LICENSED TO ROCK THE CAMPAIGN TRAIL: ARE THE ASCAP AND BMI POLITICAL CAMPAIGN LICENSES VIOLATING THEIR ANTITRUST CONSENT DECREES?

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INTRODUCTION

From the earliest days of our Republic, politicians have relied on music as a tool to evoke certain emotions and communicate to the masses.[1] Songs like "The Favorite New Federal Song" and what became "The Star-Spangled Banner" accompanied George Washington's and John Adams's elections as expressions of patriotism.[2] Since the Founding Fathers, politicians on the campaign trail have continued to tap into music's unique ability to rile up crowds and convey beliefs.[3] However, musicians have often clashed with politicians over whether they authorized the use of their songs.[4] Often, a campaign picks popular songs without contacting the artists, or without ensuring it has obtained the proper license.[5] To the public, the use of a song can imply the artist's endorsement of the candidate, and as such, artists are left to decide whether to call out the candidate publicly in an effort to disassociate from them, or allow the public to think they support the candidate.[6] At stake for the musician are their reputation and the possibility that their song becomes emblematic of a political movement they do not support, altering the meaning of their music.[7]

Though recent disputes between musicians and politicians seem fitting of current political divides, they are not a new phenomenon: Bruce Springsteen objected to Ronald Reagan's use of "Born in the

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1 *See Voices, Votes, Victory: Presidential Campaign Songs*, LIBR. OF CONG., https://www.loc.gov/exhibits/presidential-songs/early-rally-songs.html [https://perma.cc/L9VX-NY5L].

2 *Id.* At the time, songs often helped spread the news about certain new candidates, such as Abraham Lincoln, while also being used as satires to criticize other candidates. *Id.* Lyrics were specific to the candidates and set to preexisting, familiar tunes. *Id.*

3 Today, popular songs with themes and messages in line with candidates' messages are indispensable to setting the mood at campaign events. *See Using Music in Political Campaigns: What You Should Know*, ASCAP, https://www.ascap.com/~/media/files/pdf/advocacy-legislation/political_campaign.pdf [https://perma.cc/SJD5-XAVB].

4 Steve Knopper, *Why Politicians Keep Using Songs Without Artists' Permission: Inside the Recurring Controversy over Campaign Music*, ROLLING STONE (July 9, 2015, 7:13 PM), https://www.rollingstone.com/music/music-news/why-politicians-keep-using-songs-without-artists-permission-36386 [https://perma.cc/4MQN-VH5N].

5 *Id.* It is unclear whether this is a calculated political move, or just ignorance, although the latter is more likely. *Id.*

6 *Id.*

7 Many artists signed a letter to the Democratic and Republican National, Congressional, and Senatorial committees stating, "[W]e ask you to pledge that all candidates you support will seek consent from featured recording artists and songwriters before using their music in campaign and political settings." *Broad Cross-Section of Artists and Songwriters Urge Politicians to Stop Unauthorized Use of Music*, ARTIST RTS. ALL. (July 28, 2020), https://artistrightsnow.medium.com/cross-section-of-artists-and-songwriters-join-artist-rights-alliance-to-urge-politicians-stop-ed9b08ca6609 [https://perma.cc/BY47-UK62].

U.S.A.," Bobby McFerrin objected to George H.W. Bush's use of "Don't Worry, Be Happy," Sting objected to George W. Bush's use of "Brand New Day," and Sam Moore objected to Barack Obama's use of "Hold On, I'm Comin'."[8] Donald Trump received his fair share of cease and desists, and in a relatively recent, notable case, Neil Young sued Donald Trump for copyright infringement after he used his songs "Rockin' in the Free World" and "Devil's Sidewalk" at several rallies since 2015.[9] Young took issue with his music becoming the "theme song" for a campaign he vehemently opposed.[10] However, Young dropped the suit, voluntarily dismissing the case with prejudice and without comment.[11]

Despite attempts to successfully sue under copyright law, right of publicity, or false endorsement, legal redress for musicians remains uncertain.[12] This is because campaigns usually obtain licenses to use millions of songs from performing rights organizations (PROs), like the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI).[13] Both ASCAP and BMI control the performing rights of millions of songs and license their catalogs through either venue-specific licenses or campaign-specific licenses.[14] Under

8 Eveline Chao, *Stop Using My Song: 35 Artists Who Fought Politicians over Their Music: From Springsteen vs. Reagan to Neil Young vs. the Donald*, ROLLING STONE (July 8, 2015, 12:27 PM), https://www.rollingstone.com/politics/politics-lists/stop-using-my-song-35-artists-who-fought-politicians-over-their-music-75611/sam-moore-vs-barack-obama-29825 [https://perma.cc/5L3Z-NLA3]. With social media, artists today have easier access to the public to voice their political stances and directly address the use of their music in campaigns.

9 Ben Sisario, *Can Neil Young Block Trump from Using His Songs? It's Complicated*, N.Y. TIMES (Aug. 12, 2020), https://www.nytimes.com/2020/08/12/arts/music/neil-young-donald-trump-lawsuit.html [https://perma.cc/MW4V-Q2GX].

10 Ben Beaumont-Thomas, *Neil Young Drops Lawsuit Against Donald Trump*, GUARDIAN (Dec. 8, 2020, 5:15 AM), https://www.theguardian.com/music/2020/dec/08/neil-young-drops-lawsuit-against-donald-trump [https://perma.cc/R325-CXCA]. Young's complaint stated that "Plaintiff in good conscience cannot allow his music to be used as a 'theme song' for a divisive, un-American campaign of ignorance and hate." Complaint at 1, Young v. Donald J. Trump for President, Inc., No. 20-cv-06063, 2020 WL 4518246 (S.D.N.Y. Aug. 6, 2020).

11 "With prejudice" means that the suit cannot be brought again; the case may have settled, but there is no confirmation from either party. Beaumont-Thomas, *supra* note 10.

12 For a right of publicity claim, songwriters who are not also the singers will find it difficult to connect their likeness to the works, while also facing the challenge of First Amendment defenses and a lack of precedent. False endorsement claims face similar issues if the songwriter is not the singer and would require the campaigns to repeatedly use a song such that it becomes the "theme song." *See* Taylor L. Condit, Note, *The Need for Songwriters' Control: A Proposal to Prevent Unwanted Uses of Musical Compositions at Political Rallies*, 47 SW. L. REV. 207, 217–26 (2017) (discussing the First Amendment protection of political speech and the ineffectiveness of right of publicity and false endorsement claims).

13 *See* Sisario, *supra* note 9.

14 *See id.*

copyright law, this authorizes political campaigns to use millions of songs, making copyright infringement claims difficult to prevail on.[15]

As a result of legal uncertainties, most musicians have expressed their disapproval to the public in an effort to push politicians to cease and desist from using their songs.[16] Some artists, like the Rolling Stones, are now trying to avoid legal issues altogether by requesting that ASCAP and BMI remove their songs from a special license for political campaigns, so that no politician can have access to their music unless they directly ask for permission.[17] Whether artists can opt out of this political license is questionable because ASCAP and BMI are subject to Department of Justice (DOJ) antitrust consent decrees that govern the terms of their licensing agreements and restrain their power in the music licensing marketplace.[18] The consent decrees prevent artists from partially withdrawing their works from performing rights organizations, meaning they cannot selectively remove their works from a license for a certain category of licensees, while using the PROs to license those same works to other categories of licensees.[19] They must either license all of their works to every license category, or none at all.[20] This arises in the context of new media licenses, as removing works from that category leads to direct licensing with platforms like Pandora and Spotify and higher licensing rates.[21] This same prohibition on partial withdrawal informs the analysis on whether the political licenses, one of the license categories, are in violation of the consent decrees and the judicial decisions surrounding their interpretation.

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15 *Id.* In response to cease and desist letters, some candidates have issued statements defending themselves by stating that they have the appropriate licenses from the PROs granting them access to millions of songs. Emily Parker, *I Can't Get No (Legal Protection): The Unauthorized Use of Music in Political Campaigns*, 8 ARIZ. ST. SPORTS & ENT. L.J. 58, 64 (2019).

16 Musicians have taken to Twitter, issued statements through the media, and sent cease and desists to candidates to clearly indicate their disassociation from them. *See* Devon Ivie, *The Ongoing History of Musicians Saying "Hell No" to Donald Trump Using Their Songs*, VULTURE (Oct. 27, 2020), https://www.vulture.com/article/the-history-of-musicians-rejecting-donald-trump.html (last visited Dec. 2, 2021).

17 *See id.*

18 *See generally* Michelle E. Arnold, Comment, *A Matter of (Anti)trust: The Harry Fox Agency, the Performance Rights Societies, and Antitrust Litigation*, 81 TEMP. L. REV. 1169 (2008) (providing detailed information on the ASCAP and BMI consent decree litigation); Adam Candeub, *Keep the BMI-ASCAP Consent Decrees: Despite New Technology, Their Licensing Duopoly Endures*, FORBES (Jan. 13, 2020, 5:39 PM), https://www.forbes.com/sites/washingtonbytes/2020/01/13/keep-the-bmi-ascap-consent-decrees-despite-new-technology-their-licensing-duopoly-endures/#7513553516a6 [https://perma.cc/W3SQ-ANEP].

19 *See infra* Section I.D.2 (analyzing the language in the consent decrees that relates to partial withdrawals); Brian Penick, *Consent Decree Impact Infographic*, SOUNDSTR (Aug. 2, 2016), https://www.soundstr.com/consent-decree-infographic [https://perma.cc/GT3L-8HKR].

20 *See infra* Section I.D.2.

21 *See infra* Section I.D.2.

This Note proceeds in two Parts and assesses whether ASCAP's and BMI's political licenses, in allowing artists to remove songs, constitute a violation of antitrust law. Part I of this Note begins with a background on the right of public performance in the United States under the Copyright Act and introduces the role of PROs in music licensing and the DOJ consent decrees. Next, Part I provides a background of antitrust law and its relevance in regulating ASCAP and BMI. Part I introduces the specifics of the ASCAP and BMI consent decrees, beginning with a brief history of how they came to be and the relevant cases that continue to affect their interpretation, focusing on the *Pandora* cases. Part I discusses the evolution of consent decrees, how they have changed, and what they now require of ASCAP and BMI, looking closely at the language of their current iterations. Part II assesses whether, given the current interpretation of the consent decrees as explained in Part I, ASCAP's and BMI's political licenses violate the consent decrees and whether they violate larger antitrust principles. Part II argues that, in light of the courts' decisions in the *Pandora* cases, the political licenses do violate the consent decrees, highlighting the conflicts between the political licenses and the consent decrees. Part II also argues that while the political licenses do violate the consent decrees, they are not necessarily contrary to underlying antitrust laws. Part II concludes by discussing the implications of this violation and the next steps the DOJ and artists can take, such as amending the consent decrees or turning to nonlegal recourse. This Note concludes that even if artists are unable to legally withdraw works from the political license, resulting in less control over the use of their works, this could benefit the public good.

