MARKET POWER AND COPYRIGHT: THE ASCAP AND BMI CONSENT DECREES

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In 2016 — and again in 2019 — the Department of Justice declined to rescind or modify two of its longest-standing consent decrees. The decrees at issue govern the conduct of two music licensing groups: the American Society for Composers, Authors, and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI"). The decrees date back to 1941 and, though they are periodically updated, have nevertheless remained standing through eight decades, fifteen Presidential administrations, numerous reviews, and dramatic changes in DOJ attitudes toward consent decrees generally. The ASCAP and BMI consent decrees provide an interesting window into how intellectual property and competition policy intersect, including how market power turns on copyright exclusivity, increased efficiency, and the ability of intermediaries to stand in between rights holders and licensees.

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I. COPYRIGHT AND MARKET POWER

The debate over whether copyright protection grants a true monopoly is a fierce one.[2] On paper, the argument in favor seems straightforward: copyright allows firms to prevent the creation of perfect substitute goods. This view has the benefit of being widely repeated both in the literature[3] and at the Supreme Court.[4]

However, it also has its fair share of detractors.[5] These critics argue that, while copyright grants an ability to preclude creation of identical products, it falls short of creating true monopoly *power*:

> [Copyright] protection creates monopoly power only if substitutes are unavailable and entry barriers prevent the emergence of any such substitutes in the foreseeable future. Neither of these restrictive conditions is likely to be met with respect to copyright. Although some works exist for which there are few alternatives, substitutes are readily available for most works.[6]

In other words, most copyrighted works are not so inherently valuable in their originality that they lack "good enough" substitutes.

This view has some intuitive appeal. However, it suffers from two main defects. First, it assumes that copyright's ability to exclude extends only to perfect copies or substitutes. In reality, copyright's boundaries are fuzzy; its ability to exclude extends well beyond perfect substitutes to include works which are not identical, but are nevertheless "close enough" to affect the market for the original.[7] The more valuable a given

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2 For an alternative examination of copyright's role in market power, see Jacob Noti-Victor & Xiyin Tang, *Antitrust Regulation of Copyright Markets*, 101 Wash. U. L. Rev. _, 12-15 (forthcoming, 2024), available at https:// ssrn. com/ abstract= 4496870.

3 See, e.g. S.J. Liebowitz, *Copyright Law, Photocopying, and Price Discrimination*, 8 Res. L. & Econ. 181, 184 (1986); Ian E. Novos & Michael Waldman, *The Effects of Increased Copyright Protection: An Analytic Approach*, 92 J. Pol. Econ. 236, 236-38 (1984); James Boyle, *Foreword: The Opposite of Property?*, Law & Contemp. Probs. at 1, 8 (2003); Wendy J. Gordon, *Intellectual Property as Price Discrimination: Implications for Contract*, 73 Chi.-Kent L. Rev. 1367, 1386-89 & n.76 (1998); Julie E. Cohen, *Copyright and the Perfect Curve*, 53 Vand. L. Rev. 1799, 1801 (2000); William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 Harv. L. Rev. 1659, 1700 (1988).

4 See, e.g. *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1198 (2022) ("fair use … can help to keep a copyright monopoly within its lawful bounds"); *Georgia v. Public. Resource.Org, Inc.*, 140 S. Ct. 1498, 1503 (2020) ("The Copyright Act grants potent, decades-long monopoly protection for 'original works of authorship.'"); *Allen v. Cooper*, 140 S. Ct. 994, 1001 (2020) (referring to copyrights and patents as "monopoly rights"); *Golan v. Holder*, 565 U.S. 302, 346 (2012) (discussing "copyright's grants of limited monopoly privileges"); *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 33-34 (2003) ("once the … copyright monopoly has expired, the public may use the … work at will and without attribution"); *Eldred v. Ashcroft*, 537 U.S. 186, 217 (2003) ("The monopoly granted by a copyright 'is not a monopoly of knowledge… .'"); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (discussing "the copyright monopoly granted by Congress"); *\Am. Tobacco Co. v. Werckmeister*, 207 U.S. 284, 293 (1907) ("The purpose of copyright law is … to secure a monopoly … ."); *Holmes v. Hurst*, 174 U.S. 82, 85 (1899) ("The right of an author to a monopoly of his publications is measured and determined by the copyright act … ."); *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 56 (1884) ("The monopoly which is granted to [authors] is called a copyright ….").

