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## The Promise and Peril of Collective Listening

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# THE PROMISE AND PERIL OF COLLECTIVE LICENSING

*Whitney Broussard\**

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## I. INTRODUCTION

The twentieth century saw a number of new technologies evolve that promoted the broad availability of copyrighted music. The invention of records, radio, film, television, and recordable media, to name just a few, each greatly expanded the market for music and, in the aggregate, took it from a tiny cottage industry primarily concerned with the compensation of performers in the context of live performances and the compensation of songwriters in the context of selling sheet music to an economic juggernaut with diverse sources of income from a wide variety of methods of exploitation.<sup>1</sup>

The twenty-first century seems primed to continue that expansion. Already, in the early years of the century, there has been a seismic shift in the technology used to disseminate music. The internet, wireless networks, compression technologies, and ever-expanding storage capacities have created an environment of efficient delivery and enjoyment of a virtually unlimited selection of music, on demand, wherever the consumer may be. Consumers are better off than ever in terms of their access to musical works, but frustratingly, the music industry has had a difficult time fully monetizing these new technologies.

It is tempting to blame one group or another for this state of affairs—people should not share or copy music, copyright owners should be more reasonable in licensing their works for new technologies, network operators should act as police on behalf of the copyright owners, or consumer electronics manufacturers should not build devices that permit the disfavored actions—but one fundamental factor that can not be overlooked in this equation is the structural inability to efficiently license vast numbers of musical works for a wide variety of uses, even when parties are generally amenable to that license.

One suggestion that is often put forth in the search for a more efficient licensing landscape<sup>2</sup> is collective licensing.<sup>3</sup> Collective licensing is nothing new to

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<sup>1</sup> For instance, by the end of the twentieth century, performers could be compensated for record sales, live performances, licensing of sound recordings for synchronization and other uses, merchandising, and endorsements. Similarly, songwriters could be compensated for record sales, synchronization uses, merchandising uses, sales of sheet music, and public performances on the radio, in stores, bars, restaurants, and in connection with live performances.

<sup>2</sup> See generally Electronic Frontier Foundation, *A Better Way Forward: Voluntary Collective Licensing of Music File Sharing*, Apr. 2008, <http://www.eff.org/wp/better-way-forward-voluntary-collective-licensing-music-file-sharing>; Songwriters Association of Canada, *A Proposal for the Monetization of the File Sharing of Music From the Songwriters and Recording Artists of Canada*, <http://www.songwriters.ca/studio/proposal.php>; WILLIAM FISHER, *PROMISES TO KEEP: TECHNOLOGY, LAW AND THE FUTURE OF ENTERTAINMENT* (Stanford Univ. Press 2004).

<sup>3</sup> For the purposes of this Article, “collective licensing” will refer to a process by which a group of copyright owners join together to offer a single license covering multiple copyrights from different owners in lieu of requiring licensees to enter into separate licenses with each owner for that

the music industry. The American Society of Composers, Authors and Publishers (ASCAP) was formed in 1914 in order to collectively license public performances after the public performance right in musical compositions was added to United States copyright law, and there is little doubt that collective licensing did make for a more efficient licensing paradigm in that circumstance.

However, this same collective action ran afoul of principles of antitrust, and in 1941, the Department of Justice (DOJ) commenced proceedings against ASCAP to address these issues. Later that year, ASCAP and the DOJ entered into the first of a series<sup>4</sup> of consent decrees (collectively, Consent Decree) regulating certain ASCAP practices in order to reduce the anticompetitive effects of its collective action.<sup>5</sup>

Any proposal regarding collective licensing should, at its earliest stages, be informed by an understanding of the antitrust issues which may be implicated and how similar issues were resolved in the Consent Decree. Even a well-intentioned proposal, bereft of any explicit monopolistic intent, ignores antitrust issues at significant risk of subsequent legal problems.

The purpose of this Article is to summarize the provisions of the Consent Decree which tend to ameliorate the inevitable antitrust concerns of collective licensing in the hope that it may provide a useful road map for those wishing to propose or discuss collective licensing solutions to today's music licensing quagmire. In order to better understand the Consent Decree, however, it will be useful to first examine the current music licensing landscape, the general utility of collective licensing, and the specific antitrust perils of that collective action.

