ANTITRUST REGULATION OF COPYRIGHT MARKETS

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ABSTRACT

Late last year, a federal court sided with the Department of Justice and blocked the planned merger of book publishers Simon & Schuster and Penguin Random House. The decision was a rare collision between antitrust law and the deeply consolidated copyright content industries. Over the course of the past decade, acquisitions and mergers in the recording, music publishing, and audiovisual space have left just a handful of juggernaut content producers in their wake. Moreover, new technology companies that have entered the content-creation and distribution markets have begun to leverage their scale to further their own industry consolidation.

This Article examines the growing competition problems in the copyright industries and argues that, despite a resurgent interest in antitrust enforcement among policymakers, antitrust alone has not provided adequate solutions. Indeed, in the aftermath of the DOJ's victory against Penguin Random House, the publishing industry is now predicting that Simon & Schuster will simply be stripped and sold for parts, hurting author compensation while doing little to stop industry concentration. Copyright law—including its collection of safe harbors, compulsory licenses, and other industry-regulating regimes—also appears unable to meaningfully address the current reality.

The Article argues that antitrust and copyright law cannot work in silos. To find a way forward, we shine a spotlight on an underexplored legal regime: the antitrust consent decrees that continue to regulate certain

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licensing markets in the music industry by subjecting the organizations ASCAP and BMI to rate setting by the federal courts. We draw on this unusual system—perhaps the only example of antitrust regulation that has directly incorporated a concern with copyright's policy agenda—to propose a new regulatory model based not on discrete, one-off interventions (such as blocking a merger), but rather full regulation of the licensing practices in concentrated content markets. As the consent decree model shows, copyright and competition law can work in tandem, ensuring that antitrust regulation of the creative-content space remains sensitive to copyright's overarching goals of incentivizing creativity and ensuring public access to cultural works.

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INTRODUCTION

On October 31, 2022, a federal court stunned the legal and publishing worlds when it sided with the U.S. Department of Justice and blocked the planned acquisition of publishing house Simon & Schuster by the book behemoth Penguin Random House.[1] Just a little under a month later, the deal officially collapsed, "paus[ing] consolidation in an industry that has been profoundly reshaped by mergers and acquisitions, with little regulatory intervention."[2] For the publishing world, the court's order—and the decision by Simon & Schuster's parent company to terminate the deal rather than seek an appeal of the court order—broke a pattern of rapid consolidation in a deeply concentrated landscape that had dwindled to just five publishers.[3] For the legal world, the DOJ's win marked a rare victory for the new antitrust movement: regulators actively seeking to reform antitrust law away from what they argued was a narrow focus on consumer pricing, toward an expansive, mostly untested interpretation of the law that protected labor markets and curbed corporate power.[4]

More broadly, the decision was that rare collision between antitrust law and the deeply consolidated copyright-content industries, which many have long acknowledged but about which little has been done.[5] Yet, to date, scholars have generally viewed copyright and antitrust as working independently of each other, theorizing that copyright law itself might regulate competition amongst firms through specific mechanisms like safe harbors and compulsory licenses, and in cases of extreme anticompetitive conduct, that antitrust law can step in and regulate discrete antitrust harms like price-fixing.[6] But, as this Article argues, neither copyright nor antitrust law alone has been sufficient for addressing the immense concentration of the copyright industries or the anticompetitive practices of new, large technology companies.

Despite the claim that copyright creates a "limited monopoly," a copyright in a single work is alone insufficient to generate meaningful

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1. United States v. Bertelsmann SE & Co. KGaA, No. 21-2886-FYP, 2022 WL 16748157, at *2 (D.D.C. Nov. 7, 2022), *amended and superseded*, 646 F. Supp. 3d 1 (D.D.C. 2022).

2. Elizabeth A. Harris, Alexandra Alter & Benjamin Mullin, *A Huge Merger's Collapse Breaks a Pattern of Consolidation in Publishing*, N.Y. TIMES (Nov. 21, 2022), https://www.nytimes.com/2022/11/21/books/penguin-random-house-simon-schuster-deal.html [https://perma.cc/E2FK-A5EU].