5 See, e.g. Randal C. Picker, Copyright as Entry Policy: The Case of Digital Distribution, 47 Antitrust Bull. 423 at 2 (2002); Christopher S. Yoo, *Copyright and Product Differentiation*, 79 N.Y.U.L. Rev. 212, 217 (2004); Frank H. Easterbrook, *Intellectual Property Is Still Property*, 13 Harv. J.L. & Pub. Pol'y 108, 118 (1990) ("Rights to exclude are not monopolies just because the property involved is an intangible rather than something you can walk across or hold in your hand."); Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 Mich. L. Rev. 1197 (1996).

6 Christopher S. Yoo, *Copyright and Product Differentiation*, 79 N.Y.U.L. Rev. 212, 217 (2004).

7 Notably, this idea—that the "character and purpose" factor of fair use hangs heavily upon whether the two works share an overlapping market use—forms the doctrinal core of the Supreme Court's recent decision in *Andy Warhol Found. for the Visual Arts v. Goldsmith*:

> In a broad sense, a use that has a distinct purpose is justified because it furthers the goal of copyright, namely, to promote the progress of science and the arts, without diminishing the incentive to create. A use that shares the purpose of a copyrighted work, by contrast, is more likely to provide "the public with a substantial substitute for matter protected by the [copyright owner's] interests in the original wor[k] or derivatives of [it]," which undermines the goal of copyright.

43 S. Ct. 1258, 1276 (2023) (internal citations omitted).

work, the greater the incentive for firms to aggressively prosecute its close substitutes. That practical risk — and the eye-watering statutory damages attendant to a finding of infringement — can chill creation of works that stray too close to an existing high-value product.[8]

Second, exclusion power varies by market. Some value fungible works: "sound-alike" tracks are a staple of cinematic scoring and advertising;[9] romance novel enthusiasts are voracious readers[10] who actively organize their preferences around specific plot similarities between works.[11] In these scenarios, "close enough" substitutes can effectively compete with — and displace — copyrighted works in a more traditional model of competition.[12] But not all markets accommodate this kind of substitution.

Popular music streaming is driven overwhelmingly by consumer demand for a small subset of works whose rights to exclude are fiercely guarded and policed. To the end consumers whose preferences (and dollars) drive the market, popular music is non-fungible; a consumer who wants to listen to the new Lizzo album is not interested in a "close enough" substitute, even if they enjoy the substitute on its own merits.[13] Non-substitutable works represent a small percentage of the overall market output, but are the biggest economic drivers of the market.[14]

This dynamic of specific consumer preference and low substitutability gives labels price-setter power, or the ability to unilaterally determine the price of their products (in this case, licenses).[15] And while licensees are largely beholden to major rightsholders, this obligation is not reciprocal; rightsholders have their "pick of the litter," including music streaming services which enjoy the financial backing of enormous tech conglomerates. A rational rightsholder will thus set the price for its licenses at the maximum rate they believe the licensee can bear. This allows rightsholders to absorb any available surplus. Market observation — particularly the fact that no independent streaming service has ever posted a sustained profit — appears to validate this dynamic. [16]

II. ASCAP, BMI, AND THE MECHANICS OF MARKET POWER

Perhaps the two most well-known consent decrees in the entertainment world are those governing American Society for Composers, Authors, and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI"). Founded in the early 20th century, ASCAP and BMI are what are known as Performing Rights Organizations ("PROs") — membership-based organizations which bundle members' public performance

