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## The Earth Belongs to the Living, or at Least It Should: The Troubling Difficulty of Modifying Antitrust Consent Decrees\*

### INTRODUCTION

Throughout history, the public performance of music has been a powerful force in culture and entertainment. Those providing services to the public, such as bars and restaurants, began to play music for customers. However, unauthorized performance of compositions in public places became a considerable problem for composers, as they would not receive compensation in exchange for the public use of their work.<sup>1</sup> Eventually, it became evident that it was impractical for composers to negotiate licenses with individual music users on an ad hoc basis.<sup>2</sup>

In the early twentieth century, a group of composers and musicians responded to this problem by creating performance rights organizations (“PROs”), including the American Society of Composers, Authors, and Publishers (“ASCAP”) and Broadcast Music, Inc. (“BMI”). These PROs would handle the administrative rigors of licensing and, in the process, ensure composers received the royalties owed to them.<sup>3</sup>

In essence, PROs are performance rights licensing collectives that license public performance rights for songs on behalf of the owners of those songs.<sup>4</sup> PROs license songs to music users, such as bars, restaurants, and coffee shops, that play those songs for their patrons.<sup>5</sup> Further, PROs license public performance rights on behalf of their members or affiliates, which include songwriters, producers, performers, or anyone else who has an ownership interest in the rights to a given song and permits a PRO to license it.<sup>6</sup> Thus, PROs act as important middlemen between artists and music—it would be

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1. See Mary Katherine Kennedy, Recent Development, *Blanket Licensing of Music Performing Rights: Possible Solutions to the Copyright-Antitrust Conflict*, 37 VAND. L. REV. 183, 186 (1984); see also Danielle Ely, *A Law Student’s Perspective: Don’t Believe Me Just Watch: A 100% Licensing System Would Stifle Collaboration and Creativity Among Songwriters*, ENT. & SPORTS LAW., Summer 2016, at 48, 48.

2. Kennedy, *supra* note 1, at 186.

3. See *id.* at 184.

4. See Kristelia A. García, *Facilitating Competition by Remedial Regulation*, 31 BERKELEY TECH. L.J. 183, 193 (2016).

5. See *id.*

6. See *id.*

logistically untenable for artists and songwriters to license their songs to thousands of bars and restaurants on an individual basis and collect and distribute royalties on those songs.<sup>7</sup> Today, PROs account for over \$2 billion in annual U.S. revenue.<sup>8</sup>

Since 1940, BMI and ASCAP have controlled the performance rights licensing market by a wide margin as the two largest PROs in terms of repertoire.<sup>9</sup> Today, there are only four prominent PROs in the United States: BMI, ASCAP, the Society of European Stage Authors and Composers (“SESAC”), and Global Music Rights (“GMR”).<sup>10</sup> ASCAP and BMI, however, remain the preeminent players in the industry, controlling about ninety percent of the performance rights licensing market.<sup>11</sup> This near-complete domination of the market by two PROs has led to concerns of anticompetitive behavior over the past seventy-five years, and, as a result, BMI and ASCAP have defended themselves in antitrust litigation.<sup>12</sup>

Antitrust concerns in the public performance licensing space focus on market domination by only two PROs because of the fear that this could lead to a monopoly.<sup>13</sup> In addition, the U.S. Department of Justice (“DOJ”) has attacked some specific ways that PROs issue licenses, arguing that the practices are an illegal restraint on trade and that “the pooling of compositions . . . [has] permitted the performing rights organizations to charge arbitrary prices.”<sup>14</sup> Since only two PROs are dominant in the industry, the government has been concerned for years about the potential for parallel pricing and tacit collusion to remove meaningful competition from the marketplace.<sup>15</sup>

In response to these antitrust concerns, the DOJ has sought to regulate PROs over the years through consent decrees that “prevent

7. *See id.* at 187.

8. Steven J. Gagliano, Comment, *Consent Decrees in the Streaming Era: Digital Withdrawal, Fractional Licensing, and § 114(I)*, 10 J. BUS. ENTREPRENEURSHIP & L. 317, 322 (2017).

9. *See Kennedy, supra* note 1, at 188 (“ASCAP and BMI, through their members, control the performance rights to virtually every domestic copyrighted composition.”); Carly Olson, Comment, *Changing Tides in Music Licensing? BMI v. DMX and In Re THP*, 10 NW. J. TECH. & INTELL. PROP. 277, 279 (2012) (stating that BMI and ASCAP “have come to dominate the field of music licensing”).

10. *See Gabriella A. Conte, Note, “Waiting on the (Music) World to Change”: Licensing in the Digital Age of Music*, 83 BROOK. L. REV. 323, 326 (2017).

11. *See Gagliano, supra* note 8, at 330.

12. *See Kennedy, supra* note 1, at 188–89.

13. *See id.* at 189.

14. *Id.*

15. *See García, supra* note 4, at 188.

‘the aggregation of public performance rights in violation of Section 1 of the Sherman Act.’”<sup>16</sup> The government is able to exercise a measure of control over PROs by including ground rules and restrictions for PROs in the terms of each consent decree.<sup>17</sup> The terms of these consent decrees are legally binding against PROs and, in essence, serve as governmental regulations on the performance rights licensing industry.<sup>18</sup>

In recent years, there has been controversy surrounding the antitrust consent decree between the DOJ and BMI, which the two first entered into in 1966 and most recently amended in 1994.<sup>19</sup> During the lifetime of this decree, the circumstances surrounding the performance rights licensing industry have changed drastically due to advances in technology—most notably, the streaming technology surrounding digital music.<sup>20</sup>

16. See Gagliano, *supra* note 8, at 320 (quoting DEP’T OF JUSTICE, STATEMENT OF THE DEPARTMENT OF JUSTICE ON THE CLOSING OF THE ANTITRUST DIVISION’S REVIEW OF THE ASCAP & BMI CONSENT DECREES 3 (2016), <https://www.justice.gov/atr/file/882101/download> [<https://perma.cc/N8ZW-PWQF>]).

17. See Robert R. Zitko, *The Appealability of Conditional Consent Judgments*, 1994 U. ILL. L. REV. 241, 241 (“A consent judgment is a valuable procedural tool which not only allows parties to achieve settlement, but also allows courts to retain jurisdiction over parties to enforce underlying settlement agreements.”); David S. Konczal, Note, *Ruing Rufo: Ramifications of a Lenient Standard for Modifying Antitrust Consent Decrees and an Alternative*, 65 GEO. WASH. L. REV. 130, 130–31 (1996) (“Consent decrees are extremely attractive to both the Antitrust Division and defendants, primarily because of the avoidance of time consuming and expensive litigation.”). See generally Charles F. Phillips, Jr., *The Consent Decree in Antitrust Enforcement*, 18 WASH. & LEE L. REV. 39 (1961) (discussing the role of consent decrees in antitrust enforcement).

18. “A consent decree is a negotiated settlement of a case brought in equity that is enforced through the court’s [inherent] power to enforce [its own] equitable decrees or orders.” David I. Levine, *The Modification of Equitable Decrees in Institutional Reform Litigation: A Commentary on the Supreme Court’s Adoption of the Second Circuit’s Flexible Test*, 58 BROOK. L. REV. 1239, 1239 n.5 (1993). An antitrust consent decree also has been defined as “an order of the court agreed upon by representatives of the Attorney General and of the defendant, without trial of the conduct challenged by the Attorney General, in proceedings instituted under the Sherman Act, the Clayton Act, or related statutes.” ANTITRUST SUBCOMM. OF THE HOUSE COMM. ON THE JUDICIARY, 86TH CONG., REP. ON THE CONSENT DECREE PROGRAM OF THE DEPARTMENT OF JUSTICE IX (Comm. Print 1959).

19. See generally *United States v. Broad. Music, Inc.*, 720 F. App’x 14 (2d Cir. 2017) (discussing the BMI consent decree). For a detailed recapitulation of the dispute between the DOJ and BMI/ASCAP and the major points of contention, see García, *supra* note 4, at 195–96.

20. See Conte, *supra* note 10, at 325 (“A major issue with the current regulation of music licensing is the failure to account for today’s commanding digital music presence. Music in digital form, such as online radio, paid streaming subscription services, and downloadable song purchases has been on the rise since 2003. Yet, the instruments governing music licensing have not been updated in decades.”); Gagliano, *supra* note 8, at 318–19.

Digital streaming technology has completely changed the way that performance rights licensing operates. In fact, the disruption has been so significant with respect to the ability of songwriters and artists to collect royalties that there has been a bipartisan effort in Congress over the past few years to address their concerns.<sup>21</sup> Those years of advocacy culminated on October 11, 2018, when President Trump signed the Music Modernization Act (“MMA”) into law.<sup>22</sup> The MMA “is designed to streamline the music licensing process to make it easier for rights holders to get paid when their music is streamed online.”<sup>23</sup> The most significant change made by the MMA was the creation of a new governing agency that “would issue blanket mechanical licenses to digital services, and collect and distribute royalties to rights holders.”<sup>24</sup> The effect of this measure would be to ensure that artists, songwriters, and other rights holders are paid on time and what they are owed.<sup>25</sup> Assuming it functions as intended, the MMA represents a huge victory for rights holders like artists and songwriters.

In regard to consent decrees between the DOJ and PROs like BMI, the MMA changed the way judges are assigned to hear performance-royalty rate proceedings by making the assignments random.<sup>26</sup> The MMA, however, did not override most aspects of the consent decree between the DOJ and BMI.<sup>27</sup> In changing the way judges are selected to oversee proceedings relating to a consent decree, the MMA seems to be adjusting the way disputes will be adjudicated between the parties to the consent decree but not addressing many of the underlying causes of controversy. The MMA will hopefully make the process of royalty collection smoother for rights holders, but many of the disputes that exist between the PROs and the DOJ relating to their consent decrees are still in play.

21. Dani Deahl, *The Music Modernization Act Has Been Signed into Law*, VERGE (Oct. 11, 2018, 12:08 PM), <https://www.theverge.com/2018/10/11/17963804/music-modernization-act-mma-copyright-law-bill-labels-congress> [https://perma.cc/T6BX-SUX4].

22. See Orrin G. Hatch–Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (2018) (to be codified in scattered sections of 17, 19, and 28 U.S.C.).

23. Micah Singleton, *Congress May Actually Fix Music Royalties: The Music Modernization Act*, VERGE (Jan. 26, 2018, 10:36 AM), <https://www.theverge.com/2018/1/26/16931966/congress-music-modernization-act-licensing-royalties> [https://perma.cc/Q9FL-8NEW].

24. *Id.*

25. *Id.*

26. Rachel Kim, *6 Things To Know About the Music Modernization Act*, S. 2823, COPYRIGHT ALLIANCE (May 10, 2018), [https://copyrightalliance.org/ca\\_post/6-things-to-know-about-the-music-modernization-act-s2823/](https://copyrightalliance.org/ca_post/6-things-to-know-about-the-music-modernization-act-s2823/) [https://perma.cc/3AVK-ZV9W].

27. *Id.*

Therefore, the discussion of consent decree modification in this area remains relevant.