I. BACKGROUND

Before assessing the potential antitrust violation by ASCAP and BMI, it is crucial to understand the PROs' role in the music licensing landscape under U.S. copyright law, as well as basic principles of antitrust law.

A. *The Right of Public Performance*

Under the Copyright Act of 1976, as long as an original piece of music is fixed in a tangible medium, a copyright is created.[22] A piece of recorded music often has two sets of rights: the "musical work" and the

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[22] Copyright Act of 1976, 17 U.S.C. § 102(a)(2).

"sound recording."[23] The musical work, created by the songwriter, is the underlying composition including the lyrics, whereas the sound recording is the performance of the musical work fixed into a recording.[24] These can be owned by the same entity or separate entities, and often, the musical composition is owned by a publisher and the sound recording is owned by a record label.[25] The copyright owner in the musical work is entitled to certain exclusive rights for a fixed number of years, one of which is the exclusive right to publicly perform the copyrighted work.[26] The public performance right protects an artist from having their music played in public without their permission and without compensation.[27] Performing rights are implicated each time a song is played on the radio, television, any streaming platform, at a venue, or in a business.[28] Monitoring each time a song is publicly performed via thousands of businesses and venues is burdensome to artists, leading most artists to choose to affiliate themselves with PROs to monitor the use of their works.[29]

When a copyright owner in the musical work affiliates with a PRO, they enter into an agreement that grants the PRO the right to license their performing right and ensure they are paid royalties each time the song is performed in public.[30] To obtain a license to perform a song publicly, a licensee must approach the owner of the copyright in the underlying composition and pay for use or purchase a license from a

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23 *Id.* § 102(a) (enumerating the types of works of authorship protectable, including both "musical works" and "sound recordings"). The copyright in the "musical work" is at issue in this Note.

24 *Id.* § 114(b) (describing sound recordings); Joshua P. Binder, *Current Developments of Public Performance Rights for Sound Recordings Transmitted Online: You Push Play, but Who Gets Paid?*, 22 LOY. L.A. ENT. L. REV. 1, 3–5 (2001) (providing a comparison between musical works and sound recordings).

25 Binder, *supra* note 24, at 27; *Copyright Registration of Musical Compositions and Sound Recordings*, U.S. COPYRIGHT OFF., https://www.copyright.gov/register/pa-sr.html [https://perma.cc/DJ5B-BH7P].

26 17 U.S.C. §§ 106(4), 302(a). Further defining the right to performance, Section 101 of the Copyright Act states that to perform a work "publicly" means to perform, display, or transmit it "by means of any device or process" in a "place open to the public" or "where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered." *Id.* § 101.

27 Granting a performing right provided incentive for artists to continue to create music. *See What Is a Public Performance of Music and What Is the "Performing Right"?*, BMI, https://www.bmi.com/faq/entry/what_is_a_public_performance_of_music_and_what_is_the_performing_right1 [https://perma.cc/9KUU-MUYG]; Parker, *supra* note 15, at 64–65.

28 Parker, *supra* note 15, at 65.

29 *Id.*

30 17 U.S.C. § 101 (defining performing rights societies). PROs monitor establishments, broadcasts, and the internet for unauthorized use of their affiliates' songs, enforcing their rights by sending cease and desists and ensuring payment is made. Parker, *supra* note 15, at 65.

PRO.[31] Since issuing thousands of licenses to individual users would result in cumbersome administrative work, PROs act as intermediaries to streamline this process.[32]

B. *The Role of Performing Rights Organizations*

In the early twentieth century, the American Society of Composers, Authors and Publishers and Broadcast Music, Inc. were founded as nonprofits to address the volume of administrative work in music licensing and act as intermediaries between copyright owners and music users.[33] ASCAP's and BMI's "primary function is to pool the copyrights held by their composer, songwriter, and publisher members or affiliates and collectively license public performance rights to music users such as radio and television stations, streaming services, concert venues, bars, restaurants, and retail establishments."[34] Songwriters, publishers, or whoever owns the underlying musical work become members with either or both PROs, which then issue blanket licenses to businesses and send the money paid for the licenses to their members as royalties.[35] Most music users, as ASCAP and BMI call them, opt for blanket licenses, paying a fee in exchange for the right to play any music by ASCAP's or BMI's members.[36] There are different licensing

31 Sarah Schacter, Note, *The Barracuda Lacuna: Music, Political Campaigns, and the First Amendment*, 99 GEO. L.J. 571, 576 (2011). Since most songs are covered by either ASCAP or BMI, most licensees purchase the licenses through the PROs by simply going on their websites and purchasing the license according to the type of business they operate and paying a fee calculated based on the details of the use of the music. *See ASCAP Licensing: Frequently Asked Questions*, ASCAP, https://www.ascap.com/help/ascap-licensing [https://perma.cc/24Z4-B7BM].

32 *See* DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 241 (9th ed. 2015) (detailing the role of performing rights organizations as intermediaries).

33 *See id.*

34 Press Release, U.S. Dep't of Just., Department of Justice Opens Review of ASCAP and BMI Consent Decrees (June 5, 2019), https://www.justice.gov/opa/pr/department-justice-opens-review-ascap-and-bmi-consent-decrees [https://perma.cc/2TZZ-2UXL].

35 *About Us*, ASCAP, https://www.ascap.com/about-us [https://perma.cc/P6U9-VW7W]; *Our Role*, BMI, https://www.bmi.com/about/#ourrole [https://perma.cc/85Y9-5DQM]. Royalties are calculated using a specific formula, and ASCAP distributes about ninety cents of every dollar as royalties, keeping the rest for operating expenses. *ASCAP Payment System*, ASCAP, https://www.ascap.com/help/royalties-and-payment/payment [https://perma.cc/Z3MJ-B3DQ]. BMI also operates as a nonprofit, retaining a "modest reserve" of income for operations. *How We Pay Royalties*, BMI, https://www.bmi.com/creators/royalty/general_information [https://perma.cc/FFY7-AGNJ].

36 For example, a restaurant or music venue would obtain a license, generally from both ASCAP and BMI, to legally play millions of songs. *ASCAP Payment System*, *supra* note 35; *Why ASCAP Licenses Bars, Restaurants & Music Venues*, ASCAP, https://www.ascap.com/help/ascap-licensing/why-ascap-licenses-bars-restaurants-music-venues [https://perma.cc/DUC3-GWYH]; *Our Role*, *supra* note 35.

agreements depending on the music user, categorized by business type like retail, fitness, church, local government entity, or political campaign.[37] Together, ASCAP and BMI license about ninety percent of music in the United States and each has annual revenues of over one billion dollars.[38]

From ASCAP's creation in 1914, followed by BMI's in the 1930s, both PROs grew to become the largest PROs in the United States.[39] By 1940, ASCAP and BMI controlled a wide margin of the performing rights market.[40] Both PROs originally offered blanket licenses and retained the exclusive rights to their members' public performance rights, preventing members from entering into direct licensing agreements.[41] Though other PROs were created in the United States throughout the twentieth century, such as the Society of European Stage Authors and Composers (SESAC) and Global Music Rights (GMR), ASCAP and BMI continued to dominate the market.[42] As a result of ASCAP's and BMI's control of the music licensing market, concerns grew over anticompetitive behavior.[43] The DOJ began antitrust proceedings against both PROs, resulting in consent decrees that have endured until now.[44]

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37 *See Music Users*, BMI, https://www.bmi.com/licensing [https://perma.cc/2FZ6-WZ9J]; *ASCAP Music License Agreements and Reporting Forms*, ASCAP, https://www.ascap.com/music-users/licensefinder [https://perma.cc/2CPQ-HUCJ].

38 *U.S. Justice Department to Review 1941 ASCAP, BMI Consent Decrees*, REUTERS (June 5, 2019, 3:25 PM), https://www.reuters.com/article/us-usa-antitrust-ascap-bmi/us-justice-department-to-review-1941-ascap-bmi-consent-decrees-idUSKCN1T62GP [https://perma.cc/R6BT-B69R]; *BMI Sets Revenue Records with $1.283 Billion*, BMI (Sept. 9, 2019), https://www.bmi.com/news/entry/bmi-sets-revenue-records-with-1.283-billion [https://perma.cc/B3SJ-HAXC]; *ASCAP Reports Record-Breaking 2019 Revenues and Distributions*, ASCAP (May 1, 2020), https://www.ascap.com/press/2020/05/05-01-financials-release [https://perma.cc/6HTV-8EJL].

39 Brontë Lawson Turk, Note, *"It's Been a Hard Day's Night" for Songwriters: Why the ASCAP and BMI Consent Decrees Must Undergo Reform*, 26 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 493, 507–08 (2016).

40 Paul H. Sukenik, *The Earth Belongs to the Living, or at Least It Should: The Troubling Difficulty of Modifying Antitrust Consent Decrees*, 97 N.C. L. REV. 734, 735 (2019).

41 Turk, *supra* note 39, at 508.

42 SESAC was created after ASCAP and before BMI, but its small size did not offer substantial competition. *Id.*; *see also* Sukenik, *supra* note 40, at 735. SESAC is invitation-only and has 30,000 members, GMR has a repertoire of around 63,000 songs, and both are for-profit and not subject to consent decrees. *See* SESAC, https://www.sesac.com [https://perma.cc/33Q3-MJLP]; *Licensing*, GLOB. MUSIC RTS., https://globalmusicrights.com/Licensing [https://perma.cc/3BX8-YKGX].