3. *See id.*

4. *See* Jan Wolfe, *Key Tests Loom in 2023 for U.S. Antitrust Enforcers*, WALL ST. J. (Dec. 28, 2022, 10:56 AM), https://www.wsj.com/articles/key-tests-loom-in-2023-for-u-s-antitrust-enforcers-11672234668?mod=Searchresults_pos1&page=1 [https://perma.cc/6GJX-CDE6]; *see also infra* Section II.A.2 (discussing the "neo-Brandeisian" movement in antitrust).

5. *See infra* Section I.A.

6. *See infra* Part II.

market power.[7] However, the mass aggregation of copyrights can allow a single or small group of rightsholders to charge high licensing prices or even block entry to new creators or disseminators.[8] Indeed, just like in the book publishing industry, over the course of the past decade, acquisitions and mergers in the recording, music publishing, and audiovisual space have left just a handful of juggernaut content producers in their wake.[9]

Furthermore, a different set of competition problems are emerging thanks to the growing role of new technology companies in copyright-content industries. In industries with large, entrenched incumbents, disruption has often been considered favorable; copyright and innovation scholars have largely taken the view that competition from companies such as Apple, Amazon, and Google in copyright-dominated industries results in more innovation and better consumer outcomes.[10] But this Article discusses ways in which large technology firms may use their economies of scale to engage in loss leading, competing not just *in* the market but *for* the market.[11] While such strategies present no legally cognizable harm to rightsholders or to competitor distributors in the short term, such strategies are intended to cement the dominance of the technology company in the long term, ultimately reducing the variety, quantity, and quality of goods available to consumers.[12]

The rise of the large-scale copyright aggregator and the Big Tech loss leader threatens to concentrate market power in the hands of a small number of firms. The prevailing wisdom is that such competition problems should be addressed through antitrust—what we call an antitrust-only approach.[13] However, as we argue, both the classic Chicago School approach to antitrust as well as the growing "neo-Brandeisian" approach struggle to deal with the particular policy challenges (and peculiarities) of market power in copyright markets, where what seems to be a "supracompetitive" price may or may not actually be necessary to fulfill copyright's goal of incentivizing the production of new creative works.[14] Indeed, the limits of an antitrust-only approach have become apparent in the aftermath of the DOJ's victory in

7. Individual copyrighted works generally have numerous (imperfect) substitutes. *See infra* Part I.

8. *See infra* Section I.A.

9. *See infra* Section I.A.

10. *See infra* Section I.B.

11. *See infra* Section I.B.

12. *See infra* Parts I, II.

13. *See infra* Section II.A.

14. *See infra* Section II.B. More specifically, copyright is designed to allow for above-marginal-cost pricing to begin with, in order to provide an incentive for creators, which means that market power problems will often be layered onto the delicate balancing between creative incentives and consumer access that rests at the core of copyright's very reason for granting entitlements in creative works. *See infra* Section II.B.

Simon & Schuster, with the sale of the storied publishing house to private equity, "a move that would likely lead to absolute devastation [of Simon & Schuster] and wholesale job loss."[15] As one industry outlet put it in the wake of the court's decision: "While the anti-monopoly movement has a huge victory to celebrate, the publishing industry is left with a sense of impending doom."[16]

Existing copyright law, however, is also ill-equipped to address market power in the creative industries. Some scholars have noted that the copyright system contains an internal set of mechanisms designed to police market entry, including compulsory licenses housed within the regulatory state,[17] various safe harbors,[18] and even the basic mechanics of copyright infringement lawsuits.[19] Most of these regimes, however, were crafted in a pre-digital world and thus struggle to effectively handle anticompetitive behavior in the content industries. A copyright-internal approach to market power struggles in particular to make sense of the Big Tech loss leader, who, in the short term, may allow for greater production of easily accessible creative works—an ostensible boon to copyright's policy agenda—but, in the long term, threatens to erect barriers to entry for new content producers and distributors.