8 One need look no further than the infamous *Blurred Lines* case to acknowledge that copyright suits reach well beyond strict copying, and encompass works that, in the court's opinion, stray too close to another original work. *Williams v. Gaye*, 885 F.3d 1150 (9th Cir. 2018). For a broader review of the academic literature on strategic use of copyright against competitors, see Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 Wm. & Mary L. Rev. 439 (2009); Mark Lemley, *Should a Licensing Market Require Licensing?*, 70 L. & Contemp. Probs. 185 (2007) (critiquing the strategic development of licensing markets as precluding fair use); Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. Copyright Soc'y U.S.A. 209 (1982) ("Copyright, which once protected only against the production of substantially similar copies … today protects against uses and media that often lie far afield of the original.").

9 This is largely attributable to a quirk in traditional video editing workflow: the use of existing tracks as placeholders—known as "temp music"—while cutting a scene. See, e.g. Every Frame a Painting, *The Marvel Symphonic Universe*, YouTube (Sep. 12, 2016) https://www.youtube.com/watch?v=7vfqkvwW2fs; Andrew Liptak, *How Hollywood's temp scores are hurting your favorite action movies*, Verge (Sep. 12, 2016) https://www.theverge.com/2016/9/12/12893622/hollywood-temp-scores-every-frame-a-painting-film; Simon Power, *Temp Tracks: A Movie's Secret Score*, Shockwave Sound (Oct. 10, 2018), https://www.shockwave-sound.com/blog/temp-tracks-a-movies-secret-score/.

10 See *Literary Liaisons: Who's Reading Romance Books?*, Nielsen (Aug. 2015), https:// www. nielsen. com/ insights/ 2015/ literary- liaisons- whos- reading- romance- books/ ("6% of buyers purchase romance books more than once a week, and 15% do so at least once a week. … 25% of buyers read romance more than once a week, and nearly half do so at least once a week; only 20% read romance less than once a month."); Christine Larson, *Open networks, open books: gender, precarity and solidarity in digital publishing*, Info., Commc'n & Soc'y (2019) (noting that "romance readers read more than four times as many books annually as the average American").

11 Elena Burnett et al., *From meet-cutes to happy endings, romance readers feel the love as sales heat up*, NPR (Feb. 13, 2023) https:// www. npr. org/ 2023/ 02/ 13/ 1154798284/ romance- books- club- novel- group- reading ; Ann Kjellberg, *How Amazon Turned Everyone Into a Romance Writer (and Created an Antitrust Headache)*, Observer (Sep. 12, 2022), https:// observer. com/ 2022/ 09/ how- amazon- turned- everyone- into- a- romance- writer- and- created- an- antitrust- headache /; Alyssa Palmer, *Deconstructing Tropes in Popular Romance Fiction* (2021) at 3, https:// alyssalinnpalmer. com/ wp- content/ uploads/ 2023/ 05/ Deconstructing- Tropes- in- Popular- Romance-Fiction- Alyssa- PalmerID3513585- MAIS601Final. pdf .

12 Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 Tex. L. Rev. 989, 1041-42, 1072-83 (1997), discussing Edmund Kitch, *The Nature and Function of the Patent System*, 20 J.L. & Econ. 265 (1977).

13 Sherwin Rosen, *The Economics of Superstars*, 71 Am. Econ. Rev. 845 (1981), https:// www. jstor. org/ stable/ 1803469 .

14 Emily Blake, *Data Shows 90 Percent of Streams Go to the Top 1 Percent of Artists*, Rolling Stone (Sep. 9, 2020), https:// web. archive. org/ web/ 20230209193737/ https:// www. rollingstone. com/ pro/ news/ top- 1- percent- streaming- 1055005 /.

15 *Price-setter*, Oxford Dictionary of Economics (3d ed. 2009).