At the time of the consent decree's creation in 1966, or even at the time of its amendment in 1994, the DOJ could not have envisioned the development of digital technologies, such as Spotify, Pandora, and Apple Music. Such significant changes in technology have raised questions over the propriety of allowing an industry to be regulated by an antitrust consent decree that was created at a time when the industry it regulates was almost unrecognizable.<sup>28</sup>

Based on these concerns, BMI sought to modify the consent decree in 2014 but was blocked by the DOJ.<sup>29</sup> Instead, the DOJ sought to reinterpret the consent decree in 2016 to change the way performance rights licensing operates by requiring the adoption of "full-work" licensing in place of the traditional practice of "fractional" licensing.<sup>30</sup> If such a change were to be implemented, it would represent a seismic shift in the performance rights licensing industry that would lead to severe administrative, financial, and creative impacts for PROs and songwriters.<sup>31</sup> After the DOJ announced its reinterpretation, BMI sought a declaratory judgment in federal district court that the consent decree does not require full-work licensing.<sup>32</sup> The district court held in *United States v. Broadcast*

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28. See Gagliano, *supra* note 8, at 318 ("While the music business is no stranger to disruptive innovation (e.g., Napster), for the first time in decades judicial action seems to be the culprit of the disruption rather than the commercial innovation itself. The commercial innovation in question: music streaming; the judicial (in)action: failure to update consent decrees."); Konczal, *supra* note 17, at 132 ("A defendant often requests a modification because of technological innovations, industrial changes, or increases in competition since the entry of the decree that have made compliance with the decree too burdensome and restrictive. The Antitrust Division often requests a modification because of a change in circumstances in the industry or business affected by the decree to the extent that the decree no longer serves the purposes of the antitrust laws.").

29. See *ASCAP – BMI Consent Decrees*, FUTURE MUSIC COALITION (Aug. 4, 2016), <https://futureofmusic.org/article/fact-sheet/ascap-bmi-consent-decrees> [https://perma.cc/YJ6Y-NP8Z].

30. See Conte, *supra* note 10, at 324 ("Drawing from this default position of copyright law, it follows that when one of multiple copyright owners of a single musical composition wants to permit a music user to play that composition publicly, that owner alone may give license. This process is known as full-work licensing."); see also David J. Kappos, *The Antitrust Assault on Intellectual Property*, 31 HARV. J.L. & TECH. 665, 683 (2018) ("Ignoring this longstanding consensus, in 2016 the DOJ began contending that a PRO should be able to license only works to which it can offer a complete license, in other words, works created entirely by parties who are members of that PRO.").

31. See Conte, *supra* note 10, at 334. For additional discussion of the implications of shifting from fractional licensing to full-work licensing, see *infra* Part IV.

32. See *United States v. Broad. Music, Inc.*, 207 F. Supp. 3d 374, 376 (S.D.N.Y. 2016), *aff'd*, 720 F. App'x 14 (2d Cir. 2017).

*Music, Inc.*,<sup>33</sup> and the Second Circuit later affirmed, that the consent decree requires neither fractional nor full-work licensing, so either form of licensing would be permissible.<sup>34</sup> As a result, there was no clear resolution to the dispute over licensing practices. Although the DOJ “lost” in *Broadcast Music, Inc.* and BMI “won,” the practical consequence of the ordeal is that the outdated terms of the consent decree still remain the same almost five years after BMI requested a modification. From a normative standpoint, it seems problematic that major players in a rapidly changing industry have been requesting modification for almost five years without any success.

When viewed through that prism, everyone loses. When external forces demand changes in terms that cannot be effectuated, the industry as a whole becomes less efficient. If the performance rights licensing industry is not operating at an optimal level because it is governed by outdated consent decrees, then there are harmful consequences to PROs, songwriters, publishers, bar and restaurant owners, the DOJ, other music consumers, and the economy as a whole due to persistent inefficiencies that could be avoided by modifying the terms of the consent decree. As Thomas Jefferson once wrote in a letter to James Madison, “[T]he earth belongs in usufruct to the living,”<sup>35</sup> and that sentiment still rings true several hundred years later. Intuitively, it does not make sense for the performance rights licensing industry—or any other industry for that matter—to be governed by terms that were created in a previous generation. In some ways, Jefferson’s statement rings even more true today in a world in which technologies like music streaming are advancing at a pace that has never been seen before. This Recent Development argues that the current precedent governing modification of consent decrees, which is characterized by inflexibility, is suboptimal for society because it hinders the timely adoption of important changes to consent decrees that are necessary for industries to keep pace with emerging technologies like music streaming. In response, the legal process of consent decree modification should be relaxed through the adoption of a new totality-of-the-circumstances test.

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33. 207 F. Supp. 3d 374 (S.D.N.Y. 2016), *aff’d*, 720 F. App’x 14 (2d Cir. 2017).

34. See *United States v. Broad. Music, Inc.*, 720 F. App’x 14, 15 (2d Cir. 2017).

35. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 392, 392 (Julian P. Boyd & William H. Gaines, Jr. eds., 1958) (“The question Whether one generation of men has a right to bind another, seems never to have been started either on this or our side of the water. Yet it is a question of such consequences as not only to merit decision, but place also, among the fundamental principles of every government.”).

This Recent Development proceeds in five parts. Part I explores the historical background of consent decrees and their role in antitrust regulation of the performance rights licensing industry. Part II examines the facts and holding of *Broadcast Music, Inc.* Part III surveys the current law with respect to modification and asserts that consent decrees should be modified, not reinterpreted. Part IV illustrates why it is crucial for the terms of the BMI consent decree to be changed by exploring the desired modifications of involved parties in response to the ever-changing technological climate. Finally, Part V proposes that courts adopt a totality-of-the-circumstances test for assessing modification requests in order to make it easier to modify consent decrees while still maintaining necessary safeguards against ill-advised or unfair changes. Adopting the new totality-of-the-circumstances test would make consent decree modifications more attainable and would thereby enable performance rights licensing and other industries to adapt to changes in technology and society in a more timely manner.

#### I. ANTITRUST CONSENT DECREES AND THEIR ROLE IN MUSIC LICENSING

Since the early 1940s, consent decrees have played a powerful role in the regulation of performance rights licensing by PROs such as BMI and ASCAP.<sup>36</sup> As a result, music publishers and PROs have had a disproportionate amount of power in the industry for over seven decades.<sup>37</sup> For instance, ASCAP controlled “the great bulk of music in commercial demand” during the first half of the twentieth century, which led to widespread fears that it could hold monopolistic power over performance rights licensing.<sup>38</sup> In 1939, BMI was created as an alternative to ASCAP in an effort to break up ASCAP’s monopoly.<sup>39</sup> The introduction of BMI, however, did not immediately solve the problem and, in 1941, the DOJ took action to curb perceived antitrust abuses by suing ASCAP for antitrust violations and market abuse.<sup>40</sup> The parties settled the lawsuit via a consent decree and, shortly thereafter, BMI also entered into a consent decree with the DOJ with nearly identical terms.<sup>41</sup> These settlements set the precedent for using

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36. See *ASCAP – BMI Consent Decrees*, *supra* note 29.

37. See *id.*

38. Comment, *ASCAP and the Antitrust Laws: The Story of a Reasonable Compromise*, 1959 DUKE L.J. 258, 260.

39. See Conte, *supra* note 10, at 336.

40. See *id.*

41. See *id.* at 334.

consent decrees as a tool for antitrust regulation in performance rights licensing.

Essentially, a consent decree is a contract between parties in litigation. The court enters the decree as a judgment in order to settle a lawsuit on terms that are, in theory, mutually acceptable to all litigants.<sup>42</sup> In the context of performance rights licensing, consent decrees are used for antitrust regulation and occur between the DOJ and a corporate defendant.<sup>43</sup> Antitrust consent decrees have also been used by the DOJ in the context of cellular communication.<sup>44</sup>

A consent decree in the antitrust context is an agreement between the government and a defendant that settles a pending antitrust action that has typically been brought by the DOJ.<sup>45</sup> By entering into a consent decree, the defendant “accepts specific limitations on his future conduct, and the Government indicates its willingness to terminate the suit on those terms.”<sup>46</sup> A consent decree entered by a district does not constitute an adjudication on the merits.<sup>47</sup> As a result, the government exercises a measure of control over the defendant because the defendant must, moving forward, abide by the terms set by the government in the consent decree.<sup>48</sup> The use of consent decrees to settle cases has benefits for both sides, not the least of which is the avoidance of lengthy and costly litigation.<sup>49</sup>

In addition, consent decrees are used as a regulatory tool in a number of other contexts. For instance, the Environmental Protection Agency has used consent decrees to mandate guidelines for entities involved in the cleanup of hazardous waste sites.<sup>50</sup> Consent decrees have also been used in the context of employment and civil rights issues, such as use by a court to settle a civil rights lawsuit brought by an Alabama man alleging violations of Title VII of the 1964 Civil Rights Act.<sup>51</sup>

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42. See Phillips, *supra* note 17, at 40.

43. See Kennedy, *supra* note 1, at 188–89.

44. See Bernard T. Shen, Comment, *From Jail Cell to Cellular Communication: Should the Rufo Standard Be Applied to Antitrust and Commercial Consent Decrees?*, 90 NW. U. L. REV. 1781, 1782–83 (1996).

45. See Note, *Flexibility and Finality in Antitrust Consent Decrees*, 80 HARV. L. REV. 1303, 1303 (1967).

46. *Id.*

47. *Id.*

48. See *id.*

49. See *id.* at 1304–05.

50. See John R. Thomas, Note, *United States v. Fisher: “Posner’s Dilemma” and the Uncertain Triumph of Outcome over Process*, 21 ENVTL. L. 427, 427 (1991).

51. Michael T. Larkin, Casenotes, 21 ST. MARY’S L.J. 1063, 1064 (1990).

Moreover, consent decrees have been used in lawsuits by prisoners complaining of inhumane conditions inside prisons.<sup>52</sup> For example, before a lawsuit between the inmates and administrators of a prison in the U.S. Virgin Islands reached trial, it was settled via a consent decree that represented a compromise between the prison and the inmates.<sup>53</sup> The resulting consent decree did not close the facility as the inmates requested, but it did contain a number of new regulations that were favorable to the inmates.<sup>54</sup> For instance, it required the prison to reduce the inmate population to ninety-seven and improve the prison's shelter, health care, and fire safety.<sup>55</sup>

A. *The Function of Consent Decrees in Antitrust Regulation*

One of the main objectives behind the consent decree regime in antitrust regulation is efficiency. Consent decrees eliminate the time and expense involved in preparing for and fully litigating a dispute.<sup>56</sup> In order to capture this efficiency, the parties generally agree upon consent decrees at a relatively early stage in the litigation.<sup>57</sup> Consent decrees tend to reflect a degree of compromise because the agreements usually emerge from a series of secret, informal negotiations between counsel from the DOJ's Antitrust Division and the defendant's lawyers.<sup>58</sup>

Under the current regime, parties also benefit from using consent decrees to find common ground in disputes. Rather than allowing the litigation to continue as a zero-sum game in which one party will win and the other party will lose, consent decrees allow parties to come together and broker the most efficient, fair, and sustainable solution possible.