## II. THE CURRENT LICENSING LANDSCAPE

The reason it is so difficult to license all the rights necessary to offer a substantial catalog of music is that the current landscape of music licensing is highly fragmented. Different parties may own or control different rights in any given musical work, and each must be licensed, one way or the other. To offer

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owner's works.

<sup>4</sup> The first Consent Decree was the Consent and Judgment in 1941, followed by the Amended Final Judgment in 1950, an Order thereto in 1960, and most recently, the Second Amended Final Judgment in 2001. For the latter, see *United States v. Am. Soc'y of Composers*, No. 41 Civ. (S.D.N.Y. June 11, 2001), available at <http://www.ascap.com/reference/ascapafj2.pdf> [hereinafter Consent Decree].

<sup>5</sup> ASCAP's main competitor, Broadcast Music, Inc. (BMI), is also subject to substantially similar restrictions to the Consent Decree pursuant to the judgment in connection with *United States v. Broad. Music, Inc.*, No. 64 Civ. 3787 (S.D.N.Y. May 1, 2009). For clarity, only ASCAP's Consent Decree will be discussed.

a substantial catalog, one may need to license all of the necessary rights for hundreds of thousands, if not millions, of musical works.

As an initial matter, in order to license the right to use a given sound recording, two separate copyrights must be licensed: the sound recording itself<sup>6</sup> and the underlying musical composition<sup>7</sup> that is embodied in that sound recording. Generally, each of those copyrights is owned and administered by different parties.

Sound recordings are generally owned by record companies or the performing artists, and musical compositions are generally owned by music publishers or the songwriters. A substantial number of sound recordings are owned by the four major labels (Universal Music Group, Sony Music Entertainment, Warner Music Group, and EMI Music), but there are hundreds of smaller companies that, in the aggregate, own a significant portion of the total. Publishing is even more fragmented, with portions of the majority of songs controlled by the four major publishers (EMI Music Publishing, Warner/Chappell Music, Sony/ATV Music Publishing, and Universal Music Publishing Group) and the remainder controlled by tens of thousands of smaller publishers. Generally, there is little overlap between the sound recording catalog of a major record label and the musical composition catalog of its publishing affiliate.

To further complicate the matter, in some cases, a work may be owned by multiple parties rather than by a single party. This is especially common with respect to musical compositions since a great many songs are jointly written by multiple songwriters, with each songwriter's respective portion administered independently. In these cases, each individual ownership portion of the work may require a separate license.<sup>8</sup> The holder of the administration rights with respect to each such portion of a musical composition may also change periodically, requiring a potential licensee to have the most current information possible.

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<sup>6</sup> "Sound recordings" are defined in section 101 of the Copyright Act as "[W]orks that result from the fixation of a series of musical, spoken, or other sounds . . ." 17 U.S.C. § 101 (2009). Each recorded performance of a musical work is copyrightable as a separate sound recording. For example, the recorded performance of Gloria Gaynor singing the musical work "I Will Survive" is copyrightable as a sound recording, as is the version performed by Cake.

<sup>7</sup> "Musical works" are not specifically defined in the Copyright Act, but are generally understood to refer to the music and, if applicable, the lyrics of a song. Although each recorded performance of a musical work is a separately copyrightable sound recording, each such sound recording invokes the copyright in the same underlying musical work. That is, in the example in the previous footnote, the songwriters of "I Will Survive" are entitled to compensation for the exploitation of both the Gloria Gaynor performance and the Cake performance of the musical work, though Gloria Gaynor and Cake are only entitled to compensation for the exploitation of their own performances.

<sup>8</sup> Copyrights may also be administered by different parties in different territories but this Article is focused on licensing in the United States.

In addition, specific rights with respect to a given work may be administered by different parties, and those parties may be different for each co-owner.<sup>9</sup> For instance, with respect to musical compositions, one of the three United States performing rights organizations (PROs)—ASCAP, BMI, and SESAC—administers the public performance right with respect to virtually every song, though a licensee is free to bypass ASCAP or BMI under the Consent Decree (but not necessarily SESAC)<sup>10</sup> and enter into a direct license with a music publisher. However, ASCAP and BMI are prohibited by the Consent Decree from licensing rights other than the public performance right, so any use which implicates rights in addition to the public performance right requires additional licenses. The Harry Fox Agency (HFA) administers reproduction rights on behalf of its clients, which represent a substantial number of publishers, but not all of them. With respect to sound recordings, SoundExchange administers rights on behalf of its members and also collects the compulsory license royalties with respect to non-interactive digital transmission, such as webcasting and satellite radio.