43 Sukenik, *supra* note 40, at 735.

44 Turk, *supra* note 39, at 508–10; *see infra* Part II (discussing details of the consent decrees).

C. *Antitrust Background*

To understand why the political licenses violate the ASCAP and BMI consent decrees and whether they further violate antitrust laws, it is necessary to understand the basic purpose of antitrust law. The primary goal of antitrust law is to protect and promote competitive markets, resulting in benefits to consumers.[45] Antitrust laws impose liability on certain commercial conduct that interferes with this goal.[46] In the context of the ASCAP and BMI duopoly, the relevant conduct is proscribed under Sections 1 and 2 of the Sherman Act.[47] Unlawful restraints of trade are prohibited under Section 1, which states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[48] Monopolization offenses are prohibited under Section 2, but having a monopoly is not itself unlawful unless there is an element of anticompetitive conduct.[49]

One way in which antitrust laws promote competition is by making collusion among competitors to inflate prices illegal.[50] Price fixing is a form of collusion that is subject to criminal prosecution by the DOJ.[51] An example of a price-fixing agreement is one that adopts a standard formula for computing prices, just as the ASCAP and BMI blanket licenses do.[52] Though it seems that the blanket licenses violate

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45 Modern antitrust law is mostly concerned only with certain cardinal offenses against competition—the so-called per se violations, such as price-fixing and market allocation by direct competitors—as well as anticompetitive practices used by one or more firms to restrain or monopolize an entire line of commerce. William Markham, *An Overview of Antitrust Law: The Principal Antitrust Offenses*, L. OFFS. WILLIAM MARKHAM, P.C. (2021), https://www.markhamlawfirm.com/law-articles/overview-of-antitrust-law [https://perma.cc/S5R4-S6E9].

46 *Id.*

47 *See* Sherman Act, 15 U.S.C. §§ 1–2.

48 *Id.* § 1.

49 *Id.* § 2 ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ."); U.S. DEP'T OF JUST., CHAPTER 1: SINGLE-FIRM CONDUCT AND SECTION 2 OF THE SHERMAN ACT: AN OVERVIEW 5 (2008), https://www.justice.gov/sites/default/files/atr/legacy/2008/09/12/236681_chapter1.pdf [https://perma.cc/2VHS-35TU].

50 U.S. DEP'T OF JUST., PRICE FIXING, BID RIGGING, AND MARKET ALLOCATION SCHEMES: WHAT THEY ARE AND WHAT TO LOOK FOR 1–2 (2021), https://www.justice.gov/atr/file/810261/download [https://perma.cc/3YKE-QER4].

51 *Id.* at 1.

52 *See* ANDREW I. GAVIL, THE CONTINUING PROCOMPETITIVE VALUE OF THE ASCAP AND BMI CONSENT DECREES AND THE NECESSITY FOR CONGRESSIONALLY COORDINATED EFFORTS AT ANY MUSIC LICENSING REFORM 5–7 (2018), https://mic-coalition.org/cms/assets/uploads/2018/12/DOJ-Gavil-White-Paper-Final-10-14-18-1.pdf [https://perma.cc/HDL6-DXZ7].

the Sherman Act, courts have held that they are not per se unlawful restraints of trade.[53] The Supreme Court and Second Circuit carved out an exception for blanket licenses because they were the most efficient solution for licensing and because ASCAP and BMI offered an alternative license, the per-program license, giving consumers the choice to choose another kind of license.[54] The per-program license is usually obtained by radio stations or television networks and provides access to all of the works in the PRO's repertory, but allows the licensee to pay based on how much of the work they use, resulting in a more proportionate fee structure.[55] The consent decrees operate as rules of engagement for ASCAP and BMI to regulate their market power and restrain the potential anticompetitive effect of offering a blanket license.[56] The antitrust concern, with respect to partial withdrawals, is that a rights owner could pick and choose to withdraw rights from certain categories because they could get higher fees from those licensees at market price, while still benefitting from the PROs' rights administration system for other categories of licensees.[57] This would result in a distortion of market prices.[58] The PROs could potentially collude with withdrawing members by allowing them to withdraw and obtain higher licensing rates, which would then be used as benchmarks when PROs negotiated their licenses.[59] These concerns are at the crux of the debate surrounding partial withdrawal and inform this Note's analysis of whether removing works from the political licenses has anticompetitive effects. This will be elaborated on in the following Sections.

53 *Id.* at 6–7; Turk, *supra* note 39, at 511 ("The Supreme Court reversed again, however, agreeing with the district court that blanket licenses were a practical solution to an incredibly complex marketplace where thousands of copyright holders and millions of compositions must be efficiently licensed.").

54 Turk, *supra* note 39, at 511.

55 *Common Licensing Terms Defined*, ASCAP, https://www.ascap.com/help/ascap-licensing/licensing-terms-defined [https://perma.cc/9WTN-HZSM]; *Music Copyright Basics*, NRBMLC [https://perma.cc/NA73-WZ5S].

56 GAVIL, *supra* note 52, at 2.

57 MIC COALITION, PUBLIC COMMENTS OF THE MIC COALITION SUBMITTED IN RESPONSE TO THE U.S. DEPARTMENT OF JUSTICE'S REQUEST FOR COMMENT ON THE FUTURE OF THE ASCAP AND BMI CONSENT DECREES 4 (2019), https://media.justice.gov/vod/atr/ascapbmi2019/pc-507.pdf [https://perma.cc/8A7E-KK3B].

58 *Id.*

59 *See infra* Section II.A.3 (discussing the potential antitrust violation in allowing partial withdrawals from the political licenses).

D. *The ASCAP and BMI Consent Decrees Past and Present*

ASCAP and BMI have been subject to antitrust consent decrees since 1941, and they were most recently reviewed in 2016 and 2021.[60]

1. The Consent Decrees Through the Years

In 1941, the DOJ initiated antitrust proceedings against ASCAP and BMI.[61] The complaint alleged that ASCAP's and BMI's blanket license eliminated competition against members of the PROs by allowing them to fix prices, resulting in an illegal restraint of trade under Section 1 of the Sherman Act.[62] The government's antitrust concerns stemmed from a fear that ASCAP and BMI would become a monopoly and that pooling compositions with an all-or-nothing use would allow performing rights organizations to charge arbitrary prices.[63] For example, since both ASCAP and BMI form a duopoly, licensing the vast majority of songs in the United States, a venue has no real choice but to pay the PROs for a license, giving the PROs vast market power and the ability to drive up prices. The government also feared the possibility of ASCAP and BMI colluding to offer the same prices, which would remove any meaningful competition from the marketplace.[64] The objective of the lawsuit was to enjoin blanket licensing so that the PROs would create less monopolistic licensing schemes.[65] Ultimately, however, the government dismissed its charges against ASCAP and BMI, settling with the first iteration of the consent decrees at issue.[66] The consent decrees are non-sunset provisions;[67] they

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60 Candeub, *supra* note 18.

61 *See* United States v. Am. Soc'y of Composers, Authors & Publishers, No. 13-95, 1941 U.S. Dist. LEXIS 3944 (S.D.N.Y. Mar. 4, 1941). "In separate complaints in 1941, the United States charged that the blanket license, which was then the only license offered by ASCAP and BMI, was an illegal restraint of trade and that arbitrary prices were being charged as the result of an illegal copyright pool." Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 10 (1979).

62 Turk, *supra* note 39, at 508–09.

63 "The government's objectives were to enjoin blanket licensing and require the organizations to institute new, less monopolistic forms of licensing." Mary Katherine Kennedy, Recent Development, *Blanket Licensing of Music Performing Rights: Possible Solutions to the Copyright-Antitrust Conflict*, 37 VAND. L. REV. 183, 189 (1984).

64 Sukenik, *supra* note 40, at 735.

65 Kennedy, *supra* note 63, at 189.

66 *Id.*

67 Turk, *supra* note 39, at 509.

are legally binding on the PROs, acting as government regulations on performing rights licensing.[68]

The ASCAP consent decree allowed ASCAP to continue blanket licensing but required the introduction of an alternative license, the per-program license.[69] The original consent decree prevented ASCAP from artificially inflating its license's price by withholding parts of its repertory from licensees.[70] The consent decree limited ASCAP's ability to exert too much control over the music licensing market, given that it licensed the majority of available music and used blanket licenses to obtain noncompetitive prices.[71] The decree further required ASCAP to grant memberships to all those who were interested in joining the society and prevented discrimination against similarly situated licensees.[72]

After the 1941 consent decree went into effect, a series of litigation throughout the 1940s led to an amendment in 1950.[73] The 1950 amended decree established rate court judicial proceedings entered into by ASCAP and its licensees if they could not agree on a reasonable rate.[74] It also required ASCAP to provide its users with real economic choice when setting its blanket license and per-program fees.[75] Finally, the amendment required ASCAP to acquire public performance rights on a nonexclusive basis, so that music users could obtain licenses directly from composition owners.[76] The 1950 consent decree still

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68 Sukenik, *supra* note 40, at 736. A consent decree is a legal agreement between two parties in litigation. *Id.* at 741. The decree is entered into as a judgment that settles a lawsuit on terms mutually agreed upon by all litigants. *Id.* In the antitrust context, the consent decree settles an antitrust action that has been brought against the defendant, typically by the DOJ. *Id.*

69 Kennedy, *supra* note 63, at 189.

70 *Id.*

71 United States v. Am. Soc'y of Composers, Authors & Publishers, 157 F.R.D. 173, 177 (S.D.N.Y. 1994).

72 Arnold, *supra* note 18, at 1179. In sum, the 1941 consent decree required ASCAP to: (1) offer per-program licenses, (2) grant membership to any interested artist who had composed at least one musical work, and (3) enter into license agreements with broadcasters. Turk, *supra* note 39, at 509.

73 Kennedy, *supra* note 63, at 189. The amendment was a response to the 1948 case *Alden-Rochelle, Inc. v. American Society of Composers, Authors and Publishers*, 80 F. Supp. 888, 890, 894 (S.D.N.Y. 1948), in which movie theaters sued ASCAP for restraint of trade and monopolistic conduct. ASCAP had entered into agreements with its members preventing them from licensing directly to movie theaters. *Id.* at 891–92. As a result, movie theaters were forced to pay ASCAP to get a license to play music in their theaters, giving ASCAP the power to raise prices. *Id.* The court held that this violated Section 2 of the Sherman Act. *Id.* at 893–94.

74 Turk, *supra* note 39, at 510.

75 Kennedy, *supra* note 63, at 189–90.

76 Arnold, *supra* note 18, at 1180–81.

controls much of ASCAP's present regulation.[77] BMI entered into its consent decree in 1966, with similar terms.[78]

Since the 1950 amended decree, ASCAP and BMI have continued to face antitrust challenges in court. Notably, *CBS v. ASCAP* in 1975 challenged blanket licensing, which was ultimately upheld by the Supreme Court on the grounds that it was the most efficient licensing option and not anticompetitive because, under the consent decree, there existed an alternative license option, the per-program license.[79] Although blanket licensing was allowed, because it is an inherently anticompetitive method of licensing, it is still central to the debate surrounding the modification of the consent decrees, and many supporters of the decrees see them as necessary checks to the blanket license's potential for anticompetitive effects.[80]

The BMI consent decree was last amended in 1994, and the ASCAP consent decree was amended in 2001.[81] As a result of litigation between BMI and its users, BMI's consent decree was modified to establish a rate court comparable to ASCAP's.[82] This version of ASCAP's consent decree, known as the Second Amended Final Judgment (AFJ2), was modified to include four types of licenses it would offer: per-program licenses, per-segment licenses, blanket licenses, and through-to-the-audience licenses.[83] The AFJ2 further details the rate court and contains provisions that prohibit discriminating between similarly situated licensees and denying licenses to anyone requesting one.[84] These modifications were made prior to the digital music era, and as such,

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77 Kennedy, *supra* note 63, at 189.