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52. See, e.g., *Carty v. Farrelly*, 957 F. Supp. 727, 732 (D. V.I. 1997); see also Deborah Decker, Comment, *Consent Decrees and the Prison Litigation Reform Act of 1995: Usurping Judicial Power or Quelling Judicial Micro-Management?*, 1997 WIS. L. REV. 1275, 1276–78 (“In June 1994, a group of pretrial detainees and inmates at the Criminal Justice Complex in St. Thomas, United States Virgin Islands, brought a class action requesting that the complex be closed because of extreme overcrowding and related health concerns.”).

53. See *Carty*, 957 F. Supp. at 732; see also Decker, *supra* note 52, at 1278.

54. See *Carty*, 957 F. Supp. at 732–33; see also Decker, *supra* note 52, at 1278.

55. See *Carty*, 957 F. Supp. at 732–33, 732 n.4; see also Decker, *supra* note 52, at 1278 (requiring that “the inmate population [be reduced] to ninety-seven and requir[ing] the defendants to make improvements in a number of areas, including shelter, mental health care, medical care, fire safety, and security”).

56. See Phillips, *supra* note 17, at 40.

57. *Id.*

58. See *id.*

Consent decrees play an important role in antitrust regulation because their terms serve as rules for how defendant-corporations may behave in the future and gives the DOJ recourse if the corporations violate those rules. For instance, the ASCAP and BMI consent decrees created a separate Rate Court for ASCAP and BMI, which is used to adjudicate disputes between a PRO and a music user to determine reasonable license fees.<sup>59</sup> This independent decision-making body serves to protect consumer interests because it safeguards against ASCAP and BMI using their near monopoly in the market to charge exorbitant prices.<sup>60</sup> Additionally, the ASCAP and BMI consent decrees regulate the two dominant PROs by stipulating that agreements between composers and ASCAP or BMI are nonexclusive, meaning that composers remain free to directly license their works to a music user outside the PRO structure even if the composers are already members of ASCAP or BMI.<sup>61</sup> This term of the consent decree limits the power and influence of ASCAP and BMI while fostering expansion in the marketplace by keeping the door open for smaller competitors to enter the fray.

As a practical matter, the defendant in litigation against the DOJ, which is typically a corporation or other institution, has the burden of initiating negotiations and preparing a first draft of the consent decree.<sup>62</sup> After the defendant has submitted a draft proposal for the terms of the consent decree, lawyers on both sides begin secret negotiations in pursuit of a final agreement that is acceptable to all parties.<sup>63</sup>

After negotiations finish, a court must accept and sign the proposed consent decree.<sup>64</sup> Court approval, however, is typically little more than a formality and is generally regarded as a routine matter.<sup>65</sup> The court is not required to make any findings of fact or conclusions of law in approving a consent decree.<sup>66</sup> Rather, counsel for each party gives a short presentation and, if the court is satisfied that the parties

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59. See Todd Brabec, *The Performance Right—A World in Transition*, 42 MITCHELL HAMLINE L. REV. 16, 18–19 (2016).

60. *Id.* at 20–21.

61. *See id.* at 22.

62. *See Phillips, supra* note 17, at 40.

63. *See id.* at 41.

64. *See id.*

65. *See id.*

66. *United States v. Inst. of Carpet Mfrs. of Am., Inc.*, 1 F.R.D. 636, 638 (S.D.N.Y. 1941).

are in agreement, it enters the consent decree with only a cursory review.<sup>67</sup>

*B. The Importance of Consent Decree Changes for PROs: The Collection of Royalties*

The antitrust consent decree at issue in *Broadcast Music, Inc.* represents a voluntary agreement between BMI and the U.S. government containing the rules under which BMI must conduct its business.<sup>68</sup> Among other things, the consent decree “[g]overns BMI’s obligations to its license customers; [s]ets the rules for BMI’s relationships with its songwriters, [c]omposers and publishers; and [c]reates a ‘rate court’ where BMI and its customers can resolve disputes regarding the rates and terms of their license agreement.”<sup>69</sup> The consent decree was intended to promote competition in the marketplace for musical works by encouraging ASCAP and BMI to compete with one another to attract licensees and recruit new songwriter- and publisher-members.<sup>70</sup> The BMI consent decree has become controversial because most of its terms were drafted in 1966 at a time when technologies relating to the distribution and sharing of music were essentially unrecognizable. BMI now believes that “[t]he decree is simply not built to address the specific challenges and opportunities of the current music rights marketplace.”<sup>71</sup>

The proposed changes to BMI’s consent decree are important on a day-to-day basis because they govern the collection of royalties.<sup>72</sup> Traditionally, PROs operate as agents for composers and songwriters who own the copyrights to their songs but are not well versed in licensing. PROs serve as middlemen and help composers license the performance rights to their songs to music users who want to perform those songs without violating copyright law.<sup>73</sup> First, a publisher signs a

67. Phillips, *supra* note 17, at 41.

68. For an overview of the history of the consent decree between the DOJ and BMI, see Gagliano, *supra* note 8, at 323–29; Jed Goldfarb, Note, *Keeping Rufo in Its Jail Cell: The Modification of Antitrust Consent Decrees After Rufo v. Inmates of Suffolk County Jail*, 72 N.Y.U. L. REV. 625, 662 (1997) (“Over the past thirty years, antitrust enforcement agencies have fervently embraced the consent decree as a tonic for much of what ails a competitive marketplace.”).

69. *What Is the Consent Decree?*, BROADCAST MUSIC, INC., [https://www.bmi.com/pdfs/advocacy/about\\_bmi\\_consent\\_decree.pdf](https://www.bmi.com/pdfs/advocacy/about_bmi_consent_decree.pdf) [<https://perma.cc/95QK-P7UZ>].

70. *ASCAP – BMI Consent Decrees*, *supra* note 29.

71. *What Is the Consent Decree?*, *supra* note 69.

72. See Gagliano, *supra* note 8, at 319.

73. See Brabec, *supra* note 59, at 17–18.

contract with a PRO.<sup>74</sup> Then, the PRO issues licenses to music users who, in turn, receive the right to play or perform all of the songs controlled by all of the songwriters.<sup>75</sup> In effect, the PROs create efficiency by pooling copyrights and issuing collective licenses to music users and then paying their affiliated member-publishers prorated shares of the net income.<sup>76</sup>

### C. *The Problem of Fractional Licensing*

The traditional industry practice is fractional licensing of jointly owned songs.<sup>77</sup> This fractional-licensing regime took hold out of necessity in America during the twentieth century based on the administrative infeasibility of monitoring every single live performance of every song.<sup>78</sup> Essentially, fractional licensing occurs when a PRO licenses only the share of a co-owned work that is owned by the composer who is a member of the PRO.<sup>79</sup> Many, if not most, songs are co-owned by multiple individuals, such as a composer, a lyricist, and a producer. Under a fractional-licensing regime, each co-owner of a song can only license, whether directly or through a PRO, his proportional interest in the co-owned song to other music users.<sup>80</sup> Thus, it follows that if the co-owners of a song belong to different PROs, each PRO may only license the fraction of the work that belongs to the co-owner who is a member of that PRO.<sup>81</sup> To ensure they are covered under this fractional-licensing system, music users like performance venues generally purchase licenses from all four of the major PROs because all co-owners will almost certainly be a member of one of the prominent PROs.<sup>82</sup>

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

75. *Id.*

76. *See* Gagliano, *supra* note 8, at 319–20.

77. Letter from Stuart Rosen, Senior Vice President & Gen. Counsel, BMI, to Chief of the Litig. Section of the Antitrust Div., U.S. Dep't of Justice (Nov. 20, 2015) [hereinafter Rosen Letter], <https://www.justice.gov/atr/public/ascapbmi2015/ascapbmi38.pdf> [<https://perma.cc/RX24-9FGA>] (providing signatures from members of the music industry in regard to the “Justice Department Review of the BMI and ASCAP Consent Decrees” and voicing concerns in opposition to the DOJ’s proposed reinterpretation).

78. *See Music Licensing History*, NAT’L RELIGIOUS BROADCASTING MUSIC LICENSE COMMITTEE, <http://www.nrbmlc.com/music-licensing/music-licensing-history/> [<https://perma.cc/HYW7-CHEX>].

79. *See* Kappos, *supra* note 30, at 682.

80. *See id.* at 683.

81. *See id.*

82. *See id.*; *see also* Ely, *supra* note 1, at 49 (“Under the current system, if a business or organization wishes to publicly perform music, it must obtain licenses from ASCAP,

For example, suppose *A* and *B* are co-owners of a song, with each of them owning 50% of the copyright per an agreement between them. If *A* is a member of ASCAP, then ASCAP will issue licenses to music users like restaurants and then pay *A* royalties in the amount of his fractional share, which is 50% in this case. Likewise, if *B* is a member of BMI, then BMI will issue licenses to music users and then pay *B* royalties in the amount of his 50% fractional share. If a music user has purchased licenses from both ASCAP and BMI, then it operates under the assumption that it may legally play 100% of the work rather than worrying about fractional shares of co-owners. If a music user has purchased licenses from both ASCAP and BMI, then it does not have to worry about liability relating to unauthorized performance of the work.

As a result, the fractional-licensing regime simplifies the administration of performance rights licensing by not forcing all involved parties to keep careful track of precise percentages in co-ownership agreements. As a technical matter, the PROs only have the right to license the percentage of a composition owned by their affiliates. As a practical matter, however, they can license the entire song because the presence of only four main PROs allows music users to cover their bases fairly easily by simply purchasing a license from all four. This ambiguity that music users face in determining whether they have properly licensed an entire song, in part, led to the DOJ's challenge of the fractional-licensing regime, despite its long-running position as the default industry practice.<sup>83</sup>

The fractional-licensing system also becomes complicated in the context of royalties, as PROs only collect royalties for their own affiliates and in proportion to their ownership interests in the songs.<sup>84</sup> If a song is co-owned by multiple owners who work with different PROs, then each PRO has to independently collect royalties and pay them out to members based on the proportion of the song owned by the member.<sup>85</sup>

Despite the prevalence of multiple co-owners having fractional ownership interests and often working with different PROs, music users can assume they are properly licensed to perform any song, as long as they have licenses with the four main PROs.<sup>86</sup> In this way,

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BMI, or SESAC; or it could also buy licenses from a combination of two or all three of these performance rights organizations.”).

83. See Ely, *supra* note 1, at 49.

84. See *id.* at 50.

85. See *id.*

86. See *id.* at 49.

fractional licensing creates antitrust concerns due to the potential for stifling competition by crowding the market. It is feasible for a bar or restaurant to purchase licenses with only four PROs, which is all that is needed to be in compliance under the current fractional-licensing regime. On the other hand, it would not be feasible for every bar and restaurant to purchase licenses from dozens of PROs in order to avoid liability, which might be necessary in a more competitive market under a fractional-licensing regime.