Many types of exploitation which a licensee may wish to license may implicate multiple rights administered by different parties, or the desired license may contemplate a variety of exploitations which may each implicate different rights that are separately administered, greatly adding to the licensing burden.

Given the sheer number of potential licensors required to completely license a very large catalog of music, it should not come as a surprise that there can also be substantial problems in determining who owns or administers any given work,

<sup>9</sup> Copyright is a bundle of enumerated exclusive rights, each of which may be administered separately. Section 106 of the Copyright Act enumerates these rights as follows:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 106.

<sup>10</sup> SESAC is much smaller, and historically has been considered to have much less market power than either ASCAP or BMI. It is not at this time subject to restrictions similar to the Consent Decree, however, a class action complaint alleging anticompetitive practices was filed on November 4, 2009 against them in the Southern District Court of New York. Class Action Complaint, Meredith Corp. v. SESAC, No. 09 Civ. 9177 (S.D.N.Y. 2009 Nov. 4, 2009).

or portion thereof, or any particular right in a work, and, in some cases even when the owner of a work is known, the current contact information of the owner is not ascertainable despite a licensee's best efforts.<sup>11</sup>

Even to the experienced practitioner, parsing the various rights which may need to be licensed for a desired use or set of uses, and determining who controls those rights for each sound recording and musical composition which is desired to be licensed, can be an exceedingly complicated task. For the uninitiated, the situation is arcane, counterintuitive, and profoundly daunting.

As a result, it is extremely difficult and expensive to develop new services using substantial catalogs of music. It is a slow, frustrating process that is, as a practical matter, only available to established or particularly well-funded licensees. While this may not immediately strike some as problematic, what is troubling is that entrepreneurs and their investors, those most likely to take the risks involved in developing new and unique products and services, are significantly dissuaded from innovating in ways that require music licenses, and that innovation and related licensing is precisely what is necessary to further expand the market and revenues for music.

### III. THE UTILITY OF COLLECTIVE LICENSING

The difficulties inherent in the current licensing landscape are not a new occurrence in the music business. In fact, much of what has been described is applicable to the early years of public performance licensing for musical compositions. Although the public performance right for musical compositions was added to United States copyright law in 1889, it took decades for the right to be effectively monetized.<sup>12</sup>

Initially, the public performance right was largely ignored by potential licensees, and the copyright owners found the right to be particularly difficult to enforce. The very nature of public performances at that time, largely performances of bands in theaters, restaurants, and nightclubs, meant that the uses were being made by tens of thousands of companies across the United States, and no single copyright owner could hope to detect and pursue any infringement of its new right.

Similarly, no music user could reasonably hope to license each song that might be performed prior to that performance. The musical compositions that might be used at any given time and place were largely unpredictable, and the

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<sup>11</sup> For a detailed report on this issue, see generally U.S. Copyright Office, Report on Orphan Works (2006), <http://www.copyright.gov/orphan/orphan-report-full.pdf>.

<sup>12</sup> For example, ASCAP's revenues did not exceed its expenses until 1921.

distribution of ownership of the musical compositions was even more fragmented than today.

Justice White, in *Broadcast Music, Inc. v. CBS*, described the situation eloquently:

ASCAP and the blanket license developed together out of the practical situation in the marketplace: thousands of users, thousands of copyright owners, and millions of compositions. Most users want unplanned, rapid, and indemnified access to any and all of the repertory of compositions, and the owners want a reliable method of collecting for the use of their copyrights. Individual sales transactions in this industry are quite expensive, as would be individual monitoring and enforcement, especially in light of the resources of single composers. Indeed, as both the Court of Appeals and CBS recognize, the costs are prohibitive for licenses with individual radio stations, nightclubs, and restaurants, and it was in that milieu that the blanket license arose.<sup>13</sup>

In 1914, songwriters and publishers formed ASCAP to collectively license and enforce the public performance right. Acting together, copyright owners could pool their resources to substantially reduce the cost of licensing, administering, and enforcing their rights. ASCAP accomplished this by offering licensees a “blanket license,” which permitted the use of the entire ASCAP repertory in the licensee’s activities.