78 Turk, *supra* note 39, at 510.

79 *Id.* at 511. *See generally* E. Scott Johnson, *Considering the Source-Licensing Threat to Performing Rights in Music Copyrights*, 6 U. MIA. ENT. & SPORTS L. REV. 1 (1989) (providing background information on PROs and antitrust challenges to blanket licenses).

80 *See infra* Section II.A.4 (discussing various industry stakeholders' comments on the most recent revision of the consent decrees and outlining the debate on whether or not consent decrees should be amended or terminated).

81 *Antitrust Consent Decree Review—ASCAP and BMI 2019*, U.S. DEP'T JUST. (Jan. 15, 2021), https://www.justice.gov/atr/antitrust-consent-decree-review-ascap-and-bmi-2019 [https://perma.cc/Z5BM-VLD5].

82 Response of the United States to Public Comments on the Motion of Broadcast Music Inc. to Modify Its 1966 Final Judgment, United States v. Broad. Music, Inc., No. 64 Civ. 3787, 1994 WL 16189516 (S.D.N.Y. Nov. 14, 1994).

83 Second Amended Final Judgment §§ II(E), II(J), II(K), II(S), United States v. Am. Soc'y of Composers, Authors & Publishers, No. 41-1395 (S.D.N.Y. June 11, 2001) [hereinafter *AFJ2*].

84 *See id.* §§ VI, VIII(A), IX.

have necessitated review since then. The latest review was concluded on January 15, 2021.[85]

2. The Consent Decrees Today

With the rise of new digital media and legal disputes involving licensing to streaming services, the consent decrees were again revisited. In 2011, online radio service Pandora and ASCAP entered into an agreement for a five-year blanket license.[86] Around the same time, ASCAP members, like major publishing companies EMI, Sony/ATV, Warner, Universal, and BMG, withdrew or threatened to withdraw from ASCAP's license to new media services.[87] The members were concerned that ASCAP's licensing rates for new media services, including Pandora, were below-market rates, preferring instead to license with the services directly in order to secure higher rates.[88] Though the members wanted to bypass PROs with respect to new media licenses, they wanted to use ASCAP to license their works to traditional music users, like venues, broadcast radio, and businesses.[89] In order to quell its members' threats, ASCAP modified its rules and allowed them to withdraw.[90] As a result, the major publishers began to negotiate direct licenses with Pandora.[91]

This was short-lived because, in 2012, Pandora brought suit in the rate court to determine reasonable fees for the blanket license after a year of failed negotiations with ASCAP and addressed the issue of partial withdrawal.[92] In 2013, Pandora moved for summary judgment on the matter of partial withdrawal, arguing that the consent decrees

85 Ed Christman, *DOJ Ends Consent Decree Review Without Action*, BILLBOARD (Jan. 15, 2021), https://www.billboard.com/articles/business/publishing/9512236/doj-consent-decree-review-ends-no-action [https://perma.cc/LHN6-GKZW].

86 *See In re* Pandora Media, Inc., Nos. 12 Civ. 8035, 41 Civ. 1395, 2013 WL 5211927, at *1 (S.D.N.Y. Sept. 17, 2013); *see also* Eriq Gardner, *Judge Allows Pandora to Maintain License to ASCAP's Repertory*, HOLLYWOOD REP. (Sept. 18, 2013, 8:17 AM), https://www.hollywoodreporter.com/thr-esq/judge-allows-pandora-maintain-license-631671 [https://perma.cc/E9UU-MNPQ].

87 *In re Pandora Media, Inc.*, 2013 WL 5211927, at *3.

88 Pandora Media, Inc. v. Am. Soc'y of Composers, Authors & Publishers, 785 F.3d 73, 76 (2d Cir. 2015).

89 *Id.*

90 *Id.*

91 *Id.*

92 *In re Pandora Media, Inc.*, 2013 WL 5211927, at *2; Chris Welch, *Pandora Sues ASCAP over Songwriter Fees, Asks Court to Establish "Reasonable" Licensing*, VERGE (Nov. 5, 2012, 6:30 PM), https://www.theverge.com/2012/11/5/3606252/pandora-ascap-lawsuit-licensing-fees [https://perma.cc/8UVB-VSFJ].

require ASCAP to license all works in the repertory, preventing the publishers from withdrawing works from new media licenses.[93] The judge granted Pandora's motion for summary judgment, interpreting the language of the consent decree to unambiguously require ASCAP to offer Pandora a license that includes all of the works in its repertory.[94] The judge did not give much weight to ASCAP's claim that it could no longer license the works of withdrawing publishers to new media users.[95] Instead, the judge reasoned that, as long as ASCAP retained their works in its repertory to license to other classes of users, this meant that ASCAP was problematically not licensing *all* of its works to Pandora.[96]

At issue in the dispute was the interpretation of a few provisions in the consent decree, including Section IV(C), prohibiting "[e]ntering into . . . any license . . . which discriminates in license fees . . . between licensees similarly situated" and Sections VI and IX(E), requiring ASCAP to "grant to any music user . . . a non-exclusive license to perform all of the works in the ASCAP repertory."[97] The parties disagreed on the interpretation of "works in the ASCAP repertory," but the judge sided with Pandora, defining the phrase in terms of works and compositions and not individual rights in compositions with respect to classes of potential licensees, as ASCAP argued.[98] The Second Circuit affirmed, holding that ASCAP offers the licensing of works to publishers on a take-it-or-leave-it basis; publishers can either license all their works across all license categories, or not license any works

93 *In re Pandora Media, Inc.*, 2013 WL 5211927, at *1 (summarizing Pandora's argument that "the antitrust consent decree under which ASCAP operates requires ASCAP to license Pandora to perform for five years all of the works in the ASCAP repertory as of January 1, 2011, even though certain music publishers beginning in January 2013 have purported to withdraw from ASCAP the right to license their compositions to 'New Media' services such as Pandora").

94 *Id.*

95 *See id.*

96 *Id.*

97 *AFJ2*, *supra* note 83, at *3–4.

98 *In re Pandora Media, Inc.*, 2013 WL 5211927, at *5. Central to ASCAP's argument was the contention that *AFJ2* does not "unambiguously" prohibit ASCAP from accepting partial grants of rights, and if the consent decree does not unambiguously prohibit conduct, the district court cannot rewrite the decree. Brief of Respondent-Appellant at 31–33, Pandora Media, Inc. v. Am. Soc'y of Composers, Authors & Publishers, 785 F.3d 73 (2d Cir. 2015) (Nos. 14-1158, 14-1161, 14-1246), 2014 WL 3887402. ASCAP also offered a competing interpretation of the definition of the "ASCAP repertory" at issue to mean "only those rights that ASCAP's members have granted ASCAP the right to license" and that under the copyright law, no one could force copyright owners to license their works. *Id.* at 35. ASCAP also made an argument that this interpretation of *AFJ2* conflicted with the Copyright Act's grant of divisible rights, as this outcome would divest the withdrawing publishers of their right to limit the divisible rights they granted to ASCAP and retain the rights they did not authorize to ASCAP, making them indivisible rights counter to the Copyright Act. *Id.* at 38–39.

through the PRO, but they cannot selectively withdraw the right to license works for a particular category, like the new media license, and not others.[99]

Around the same time, BMI faced the same issue with Pandora. The parties entered into similar proceedings, and the Southern District of New York also found that publishers could not partially withdraw from their BMI licenses.[100] Like ASCAP, in 2013 BMI allowed its members to opt for Digital Rights Withdrawal to prevent licensing to new media applicants.[101] The court held that BMI's consent decree required it to offer all compositions in the BMI repertory to all of its applicants.[102] Furthermore, the court's ruling differed from ASCAP's in its characterization of the restriction, interpreting it as an "all-out" rule, rather than an "all-in" rule.[103] This meant that if BMI's members refused to license certain works to certain users, like Pandora or other New Media entities, those works were automatically excluded from BMI's repertory.[104] Notably, the court held that the language in the consent decree cannot be interpreted to allow a player such as BMI, with its vast

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99 Pandora Media, Inc. v. Am. Soc'y. of Composers, Authors & Publishers, 785 F.3d 73, 77 (2d Cir. 2015) ("We agree with the district court's determination that the plain language of the consent decree unambiguously precludes ASCAP from accepting such partial withdrawals. The decree's definition of 'ASCAP repertory' and other provisions of the decree establish that ASCAP has essentially equivalent rights across *all* of the works licensed to it. . . . As ASCAP is required to license its entire repertory to all eligible users, publishers may not license works to ASCAP for licensing to some eligible users but not others.").

100 Broad. Music, Inc. v. Pandora Media, Inc., Nos. 13 Civ. 4037, 64 Civ. 3787, 2013 WL 6697788, at *1 (S.D.N.Y. Dec. 19, 2013).

101 *Id.* at *2.

102 *Id.* at *3–4. First, BMI argued that it could only grant the rights it had received from copyright holders and that under copyright law, BMI could not force its affiliates to license works they did not expressly grant it. BMI argued that it was prohibited by Section IV(A) of the decree from interfering with its members' direct licensing, precluding free market licensing. As such, compelling BMI to license all of a rightsholder's works to any user, despite the rightsholder explicitly withdrawing the works so they could license them directly, could result in an inadvertent impingement on the rights granted to rightsholders in Section IV(A) of the decree. BMI's Memorandum of L. in Opposition to Pandora's Motion for Partial Summary Judgment at 13–14, Broad. Music, Inc. v. Pandora Media, Inc., No. 13 Civ. 4037, 2013 WL 7021820 (S.D.N.Y. Dec. 6, 2013).

103 *See Broad. Music, Inc.*, 2013 WL 6697788, at *3–4.