16 For a more in-depth discussion of the financial and market state of digital streaming platforms, see Meredith Rose, *Streaming in the Dark: Competitive Dysfunction within the Music Streaming Ecosystem*, 13 Berkeley J. Ent. & Sports L. __ (2024). Preprint available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4586800.

rights and offer them as "blanket licenses." These blanket licenses were immensely valuable to radio stations, live music venues, and others, because they eliminated the cost of identifying, locating, and negotiating independently with thousands upon thousands of composers and publishers.[17]

Prior to 1939, ASCAP exercised a functional monopoly on blanket licenses. This led to predictable anticompetitive results, the most egregious of which was ASCAP simultaneously refusing to offer individual or per-use licenses, while also prohibiting its members from directly negotiating with licensees. This forced all licensees, regardless of size or need, to purchase sweeping blanket licenses through ASCAP, and ASCAP alone.[18] These licenses were often priced as a percentage of the station's revenue, regardless of whether (or how much) ASCAP music had actually been aired. A proposed rate hike in 1939 led broadcasters to boycott ASCAP and form BMI as a competing PRO. It was not long before the Department of Justice waded into the debate by suing ASCAP for antitrust violations; both PROs entered into roughly parallel consent decrees in 1941, and remain under modified versions to this day.[19]

The specifics have shifted over the intervening decades, but the core features of the decrees remain largely unchanged. ASCAP and BMI may not interfere with their members' ability to directly license;[20] discriminate between similarly situated licensees;[21] or base their licensing rates upon performance of works not within their own catalog.[22] In addition to blanket licenses, both PROs must offer per-program licenses.[23] And, importantly, all licenses must be technologically neutral and "through-to-the-audience."[24] This means that the license encompasses public performance by the licensee and any intermediary necessary to deliver the performance to the end audience — an important distinction as new technologies develop layered delivery mechanisms.[25]

The decrees' endurance is a testament the tremendous market power that ASCAP and BMI's blanket licenses continue to wield. The Supreme Court itself has noted that these blanket licenses would, in the absence of standing consent decrees and rate courts, likely violate antitrust law.[26] In other words, the efficiency benefits created by PROs do not exist in *spite* of the consent decrees, but largely flow *from* them. Take, for example, catalog transparency. In theory, a licensee who wanted to avoid dealing with either PRO could simply choose to not perform its

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17 "The disk-jockey's itchy fingers and the bandleader's restive baton, it is said, cannot wait for contracts to be drawn with ASCAP's individual publisher members, much less for the formal acquiescence of a characteristically unavailable composer or author, or—heaven forfend the legal ramifications!—the manifold unascertainable and unlocatable heirs, assigns, or other legal representatives of the composer and author." Sigmund Timberg, *The Antitrust Aspects of Merchandising Modern Music: The ASCAP Consent Judgment of 1950*, 19 L. & Contemp. Probs. 294, 297 (1954).

18 Noel L. Hillman, *Intractable Consent: A Legislative Solution to the Problem of the Aging Consent Decrees in United States v. ASCAP and United States v. BMI*, 8 Fordham Intell. Prop. Media & Ent. L.J. 733 (1998).

19 The Department of Justice chose to largely ignore BMI in favor of prosecuting ASCAP. Although BMI's consent decree sprang in part from "alleged legal infirmities somewhat akin to those of ASCAP," its adoption was more strategic than legal: the two PROs had been engaged in a long and bitter feud, and BMI's acquiescence to a consent decree forced ASCAP's hand to accept one as well. Sigmund Timberg, *The Antitrust Aspects of Merchandising Modern Music: The ASCAP Consent Judgment of 1950,* 19 L. & Contemp. Probs. 306 (1954). See also, Sol Taishoff, *War Against ASCAP Believed Nearly Won*, Broad. Mag. (Jan. 27, 1941), *available at* https:// web. archive. org/ web/ 20230220033834/ https:// worldradiohistory. com/ Archive- BC/ BC- 1941/ 1941- 01- 27- BC. pdf .

20 *United States v. Am. Soc'y of Composers, Authors & Publishers*, Civ. Action No. 41-1395 (WCC) at 6 (S.D.N.Y. Jun. 11, 2001) (Second Amended Final Judgment) [hereinafter *ASCAP Consent Decree]; United States v. Broadcast Music, Inc.*, No. 64-Civ-3787, at 3 (S.D.N.Y. Nov. 18, 1994) (Amended Final Judgment) [hereinafter *BMI Consent Decree*].