In theory, licensees also could benefit from this development as now they could enter into a license with a single entity to obtain the rights they need to virtually all of the compositions they might want to use. In practice, however, many of ASCAP’s actions drew considerable criticism from potential licensees and thus many of ASCAP’s resources in its early years were spent defending itself against claims that its actions were anticompetitive and in violation of antitrust law.

#### IV. ANTITRUST PROBLEMS WITH COLLECTIVE LICENSING

Antitrust law exists to protect markets from monopolization and other anticompetitive restraints of trade, which may cause market stagnation and inhibit economic growth.<sup>14</sup> Such anticompetitive practices may include horizontal and

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<sup>13</sup> 441 U.S. 1, 20 (citation omitted).

<sup>14</sup> For examples of the primary federal antitrust statutes, see generally the Sherman Act, 15 U.S.C. §§ 1–7 (2006); the Clayton Act, 15 U.S.C. §§ 12–27 (2006); and the Robinson-Patman Act, 15



vertical price fixing,<sup>15</sup> refusals to deal,<sup>16</sup> group boycotts,<sup>17</sup> price discrimination,<sup>18</sup> predatory pricing,<sup>19</sup> exclusive dealing,<sup>20</sup> and tying arrangements.<sup>21</sup>

The mere presence of any of the aforementioned activities, however, is generally not the end of the inquiry as to whether there has been a violation of antitrust law. There are two paths of analysis that are used, depending on the circumstances: the “unlawful per se” analysis and the “rule of reason” analysis.<sup>22</sup> Activities that by “nature and necessary effect are . . . plainly anticompetitive” may be treated as unlawful per se, without a substantial examination of the activity’s likely competitive effect.<sup>23</sup> It is much more common, however, that potentially illegal restraints are imposed in connection with activities which arguably enhance the efficiency of the market. In such event, the analysis follows a rule of reason.

According to the Antitrust Guidelines for the Licensing of Intellectual Property issued by the Department of Justice in 1995 (Guidelines):

In the vast majority of cases, restraints in intellectual property licensing arrangements are evaluated under the rule of reason. The Agencies’ general approach in analyzing a licensing restraint under the rule of reason is to inquire whether the restraint is likely to have anticompetitive effects and, if so, whether the

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U.S.C. § 13 (2006). Many states have also enacted statutes restricting anticompetitive behavior.

<sup>15</sup> Price fixing is an agreement between competitors to sell the same good or service for the same price.

<sup>16</sup> A refusal to deal is an agreement between competitors which restricts the persons or classes of persons to whom goods are sold or from whom goods are bought.

<sup>17</sup> A group boycott is a type of refusal to deal in which competitors refuse to conduct business with a person unless the person agrees to cease doing business with an actual or potential competitor of the person conducting the boycott.

<sup>18</sup> Price discrimination is when the same person sells identical goods or services at different prices to different customers.

<sup>19</sup> Predatory pricing is when a person sells a product or service at a low price with the intent of driving competitors out of the market or creating insurmountable barriers to entry for potential new competitors.

<sup>20</sup> Exclusive dealing is when a promise by a purchaser or seller is required as a condition of a purchase or sale such that no other person will be permitted to purchase or sell the goods or services involved from the promisor.

<sup>21</sup> A tying arrangement is when the sale of one good or service is conditioned on the purchase of a second good or service.

<sup>22</sup> U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 3.4 (1995).

<sup>23</sup> *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 433 (1990) (quoting *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 692 (1978)).

restraint is reasonably necessary to achieve procompetitive benefits that outweigh those anticompetitive effects.<sup>24</sup>

In order to form ASCAP, a number of established musical composition copyright owners with substantial aggregate market power pooled together their public performance rights so that those rights could be collectively licensed. Clearly, this was an agreement amongst competitors who, in the aggregate, controlled a substantial portion of the market, tending toward a monopoly over the hit songs of the period. Additionally, certain specific practices of ASCAP led to allegations of prohibited horizontal and vertical price fixing, exclusive dealing, refusals to deal, price discrimination, and tying arrangements.