104 *Id.* With regard to the blanket license, the PRO had always interpreted the license to include only the specific works it was authorized to license to that specific user. BMI emphasized that in contrast to ASCAP, BMI's limitations on licensing certain rights had always been imposed by its agreements with members, rather than its consent decree. BMI's Memorandum of L. in Opposition to Pandora's Motion for Partial Summary Judgment, *supra* note 102, at 7.

control over the market, to decide when it wants to discriminate against potential licensees.[105]

In 2014, following the *Pandora* cases, ASCAP and BMI advocated for another modification of the consent decrees that would allow for partial withdrawal, among other changes.[106] The DOJ opened a period of review that lasted two years.[107] In 2016, the DOJ announced there would be no modifications to the consent decree.[108] Though the DOJ received many comments on partial withdrawal, the central focus of the decision was the debate between full work and fractional licensing, and the biggest change to the interpretation of the consent decree was in requiring full-work licensing.[109] The DOJ came to its decision not to act on partial withdrawal because there was not enough information on the competitive effects of partial withdrawal to determine if it would be in the public interest, and the uncertainty and changes regarding full and fractional licensing would render any other changes too disruptive to the industry.[110] That the DOJ specifically asked for comments on whether partial withdrawal should be permitted during its period of review, coupled with its decision not to modify the decrees, clearly

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105 *Broad. Music, Inc.*, 2013 WL 6697788, at *5 ("Nothing in the Consent Decree settling this antitrust case can be read to allow one with BMI's market power to refuse to deal with certain of its applicants."). BMI argued that the BMI decree did not expressly prohibit limited grants, and as such, the court could not impose a prohibition that did not exist in the decree. Like ASCAP, BMI contended that the parties to the consent decrees would have added an express provision prohibiting limited grants given it had been an ongoing practice for many decades. BMI's Memorandum of L. in Opposition to Pandora's Motion for Partial Summary Judgment, *supra* note 102, at 15.

106 *Antitrust Consent Decree Review—ASCAP and BMI 2014*, U.S. DEP'T JUST. (Dec. 16, 2015), https://www.justice.gov/atr/ascap-bmi-decree-review [https://perma.cc/FF2F-7PTL].

107 *See Antitrust Consent Decree Review—ASCAP and BMI 2015*, U.S. DEP'T JUST. (Aug. 4, 2016), https://www.justice.gov/atr/antitrust-consent-decree-review-ascap-and-bmi-2015 [https://perma.cc/F4RZ-2KCJ].

108 U.S. DEP'T OF JUST., STATEMENT OF THE DEPARTMENT OF JUSTICE ON THE CLOSING OF THE ANTITRUST DIVISION'S REVIEW OF THE ASCAP AND BMI CONSENT DECREES 3 (2016) [hereinafter STATEMENT OF THE DEPARTMENT OF JUSTICE], https://www.justice.gov/atr/file/882101/download [https://perma.cc/ZM6U-4H85]; *ASCAP-BMI Consent Decrees*, FUTURE MUSIC COAL. (Aug. 4, 2016), http://futureofmusic.org/article/fact-sheet/ascap-bmi-consent-decrees [https://perma.cc/HJU2-TXZT].

109 STATEMENT OF THE DEPARTMENT OF JUSTICE, *supra* note 108, at 16. Another outcome was that full-work licensing, rather than fractional licensing, would require any entity that controls part of a composition to offer a license for the whole composition without permission from the other songwriters. Sukenik, *supra* note 40, at 761. The songwriter would then pay the other songwriters their share. Penick, *supra* note 19. Following the 2016 reinterpretation, BMI challenged the full-work licensing requirement. The district court held that the "consent decree requires neither fractional nor full-work licensing, so either form of licensing would be permissible." Sukenik, *supra* note 40, at 738–39.

110 STATEMENT OF THE DEPARTMENT OF JUSTICE, *supra* note 108, at 4.

confirms that partial withdrawal is not allowed under the consent decrees.[111]

The most recent revision of the consent decrees began in 2019 and ended in January 2021, during which ASCAP, BMI, and other music industry players again advocated for modification or even termination of the consent decrees.[112] After the DOJ held a public workshop of hearings and received public comments from a range of participants in the music licensing ecosystem, it decided to make no changes to the consent decrees.[113] Again, the DOJ offered little detail on partial withdrawal, but in doing so, affirmed that it continues to be prohibited.[114] The remarks briefly addressed partial withdrawal, pointing to the 2013 *Pandora* decisions that prohibited it, and stated that overruling the decisions would require a modification of the consent decrees or an act of Congress.[115] Given the *Pandora* decisions and lack of action from the DOJ, partial withdrawal is currently prohibited.

II. Analysis

A. *The Political Campaign License—A Violation of the Consent Decrees?*

Given the current state of the ASCAP and BMI consent decrees, the *Pandora* cases, and the decisions from the DOJ in 2016 and in 2021, the political licenses from both PROs are in violation of the consent decrees.

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111 *ASCAP and BMI Consent Decree Review Request for Public Comments 2015*, U.S. DEP'T OF JUST. (Aug. 4, 2016), https://www.justice.gov/atr/ascap-and-bmi-consent-decree-review-request-public-comments-2015 [https://perma.cc/DWC4-NXGK] ("If ASCAP and BMI were to offer licenses that do not entitle users to play partially owned works, how (if at all) would the public interest be served by modifying the Consent Decrees to permit ASCAP and BMI to accept partial grants of rights from music publishers under which the PROs can license a publisher's rights to some users but not to others?").

112 Christman, *supra* note 85.

113 *Id.*; Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Just., Remarks at the Vanderbilt University Law School Virtual Event "And the Beat Goes On": The Future of ASCAP/BMI Consent Decrees (Jan. 15, 2021), https://www.justice.gov/opa/speech/remarks-assistant-attorney-general-makan-delrahim-future-ascap-and-bmi-consent-decrees [https://perma.cc/7BYY-TMLE].

114 STATEMENT OF THE DEPARTMENT OF JUSTICE, *supra* note 108, at 16–17.

115 *See* Delrahim, *supra* note 113.

1. The Political Entity License

ASCAP and BMI each have their own versions of a political license that allows members to withdraw songs from the license if they object to the intended use by the candidate.[116] The members must notify the PROs of the works they seek to withdraw, and the PROs must notify the campaigns.[117] The licenses were created to ensure campaigns properly license songs used on the campaign trail, given that venues either do not obtain PRO licenses or their licenses do not include campaign activities.[118] As the stops on the campaign trail vary and have different licensing needs, whether a convention center, a warehouse, or outside, the political license allows campaigns to streamline the process of ensuring they have proper authorization to play music.[119] As ASCAP explains, the licenses clarify a campaign's legal obligations, especially in light of the disputes between artists and candidates and unwanted publicity.[120] Notably, campaigns must be aware of the fact that some large venues like arenas or hotels may have PRO licenses that do not encompass third-party events, including campaign events, requiring the campaigns to be responsible for obtaining the rights.[121]

BMI created the Political Entities or Organizations License ten years ago in an effort to bring campaigns into compliance with copyright law.[122] The license explicitly allows members to remove works from the license, stating that "a specific work may be excluded from this license if notice is received from a BMI songwriter or publisher objecting to the use of their copyrighted work for the intended uses by [licensee]."[123] It also states that a campaign cannot rely on a venue

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116 Licensing Agreement, BMI, Music License for Political Entities or Organizations 1 [hereinafter BMI Political License], https://www.rstreet.org/wp-content/uploads/2016/08/Political-Entities-Org_POL1.2016_1.pdf [https://perma.cc/56VW-TDX9]; ASCAP, USING MUSIC IN POLITICAL CAMPAIGNS: WHAT YOU SHOULD KNOW [hereinafter ASCAP POLITICAL LICENSE], https://www.ascap.com/~/media/files/pdf/advocacy-legislation/political_campaign.pdf [https://perma.cc/6HP8-HZ2J].

117 ASCAP POLITICAL LICENSE, *supra* note 116; BMI Political License, *supra* note 116, at 1.

118 ASCAP POLITICAL LICENSE, *supra* note 116.

119 *Id.* ("Having such licenses in place would guarantee that, no matter where you have a campaign stop, the performances of music at the events would be in compliance with copyright law.").

120 *Id.*

121 *Id.*

122 *Rolling Stones Working with BMI to Stop Trump's Use of "You Can't Always Get What You Want" at Rallies*, REUTERS (June 28, 2020, 9:22 AM) [hereinafter *Rolling Stones Working with BMI*], https://www.reuters.com/article/us-rolling-stones-trump/rolling-stones-working-with-bmi-to-stop-trumps-use-of-you-cant-always-get-what-you-want-at-rallies-idUSKBN23Z0GQ [https://perma.cc/33R6-3TEE].

123 BMI Political License, *supra* note 116, at 1.

license to authorize its performance of an excluded work.[124] In the case of the Rolling Stones and Donald Trump, BMI has claimed that the Trump campaign has a political entities license but, pursuant to the agreement, the campaign was notified that the Stones requested its works be removed from the license, and any future use of the song would result in a breach of the agreement.[125] Additionally, if an artist sends a cease and desist letter to a political candidate, any future use is a breach of the candidate's contract with the PRO.[126]

ASCAP's license, called the ASCAP Political Campaign License, similarly provides for the removal of songs upon the member's request.[127] ASCAP's license extends only for the duration of the campaign, until the candidate is sworn into office.[128] Additionally, ASCAP informs its members and users that, despite having proper authorization from the political license to use certain songs, a campaign still faces the possibility of disputes with artists who take issue with the candidate's use of the song.[129] Artists can publicly criticize the candidate or sue them under noncopyright infringement causes of action, such as right of publicity, the Lanham Act, or false endorsement.[130] The PRO mentions this to encourage campaigns to seek the ultimate protection from liability for using an artist's songs—directly asking the artist for permission.[131]

While the licenses are explicit about their members' options to remove works from the political license, it remains unclear who exactly gets to exercise the right to remove the song.[132] An ASCAP or BMI member owns the underlying copyright in the composition, not the sound recording.[133] The member can be an individual songwriter, a

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124 *Rolling Stones Working with BMI*, *supra* note 122.

125 *Id.*

126 Bill Forman, *Musicians Say "No" to Trump*, SOURCE WKLY. (Oct. 21, 2020), https://www.bendsource.com/bend/musicians-say-no-to-trump/Content?oid=13479519 [https://perma.cc/LV9W-SQ8Q]. BMI's political campaign license also states that "BMI may withdraw from the license the right to perform any musical work as to which a legal action has been brought or a claim made that BMI does not have the right to license the work or that the work infringes another work." BMI Political License, *supra* note 116, at 1.

127 ASCAP POLITICAL LICENSE, *supra* note 116.

128 *Id.* ("ASCAP members may ask ASCAP to exclude specific songs from a particular political campaign's license.").

129 *Id.*

130 *Id.*

131 *Id.*

132 *See id.*; BMI Political License, *supra* note 116, at 1.