As such, it would be extremely difficult for competitor PROs to break into the market under a fractional-licensing scheme because music users do not want to be required to purchase more licenses in order to be in compliance. Therefore, the fractional-licensing system reinforces the dominance of only four PROs in the market because it would be difficult for competitors to even enter the market. If the long-standing practice of fractional licensing seems a bit unclear, that is because it *is* unclear.<sup>87</sup>

#### D. *The Push for Full-Work Licensing*

In recent years, the DOJ has targeted fractional licensing, at least in part because of the ambiguities surrounding co-ownership interests and has sought to replace it by reinterpreting performance rights licensing consent decrees to require a full-work licensing regime as it did in *Broadcast Music, Inc.*<sup>88</sup> A full-work licensing system would be entirely different from the current fractional-licensing regime. Such a massive shift would force the industry to completely change how it transacts business in many ways.<sup>89</sup> Under a full-work licensing regime, PROs would have “to grant a complete 100% license for any song they administer, even if only a portion.”<sup>90</sup> The administrability of this system grows murky in the context of royalties because BMI would have to grant a 100% license to music users even if its member only owned 50% of the song and his co-owner owned the other 50% but was affiliated with ASCAP.<sup>91</sup>

In effect, the PRO would have to grant 100% of the license and then pay applicable royalties to *both* its member and the member of

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87. *See id.* (“[T]he exact mechanics of what songs (or portions of songs) each of these licenses cover seem to be unclear.”).

88. *See id.* (“The ambiguous nature of these licenses is evidenced by the questions posed by the Department of Justice.”).

89. *See id.* at 50 (“This new regime would be completely at odds with the current music licensing system, and would undermine decades of established and efficient practices.”).

90. *Id.*

91. *See id.*

another PRO in proportion to their co-ownership interests. That would be a significant change because, under the current fractional-licensing regime, “PROs account only to their own affiliates.”<sup>92</sup> Under a full-work licensing regime, PROs would have to implement a system to track nonaffiliate composers in order to pay them the royalties they are owed.<sup>93</sup> Gathering all of that information about nonmembers would be costly and complicated and would result in higher transaction costs for both affiliates of PROs and music users.<sup>94</sup>

Such a radical departure from the traditional practice of fractional licensing would turn the industry on its head by forcing all interested parties to revisit and reformulate decades of established practices that have grown out of practical experience in the field.<sup>95</sup> In many ways, parties involved in licensing would have to start over with regard to their licensing practices and would lose the efficiencies and institutional knowledge they have developed over the past century. Unsurprisingly, there was significant backlash against the DOJ’s reinterpretation, and it was challenged by BMI in federal court.<sup>96</sup>

## II. FACTS OF *BROADCAST MUSIC, INC.* AND THE SECOND CIRCUIT’S OPINION

Due to the advent of streaming technologies, in 2014 BMI petitioned the DOJ to modify the consent decree “to permit publishers to directly negotiate streaming rights with digital services providers like Spotify and Pandora.”<sup>97</sup> The DOJ opened a review of BMI’s consent decree in response.<sup>98</sup> On August 4, 2016, the DOJ announced that it would not modify the consent decree but instead would reinterpret the decree to include a 100% full-work licensing requirement.<sup>99</sup> The DOJ, in issuing this reinterpretation, turned the traditional model of fractional licensing on its head. The DOJ’s new requirement of full-work licensing would mean that BMI must “license 100% of a song for use, regardless of what percentage of the

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92. *Id.*

93. *See id.*

94. *See id.*

95. *See id.*

96. *See United States v. Broad. Music, Inc.*, 207 F. Supp. 3d 374, 376 (S.D.N.Y. 2016), *aff’d*, 720 F. App’x 14 (2d Cir. 2017) (striking down the DOJ’s reinterpretation of the consent decree that would have required full-work licensing instead of fractional licensing).

97. Gagliano, *supra* note 8, at 321.

98. *See id.*

99. *ASCAP – BMI Consent Decrees*, *supra* note 29.

song [BMI] represents.”<sup>100</sup> Therefore, “any entity that controls part of a composition must offer a license for the whole of the composition.”<sup>101</sup> The DOJ based its decision not only on textual interpretations of the consent decree but also on the policy reason that “only full-work licensing can yield the substantial procompetitive benefits associated with blanket licenses.”<sup>102</sup>

This reinterpretation would have been significant because, as described above, the performance rights licensing industry has traditionally operated under a fractional-licensing regime “whereby each owner holds a copyright to a portion of the song, and all must grant license[s] to a music user in order to secure the rights to a public performance.”<sup>103</sup>

In an effort to preserve the status quo of fractional licensing and avoid upsetting the apple cart for the entire performance rights licensing industry, BMI promptly challenged the DOJ’s decision in district court and won.<sup>104</sup> In striking down the DOJ’s reinterpretation of the consent decree, Judge Louis L. Stanton wrote that “[t]he Consent Decree neither bars fractional licensing, nor requires full-work licensing.”<sup>105</sup> The DOJ appealed the district court’s ruling to the Second Circuit.<sup>106</sup>

In *United States v. Broadcast Music, Inc.*,<sup>107</sup> the Second Circuit affirmed the district court and rejected the DOJ’s proposed reinterpretation that would have required full-work licensing.<sup>108</sup> The Second Circuit held that, in asking for its proposed reinterpretation, the DOJ was in effect asking the court to read an additional requirement into the consent decree in order to accomplish procompetitive objectives.<sup>109</sup> The court concluded that it would be

100. Brittany Hodak, *U.S. Dept. of Justice Deals Crushing Blow to Songwriters*, FORBES (July 1, 2016, 1:52 PM), <https://www.forbes.com/sites/brittanyhodak/2016/07/01/u-s-dept-of-justice-deals-crushing-blow-to-songwriters/#e96550113faa> [<https://perma.cc/2DCM-MC4N>].

101. *ASCAP – BMI Consent Decrees*, *supra* note 29.

102. DEP’T OF JUSTICE, STATEMENT OF THE DEPARTMENT OF JUSTICE ON THE CLOSING OF THE ANTITRUST DIVISION’S REVIEW OF THE ASCAP & BMI CONSENT DECREES 3 (2016), <https://www.justice.gov/atr/file/882101/download> [<https://perma.cc/N8ZW-PWQF>].

103. Conte, *supra* note 10, at 324.

104. *See* *United States v. Broad. Music, Inc.*, 207 F. Supp. 3d 374, 376 (S.D.N.Y. 2016), *aff’d*, 720 F. App’x 14 (2d Cir. 2017).

105. *See id.* at 377.

106. *See* *United States v. Broad. Music, Inc.*, 720 F. App’x 14, 14 (2d Cir. 2017).

107. 720 F. App’x 14 (2d Cir. 2017).

108. *Id.* at 18.

109. *See id.* (“To the extent DOJ asks us [to] read an additional requirement into the decree to advance these procompetitive objectives, we are foreclosed from doing so.”).

improper to consider the potential competitive impact of the proposed reinterpretation and thus rejected the reinterpretation because it was not supported by the terms contained within the four corners of the consent decree.<sup>110</sup> In doing so, the Second Circuit squashed the DOJ's attempt to make a significant material change to the operation of the consent decree through reinterpretation rather than an actual modification of the terms.

In a technical sense, the Second Circuit appropriately applied existing precedent governing the interpretation of consent decrees. Over the years, there have been a number of decisions in which courts commented on the process of interpreting consent decrees. In *Perez v. Danbury Hospital*,<sup>111</sup> the Second Circuit stated that it is a "well-established principle that the language of a consent decree must dictate what a party is required to do and what it must refrain from doing" and that "courts must abide by the express terms of a consent decree and may not impose [additional requirements or] supplementary obligations on the parties even to fulfill the purposes of the decree more effectively."<sup>112</sup> In addition, in *United States v. Armour & Co.*<sup>113</sup> the Supreme Court stated that "the scope of a consent decree must be discerned within its four corners."<sup>114</sup> The Court may not "impose obligations on a party that are not unambiguously mandated by the decree itself."<sup>115</sup> These rigid principles limit the ability of courts to approve any reinterpretation beyond the express terms of a consent decree.

On a textual basis, the court in *Broadcast Music, Inc.* properly adhered to precedent because the text of the consent decree is silent on the issue of fractional versus full-work licensing,<sup>116</sup> and precedent precludes the court from imposing any requirements upon parties not expressly included in the terms of the consent decree.<sup>117</sup> In its argument, the DOJ claimed that a full-work licensing arrangement

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110. *See id.*

111. 347 F.3d 419 (2d Cir. 2003).

112. *Id.* at 424 (first citing *United States v. O'Rourke*, 943 F.2d 180, 187 (2d Cir. 1991); then citing *King v. Allied Vision Ltd.*, 65 F.3d 1051, 1058 (2d Cir. 1995); and then citing *United States v. Int'l Bhd. of Teamsters, AFL-CIO*, 998 F.2d 1101, 1107 (2d Cir. 1992)).

113. 402 U.S. 673 (1971).

114. *Id.* at 682.

115. *Barcia v. Sitkin*, 367 F.3d 87, 106 (2d Cir. 2004) (quoting *Tourangeau v. Uniroyal, Inc.*, 101 F.3d 300, 307 (2d Cir. 1996)).

116. *See* Consent Decree at 5–6, *United States v. Broad. Music, Inc.*, No. 64-Civ-3787 (S.D.N.Y. Nov. 18, 1994), <https://www.justice.gov/atr/case-document/file/489866/download> [<https://perma.cc/GJV6-TWUK>] (providing the most recent version of the BMI consent decree).

117. *See Perez*, 347 F.3d at 424.

would have “procompetitive benefits.”<sup>118</sup> However, the court did not take a deep look at the policy reasons behind the proposed reinterpretation because *Perez* stated that it could not impose additional requirements that were not already included in the text of the consent decree, even when they might “fulfill the purposes of the decree more effectively.”<sup>119</sup> In that sense, *Perez* stands for the proposition that courts cannot interpret consent decrees based on policy reasons without an explicit basis in the text of the agreement.

Decisions relating to reinterpretation and modification of antitrust consent decrees are high stakes, and any such changes have the potential to cause reverberations throughout the entire industry.<sup>120</sup> Following the court’s decision in *Broadcast Music, Inc.*, the MIC Coalition (“MIC”)—a group of trade associations that represent radio stations and other music users—released a statement saying the decision “will have devastating consequences for the future of music licensing. If left unchallenged, this decision will fundamentally alter decades of business practices while destroying the value of collective licensing and threatening to throw the entire music marketplace into chaos.”<sup>121</sup> The dramatic prose and “sky-is-falling” tone of MIC’s statement shows how crucial the terms of these consent decrees are to parties with material interests in the performance rights licensing industry.