ASCAP's collective licensing practices offered crucial benefits to the music licensing market, however, and thus were not considered unlawful per se, but entitled to a rule of reason analysis. ASCAP's activities brought a promise of greatly enhanced efficiency to a market that for all intents and purposes had failed or, perhaps, never developed in the first place. However, despite the increased efficiency, there were significant anticompetitive practices that did not seem reasonably necessary to achieve those goals. The Guidelines state:

The existence of practical and significantly less restrictive alternatives is relevant to a determination of whether a restraint is reasonably necessary. If it is clear that the parties could have achieved similar efficiencies by means that are significantly less restrictive, then the Agencies will not give weight to the parties' efficiency claim.<sup>25</sup>

Accordingly, ASCAP and the DOJ entered into the Consent Decree in order to eliminate or diminish the unnecessarily restrictive practices, while still preserving the existence and basic function of ASCAP, and the substantial efficiencies collective licensing brought to the market for public performance licenses. The result is a system of regulation which has been fine tuned over the course of decades, and which both preserves the financial incentives to copyright owners to create and market new works and allows licensees of music rights to obtain those rights efficiently, predictably, and on reasonable terms.

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<sup>24</sup> See U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 4.2 (1995).

<sup>25</sup> *Id.*

## V. THE CONSENT DECREE

The essence of the Consent Decree is that, upon written request, ASCAP must grant a public performance license for a reasonable fee on nondiscriminatory terms for similarly situated licensees. This closely approximates a competitive market since, in the presence of competitors, a licensee can be assured of obtaining a license from one of many potential licensors, and the competition between those licensors would cause each of those potential licensors to offer licenses on competitive terms.

Further, the Consent Decree specifically preserves the right of ASCAP's members to compete against ASCAP itself, as it forbids ASCAP from prohibiting nonexclusive direct licenses between its members and potential licensees. In order to avoid a situation whereby ASCAP could develop a monopoly through the gradual accretion of long-term contracts, the Consent Decree mandates that ASCAP may not grant licenses with durations in excess of five years.

ASCAP may not require a licensee to enter into a license based upon usage of only ASCAP repertory regardless of the actual percentage use of the ASCAP repertory in the licensee's programming (this would be a form of tying arrangement since the licensee is required to purchase more than its requirements). ASCAP must offer the licensee a genuine choice between different license structures (such as blanket licenses,<sup>26</sup> per segment licenses,<sup>27</sup> and per program licenses<sup>28</sup>) such that the fee for a licensee that uses less than 100% ASCAP repertory in the music it publicly performs, or does not use music in all of its programming, approximates a prorated share of the fee that would be due if that licensee used 100% ASCAP music in all of its programming. These structures are not limits on the terms to which parties may agree, but rather limits on the terms that ASCAP may require of its licensees. ASCAP and its licensees may still negotiate and enter into a license structure upon which the parties mutually agree.

The Consent Decree also requires that licenses must, at the licensee's request, include a license "through to the audience." That is, the rights must be

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<sup>26</sup> A blanket license is "a non-exclusive license that authorizes a music user to perform ASCAP music, the fee for which does not vary depending on the extent to which that music user in fact performs ASCAP music." Consent Decree, *supra* note 4, § II(E).

<sup>27</sup> A per segment license is "a non-exclusive license that authorizes a music user to perform any or all works in the ASCAP repertory in all segments of a music user's activities in a given industry, the fee for which varies depending on which segments contain ASCAP music not otherwise licensed for public performance." *Id.* § II(K).

<sup>28</sup> A per program license is "a non-exclusive license that authorizes a broadcaster to broadcast ASCAP's music in all of the broadcaster's programs, the fee for which varies depending on which programs contain ASCAP music not otherwise licensed for public performance." *Id.* § II(J).

licensed through to the audience even in circumstances where the licensee exercises the rights granted through intermediaries who may otherwise need to obtain a separate license. This inhibits the ability of ASCAP to issue licenses which are not entirely sufficient for public performance of its repertory and require additional licenses. Similarly, ASCAP may not exercise its rights in such a way as to require additional payments for either public performances or subsequent transcriptions or fixations thereof.