133 Joy Butler, *Music Licensing: The Difference Between Public Performance and Synchronization Licenses*, COPYRIGHT CLEARANCE CTR. (May 16, 2017), http://www.copyright.com/blog/music-licensing-public-performance-license-synchronization [https://perma.cc/9668-8JLM].

publisher, or whoever owns part of the underlying copyright.[134] Songs can be created by a single singer-songwriter, but often, many people are involved in writing a song.[135] This complicates matters in the context of objecting to the political use of the songs because, while a famous singer may object to a politician's use of their song publicly, they might not necessarily be the songwriter or own the copyrights.[136] Additionally, multiple songwriters or publishers involved in a song may not all agree on whether to remove a song from a political license. It is unclear if nonsongwriters or publishers are able to have a say in withdrawing the work from the license.

2. The Political Entity License Violates the Consent Decrees

Given the *Pandora* cases and current interpretation of consent decrees that prevent partial withdrawal from ASCAP and BMI, the political licenses, in allowing artists to withdraw their songs, directly contradict these decisions.[137]

The current political licenses raise the same concerns the courts had about the anticompetitive effects of allowing the PROs to refuse licensing of their "full repertory" to licensees.[138] If one artist could refuse to license their works to a campaign or all campaigns, this could open the door to most artists choosing to do so, which would be, in essence, ASCAP and BMI "refus[ing] to deal with certain . . . applicants."[139] It follows that a campaign could be left with a license that contains few to no songs, given the option to withdraw.

In addition to contradicting the *Pandora* decisions, the political licenses also conflict with the language of the consent decrees prohibiting partial withdrawal, as interpreted in 2016 by the DOJ.[140] From the customer/licensee perspective, partial withdrawal from the

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134 *Membership Application*, ASCAP, https://ome.ascap.com [https://perma.cc/HS7T-VSFE] (detailing the types of membership options for writers and publishers).

135 Dorian Lynskey, *How Many People Does It Take to Write a Hit Song in 2019?*, GQ MAG. (Nov. 2, 2019), https://www.gq-magazine.co.uk/culture/article/long-songwriting-credits [https://perma.cc/J227-NF94].

136 *See, e.g.*, RIHANNA, DON'T STOP THE MUSIC (Def Jam 2007). Rihanna was not a songwriter, but publicly objected to Trump's use of the song. Morgan Gstalter, *Rihanna Music Publisher Removes Her Songs from Trump Campaign License*, HILL (Nov. 10, 2018, 8:42 AM), https://thehill.com/blogs/in-the-know/in-the-know/416051-rihannas-music-publisher-removes-her-songs-from-trumps-campaign [https://perma.cc/3HZ2-6KC7].

137 *See supra* Section I.D.2.

138 *See supra* Section I.D.2.

139 *See supra* note 105.

140 *ASCAP-BMI Consent Decrees*, *supra* note 108.

political license shuts out a licensee and results in disparate treatment of customers, where the consent decrees explicitly prohibit discrimination against similarly situated licensees.[141] Though ASCAP and BMI are not refusing to license to campaigns, which would blatantly violate the consent decrees, they are refusing to license all of the works in their repertories.[142] As Judge Cote reasoned in her decision in *Pandora*, if the court sided with ASCAP, it would be incorrectly interpreting Section XI(B)(3)(c) to allow rightsholders to keep works in the ASCAP repertory, while selectively depriving licensees of certain works of their choosing.[143] This clearly conflicts with Sections VI and IX's explicit statement that ASCAP has to license all of the works in the repertory to anyone requesting a license.[144]

BMI and ASCAP have yet to be challenged on whether the political license violates the consent decrees, but by continuing to offer them, they operate under the assumption that they are not in violation.[145] BMI and ASCAP's arguments were rejected by the Second Circuit, but they illustrate the arguments they might make in support of their position that the political licenses are not unlawful.[146] One notable argument rests on the sections of the consent decrees relating to the PROs' rights to protect the economic value of their works, found in Section IV(F).[147] This argument appears to be the driving justification for ASCAP and BMI in continuing to offer the political campaign license.[148] According to one of the only public statements on the issue to date, ASCAP and BMI believe that they can withdraw works under certain conditions,

141 *See supra* Section I.D.2.

142 *See supra* Section II.A.1 (discussing the political licenses' provision allowing withdrawal of certain works, per a rightsholder's request to remove the song).

143 *In re* Pandora Media, Inc., Nos. 12 Civ. 8035, 41 Civ. 1395, 2013 WL 5211927, at *8–9 (S.D.N.Y. Sept. 17, 2013).

144 *Id.* at *9.

145 GIBSON DUNN, MEDIA, ENTERTAINMENT AND TECHNOLOGY GROUP 2020 YEAR-END REVIEW 10–11 (2021), https://www.gibsondunn.com/wp-content/uploads/2021/02/media-entertainment-and-technology-group-2020-year-end-review.pdf [https://perma.cc/58V5-SQHQ] (confirming that BMI and ASCAP have not yet been challenged).

146 Brief for Petitioner-Appellee at 21–22, Pandora Media, Inc. v. Am. Soc'y of Composers, Authors & Publishers, 785 F.3d 73 (2d Cir. 2015) (Nos. 14-1158-cv, 14-1161-cv, 14-1246-cv), 2014 WL 5786364.

147 *Id.* at 29–30. Section IV(F) states that "nothing in this Section IV(F) shall be construed to prevent ASCAP, when so directed by the member in interest in respect of a work, from restricting performances of a work in order reasonably to protect . . . the value of the public performance rights therein," leading ASCAP to conclude that members could selectively restrict ASCAP's ability to license their works to certain users and not others. *AFJ2*, *supra* note 83, § IV(F); Brief for Petitioner-Appellee, *supra* note 146, at 29–30.

148 Sisario, *supra* note 9 ("ASCAP and BMI both believe their consent decrees allow the writers and publishers they represent to withdraw material under certain conditions, including if a particular use could damage the economic value of a song's copyright.").

one of which is to prevent the erosion of the economic value of a song's copyright, as it is worded in the consent decree.[149] BMI's public statements on the political licenses, made by their general counsel, imply that the association or endorsement of a particular political candidate can harm the economic value of a work, thus falling under Section IV(F)'s withdrawal-under-certain-conditions language.[150]

The relatively recent statements in the media underscore the possibility that, should ASCAP and BMI face challenges to the political license work withdrawals, they might successfully argue that withdrawing works from the political license falls within the scope of the exception in Section IV(F). ASCAP attempted to make this argument in the *Pandora* case, but it failed with respect to New Media rights.[151] The judge rejected ASCAP's argument that "all-in" or "all-out" was at odds with Section IV(F).[152] Instead, the judge was convinced by Pandora's arguments, finding that Section IV set forth narrow prohibitions that did not trump the broad, affirmative requirements of Sections VI and IX about licensing all works to any music user that were central to the consent decrees.[153] Additionally, Pandora argued that Section IV(F) did not apply to the case at bar and was intended to apply to situations like licenses for pornographic films that would devalue the copyright, arguing that instead, licensing to Pandora would increase the value of the work.[154]

If a political license were considered akin to the porn example in its potential to devalue a copyright, the PROs might prevail. But absent any judicial or regulatory decisions about the political licenses and what

149 *See id.*

150 *See id.* ("'BMI does not remove a song from the license in order to achieve higher rates or for any reason other than that the rightsholders believe the association of their song with a campaign is an implied endorsement and diminishes the value of that work,' said Stuart Rosen, BMI's general counsel.").

151 *In re* Pandora Media, Inc., Nos. 12 Civ. 8035, 41 Civ. 1395, 2013 WL 5211927, at *10 (S.D.N.Y. Sept. 17, 2013); *Pandora Media, Inc.*, 785 F.3d at 77.

152 *In re Pandora Media, Inc.*, 2013 WL 5211927, at *10.

153 Brief for Petitioner-Appellee, *supra* note 146, at 30–31 ("These narrow provisions relating to what ASCAP is prohibited from doing (Section IV, 'Prohibited Conduct') do not trump the plain language of the licensing section requiring ASCAP to license all of the works in its repertory upon request by any music user (or the plain language of the definition of 'ASCAP repertory' making clear that it consists of 'works'). If anything, the absence of a provision in Section IV allowing a user to instruct ASCAP not to license works to new media users cuts against ASCAP's position.").

154 *Id.* at 30 ("Under this section, a user may prevent a work from being performed in a pornographic film or in another manner that would reduce its value. This section has no conceivable application here, where the court found that the evidence 'suggests that Pandora is promotional' . . . —*i.e.*, that performances on Pandora increase rather than cannibalize music sales.").

constitutes an exception under Section IV(F), this is uncertain. Furthermore, if the court's reasoning for rejecting the Section IV(F) arguments for new media rights is any indication, an argument that the political license falls into the Section IV(F) exception faces an uphill battle.[155] Though there certainly is a difference between licensing to digital service providers (DSPs) and political campaigns, the Pandora and DOJ opinions emphatically seek to uphold the requirements in the licensing sections and limit any possibility of anticompetitive behavior resulting from PROs withholding works and discriminating against licensees.[156]

Looming questions about the intersection between Section IV and the other sections should be clarified, and while the argument that political campaign licensing could fall into Section IV(F) is plausible, as it stands now, the general prohibition on partial withdrawal strongly suggests that the political licenses are violating the consent decrees.[157] As such, by continuing to offer the option to withdraw songs from the license, ASCAP and BMI are either ignoring the judicial and DOJ decisions or presuming that the political license fits into the Section IV(F) exception.

3. The Political Entity License Does Not Violate Antitrust Principles

Though the political licenses violate both the *Pandora* decisions and the DOJ's interpretation of the language of the consent decrees, the violation does not extend beyond the four corners of the decree, nor does it negatively impact the big picture goals of antitrust law. There seems to be a gap between the anticompetitive behavior the consent decrees are trying to regulate and the actual effects on competition of removing a song from the political license.

The public comments surrounding the DOJ's 2016 and 2021 revisions of the consent decrees provide further insight into whether partial withdrawal violates antitrust principles. BMI and ASCAP naturally argued that partial withdrawal is not anticompetitive, but rather furthers procompetitive goals.[158] One argument in support of this

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155 *See supra* text accompanying notes 152–55.

156 *See supra* Section II.A.2.

157 *See supra* Section II.A.2. It remains to be seen how the prohibition on partial withdrawal applies to other licensing categories and what constitutes a use that devalues the copyright of the work.