Although the DOJ “lost” in *Broadcast Music, Inc.* and BMI “won,” the practical consequence of the litigation is that the outdated terms of the consent decree still remain the same almost five years after BMI requested a modification. After the initial modification request, the DOJ was able to reject the request and instead announce its own unilateral reinterpretation that would have the practical effect of a modification.<sup>122</sup> Under the current system, BMI’s only recourse against the DOJ’s reinterpretation was to challenge it in federal district court. Then, once the district court rejected the reinterpretation, the dispute entered the lengthy appeals process.<sup>123</sup>

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118. See *United States v. Broad. Music, Inc.*, 720 F. App’x 14, 17–18 (2d Cir. 2017).

119. *Perez*, 347 F.3d at 424.

120. See Conte, *supra* note 10, at 328–34. For more discussion on potential industry-wide impacts, see *infra* Part IV.

121. Press Release, MIC Coal., MIC Coalition Statement on Court of Appeals Decision on BMI Consent Decrees (Dec. 20, 2017), <https://mic-coalition.org/news-posts/mic-coalition-statement-bmi-consent-decrees/> [<https://perma.cc/XWZ7-T9CT>].

122. See Kappos, *supra* note 30, at 683.

123. See *id.* at 684 (“The DOJ’s radical reinterpretation was flatly rejected by the Southern District of New York in 2016 . . . [and] the DOJ continues to press its position on appeal.”).

Given how cumbersome and slow the American courts system typically is, it is unsurprising that the terms of the BMI consent decree remain the same. From a normative standpoint, it seems problematic that major players in a rapidly changing industry have been requesting modification for almost five years without any success.

The DOJ and other proponents of full-work licensing view fractional licensing as anticompetitive, forcing music users to purchase licenses from all four major PROs in order to avoid liability.<sup>124</sup> Implementing a system in which music users are not required to have licenses with all PROs in order to protect themselves would allow for competition to enter the market and for the number of PROs to expand, thus driving down prices. In a fractional-licensing system in which all music users must purchase licenses with PROs, it is going to be difficult for new PROs to gain traction because music users want to purchase as few licenses as possible.

The full-work licensing system would also help music users ensure they are in compliance with copyright law by relieving the clerical burden of keeping track of co-ownership interests.<sup>125</sup> There is no central database that keeps track of co-ownership interests in songs, so it is difficult for music users to ensure compliance with copyright law because they do not know with certainty who owns or co-owns compositions and in what proportion.<sup>126</sup> In a full-work licensing regime, music users would have assurance that they can legally perform specific compositions, as any PRO that owned any portion of a song would have the authority to grant a full license to perform the composition.<sup>127</sup>

In sum, the Second Circuit's holding was correct as a technical matter because the court properly adhered to applicable precedent in its decision. Common sense tells us that outdated consent decrees need to be updated to keep pace with emerging technologies, but existing precedent indicates that reinterpretation is not an effective method for changing consent decrees. Therefore, it is important to explore other possible avenues for changing consent decrees.

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124. See Ely, *supra* note 1, at 50 ("Under the current system, a licensee that does not purchase licenses from all three major PROs would have to monitor which musical works it used and play only works wholly owned by the PRO from which it purchased a license.").

125. See *id.*

126. See *id.*

127. See *id.* ("Requiring 100% licensing would give greater assurance that a licensee was granted the necessary permissions to use specific compositions, as any party that owned any portion of a work could grant a full license to use the work.").

### III. CHANGING A CONSENT DECREE THROUGH MODIFICATION RATHER THAN REINTERPRETATION

#### A. *Reinterpretation as a Method for Altering Consent Decrees*

While the court's rejection of the DOJ's proposed reinterpretation was correct in a technical sense, the result also seems proper in a normative sense. The Second Circuit's rejection of the DOJ's reinterpretation of the existing terms is intuitive because it seems that the DOJ may have been trying to obtain its desired reforms by using reinterpretation as a back door. It can be termed a "back door" because the DOJ's maneuvering sought to materially change the terms of the consent decree without *actually* changing the terms. If the main objective behind consent decrees is to reach compromise through voluntary negotiations, then it makes sense that one party should not be able to unilaterally reinterpret the previously agreed upon terms in a way that materially changes the operation of a bilaterally created agreement.

Scholars have argued that, if reinterpretation of consent decrees becomes common, then the incentive to enter into such decrees would be reduced significantly because they would seem like a thing of wax in the hands of agencies.<sup>128</sup> If agencies could easily change consent decrees through reinterpretation, then the terms of decrees would become unpredictable and it would be harder for parties to rely on them in making organizational decisions.<sup>129</sup> Predictability is an important attribute of consent decrees that should be preserved, as it is part of what makes consent decrees attractive as a means of dispute resolution in the first place.<sup>130</sup> If consent decrees were to disappear as a regulatory tool, then litigation would increase significantly and be costly and burdensome to all parties involved.<sup>131</sup>

Some might argue that agencies have expertise in the field and should be able to change the terms of consent decrees in accordance with that expertise. The dispute surrounding *Broadcast Music, Inc.*, however, reveals that material changes to these consent decrees can have reverberations that echo throughout an entire industry and,

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128. See Phillip G. Oldham, Comment, *Regulatory Consent Decrees: An Argument for Deference to Agency Interpretations*, 62 U. CHI. L. REV. 393, 419 (1995).

129. See *id.*

130. See *id.*

131. See *id.*

when aggregated, the economy as a whole.<sup>132</sup> In addition, often a change that is beneficial for one side is harmful for the other. As a result, one must ask whether, as a normative matter, it is acceptable for a few experts at an agency to be making decisions that could have such a profound impact on many different elements of the economy and society without the participation of the interested parties and the courts.

In this case, the DOJ wanted to change the system to full-work licensing in order to achieve procompetitive benefits. Such a change would result in a massive shift for the performance rights licensing industry. For the reasons discussed above, unilateral reinterpretation by one party should not be the manner by which consent decrees change because reinterpretation of material terms could fundamentally alter the way an entire industry does business and, in turn, have a noticeable effect on the overall economy. Although the actual language of a consent decree would not be changed through reinterpretation, its operation could be significantly altered, as evidenced by the *Broadcast Music, Inc.* dispute. Therefore, the rigid precedent relating to *reinterpretation* of consent decrees is tolerable for society because one party should not be able to change the operation of the decree.

Having exposed the weaknesses of reinterpretation, another method is needed to facilitate changes to consent decrees when necessary in order to keep pace with new technologies. These antitrust consent decrees do not, as a practical matter, exist in a vacuum. While the terms of consent decrees remain static over the years, forces in technology and society are constantly evolving. As technology advances, the ecosystem in which consent decrees operate can completely change and render obsolete the ability of the consent decree to effectively regulate. In terms of the BMI consent decree, the advent of digital music has essentially ushered in a new epoch of performance rights licensing. It is troubling, to say the least, that a consent decree originally drafted in 1966 and last amended in 1994 still governs performance rights licensing in the digital age. Since the early days of antitrust consent decrees, scholars have shared these concerns about the ability, or lack thereof, to update consent decrees in response to changing circumstances in technology and society.<sup>133</sup>

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132. Brian Penick, *5 Things Songwriters Need To Know About the Consent Decree*, SOUNDSTR (July 13, 2016), <https://www.soundstr.com/5-things-consent-decree/> [<https://perma.cc/EX7C-DVML>].

133. Milton Katz, *The Consent Decree in Antitrust Administration*, 53 HARV. L. REV. 415, 423 (1940) (claiming that each antitrust consent decree should have “an express

*B. Case Law Relating to Modification of Consent Decrees*

With reinterpretation off the table, modification is another avenue through which a party may seek to change the terms of a consent decree. First, the party seeking modification must make a motion requesting that the court amend an antitrust consent decree.<sup>134</sup> In its 1932 opinion in *United States v. Swift & Co.*,<sup>135</sup> the Court stated that, in order to succeed, the movant must show that new circumstances have led to a “grievous wrong” that requires a modification to the agreement.<sup>136</sup> Years later, in *United States v. United Shoe Machinery Corp.*,<sup>137</sup> the Court added that a request for modification should only be granted if the movant can show that the decree’s original purposes have been fulfilled.<sup>138</sup> That holding could apply in the context of the BMI consent decree if hundreds of PROs suddenly appeared and BMI no longer had a near monopoly on the licensing of performance rights. The original purpose of the consent decree between the DOJ and BMI was to limit anticompetitive behavior and alleviate antitrust concerns in a performance rights licensing industry that was, at that time, dominated by only a few PROs.<sup>139</sup> If, hypothetically, hundreds of new PROs entered the performance rights licensing industry and BMI only possessed a two percent market share, then a court might say that the decree’s original purpose has been fulfilled and, in turn, would likely be willing to grant a modification. *Swift* and *United Shoe* have together been construed to form the fairly rigid, traditional standard for modifying an antitrust consent decree.<sup>140</sup>

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reservation of power in the court to modify or vacate the decree whenever it shall appear that such modification or revocation is necessary to achieve the purpose of the decree or to take account of changed conditions; and an express statement that it is contemplated that either party, upon due notice to the other, may apply to the court for an order modifying or revoking the decree in accordance with the reservation of power”).

134. See Konczal, *supra* note 17, at 132 (“The court that initially enters a consent decree has the power to modify the decree. . . . Despite this inherent power of a court of equity, most consent decrees contain a retention-of-jurisdiction clause which stipulates that the court entering the decree can later modify or terminate it at the request of one or both of the parties.”).

135. 286 U.S. 106 (1932).

136. *Id.* at 119 (“Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed . . . with the consent of all concerned.”).

137. 391 U.S. 244 (1968).

138. See *id.* at 248 (noting that a request for modification should not be granted where the “purposes of the litigation as incorporated in the decree . . . have not been fully achieved”).

139. See *supra* notes 9–18 and accompanying text.

140. See Goldfarb, *supra* note 68, at 625–26.

However, the precedent set forth by *Swift* and *United Shoe*—both antitrust cases—became murky after the Court relaxed the standard in the context of institutional reform (notably separate from the area of antitrust).<sup>141</sup> In the institutional reform setting, consent decrees have been used to regulate institutions by imposing requirements on their administration. For instance, a consent decree could force a prison to improve living conditions for inmates by instituting a strict cap on the number of inmates who could be housed there, limiting the number of inmates per cell, or requiring that inmates be given a certain amount of time outdoors each day.

In *Rufo v. Inmates of Suffolk County Jail*,<sup>142</sup> the Court said the movant need only show that a “significant change in circumstances warrants revision of the decree.”<sup>143</sup> The *Rufo* Court held that consent decrees may be amended “when changed factual conditions make compliance with the decree substantially more onerous,” “when a decree proves to be unworkable because of unforeseen obstacles,” or “when enforcement of the decree without modification would be detrimental to the public interest.”<sup>144</sup> This new standard set forth a much lower bar for modifying a consent decree than the rigid test set forth in *Swift* and *United Shoe*. As a result, *Rufo* stands for a more flexible approach to amending consent decrees. It is unclear, however, whether the *Rufo* standard would apply to an antitrust consent decree as in *Broadcast Music, Inc.* because *Rufo* involved an institutional reform consent decree.<sup>145</sup>

In 1995, the Second Circuit appeared to extend the more flexible *Rufo* standard to the modification of antitrust consent decrees in *United States v. Eastman Kodak Co.*<sup>146</sup> In *Kodak*, a photographic film company entered into two separate antitrust consent decrees with the DOJ in 1921 and 1954 that imposed a variety of restrictions on Kodak’s business practices.<sup>147</sup> In 1993, Kodak brought a motion to modify or terminate the consent decrees.<sup>148</sup> The district court and the

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141. See generally *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367 (1992) (adopting the more flexible *Rufo* standard for modification requests of consent decrees in the context of institutional reform).