The Article argues, instead, that to address concentration in copyright markets, antitrust and copyright law cannot work in silos. To find a way forward, we consider what may be the only existing legal regime that combines antitrust enforcement with sensitivity to copyright's policy goals: the consent decrees that manage the music performance rights organizations (PROs) ASCAP and BMI. Thanks to these consent decrees, which were entered into in the 1940s but are still in force today, certain segments of

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15. Alex Shephard, *The Penguin Random House–Simon & Schuster Merger Has Been Blocked. What Now?*, NEW REPUBLIC (Nov. 3, 2022), https://newrepublic.com/article/168444/penguin-random-house-merger-blocked [https://perma.cc/FS9M-PB2A]. Simon & Schuster has since been acquired by the private equity firm KKR. *See* Elizabeth Blair, *Paramount Sells Simon & Schuster to Private Investment Firm*, NPR (Aug. 7, 2023, 6:21 PM), https://www.npr.org/2023/08/07/1192539219/simon-schuster-sold [https://perma.cc/W4MV-T5BC]. While it is too early to say what KKR plans on doing with Simon & Schuster, private equity ownership of other publishing companies, such as newspapers, has resulted in cost-cutting efficiencies that are generally viewed as negative for the industry through heavy job losses and reductions on content. *See* McKay Coppins, *A Secretive Hedge Fund Is Gutting Newsrooms*, ATLANTIC (Oct. 14, 2021), https://www.theatlantic.com/magazine/archive/2021/11/alden-global-capital-killing-americas-newspapers/620171/ [https://perma.cc/9M74-XVT2].

16. Shephard, *supra* note 15.

17. *See, e.g.*, 17 U.S.C. §§ 114–15; *see also infra* Sections II.B.2, IV.A.

18. *See, e.g.*, 17 U.S.C. § 512 (immunizing platforms from liability for uploaded infringing content under certain circumstances). *See generally* Jacob Noti-Victor, *Copyright's Law of Dissemination*, 44 CARDOZO L. REV. 1769 (2023) (outlining safe harbors).

19. *See, e.g.*, Am. Broad. Cos. v. Aereo, Inc., 573 U.S. 431, 436 (2014) (considering whether new form of dissemination should be immune from copyright infringement liability but ultimately ruling against company).

music licensing are regulated,[20] including via judicial oversight of royalty rates. Our analysis of rate court adjudications brought under the decrees shows that, far from an outdated relic that parties no longer rely upon, parties continue to call upon rate court judges to adjudicate disputes—especially as new technologies and new modes of disseminating content arise.

The consent decree system showcases a model that merges the antitrust enforcement power of the DOJ with copyright expertise developed by the district court judges tasked with rate-setting under the decrees. When considering recent rate-setting decisions, we can see how the consent decree system combines the flexible, industry-specific regulatory approach of antitrust with the specific policy balancing that copyright law contemplates.[21] Moreover, the consent decrees employ features such as as-needed (rather than required) rate setting to limit the inefficiencies posed by market regulation generally, as well as provisions like mandatory licensing to all-comers that apply regardless of whether judges are called upon to specifically set rates.[22]

We use the example offered by the consent decree system to develop a more general copyright-antitrust regulatory framework, which focuses on direct regulation of licensing practices in concentrated content industries. While conventional price-fixing and pooling allegations like those originally leveled against ASCAP and BMI seem the most obvious contenders for our approach, the recent regulatory focus on mergers, both completed and contemplated, may also have much to learn from our approach. Rather than unwind past mergers or block future ones, another choice could be to regulate—to supervise markets until such supervision is no longer necessary.[23]

Despite our skepticism of the decision to block the Simon & Schuster-Penguin Random House merger, our proposal finds much in common with the resurgent interest in antitrust enforcement, and especially the more expansive understanding of the harms of consolidation currently being championed by many scholars and policymakers.[24] Our argument for rate-regulating consent decrees is simply that the brute yes/no approach often demanded by purely structural interventions—shore up buzzy, one-time

20. Specifically, any entity that wishes to license the right to "publicly perform" a musical work (for example, playing a song on the radio, granting access to a song on a streaming platform, or even playing a song at a restaurant) must receive a license. ASCAP and BMI control the vast majority of music public performance rights and their licensing arrangements are regulated by the consent decrees. *See infra* Section III.A.