158 BMI, PUBLIC COMMENTS OF BROADCAST MUSIC, INC. 15 (2014) [hereinafter BMI PUBLIC COMMENTS 2014], https://www.justice.gov/atr/page/file/1086751/download [https://perma.cc/

position is that going "all-in" has the effect of forcing collective licensing rather than giving publishers the freedom to directly license their works in a free market, contradicting the intended goal of the consent decree to encourage procompetitive behavior.[159] Furthermore, partial withdrawal is consistent with antitrust principles, favoring direct licensing over collective licensing.[160] Another argument is that partial withdrawal would actually serve procompetitive interests by encouraging direct licensing, which would allow rates to be set by market forces and not rate courts, while giving publishers and songwriters the option of benefiting from the PROs' efficiencies.[161] If an increase in direct licensing resulted from allowing partial withdrawal, publishers and songwriters would benefit, as they could obtain fair compensation that reflects the market value of their works.[162] Certain smaller, independent publishers also agree that partial withdrawal would be in the best interest of their songwriters, allowing them to benefit from the market value of their works.[163] They argue that if larger

W8LA-H66M]; ASCAP, PUBLIC COMMENTS OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS REGARDING REVIEW OF THE ASCAP AND BMI CONSENT DECREES 21 (2014) [hereinafter ASCAP PUBLIC COMMENTS 2014], https://www.justice.gov/sites/default/files/atr/legacy/2014/08/14/307803.pdf [https://perma.cc/97LL-PL86].

159 BMI pointed out that "all-in" or "all-out" was at odds with the Second Circuit's ruling in *CBS v. ASCAP*, where the court held that the blanket licenses did not restrain trade precisely because a direct license remained available to users, and that in the absence of an antitrust holding against BMI, there was no basis to prohibit partial withdrawal. BMI PUBLIC COMMENTS 2014, *supra* note 158, at 14–15. Universal Music Publishing Group argued that the consent decrees contradicted their goal of reducing the adverse effect of collective licensing on competition by essentially urging rightsholders to use the blanket license for all categories. UNIVERSAL MUSIC PUBL'G GRP., ASCAP/BMI COMMENT: UNIVERSAL MUSIC PUBLISHING GROUP 2, https://www.justice.gov/sites/default/files/atr/legacy/2014/09/24/307988.pdf [https://perma.cc/SH9V-3Y25].

160 NAT'L MUSIC PUBLISHERS' ASS'N, "SELECTIVE WITHDRAWAL" OF NEW MEDIA RIGHTS FROM ASCAP AND BMI 3 (2019) [hereinafter NMPA PUBLIC COMMENTS 2019], https://media.justice.gov/vod/atr/ascapbmi2019/pc-550.pdf [https://perma.cc/WVK8-C5LU].

161 BMI PUBLIC COMMENTS 2014, *supra* note 158, at 15; NMPA PUBLIC COMMENTS 2019, *supra* note 160, at 3 ("This modification, to which we refer herein as 'selective withdrawal,' would empower copyright owners to decide whether to license their works directly to digital service providers ('DSPs') or whether to continue to license to such music users through the performance rights organization ('PRO') system. Increased direct licensing between music publishers and DSPs would be efficient and procompetitive . . . .").

162 NMPA PUBLIC COMMENTS 2019, *supra* note 160, at 3 ("Today, owners of musical works are hamstrung in their ability to reap the market value of their intellectual property because DSPs can take advantage of regulatory consent decree provisions never meant for them. There is no legitimate antitrust enforcement-based reason to continue to regulate music publishers and songwriters in this manner.").

163 *See, e.g.*, Letter from Roger Miller, CEO, The Bicycle Music Co., to the Dep't of Just. 2 (Aug. 5, 2014), https://www.justice.gov/sites/default/files/atr/legacy/2014/08/13/307716.pdf [https://perma.cc/MN3Q-QTFP] ("We believe that any publishing company that wishes to issue

publishers are unable to partially withdraw from PROs, they will withdraw completely, hurting independent publishers, because PROs' bargaining positions would be eroded and would require them to accept below market rates.[164]

One argument in favor of partial withdrawal hinges on the idea that prohibiting partial withdrawal is not actually addressing the anticompetitive threats of ASCAP and BMI, because it has the effect of regulating the copyright owners rather than the PROs.[165] This concern emphasizes the effect of the prohibition on the ability of copyright owners to act freely, noting that they are not parties to the consent decree, and the prohibition does not have the effect of controlling ASCAP's and BMI's actions.[166]

Addressing the gap between the outcome of the courts' and DOJ's interpretations of partial withdrawals and actual anticompetitive effects, BMI stated that the consent decrees unnecessarily focus on matters that do not implicate antitrust concerns.[167] Accordingly, the PRO critiqued the litigation with Pandora, arguing that the focus on whether the partial withdrawal of works was consistent with the language of the consent decrees did not adequately address the larger

its own digital rights should be able to do so rather than being forced to have 'all or nothing' licensed by the performing rights organization as was recently determined by the rate courts. As many large companies have already set out to do so, and rights agencies new and old from around the world are now competing to offer these services in a rapidly changing and global digital marketplace, it is evident that ASCAP and BMI no longer have the market power that the consent decrees were originally intended to mitigate. As such, and with so many companies seeking to establish fair value for their music in the open and unregulated market, we believe that ASCAP and BMI should be able to do the same for the benefit of independent music publishers and without the encumbrances imposed by their current consent decrees.").

164 DOWNTOWN MUSIC PUBL'G, LLC, ASCAP/BMI COMMENT: DOWNTOWN MUSIC PUBLISHING, LLC 2–3, https://www.justice.gov/sites/default/files/atr/legacy/2014/09/24/307891.pdf [https://perma.cc/LUW8-Q2H3] ("The Consent Decrees should be modified so that any publisher may opt out of the collective licensing scheme for individual licenses or for certain sets of rights (e.g., digital licenses). This would place the independents on an even playing field with its major competitors and its licensees by allowing any publisher to withdraw and directly negotiate limited rights where economically and technologically feasible.").

165 NMPA PUBLIC COMMENTS 2019, *supra* note 160, at 12 ("The consent decrees' prohibition on selective withdrawal is a regulation on copyright owners themselves, which lacks any countervailing justification needed to address any anticompetitive threat posed by ASCAP and BMI. . . . If anything, the prohibition on selective withdrawal enlarges ASCAP and BMI by expanding the scope of rights in their repertories.").

166 *Id.* at 14 ("[I]t only serves to constrain the behavior of rightsholders who were not alleged to have committed 'illegal practices' or other 'violation[s]' in the first place. Selective withdrawal should be permitted for this reason alone.").

167 BMI, BMI'S RESPONSE TO THE DEPARTMENT OF JUSTICE'S JUNE 5, 2019 REQUEST FOR PUBLIC COMMENTS CONCERNING THE BMI AND ASCAP CONSENT DECREES 43 (2019) [hereinafter BMI PUBLIC COMMENTS 2019], https://media.justice.gov/vod/atr/ascapbmi2019/pc-077.pdf [https://perma.cc/NF3L-UNPL].

antitrust issue.[168] The comment went on to explain that both *Pandora* cases failed to consider the beneficial or detrimental effects of rights withdrawal on competition.[169]

Rather than focusing on the language of the consent decrees, BMI emphasized that the relevant inquiry should focus on the economic effects of actions like partial withdrawal.[170] If there were no consent decrees, this inquiry would be used when analyzing the legality of partial withdrawals and would spare the PROs from having to constantly assess whether their actions are in violation of their consent decrees.[171] As a result of the uncertainty surrounding how the consent decrees are interpreted, BMI argued that it is disincentivized from engaging in procompetitive activity.[172]

ASCAP's public comment added that the consent decrees should be modified to allow ASCAP to refuse an instance of partial withdrawal if licensing the limited rights did not add any economic value.[173] The PRO concluded that allowing for partial withdrawal would harmonize the consent decrees with copyright law.[174] Ultimately, ASCAP, BMI, and critics of the outcome of the *Pandora* cases and the DOJ's 2016 revision feared that preventing partial withdrawal could lead to publishers opting out entirely of the PRO system, jeopardizing their business.[175]

Parties arguing that partial withdrawal would threaten antitrust principles are worried that PROs and publishers would use partial withdrawal as a means to obtain more bargaining power or higher fees from licensees.[176] Basing their argument on what occurred when the

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168 *Id.* at 44.

169 *Id.*

170 *Id.*

171 *Id.*

172 *Id.* at 45.

173 ASCAP PUBLIC COMMENTS 2014, *supra* note 158, at 21.

174 *Id.* at 21–22.

175 Penick, *supra* note 19.

> Perpetuating an all in/all out rationale, reflected in the courts' interpretation of the current consent decrees, could have a grave impact on the industry. Sony/ATV Music Publishing has threatened to withdraw from both ASCAP and BMI if the decrees are not soon modified to allow for partial withdrawal. A move such as this could threaten the viability of both PROs, given Sony's significant market share, which in turn would threaten the livelihood of the individual songwriters and small publishing houses the PROs represent.

Turk, *supra* note 39, at 525–26.

176 MIC COALITION, *supra* note 57, at 4. In its 2014 comments to the DOJ, the National Association of Broadcasters cited the *Pandora* case, in which Judge Cote stated,

major publishers withdrew from the PROs before the *Pandora* litigation, opposers of partial withdrawal argue that collusion between the PROs and publishers occurred, as the PROs facilitated the publishers' withdrawals in order to use the outcome of those direct deals as a benchmark in the rate courts.[177] They are also concerned that allowing partial withdrawal would hurt competition because it would cause the system to become even more complicated, hindering innovation and becoming a barrier to entry for new artists, especially smaller publishers and independent songwriters.[178] Whereas supporters of partial withdrawal think the "all-in" or "all-out" regime would limit copyright owners' options to their detriment, opposers of partial withdrawal view this limitation as preventing the copyright owner from having to make the difficult choice between shouldering the burden of high administrative costs to license directly to DSPs or license through the PRO at less competitive rates.[179]

While these arguments are plausible in the context of new media licensing, with respect to a political campaign license, the same anticompetitive concerns are not present. Realistically, artists and publishers withdrawing songs from the political license would not obtain higher licensing rates from politicians in the same way that publishers wanted to obtain higher rates from Pandora, knowing that obtaining these licenses were essential for streaming services.[180] Here, the economics of the political license withdrawal differ from that of the new media license, impacting any analysis of the anticompetitive effects of the political license, because a campaign's access to a particular song is arguably not as essential as it is for a streaming platform, and the

> [T]he evidence at trial revealed troubling coordination between Sony, UMPG, and ASCAP, which implicates a core antitrust concern underlying AFJ2 . . . . Because their . . . interests were aligned against Pandora, and they coordinated their activities with respect to Pandora, the very considerable market power that each of them holds individually was magnified.