142. 502 U.S. 367 (1992).

143. *Id.* at 383.

144. *Id.* at 384.

145. See Goldfarb, *supra* note 68, at 626 (“Because the consent decree in *Rufo* specifically involved institutional reform, lower courts are divided over the extent to which *Rufo*’s more flexible standard should apply beyond an institutional reform setting.”).

146. 63 F.3d 95 (2d Cir. 1995).

147. *Id.* at 97.

148. *United States v. Eastman Kodak Co.*, 853 F. Supp. 1454, 1459 (W.D.N.Y. 1994), *aff’d*, 63 F.3d 95 (2d Cir. 1995).

Second Circuit first agreed that the Supreme Court's rulings in *United Shoe* and *Rufo* provided the legal standard for terminating antitrust consent decrees, and second, under the standards announced in those decisions, it was proper to terminate or modify the consent decrees.<sup>149</sup>

Despite the court's explicit application of *Rufo*, the court stopped short of wholesale importation of the *Rufo* standard into antitrust consent decree jurisprudence.<sup>150</sup> In effect, the Second Circuit's apparent adoption of *Rufo* into the context of antitrust consent decree modification amounted to nothing more than a *Swift* and *United Shoe* analysis.<sup>151</sup> As a result, there is substantial confusion as to whether the Second Circuit should apply *Rufo* in the case of an antitrust consent decree modification.<sup>152</sup>

Under the somewhat confusing law of modification, BMI has experienced years of delay in securing potential changes to the decree that could improve the way the entire industry operates. BMI first tried to modify the consent decree in 2014 in response to the advent of streaming technologies like Spotify and Pandora and now, almost five years later, the consent decree with the DOJ remains in place and unchanged.<sup>153</sup> With an eye to the almost five-year delay, the proof is in the pudding that modification precedent is too rigid and needs to be loosened to make it easier to update terms of consent decrees.

If a party to a consent decree—especially if that party is a major player in a multibillion-dollar industry, like BMI—sees the need to change the terms of that decree in order to optimize its business in response to new technologies such as music streaming, then there needs to be a way for that potential modification to be explored more efficiently. In addition, the modification process must not be unilateral, like reinterpretation. Rather, a petition for modification should involve the courts as an independent decisionmaker and be handled in an objective and fair manner that gives all parties to the decree the opportunity to represent their respective interests. Therefore, modification of consent decrees should follow a process

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149. See *Kodak*, 63 F.3d at 102 (finding appropriate grounds to terminate the consent decree).

150. See Goldfarb, *supra* note 68, at 627 (“Yet despite their explicit adoption of *Rufo*, both courts imported a requirement not adhered to in *Rufo* itself . . .”).

151. See *id.* (“The extensions of *Rufo* by the *Kodak* and *Western Electric* courts are therefore somewhat innocuous, representing little more than a *Swift/United Shoe* analysis under the guise of *Rufo*.”).

152. See *id.* (“Due to *Rufo*'s generally warm reception beyond the institutional reform context, uncertainty persists as to whether future courts will apply *Rufo* literally to requests to modify antitrust consent decrees.”).

153. See Gagliano, *supra* note 8, at 321.

similar to litigation but needs to be expedited in order to enable companies like BMI to make changes necessary for their business to operate efficiently in the face of technological advancements like music streaming.

A counterargument here might be that litigation is typically a slow process that can span a number of years, so if modification requests are going to proceed through the courts, then one must be prepared to wait years for a resolution. However, the issue of modifying antitrust consent decrees that profoundly affect the operation of a multibillion-dollar industry like performance rights licensing is a more urgent one than a standard dispute that one might see in other contexts, such as routine business or employment litigation. While business litigation is notorious for being a long, drawn out process, the delay is not as troubling because the dispute at issue is typically more private in nature as compared to a dispute surrounding an antitrust consent decree.

For instance, if a business spends years litigating whether an employee violated his nondisclosure agreement, that is unfortunate and costly for the parties but typically comes at a minor cost to the general public and the overarching industry in which the business operates. On the other hand, litigation surrounding the modification of a consent decree can affect the operation of an entire industry directly and, in a less quantifiable sense, can impact the entire economy when its effects are aggregated. In that sense, antitrust consent decrees like the one at issue in *Broadcast Music, Inc.* are more public in nature than traditional business litigation.

Since the modification of antitrust consent decrees presents a more urgent question that affects a much wider swath of the American public than typical private business litigation, there is greater societal interest in resolving the consent decree dispute expediently. As such, streamlining litigation in the context of antitrust consent decrees should be elevated over efforts to expedite routine forms of litigation, such as business or employment disputes. Multiyear litigation, which has become standard in American society, should not be tolerated in a context like proposed modifications to antitrust consent decrees because of the far-reaching implications for an industry and the overall economy.

#### IV. THE NEED FOR CHANGES TO THE BMI CONSENT DECREE

It is important to allow modifications of antitrust consent decrees because all parties have powerful interests that are profoundly linked to the terms of the decree. If technologies change in such a way that

parties find themselves in a materially worse position than at the time of the original agreement, then intuitive notions of fundamental fairness and equity would demand that the terms of the decree be adjusted. Oftentimes, as in the case of *Broadcast Music, Inc.*, both parties want changes to the current operation of the consent decree.

A. *Reasons Why BMI Wants to Change the Consent Decree*

BMI wants to update the consent decree so that it clearly permits fractional licensing for several reasons, all of which are tied to the advent of digital music. Although fractional licensing is already the traditional industry practice, BMI wants to update the consent decree to clarify that fractional licensing is permitted. Under a fractional-licensing regime, “BMI represents only the interests of its writers and publishers.”<sup>154</sup> BMI argues that “[f]ractional licensing . . . is the efficient, common-sense way to deal with the longstanding fact that many songs are co-written by BMI affiliates and non-BMI affiliates (‘split works’).”<sup>155</sup> In fact, the ubiquity of split works likely makes a full-work licensing regime untenable as a practical matter.

BMI also wants publishers to be able “to give BMI the right to license works for certain uses, while permitting publishers to retain the exclusive right to license works for other defined, digital uses.”<sup>156</sup> BMI wants this change so it can offer easier and more efficient access to its immense collection for many traditional music uses that have existed for decades.<sup>157</sup> BMI also believes the change would have the positive effect of providing publishers and music users with the opportunity to negotiate their own free-market deals in the numerous new digital contexts, like streaming, that could not have even been dreamed of when the BMI consent decree was last amended.<sup>158</sup> The newest technology that has most disrupted the performance rights licensing industry is music streaming.<sup>159</sup> Although music streaming is excellent for consumers, composers claim that they have not been adequately compensated in the streaming era.<sup>160</sup> Streaming services

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154. See Public Comment, *Broad. Music, Inc., Review of Consent Decree in United States v. Broad. Music, Inc.* 3 (Nov. 20, 2015), <https://www.justice.gov/atr/public/ascapbmi2015/ascapbmi18.pdf> [<https://perma.cc/VNY4-447L>].

155. *Id.*

156. *What Is the Consent Decree?*, *supra* note 69.

157. *Id.*

158. *Id.*

159. See Gagliano, *supra* note 8, at 318.

160. *Id.*

like Apple, Amazon, Google, Pandora, Spotify, and Tidal, however, disagree with those claims of inadequate compensation.<sup>161</sup>

Both PROs and songwriters want fractional licensing because they are concerned that full-work licensing would depress royalty rates by enabling digital music users like Spotify to shop around for whichever PRO is offering the lowest price.<sup>162</sup> The fear among PROs and composers is that full-work licensing would lead to a “race-to-the-bottom,” resulting in reduced license rates for PROs and lower royalties for composers.<sup>163</sup> BMI also wants to clarify that it can bundle any rights relating to the musical work that a music user needs to bring its product or service to the public.<sup>164</sup> By bundling rights, BMI could be a one-stop licensing source in order to meet the needs and match the ever-increasing pace of the digital marketplace.<sup>165</sup>

Next, BMI wants to move the rate-setting forum from federal court to a binding arbitration model because it would resolve disputes more quickly and less expensively for all parties.<sup>166</sup> Arbitration procedures have changed significantly since the Supreme Court began ushering in a new “Age of Arbitration” during the 1980s.<sup>167</sup> Consequently, arbitration has become a much more useful tool for efficient dispute resolution, leading to its widespread adoption in a range of different contexts.<sup>168</sup> Many of these sweeping changes that have made the arbitration model more attractive have occurred since the BMI consent decree was last amended in 1994. As a result, BMI wants to update the consent decree to move the rate-setting court to binding arbitration in order to best tailor its terms to new circumstances that have emerged in society since the last modification.

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161. *Id.* at 318–19.

162. *See id.* at 341.

163. *See id.*

164. *See id.*

165. *See id.*

166. *Id.* at 321 n.26.

167. Christopher R. Leslie, *Conspiracy to Arbitrate*, 96 N.C. L. REV. 381, 383 (2018).

168. *See id.* at 383–84 (“In the 2010s, the Court expanded on its pro-arbitration jurisprudence and upheld the enforceability of arbitration clauses in consumer contracts, even when those clauses were held unconscionable under applicable state law. The Court also permitted businesses to insert class-action waivers into their arbitration clauses, thus preventing victims of illegal activity from participating in class-action litigation. The growing judicial deference to arbitration clauses has provided firms the ability to include otherwise unenforceable terms in their contracts, which may allow defendants to shorten statutes of limitations, to limit damages, and to prevent injunctive remedies altogether.”).

*B. Reasons Why the DOJ Wants to Change the Consent Decree*

On the other hand, the DOJ wants 100% full-work licensing instead of the standard industry practice of fractional licensing.<sup>169</sup> Under the 100% full-work licensing regime, BMI's licenses would need "to offer users the ability to perform all 'compositions' in its repertory."<sup>170</sup> Under full-work licensing, a BMI licensee would have the right to perform all co-written songs without permission to perform those songs from the other PRO or any other nonaffiliated co-writer or publisher.<sup>171</sup> Those on the side of the PROs—songwriters and artists—feel that a full-work licensing scheme would "inject great inefficiency and confusion into the pricing, collecting, and distribution of performance rights royalties."<sup>172</sup> The inefficiency would result from PROs having to keep track of the proportional co-ownership interests of every song, even if some co-owners are not affiliated with that PRO. The lack of a central database containing co-ownership information for every song would make it especially difficult for PROs to comply with a full-work licensing regime.