21. *See infra* Section III.B.

22. *See infra* Section IV.A.

23. Antitrust consent decrees can be, and frequently have been, sunset. *See infra* Part IV.

24. *See infra* Section IV.C.

victories while ignoring the very real problems facing an acquiree that led it to be up for sale in the first place—can miss the mark when applied to copyright content markets. To simply block an acquisition and leave the acquiree to fend for itself afterwards, including through further consolidation or else bankruptcy, ignores the unique peculiarities of why copyright content markets are so deeply consolidated in the first place.[25] While structural remedies may certainly be necessary at times,[26] oversight by consent decree—with provisions that might mandate licensing-to-all or nonexclusive (rather than exclusive) licensing, all backed up by rate court adjudication in the event of a failed negotiation—should be an essential option in the antitrust enforcer's toolkit.[27]

The Article proceeds in four Parts. Part I examines the growing concentration in the creative industries, thanks to both copyright owner consolidation and strategies by new technology companies. Part II considers the theoretical application of antitrust and copyright law to these market power dynamics, analyzing the interplay of market power with copyright's general policy goals, as well as the problems of using an antitrust-only or copyright-internal approach to address competition problems in copyright-centered markets. Part III introduces the history and current role of the ASCAP/BMI consent decree system, exploring its development as a truly hybrid copyright-antitrust regime. Part IV draws on the rate-setting consent decree model to introduce a framework for addressing market power in copyright industries, while also examining the implications of our proposal for broader debates in antitrust and copyright law.

I. COPYRIGHT'S COMPETITION PROBLEM

Copyright's relationship with competition policy is notoriously underexplored.[28] Despite judges frequently stating that copyright grants a "monopoly" power, most scholars now agree that an individual copyright

25. Indeed, there are particular reasons that copyright content markets veer toward concentration, including advantages in risk-spreading and the high cost of content creation. *See infra* Parts I, II.

26. *See infra* Section IV.C (examining criticisms of behavioral remedies).

27. Such an approach could also be promising as part of comprehensive reform of copyright's internal regulatory regimes. We are open to such an option but explain below why we believe that antitrust is likely the better vehicle for regulating copyright content industries for the time being. *See infra* Section IV.A.4.

28. This is in contrast to the relationship between patent and antitrust, of which much has been written. *See generally, e.g.*, Michael A. Carrier, *Unraveling the Patent-Antitrust Paradox*, 150 U. PA. L. REV. 761 (2002); WARD S. BOWMAN, JR., PATENT AND ANTITRUST LAW: A LEGAL AND ECONOMIC APPRAISAL (1973); Louis Kaplow, *The Patent-Antitrust Intersection: A Reappraisal*, 97 HARV. L. REV. 1813 (1984).

does not confer meaningful market power.[29] While the ownership of a copyright in a novel grants a rightsholder the ability to prevent competitors from selling that specific novel, an individual novel has numerous (imperfect) substitutes, precluding a true monopoly.[30]

Nonetheless, the mass *aggregation* of copyrights by a single or small number of owners or exclusive licensees can create meaningful market power. Looking at copyright markets from a broader vantage point shows how entities like record labels or publishers can aggregate copyright interests in order to foreclose market entry by new competitors or charge supracompetitive prices to licensees. Moreover, such aggregation has downstream effects on distributors, who now frequently engage in their own anticompetitive strategies, such as loss leading, in order to create their own market power and, potentially, block new market entrants. This Part examines both phenomena in turn.