NAT'L ASS'N OF BROADS., COMMENTS OF NATIONAL ASSOCIATION OF BROADCASTERS 4 (2014) [hereinafter NAB PUBLIC COMMENTS], https://www.justice.gov/sites/default/files/atr/legacy/2014/08/13/307974.pdf [https://perma.cc/E8W2-GTXC] (quoting *In re* Pandora Media, Inc., 6 F. Supp. 3d 317, 357–58 (S.D.N.Y. 2014)).

177 NETFLIX, INC., COMMENTS FROM NETFLIX, INC. 11 (2014), https://www.justice.gov/sites/default/files/atr/legacy/2014/08/20/307908.pdf [https://perma.cc/VHM2-NXFD]. Netflix cited to the fact that "Judge Cote found that ASCAP made no effort to engage in price competition with the withdrawing publishers and did not even consider charging lower prices than those secured by withdrawing publishers (in order to drive higher demand for the works of the remaining compositions licensable by ASCAP)." *Id.*

178 *See* NAB PUBLIC COMMENTS, *supra* note 176, at 4.

179 *See id.*

180 *See supra* Section I.D.2.

demand is not nearly as high.[181] As BMI's general counsel explained, removing works from the political license is not to obtain a higher bargaining price or extort higher fees, but rather to protect the copyright's value.[182] Ultimately, even if certain works are missing from the political campaign license, the PROs would still be complying with the central tenet of the consent decrees by offering the license to any user without discrimination, precluding the concern that PROs were unfairly refusing to deal with certain music users.[183] As such, they would not violate larger antitrust principles.

4. What Happens Now?

In light of the fact that the political licenses violate the consent decrees but nonetheless do not have anticompetitive effects, the DOJ could amend the consent decrees to allow partial withdrawal or specify that partial withdrawal is allowed for certain types of license categories, including the political license.[184] While recent efforts to amend the consent decrees to allow for partial withdrawal have failed, artists still have some nonlegal recourse.[185]

The most recent review of the consent decrees was again met with comments from PROs and publishers, vocalizing their position that the consent decrees are outdated and no longer serve their initial purposes.[186] Those who favor keeping the consent decrees argue that

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181 Steven J. Gagliano, *Consent Decrees in the Streaming Era: Digital Withdrawal, Fractional Licensing, and § 114(I)*, 10 J. BUS. ENTREPRENEURSHIP & L. 317, 335–36 (2017) (describing the economics of partial withdrawal).

182 Sisario, *supra* note 9.

183 *See supra* Section I.D.2.

184 Gabriella A. Conte, Note, *"Waiting on the (Music) World to Change": Licensing in the Digital Age of Music*, 83 BROOK. L. REV. 323, 354 (2017) (proposing that the consent decrees be amended to require user-specific provisions that would account for the differences in music users).

185 *See supra* Section I.D.2.

186 *See* Jem Aswad, *ASCAP, BMI Submit Final Arguments to DOJ to Modernize "Outdated" Consent Decrees*, VARIETY (Aug. 9, 2019, 1:54 PM), https://variety.com/2019/biz/news/ascap-bmi-final-arguments-to-doj-outdated-consent-decrees-1203298222 (last visited Dec. 26, 2021). In ASCAP's 2019 public comment, it proposed that the consent decrees be replaced by a Transitional Decree that would sunset after a reasonable period, meaning that the DOJ's ongoing regulation would end, allowing ASCAP and BMI to finally compete in a free market. BMI and ASCAP recommended provisions that would be included in a new, temporary consent decree. The four modifications included: (1) retaining automatic licensing subject to payment of an interim fee, (2) continuing access to the rate court, (3) maintaining alternatives to the blanket license, and (4) continuing to have nonexclusive licenses to encourage direct deals. ASCAP, ASCAP'S RESPONSE TO THE DEPARTMENT OF JUSTICE'S JUNE 5, 2019 REQUEST FOR PUBLIC

"[t]he market for music licenses is inherently anticompetitive, and traditional free market principles do not necessarily translate."[187]

Ultimately, the DOJ concluded its period of review by determining that no modifications would be made, and the consent decrees would continue to operate.[188] In announcing the decision, Assistant Attorney General for the Antitrust Division Makan Delrahim addressed critiques of the consent decrees but emphasized the music licensing community's reliance on the current consent decrees.[189] The Assistant Attorney General argued that the existing consent decrees were the best solution for all stakeholders.[190] The remarks briefly addressed partial withdrawals, pointing to the 2013 *Pandora* decisions that prohibited them, and stated that overruling the decision would require a modification of the consent decrees or an act of Congress.[191]

Even if the political license is found to be in violation of the consent decrees and artists are no longer able to withdraw their works from the license, nonlegal recourse remains available. Songwriters, musicians, and rightsholders can continue to voice their opinions publicly.[192] Though artists like the Rolling Stones and Neil Young have withdrawn their works, it is unclear how many others have chosen this option.[193]

COMMENTS CONCERNING THE ASCAP AND BMI CONSENT DECREES 1–2, 28–31 (2019), https://media.justice.gov/vod/atr/ascapbmi2019/pc-043.pdf [https://perma.cc/J29E-DAC6]; BMI PUBLIC COMMENTS 2019, *supra* note 167, at 4.

187 Letter from Frontiers of Freedom et al., to William P. Barr, Att'y Gen., U.S. Dep't of Just. (Aug. 6, 2019), https://media.justice.gov/vod/atr/ascapbmi2019/pc-270.pdf [https://perma.cc/5LGT-3KKX]. Given ASCAP's and BMI's market power and ability to set a standard price for music, they caution that ending the consent decrees would necessitate another form of regulation, leading to disruption in the industry that would not be worth the tradeoff. *Id.* Another argument in favor of the consent decrees is that the changes in the music industry only apply to distribution and not to licensing of public performance rights, as ASCAP and BMI control the vast majority of rights just as they did in 1941, so the same anticompetitive effects remain. *See id.*

188 Christman, *supra* note 85.

189 *See* Delrahim, *supra* note 113.

190 *See id.* Despite the decision to keep the consent decrees, the remarks laid out three essential guiding principles. *Id.* The first goal focuses on ultimately arriving at a market-based solution, so that songwriters can be compensated at market rates. *Id.* The second goal is to ensure that songwriters are not placed at a competitive disadvantage by the nonmarket effects of the consent decrees. *Id.* The third goal focuses on the principle that compulsory licensing is not an effective solution and runs contrary to the free market of intellectual property rights. *Id.* Finally, the remarks concluded by stating that the consent decrees should be reviewed every five years to ensure they uphold these goals and continue to protect competition as the industry changes. *Id.*

191 *Id.*

192 *See* Ivie, *supra* note 16 (listing artists, including Rihanna, Pharrell Williams, and Guns N' Roses, who have tweeted or issued public statements about Donald Trump's use of their songs at campaign rallies).

193 *Rolling Stones Working with BMI*, *supra* note 122; *see* David Robb, *ASCAP Says Donald Trump Campaign Can't Use Any Rolling Stones Songs in Its Repertory, Following BMI's Lead*,

Regardless, many artists have chosen the court-of-public-opinion option, using a myriad of avenues available to communicate to their audiences.[194] Even if artists legally withdraw their works, it remains to be seen whether candidates will be cautious about obtaining the proper license or be sufficiently deterred by the threat of suit from artists.[195]

Should the aforementioned scenario play out—that artists are no longer able to withdraw their works and are left with nonlegal options—there are silver linings. Rightsholders will have less legal control over the use of their works if they cannot stop politicians from using the songs, but from an American copyright law perspective, this may be in the best interest of society. The current copyright law regime protects economic interests and grants a limited monopoly over works.[196] The lack of legal control over the political use of music is consistent with the United States' rejection of moral rights, which allow rightsholders to object to use of their works if they were contrary to their creative intentions or would negatively impact their personality or reputation.[197] The right of public performance obtained through a PRO's blanket license is an economic transaction that does not allow for the artist to object to the potential use.[198] But this regime exists to promote the creativity and innovation to the benefit of society, even if individual artists' rights and abilities to control their works takes the back seat. Less fettered control over music could allow it to be disseminated more freely, contributing to the exchange of art, ideas, and debate.

DEADLINE (June 29, 2020, 6:31 PM), https://deadline.com/2020/06/donald-trump-campaign-rolling-stones-songs-ascap-1202973371 [https://perma.cc/U8YX-F6L5].

194 *See, e.g.*, Ivie, *supra* note 16; Axl Rose (@axlrose), TWITTER (Nov. 4, 2018, 3:05 AM), https://twitter.com/axlrose/status/1058993598656638976 [https://perma.cc/4E5D-6ZK4].

195 As mentioned earlier in Part II, one uncertainty is who gets to object, and though artists have made public objections, they are not necessarily the rightsholders of the works. *See supra* Section II.A.1.

196 Aurele Danoff, Note, *The Moral Rights Act of 2007: Finding the Melody in Music*, 1 J. BUS. ENTREPRENEURSHIP & L. 181, 183 (2007).

197 *Id.* Blanket licenses fit into this framework, as PROs "promote the economic interests of their members, but at the same time expose for exploitation their members' personal interests in preventing their works from being used in ways that conflict with their artistic visions." *See* Lauren M. Bilasz, Note, *Copyrights, Campaigns, and the Collective Administration of Performance Rights: A Call to End Blanket Licensing of Political Events*, 32 CARDOZO L. REV. 305, 312, 325–27 (2010) (discussing PRO blanket license in the context of moral rights and arguing that blanket licensing should not be applicable to political campaigns but rather that artists should be asked for permission or be allowed to withdraw from the political license).

198 *See supra* Part I.

CONCLUSION

As this Note argues, BMI's and ASCAP's political licenses violate their consent decrees by allowing rightsholders to withdraw works from a specific license category. Though it is possible that an exception exists in the consent decree for withdrawing works that would protect the economic value of the copyright, at present there is no indication that the political license fits this exception. In fact, given the courts' opinions in the *Pandora* cases and the DOJ's goals, ASCAP and BMI would likely struggle in arguing that the exception applies. While the political licenses violate the consent decrees, withdrawing works from the license so campaigns are unable to use them does not have anticompetitive effects and, therefore, should be allowed. Though the simple solution would be for the DOJ to amend the consent decree to confirm that an artist can withdraw from any type of license, if this does not happen, artists and society may not be substantially harmed such that risking an uncertain licensing change would be worth it. They can turn to the media to speak out against the use of the music and disassociate from political candidates. Furthermore, even if artists cannot enjoy the ability to object to use of their songs, there are benefits to the public good in promoting a regime of less control over copyrights that can allow for a freer exchange and debate over art and music that is essential to a thriving culture.