A crucial aspect of the Consent Decree is its mechanism to enforce the imposition of reasonable fees. In the event that ASCAP and a prospective licensee are unable to agree to a reasonable fee for a proposed license, either ASCAP or that prospective licensee may apply to a special rate court for a determination of a reasonable fee. The burden is on ASCAP to prove that the fee it proposed is, in fact, reasonable. If that burden is not established, then the rate court sets a reasonable fee which applies in that case and in all subsequent licenses for similarly situated licensees. In order to ensure that public access to the service is not blocked during the negotiations or rate court proceedings, the Consent Decree explicitly permits the prospective licensee to use ASCAP's repertory from the date of the original written request, subject to payment of the applicable fee retroactively.

The Consent Decree also limits the terms under which ASCAP deals with its members. ASCAP must allow writers and publishers to join at will, subject only to minimal requirements. Monies must be distributed based on performances indicated by objective surveys (though ASCAP may make special awards based on contribution to repertory or unique prestige value), and ASCAP must, upon request, furnish to its members a full disclosure of the methodology used to calculate those monies. ASCAP must allow its members to resign at the end of the calendar year (subject to recoupment or repayment of any advances paid by ASCAP to that member), and may not alter the monies otherwise payable to that member due to the member's decision to resign.

The Consent Decree mandates public access to ASCAP's membership list. ASCAP must inform any person if a work identified by title and writer is in their repertory and use good faith efforts to do so even if the work is otherwise identified. Further, ASCAP must make a public list of its repertory available in their office, via the internet, and via physical copies in a machine-readable format for the cost of reproduction. The public list must include genres, writers, and works illustrating the variety of works in the repertory, date of U.S. copyright registration, if any, and current publisher or other copyright owner. ASCAP may not institute or threaten suit for any works not listed in public list as of the date of the alleged infringement.

Finally, in order to guard against unintended loopholes in the provisions of the Consent Decree, and to permit re-evaluation in light of changes in the

marketplace, the Consent Decree explicitly retains the court's jurisdiction over the issues and reserves the right to adjudicate subsequent modifications thereto and enforcement thereof, as was done multiple times since the initial Consent Decree in 1941. The DOJ also explicitly reserves the right to assert subsequent modifications to the Consent Decree, including the dissolution of ASCAP. These provisions are an important safeguard against actions which may not violate the letter of the Consent Decree, but may still violate its spirit.

## VI. CONCLUSION

As it has in the past, the music industry now faces increased pressure for a paradigm shift in its licensing practices. In the beginning of the twentieth century, copyright owners faced a frightening scenario in which they were unable to monetize valuable rights due to the practical impossibility of adequately enforcing and licensing their rights. Potential licensees were also frustrated by the inability to acquire rights efficiently and on reasonable terms, and exposed themselves to substantial liability in proceeding without those licenses.

Collective licensing through ASCAP provided a promising resolution to this logjam, but ASCAP's potentially anticompetitive practices in connection with its exercise of near-monopoly power over the hit songs of the day threatened to replace the chaos with a hegemony in which membership and licensing were only available to parties favored by ASCAP.

Decades of lawsuits and intervention by the DOJ resulted in the Consent Decree, which significantly reduced the monopoly power of ASCAP and greatly increased the efficiency of licensing public performances. The Consent Decree has been further revisited and modified periodically, the most recent modification occurring in 2001, and is quite well-tuned to achieve its goals.

Those considering collective licensing as a solution to today's licensing quagmire must familiarize themselves with the antitrust problems inherent in large-scale collective action and the solutions that evolved to address those problems over the years. By appreciating this tension and understanding the historical methods by which it was reduced, any proposed collective will likely avoid the years of legal wrangling and squandered resources that plagued ASCAP in its early years.

Perhaps most importantly, though, it is in the best interest of both copyright owners and licensees to find an efficient, reasonable, and legal solution to the current dysfunction in the music licensing market as soon as possible. For copyright owners, it will allow the collection of previously uncollectible monies and the rapid maturation of essential new markets. For licensees, it will allow rapid access to copyrighted works on reasonable terms, and allow them to focus

on their most important task: innovating new markets which will be the growth engine of the music business in the twenty-first century.

