriters and music labels even further. Unfortunately, this solution was not included in the MMA or in the recent decision from the CRB to increase streaming royalties. Per stream rates would allow uniform payouts across the various DSPs. The current system takes 15.1% of the gross revenue of each DSP minus the cost of public performance. Replacing the current system becomes problematic. DSPs have differing gross revenue which means even if there were a uniform rate, the royalty payout would still vary depending on the DSP. Furthermore, there are different services offered within each DSP. There are versions of Spotify and YouTube where you can stream music for free as opposed to paying for a monthly subscription. The revenue a song makes when being streamed on YouTube for free is substantially less than the revenue a song makes when being streamed on Spotify's \$9.99 a month premium subscription service.<sup>102</sup>

Any potential remedy rests on financial compensation from the CRB granting songwriters a per stream rate. Although missing key components such as a per stream rate, the MMA is an excellent start to begin helping the songwriters. Without the MMA, songwriters will continue to be severely underpaid for their work and the institutions that control songwriters and royalty payouts will continue to take advantage of the system for their own benefit. The MMA is a good start and a complete necessity for a system that needs a complete reformation. However, it is

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<sup>99</sup> *supra*, note 96.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> Daniel Sanchez, *What Streaming Music Services Pay (Updated for 2018)*, DIGITAL MUSIC NEWS, (Jan. 16, 2018) <https://www.digitalmusicnews.com/2018/01/16/streaming-music-services-pay-2018/>.

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imperative that songwriters and organizations continue to fight towards a per stream rate. These reformations have the ability to create balance in royalty payouts while simultaneously allowing consumers to enjoy the convenience of streaming music.

## VI. CONCLUSION

The government mandated consent decrees that force regulations on the music industry, combined with an outdated system of royalty payments are depriving songwriters of money that is owed to them. This deprivation is causing serious concern for the future of collaboration and creativity within the industry. Due to the enormous power given to DSPs because of the consent decrees, there has been a tremendous decline in the amount of revenue paid to songwriters. The determination of licensing fees by a rate court, the 100% licensing mandate, and the lack of a per stream rate all demonstrate the negative economic impact resulting from the consent decrees. In order to reverse this trend, Congress needs to amend the consent decrees to allow for publishers to partially withdraw their catalogs from PROs and go back to the traditional system of fractional licensing. These amendments would allow the songwriters and publishers to negotiate directly with streaming services for licensing fees, as well as allow them more freedom in determining who can license their music. More importantly, Congress needs to pass the MMA. The MMA represents a brighter future for songwriters and the opportunity for them to be paid equitably in the era of online music streaming. Until the MMA is passed into law and the consent decree is lifted or amended from ASCAP and BMI, there will continue to be declines in revenue paid to songwriters and a fall in creativity within the music industry itself.