A. *Copyright Owner Market Power: Aggregation and the Rise of the Copyright Portfolio*

Aggregation of copyrights on a mass scale by a single (or small group) of firms can benefit licensing markets. As Professor Robert Merges has argued, contract-based arrangements that pool various IP rights can significantly reduce transaction costs and increase efficient exchanges.[31] Thus, for example, if a single record label were to acquire the rights to most recorded music, a streaming service could, hypothetically, seamlessly license the label's entire catalogue (known as a blanket license), foregoing the costs of negotiating with many different rightsholders.[32]

Such an arrangement, however, would also grant this rightsholder significant market power in its relationship with licensees, including

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29. *See* HERBERT HOVENKAMP, MARK D. JANIS, MARK A. LEMLEY & CHRISTOPHER R. LESLIE, 1 IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW §§ 1.3a, 4.2d (2d ed. 2010); Christopher S. Yoo, *Copyright and Product Differentiation*, 79 N.Y.U. L. REV. 212, 217–18 (2004) ("Although courts and commentators routinely speak of copyright 'monopolies,' the exclusivity granted by intellectual property protection creates monopoly power only if substitutes are unavailable and entry barriers prevent the emergence of any such substitutes in the foreseeable future." (footnote omitted)).

30. *See* Michael Abramowicz, *An Industrial Organization Approach to Copyright Law*, 46 WM. & MARY L. REV. 33, 38 n.12 (2004); Oren Bracha & Talha Syed, *Beyond Efficiency: Consequence-Sensitive Theories of Copyright*, 29 BERKELEY TECH. L.J. 229, 241 (2014) (outlining scholarship).

31. *See* Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CALIF. L. REV. 1293, 1340 (1996).

32. *See* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 21 (1979) ("This substantial lowering of costs, which is of course potentially beneficial to both sellers and buyers, differentiates the blanket license from individual use licenses.").

distributors of copyrighted works.[33] Professor Timothy Wu in particular has analyzed the "'bottleneck' problem deriving from copyright's grant of control over an asset essential to market entry (namely, copyrighted works)."[34] If a new distributor seeks to enter the market, it must obtain licenses from incumbent copyright owners in order to have legal authority to disseminate the protected works. As Professor Randy Picker puts it: "Empty pipes accomplish little, yet copyright law, along with communications law, determines whether entrants can easily find things to put in the pipes."[35] In a world of large-scale rights aggregation, copyright owners control what, if anything, goes in any new pipe, meaning distributors are often forced to pay supracompetitive prices to the owners of large "copyright estates."[36] Or, in situations where the rightsholder itself vertically integrates and enters the distribution market, competitors might simply be precluded from licensing entirely and thus essentially barred from entering the market.[37]

This situation is not just theoretical; in recent decades, a small handful of rightsholders have come to control the vast majority of copyrighted works in major creative industries. Five movie studios control between 74 to 84 percent of the motion picture market;[38] five trade book publishers control most of the U.S. publishing market;[39] three publishers control the majority of musical composition rights;[40] and three record labels control most sound recording copyrights, accounting for at least two-thirds of

33. Copyright owner market concentration also creates monopsony problems, which was the theory the government pursued—and won—in *Bertelsmann*. *See infra* Section IV.B.2. Combatting buy-side concentration, through greater attentiveness to individual authorial power, is explored in one of our forthcoming works. *See* Xiyin Tang, A Labor Theory of Intellectual Property (unpublished manuscript) (on file with author).

34. Timothy Wu, *Copyright's Communications Policy*, 103 MICH. L. REV. 278, 325–29 (2004); *see also* Peter Lee, *Reconceptualizing the Role of Intellectual Property Rights in Shaping Industry Structure*, 72 VAND. L. REV. 1197, 1203 (2019) ("[T]he mere aggregation of intellectual property rights can confer cost advantages on incumbents (and cost disadvantages on potential entrants) that indirectly shape industry structure.").

35. Randal C. Picker, *Copyright as Entry Policy: The Case of Digital Distribution*, 47 ANTITRUST BULL. 423, 441 (2002).

36. Lee, *supra* note 34, at 1245; *see also* Wu, *supra* note 34, at 326 ("The incumbent should be expected to charge a supra-competitive price if its ownership of the protected link makes it the only entity in a position to provide the service in question.").

37. Wu, *supra* note 34, at 325–28 (describing "vertical foreclosure" strategies).

38. *Movie Studios in the United States and Canada—Statistics & Facts*, STATISTA (Jan. 6, 2023), https://www.statista.com/topics/4394/movie-studios/ [https://perma.cc/2XG7-KCVL].