21 *ASCAP Consent Decree* at 7; *BMI Consent Decree* at 4.

22 *ASCAP Consent Decree* at 8; *BMI Consent Decree* at 5.

23 *ASCAP Consent Decree* at 9-11*; BMI Consent Decree* at 5.

24 *ASCAP Consent Decree* at 8; *BMI Consent Decree* at 2.

25 See, e.g. Makan Delrahim, Assistant Attorney General, Antitrust Division, U.S. Dept. of Justice, Remarks as Prepared for the Vanderbilt University Law School: *"And the Beat Goes On": The Future of the ASCAP/BMI Consent Decrees* (Jan. 15, 2021), available at https:// web. archive. org/ web/ 20230217220619/ https:// www. justice. gov/ opa/ speech/ file/ 1355241/ download .

26 When considering the dispute between BMI and broadcasting giant CBS, the Court went out of its way to emphasize the necessity of both the rate court and the standing decrees:

> [I]t cannot be ignored that the Federal Executive and Judiciary have carefully scrutinized ASCAP and the challenged conduct, have imposed restrictions on various of ASCAP's practices, and, by the terms of the decree, stand ready to provide further consideration, supervision, and perhaps invalidation of asserted anticompetitive practices. In these circumstances, we have a unique indicator that the challenged practice may have redeeming competitive virtues and that the search for those values is not almost sure to be in vain.

Broadcast Music, Inc. (BMI) v. Columbia Broadcasting System (CBS), Inc., 441 U.S. 1, 13 (1979).

music. In this situation, the strategically optimal move is for the PRO to obfuscate the contents of its catalog. Copyright's famously high statutory damages (reaching $150,000 per infringement) is enough to ensure that a rational licensee operating at scale will purchase the blanket license simply as a form of liability insurance. Notably, this problem is not purely theoretical. In 2011, ASCAP failed to follow its own internal transparency rules, because a member publisher believed that doing so would put it at a negotiating disadvantage.[27] Lack of catalog transparency remains, to this day, a recurring complaint among licensees of all sizes.[28]

Direct licensing — the availability of which depends entirely the consent decrees — is a similarly important check on ASCAP's and BMI's market power. Direct licensing both prevents licensees from being strong-armed into blanket licenses, and exerts indirect pressure on the pricing and terms of the PROs' official licenses. Unsurprisingly, PROs have historically resisted the practice. While the consent decrees mandate that ASCAP and BMI allow direct licensing,[29] two much smaller, more recent PROs — Global Music Rights ("GMR") and SESAC — have both been accused of blocking their members from directly contracting with licensees.[30] A court determined that SESAC had obscured the contents of its repertory specifically to prevent licensees from identifying the parties with whom they needed to negotiate;[31] GMR was accused of a similar practice, but the case settled before the court could rule on the merits.[32]

Finally, it is important to note that although PROs compete for membership (via better rates, transparency, and representation),[33] there is no need for them to compete for buyers of blanket licenses. Radio stations, broad-catalog streaming services, and live venues are all captive buyers for all four PROs' blanket licenses. This is largely due to the practice of fractional licensing — a system under which any joint rightsholder (such as one songwriter out of four credited for a given song) can only license their "fraction" of the work. To publicly perform a song with multiple credited songwriters, a licensee must clear each writer's share separately, even when the writers are represented by different PROs. Failure to clear any one of the relevant rights constitutes copyright infringement. This system may be administrable in a universe where most songs have one or two songwriting credits; we do not, however, live in that world.[34] In 2016, most "popular mainstream songs ha[d] (on average) at least four writers and six publishers each,"[35] and thirteen of that year's top 100 hits had eight or more songwriter credits attached.[36] DSPs cannot, therefore, reasonably avoid contracting with a disfavored PRO. Thus, PROs, while incentivized to compete for *members*, have no need to compete against one another for *licensees*.