Broadly, the DOJ wants full-work licensing in order to preserve what it perceives as procompetitive benefits.<sup>173</sup> The DOJ believes that, with full-work licensing, BMI licenses can provide adequate "protection from unintended copyright infringement liability and immediate access to the compositions in the organizations' repertoires."<sup>174</sup> The DOJ also argues that fractional licensing hinders the operation of the market for public performance licensing and possibly reduces the playing of music as a consequence.<sup>175</sup>

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169. See DEP'T OF JUSTICE, *supra* note 102, at 13.

170. *Id.* at 11.

171. See Public Comment, Broad. Music, Inc., *supra* note 154, at 4.

172. *Id.* ("It would also have the perverse effect, from an antitrust policy point of view, of undercutting an individual publisher's ability to license their catalogs directly to music users (because the PROs will have already licensed any split works, which now make up a large portion of most publishers' catalogs), thereby shoring up and increasing the bargaining power of the collective licensing organizations. At the same time, mandatory 100% licensing by PROs would encourage opportunistic gamesmanship by any music user seeking to avoid paying the full value of all the rights it acquires.").

173. See DEP'T OF JUSTICE, *supra* note 102, at 13.

174. *Id.*

175. See *id.* at 13–14 ("If ASCAP and BMI were permitted to offer fractional licenses, music users seeking to avoid potential infringement liability would need to meticulously track song ownership before playing music. As the experience of ASCAP and BMI themselves shows, this would be no easy task.").

C. *Reasons Why Other Interest Groups Want to Change the Consent Decree*

There are additional interest groups affected by the consent decree that would also like to see changes in its terms. For instance, some songwriters believe that the consent decree is both “obsolete” and “outdated.”<sup>176</sup> As songwriters have explained, “[r]ules created more than sixty years ago to govern the collection of America’s performance royalties for songwriters cannot possibly function in 2014.”<sup>177</sup> Songwriters want the terms of the consent decree to be changed in order to clarify that the terms allow fractional licensing because “a shift to 100% licensing would severely impact [their] creative freedom, [their] ability to choose . . . PRO licenses, [their] music, and, ultimately, [their] livelihood as songwriters.”<sup>178</sup> Under full-work licensing, songwriters would have to collaborate only with fellow BMI writers in order to ensure they receive the fee to which they agreed for their work.<sup>179</sup> Under a full-work regime, if a BMI writer collaborated with an artist belonging to a different PRO that charges a lower fee than BMI, then the BMI writer could be forced to accept the lower fee offered by the other PRO, even though the BMI writer had only contracted with BMI.<sup>180</sup>

A full-work licensing model could also result in a major drain on songwriters’ income.<sup>181</sup> First, full-work licensing could potentially delay and lower royalty payments if the payments had to flow through two PROs because two collaborators were affiliated with two different PROs.<sup>182</sup> There would also be a serious pragmatic concern based on the fact that, under full-work licensing, songwriters would “have to monitor what [they] are being paid by a PRO [they] have no relationship with, figure out whether [the PRO] ha[s] missed any of [their] performances, understand how and when they will pay [them], determine whether [they] are getting [their] fair shares of bonuses under the other PRO’s distribution system, and so on.”<sup>183</sup>

In addition to concerns about songwriters’ income, a full-work licensing regime would suppress creativity, as songwriters might have

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176. Public Comment, Bart Herbison, Exec. Dir., Nashville Songwriters Ass’n Int’l, Review of ASCAP and BMI Consent Decrees 2 (Aug. 5, 2014), <https://www.justice.gov/sites/default/files/atr/legacy/2014/08/13/307686.pdf> [<https://perma.cc/Q7CY-8HQW>]

177. *Id.*

178. Rosen Letter, *supra* note 77, at 1.

179. *See* Public Comment, Broad. Music, Inc., *supra* note 154, at 3.

180. *See id.*

181. *See* Rosen Letter, *supra* note 77, at 1.

182. *See* Public Comment, Broad. Music, Inc., *supra* note 154, at 10.

183. *See* Rosen Letter, *supra* note 77, at 1.

to make choices about with whom they collaborate based on which PRO the other songwriter belongs to rather than musical talent or personal chemistry. This creative concern is extremely pressing, as “[t]he creativity and success of any songwriter stems from being able to work with songwriters of our choosing, regardless of their PRO affiliation.”<sup>184</sup> Further, songwriters worry that

[a]ll of a sudden, [their] individual and careful choice of [a] collaborator will not be driven by artistic chemistry or compatibility, but by rules imposed by the government. The 100% licensing model sounds like the government stepping into the creative process and effectively dictating our collaborators and our licensing representatives.<sup>185</sup>

This potential drain on creativity is profoundly troubling. Creativity is the engine behind the creation of music, and the art of music is the foundation of the performance rights licensing industry. Although economics and music have merged to form a massively profitable industry, the production of good music from an artistic standpoint is a necessary predicate for the whole industry to run. Since the production of good music requires creativity, a 100% full-licensing regime could threaten the entire music industry by curbing creativity among songwriters.

One potential unintended consequence of full-work licensing could be that most or all composers decide to join the same PRO in order to avoid issues relating to collaboration between members of different PROs. Although unlikely, this would frustrate the DOJ’s purpose in entering into these consent decrees, cutting against the very core of antitrust principles by essentially giving one PRO a monopoly. A shift of all songwriters to one PRO, however, would require a massive coordinated movement that is unlikely to ever occur and, even if it did, the DOJ would likely take some type of action to stop it.

#### V. A NEW STANDARD FOR ASSESSING REQUESTS FOR MODIFICATION OF ANTITRUST CONSENT DECREES

If a new standard is needed for modification of antitrust consent decrees, the next step is to explore viable alternatives.

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184. *Id.* at 2.

185. *Id.*

A. *The Unworkability of Rufo for Antitrust Consent Decree Cases*

One possibility would be to import the *Rufo* standard into performance rights licensing jurisprudence. But, as David Konczal and Jed Goldfarb have both argued, applying *Rufo* in the context of antitrust consent decrees would mean forgoing many of the important benefits such decrees provide.<sup>186</sup> Konczal argues that a flexible modification standard like *Rufo* would negate the public benefits that arise from the use of consent decrees as a means of settling antitrust disputes.<sup>187</sup> Konczal argues that applying the *Rufo* standard in the antitrust context would make it too easy to change the terms and, therefore, would “increase the uncertainty and risk faced by antitrust defendants,<sup>188</sup> would reduce the incentive of defendants to enter into consent decrees,<sup>189</sup> and would lead to a waste of scarce judicial resources.”<sup>190</sup> At the heart of Konczal’s argument is the notion that consent decrees need certainty and finality in order to function properly.

At the same time, however, flexibility is needed so that terms of consent decrees can be modified in order to adapt to new technologies and other societal advancements. Flexibility is needed to level the playing field and should be regarded as fundamental in the context of modifying consent decrees. Here, circumstances have evolved to the point that one party is significantly disadvantaged relative to the other in such a way that was not contemplated at the time of the original consent decree.

This idea that governmental mandates carrying the force of law should be updated from time to time in order to best fit the new circumstances that come with new generations is not a new concept.<sup>191</sup>

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186. See Konczal, *supra* note 17, at 134; see also Goldfarb, *supra* note 68, at 627–28.

187. See Konczal, *supra* note 17, at 134.

188. “Because a liberal modification standard will likely entice the Antitrust Division to seek modification of existing consent decrees, applying *Rufo* in this context will reduce the certainty and risk-avoidance that defendants seek in entering into consent decrees.” *Id.*

189. “[A] liberal modification standard may dissuade defendants from entering into consent decrees because of a fear that the Antitrust Division will continuously attempt to intensify the restrictions imposed upon the defendants in the original decrees.” *Id.*

190. *Id.* “[I]t will encourage defendants and the Antitrust Division to pursue constantly modification of consent decrees, thereby wasting the time and money of the courts, defendants, and the Antitrust Division.” *Id.*

191. See Letter from Thomas Jefferson to James Madison, *supra* note 35, at 392 (“The question Whether one generation of men has a right to bind another, seems never to have been started either on this or our side of the water. Yet it is a question of such consequences as not only to merit decision, but place also, among the fundamental principles of every government.”).

As noted earlier, Thomas Jefferson stated in his famous 1789 letter to James Madison that “the earth belongs in usufruct to the living; that the dead have neither powers nor rights over it.”<sup>192</sup> With that statement, Jefferson set forth the idea that laws should be revisited at least every generation to best meet the needs of the living generation.<sup>193</sup> This principle is relevant and applicable to the issue of modifying antiquated consent decrees in the sense that they should be tailored to best fit the needs of the digital age. It seems irresponsible to regulate performance rights licensing in the digital age under terms that were drafted in 1966 and amended in 1994, when the industry was almost unrecognizable from what it is today.

*B. The Benefits of a Totality-of-the-Circumstances Analysis*

Ultimately, though, the *Rufo* standard is not the flexible standard that is needed in this context.<sup>194</sup> Instead, this Recent Development proposes the following standard for the modification of antitrust consent decrees: an antitrust consent decree shall be amended only if, by a totality-of-the-circumstances analysis, the court finds a reasonable and necessary request for modification that does not unduly prejudice the other party or run counter to the public interest. The three major factors to consider in the analysis include the following: (1) the necessity, or lack thereof, of the modification request from the standpoint of the movant; (2) achieving a balance between whether refusing the request for modification would unduly prejudice the movant and whether granting the request would unduly prejudice the nonmovant; and (3) whether the policy benefits of the modification would outweigh the risk of encouraging more amendment requests by granting the change.

Issues of antitrust consent decree modification can be so varied and complex that it is unlikely they can be placed neatly into a clear standard like *Rufo*, *Swift*, or *United Shoe*. As such, the totality-of-the-circumstances reasonableness test and its accompanying framework of factors would capture the flexibility of the *Rufo* test by leaving a considerable amount of discretion for the courts to make decisions on a case-by-case basis while still imposing safeguards against Konczal’s concerns about certainty and finality. In this way, the proposed new

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192. *Id.*

193. *See id.*

194. *See generally* Goldfarb, *supra* note 68 (making the case that the *Rufo* standard is not appropriate for the antitrust consent decree context); Konczal, *supra* note 17 (arguing that the *Rufo* standard should not be extended to the context of antitrust decrees).

standard would occupy a middle ground between the inflexible *Swift* and *United Shoe* standard and the overly flexible *Rufo* standard.

The first factor—the necessity, or lack thereof, of the proposed modification for the movant—is a threshold inquiry to deter frivolous modification requests that would reduce certainty and finality and waste money and the time of the courts. As such, this should be the weightiest factor because the court should dismiss the motion if it does not find it to be necessary from the standpoint of the movant. In carrying out the analysis, the reviewing court should take a hard look at the material position of the movant in the context of changed circumstances, as well as the intent of the movant. If the movant's material position appears relatively unchanged from the time of the original consent decree, then that is a red flag that the amendment request is not necessary. In addition, if the movant's intent appears to be nefarious, such as to drive up legal costs for its opponent, then that is also reason to dismiss the motion.