39. United States v. Bertelsmann SE & Co. KGaA, 646 F. Supp. 3d 1, 12 (D.D.C. 2022).

40. *See* IMPF, GLOBAL MARKET VIEW INDEPENDENT MUSIC PUBLISHING 3 (3d ed. 2023), https://www.impforum.org/wp-content/uploads/2023/04/Third-Edition-IMPF-Independent-Music-Publishing-Global-Market-View.pdf [https://perma.cc/94YF-UCZ2].

domestic music revenue.[41] How this concentration has explicitly affected the ability of new distributors to enter the market is difficult to determine in the abstract, but one example is potentially illustrative: Spotify's efforts to enter the U.S. market as a distributor were thwarted by record labels' licensing demands for years.[42] It was only after the major record labels convinced Spotify to grant them equity stakes in the company that the impasse was resolved.[43]

The market power conferred by aggregation has different effects depending on the market. In the digital music streaming market, for example, access to full catalogs is generally necessary for a distributor to compete.[44] A streaming service must obtain control over most music in order to have any chance of attracting listeners. In this respect, the individual catalogues of each large rightsholder are complements, granting these entities what some have called complementary oligopoly power.[45] Indeed, record labels and music publishers have been able to wield tremendous negotiating power when licensing to distributors such as Spotify.[46]

The dynamics differ somewhat in the television and film industries. Here, the trend has been toward vertical integration; companies with large portfolios of copyrighted works have formed dedicated streaming platforms

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41. *See* Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), 84 Fed. Reg. 1918, 1978 n. 230 (Feb. 5, 2019) (Strickler, C.R.J., dissenting) (final rule and order); *see also* U.S. COPYRIGHT OFF., COPYRIGHT AND THE MUSIC MARKETPLACE 22–23 (Feb. 2015) [hereinafter COPYRIGHT OFF. MUSIC STUDY], https://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf [https://perma.cc/66KM-HYJJ]; *see also* Lee, *supra* note 34, at 1256 (putting the number at 88%).

42. *See* Maura Johnston, *Spotify's U.S. Launch Delayed Again*, ROLLING STONE (Dec. 8, 2010), https://www.rollingstone.com/culture/culture-news/spotifys-u-s-launch-delayed-again-245549/ [https://perma.cc/7833-NBFC]; Andrew Nusca, *Spotify Saved the Music Industry. Now What?*, FORTUNE (Oct. 21, 2019, 3:30 AM), https://fortune.com/longform/spotify-music-industry-profits-apple-amazon/ [https://perma.cc/KD83-TPZS].

43. *See* Mark Dent, *The Economics of Spotify*, HUSTLE (Feb. 5, 2022), https://thehustle.co/the-economics-of-spotify/ [https://perma.cc/534N-QZX8].

44. *See* COMPETITION & MKTS. AUTH., MUSIC AND STREAMING: FINAL REPORT § 4.4 (2022) [hereinafter MUSIC AND STREAMING REPORT], https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1120610/Music_and_streaming_final_report.pdf [https://perma.cc/G5ZL-TBGB] ("While consumers benefit from having all of the most popular music on their chosen music streaming service, this 'full catalogue' model appears to result in weak competition, particularly on price, in the supply of this music by record companies to music streaming services.").

45. *See* Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), 84 Fed. Reg. 1918, 1979 n.232 (Feb. 5, 2019) (Strickler, C.R.J., dissenting) (describing complementary oligopoly problem and linking to Cournot's theory of oligopoly); *see also id.* at 1940 (majority opinion); Determination of Royalty Rates and Terms for Ephemeral Recording and Webcasting Digital Performance of Sound Recordings (Web IV), 81 Fed. Reg. 26316, 26348 (May 2, 2016).