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27 *In re Pandora Media, Inc.*, 6 F. Supp. 3d 317, 345 (S.D.N.Y. 2014), *aff'd sub nom. Pandora Media, Inc. v. Am. Soc. of Composers, Authors & Publishers,* 785 F.3d 73 (2d Cir. 2015).

28 See, e.g. Comments of Future of Music Coal. at 12 ("Under the Consent Decrees, ASCAP and BMI have struggled with transparency in internal and external matters."); Comments of Comput. & Commc'n Indus. Ass'n at 4-7 ("PROs should not simultaneously be empowered to control a large and economically significant swath of cultural works, and at the same time be permitted to obscure the boundaries of that dominion."); Comments of NCTA at 5 ("The lack of transparency in the current system is a significant impediment to concluding transactions; creating greater transparency in these respects would have significant efficiency benefits ... The existing ASCAP and BMI song databases are fundamentally inadequate for users seeking to identify, for example, the songs licensable on a publisher-by-publisher or writer-by-writer basis."); Comments of Nat'l Ass'n Broad. at 4 ("Lack of meaningful access to [licensing] information has increased transaction costs and hindered licensing activities—both direct and collective."); Comments of Netflix at 17 ("the lack of transparency to users can lead to material information imbalances or asymmetries between licensors and licensees—which render a marketplace setting demonstrably noncompetitive"); Comments of Radio Music Licensing Comm. at 32; Comments of Nat'l Religious Broad. Music Licensing Comm. at 10 (noting that "[t]he PROs themselves disclaim the accuracy of their database.").

29 *ASCAP Consent Decree* at 6.

30 "[E]ven where a station is willing to try to operate without using GMR's 'must have' repertory, GMR does not make available a feasible and reliable method that radio stations can use to determine, with any level of confidence, what works they would need to avoid playing in order to operate without risk of copyright infringement." Complaint, *Radio Music License Comm. v. Glob. Music Rts.*, No. 16-6076 (E.D. Pa., Mar. 29, 2019). The case settled in 2022.

31 *Radio Music License Comm. v. SESAC,* No. 12-cv-5087, Report and Recommendation at 29 (E.D. Pa., Dec. 20, 2013).

32 *Radio Music License Comm. v. Glob. Music Rts., supra* note 30.

33 Both ASCAP and BMI post detailed information about royalty calculations and payment schedules on their websites. *ASCAP Payment System: How ASCAP Calculates Royalties*, ASCAP, https:// web. archive. org/ web/ 20230217200405/ https:// www. ascap. com/ help/ royalties- and- payment/ payment/ royalties (last visited Feb. 17, 2023); *How We Pay Royalties: General Royalty Information*, Broad. Music Inc., https://web.archive.org/web/20230217200535/https://www.bmi.com/creators/royalty/general_information (last visited Feb. 17, 2023).

34 Nor, of course, do consumers structure their preferences around PRO affiliation.

35 Daniel Sanchez, *The Average Hit Song Has 4+ Writers and 6 Different Publishers*, Digit. Music News (Aug. 2, 2017), https:// www. digitalmusicnews. com/ 2017/ 08/ 02/ songwriters- hit- song /.

36 There are multiple reasons for this trend. Many are industry-specific; none show any signs of abating. Mark Sutherland, *Songwriting: Why it takes more than two to make a hit nowadays,* Music Week (May 16, 2017), https:// www. musicweek. com/ publishing/ read/ songwriting- why- it- takes- more- than- two- to- make- a- hit- nowadays/ 068478_.

III. CONCLUSION

The continued existence of the ASCAP and BMI consent decrees seems, to music industry outsiders, to be an anomaly. The reality is far more complex: the unique characteristics of popular music, copyright law, and the mechanisms of market power create specific risks that can only be addressed through ongoing monitoring and antitrust enforcement. As copyright becomes ever more central to our economy, policymakers, litigators, and industry professionals should further scrutinize its intersection with — and effects on — competition policy.

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