Once necessity has been established, factor two is designed to promote fundamental fairness. Consideration of the first element of the balance in factor two—whether refusing the request for modification would unduly prejudice the movant—is designed to safeguard against undue enrichment of the nonmovant as a result of changed circumstances since the initial entering of the decree. Ensuring the requested modification is the result of circumstances that have changed since the original consent decree will prevent parties from simply requesting a modification whenever the terms of the original consent decree did not end up working out as they had hoped. This factor directs the court to only grant a modification when it is the result of changed circumstances and when, as a practical matter, fairness requires the modification. In assessing this factor, courts should take a hard look at the changed circumstances alleged by the movant and how they have affected the way the industry operates. If the court finds that external forces have materially changed the movant's position in a way that could be fixed by granting the modification, then this factor should weigh in favor of modification. If it is unclear that the proposed modification would improve the position of the movant without creating a new advantage for the movant, then this factor should weigh in favor of refusing the modification as a way to deter frivolous modification requests.

Consideration of the second element of the balance in factor two—whether granting the request would unduly prejudice the nonmoving party—is designed to ensure that the proposed amendment would not benefit the movant to a degree that would

place them at an advantage relative to the nonmovant. The idea would be to prevent modification requests from becoming a commonly used tool to gain a business advantage. Courts should look at the effects the modifications would have on the relative position of the parties, with the goal being the balance of fundamental fairness. The modification would be acceptable if it would improve the position of the movant, as that would be the point of the modification in the first place. But the important thing is that the movant's position does not become improved past the point of fundamental fairness to a point where the nonmovant becomes the disadvantaged party. If granting the request would improve the standing of the moving party at the expense of the nonmoving party beyond the equilibrium of fundamental fairness, then this factor should weigh in favor of rejecting the modification.

The third factor—whether the policy benefits of the modification would outweigh the risk of encouraging more amendment requests by granting the change—represents a broad catchall and simply asks the court to weigh the overall policy implications of the proposed modification against the negative policy concerns associated with the general practice of allowing parties to modify consent decrees.<sup>195</sup> This factor is intended to be broad as a way for the court to keep an eye out for society in the rare case that a proposed modification may pass the other factors and be equitable among the parties but have detrimental effects to the industry, the economy, or society as a whole.

### C. *The Unworkability of a Legislative Solution*

A wholesale alternative to the judicial standard proposed above would be to adopt a comprehensive legislative solution that governs the business of performance rights licensing. In fact, the DOJ has suggested replacing the consent decree model with a legislative scheme in the future but recognizes that the consent decree model is too entrenched to be changed at this time.<sup>196</sup> While that alternative

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195. For a discussion of these policy implications, see *supra* notes 191–94 and accompanying text.

196. DEP'T OF JUSTICE, *supra* note 102, at 22 (“The Division recognizes the incongruity in the oversight over the licensing of performance rights and other copyrights in compositions and sound recordings and believes that the protections provided by the consent decrees could be addressed through a legislative solution that brings performance rights licensing under a similar regulatory umbrella as other rights. The Division encourages the development of a comprehensive legislative solution that ensures a competitive marketplace and obviates the need for continued Division oversight of the PROs.”).

would remove consent decrees from the equation, it would frustrate the main rationale behind the use of consent decrees in the first place: efficiency.<sup>197</sup> While the almost five-year delay since BMI's initial modification request seems like a long time, the political and legislative process could potentially take even longer.

First, PROs would need to lobby the necessary lawmakers in order to gain support, which could take years. In addition, there could be serious inequities that arise during the lobbying process. For instance, a wealthy corporation like Spotify might have much more political influence than a coalition of songwriters. If the interests of those two groups clashed, companies like Spotify would be better equipped to pursue change through the legislative process. As a practical matter, there would be no remedy for that disparity in power with respect to shaping the eventual laws and regulations. On the other hand, consent decrees provide for more equal bargaining power among the involved parties.

Even if a party were to convince enough lawmakers of its proposed legislation, those lawmakers would still need to wait for the opportune time to introduce the bill to ensure that it gets passed. That timeline could be at the mercy of the current partisan makeup in Congress or many other factors. In that sense, subjecting antitrust regulation to the political process would only magnify Konczal's concerns about certainty and finality.

In addition, replacing antitrust consent decrees with standard legislation would unavoidably import the pitfalls of party politics, special interest lobbies, and other imperfections from the political system into the decision-making process. For instance, lawmakers on the side of BMI would inevitably need to relinquish some demands as a compromise in order to get the necessary votes to pass the bill. As a result, a legislative scheme would take the act of compromising out of the hands of the parties who are actually involved and instead place the ability to compromise in the hands of lawmakers who are likely detached and disinterested in comparison to the actual parties to the decree.

The political process tends to be more transparent than the confidential negotiation process through which consent decrees are born. Intuitively, it seems much more efficient to have the parties who will be relying upon the decree negotiating its terms in a confidential setting. Therefore, the parties are most likely to arrive at the fairest reasonable compromise because they can negotiate based purely on

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197. See *supra* Part I.

their own material interests, free from external political pressures that may have little or no basis in the practical operation of the consent decree.

Furthermore, members of Congress do not have the same expertise about emerging technologies that are changing the performance rights licensing landscape.<sup>198</sup> In fact, “[e]ven members of Congress acknowledged their limited ability to keep abreast of technological developments for the delivery of music” during meetings with the Nashville Songwriters Association.<sup>199</sup> Without such intimate knowledge of pertinent issues, lawmakers are unlikely to formulate a fairer solution than a consent decree that is agreed upon by parties who possess strong familiarity with the industry and have the incentive to protect their own material interests.

Although songwriters and artists gained some relief through the legislative process by getting the MMA passed and signed into law, it was far from a complete and wholesale solution for the problems afflicting BMI and the performance rights licensing industry.<sup>200</sup> Without a doubt, the MMA was a significant victory for rights holders, as it will hopefully assuage their most pressing concern by ensuring that they get paid. The consent decrees between the DOJ and PROs, however, are still in existence and were not rendered defunct by the legislation. As a result, the discussion surrounding the modification decrees remains pertinent. Nonetheless, the MMA serves to show the potential viability of a legislative solution in certain circumstances.

#### *D. The Federal Trade Commission as a Potential Alternate Forum*

Another alternative would be for Congress to turn enforcement of antitrust consent decrees over to a special division of the Federal Trade Commission (“FTC”). Given that agencies usually hold more expertise than lawmakers, such an alternative could potentially work if the proper procedures and safeguards were implemented. Considering the high stakes that come with modifying a consent decree, especially since they affect how a multibillion-dollar industry is regulated, it would be concerning to give the FTC unilateral power to change antitrust consent decrees.<sup>201</sup> Nonetheless, a quasi-judicial model, where both sides have the chance to argue their positions

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198. See Public Comment, Bart Herbison, *supra* note 176, at 2.

199. *Id.*

200. Singleton, *supra* note 23.

201. See *supra* Section III.A.

before an independent decisionmaker within the FTC, could potentially be a viable option.

Even if it is assumed that consent decrees are a better solution than the legislative process, the current controversy between BMI and the DOJ indicates the necessity of some level of flexibility with respect to modifying the terms of a decree. The nature of the industry is such that changing technologies can demand changes to the consent decree by entirely transforming the way business is transacted. In the case of *Broadcast Music, Inc.*, the advent of digital music is the main technological advancement that has led to calls for change to the consent decree.

The new standard proposed in this Recent Development combines the flexibility of *Rufo* with safeguards against its main policy concerns. In addition, the flexibility of the *Rufo* standard is enhanced by the totality-of-the-circumstances approach and the inclusion of the broad catchall in the third factor, which gives the court a license to strike down a modification proposal if it would result in negative policy consequences such as those contemplated by Goldfarb and Konczal.

#### CONCLUSION

In *Broadcast Music, Inc.*, the district court and later the Second Circuit correctly struck down the DOJ's attempt to alter the terms of the BMI consent decree through a proposed reinterpretation. The court's decision was proper both as a technical adherence to precedent and as a normative matter. Nonetheless, involved parties need another way to make changes to consent decrees in order to adapt to ever-changing external forces. The DOJ could stop using antitrust consent decrees to regulate music licensing, but then the leading alternative would be to regulate through the political process. The use of consent decrees, however, is better than a legislative scheme because it increases efficiency and fairness, and it keeps decisionmakers independent from the political process. As a result, the best alternative for making necessary changes to consent decrees is through the process of modification. Unfortunately, the current body of law with respect to modification is too rigid and does not allow parties to make the changes necessary to maintain the efficacy of the consent decree in response to a rapidly changing technological environment.

In order to make the modification process more flexible and less arduous while maintaining the safeguards that underlie the current modification doctrine, courts should use a totality-of-the-

circumstances test to assess a proposed modification to an antitrust consent decree. The proposed totality-of-the-circumstances test and its accompanying factors provides a court with a framework for assessing the reasonableness and necessity of a proposed modification while safeguarding against unfairness, frivolous claims, and other critiques of flexible standards such as the *Rufo* standard. The flexibility of the proposed new standard is important because it levels the playing field in situations in which circumstances have evolved to the point that one party is severely disadvantaged relative to the other.

Although this Recent Development focused on antitrust consent decrees in the context of the performance rights licensing industry, the new test it sets forth could potentially be extended to the review of modification requests in other industries that the DOJ regulates through consent decrees.<sup>202</sup> While not all other industries may be as inextricably linked to changing technologies as the performance rights licensing business, all industries need to adapt to changing societal circumstances to some extent. At the very least, having the *ability* to make reasonable changes to a consent decree is an advantage for any industry. Regardless of the industry, there is never a reason to continue being governed by outdated regulations when there is a reasonable way to update them.

Scholars have warned that giving too much flexibility in changing a consent decree can be problematic because it can undermine the certainty and finality that are required for consent decrees to function in the regulatory context.<sup>203</sup> However, the standard proposed in this Recent Development has safeguards built into its framework to protect against those concerns. Although many specific issues facing other industries may be unique from those facing the performance rights licensing business, the proposed new standard represents a broad enough framework for it to be useful in the regulation of other industries and other contexts, such as institutional reform litigation or the regulation of prison conditions. As such, the totality-of-the-circumstances test for reviewing requests to modify consent decrees

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202. See Sheryl Gay Stolberg & Eric Lichtblau, *Sweeping Federal Review Could Affect Consent Decrees Nationwide*, N.Y. TIMES (Apr. 3, 2017), <https://www.nytimes.com/2017/04/03/us/justice-department-jeff-sessions-baltimore-police.html> [https://perma.cc/7AT4-VLQ8 (dark archive)] (examining consent decrees in the context of troubled police departments). See generally Levine, *supra* note 18 (discussing the modification of consent decrees in the context of institutional reform litigation).

203. See generally Goldfarb, *supra* note 68 (making the case that the *Rufo* standard is not appropriate for the antitrust-consent-decree context); Konczal, *supra* note 17 (arguing that the *Rufo* standard should not be extended to the context of antitrust decrees).

could enhance the efficiency and efficacy of many industries that are regulated by consent decrees and, in turn, contribute to the overall prosperity of the American economy.

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