46. *See* Xiyin Tang, *Copyright's Techno-Pessimist Creep*, 90 FORDHAM L. REV. 1151, 1183 (2021).

to showcase both their new content and back catalogues.[47] A prime example is Disney's creation of the "Disney+" platform, as the exclusive home to Disney's vast "library of beloved movies, TV series and exclusive original content from Disney, Pixar, Marvel, *Star Wars* and National Geographic."[48] Companies that serve primarily as distributors have lost access to catalogues that are now only available on the content-owner's dedicated streaming service.[49] Thus, distribution-focused companies such as Netflix have also vertically integrated, focusing more on developing original content in order to compete with Disney, Paramount, and other content producers.[50] But, as Netflix's recent financial troubles seem to portend, consumers may very well no longer be interested in a streaming platform unless they can gain access to both new content as well as a large range of existing content.[51]

In this respect, the market power conferred by aggregation of copyrighted works not only affects the ability of new distributors to enter the market but also affects entry at the content-creator level.[52] If Netflix, for example, is truly unable to keep its customers happy by investing in new content without also providing access to a range of back catalogues, the future of content creation may be a world in which the market is dominated by companies like Disney, i.e., where only established entities with large existing copyright portfolios and dedicated distribution platforms have the customer base necessary to ensure that new content production is a financially worthwhile endeavor. Part of this story is also tied to data collection; as Professors Kal Raustiala and Christopher Sprigman have argued, production companies are increasingly using consumer data in order to create content that is carefully tailored to consumer preferences.[53] Such data aggregation requires operating a dedicated distribution platform that features a large range of existing works.[54]

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47. *See* Lee, *supra* note 34, at 1244–45 ("The prospect of marrying distribution pipelines (such as cable and internet access) to copyrighted content helped motivate the recent Comcast-NBC Universal and AT&T-Time Warner mergers.").

48. *Disney+ Launches Today—and a New Era of Disney Entertainment Begins*, WALT DISNEY CO. (Nov. 12, 2019), https://thewaltdisneycompany.com/disney-launches-today-and-a-new-era-of-disney-entertainment-begins/ [https://perma.cc/NS4X-HYT6].

49. *See* Julia Alexander, *Every Part of Disney Is Making Exclusive Content for the Disney+ Streaming Service*, VERGE (Feb. 5, 2019, 4:45 PM), https://www.theverge.com/2019/2/5/18212646/disney-streaming-service-price-release-date [https://perma.cc/3QLX-ZLFR].

50. *See* Ben Thompson, *Spotify, Netflix, and Aggregation*, STRATECHERY (June 27, 2022), https://stratechery.com/2022/spotify-netflix-and-aggregation/ [https://perma.cc/AU5A-2KML].

51. *See id.*; *see also* Tang, *supra* note 46, at 1183–84 (discussing lack of access to catalogues as a "pain point" for any distributor).

52. *See* Neil Weinstock Netanel, *Copyright and 'Market Power' in the Marketplace of Ideas*, *in* ANTITRUST, PATENTS AND COPYRIGHT 149, 153 (François Lévêque & Howard Shelanski eds., 2005).

53. *See* Kal Raustiala & Christopher Jon Sprigman, *The Second Digital Disruption: Streaming and the Dawn of Data-Driven Creativity*, 94 N.Y.U. L. REV. 1555, 1558 (2019).

54. *See id.* at 1590 (explaining that data driven creativity requires "know[ing] what consumers watch and how they watch it").

Moreover, control over large catalogues of existing copyrighted works can create barriers to entries at the content-creation level in other ways. Professor Peter Lee notes that large incumbent movie studios tend to use their existing catalogues as a way of "ground[ing]" their new production arms, providing the vast amounts of capital necessary to cover the development, marketing, and distribution of new content,[55] as well as to spread risk.[56] This inevitably means such studios become the gatekeepers for any new content.

A similar dynamic is also at play in the book publishing industry.[57] Consider *United States v. Apple*, which found that Apple had entered into an e-book price fixing conspiracy with the five major book publishers, in violation of the Sherman Act.[58] The book publishers had colluded on setting e-book prices and threatened to withhold their catalogues from Amazon unless Amazon agreed to the new price scheme.[59] As Judge Cote noted in her bench trial findings, the publishers' actions were partially motivated by fear over Amazon's efforts to "disintermediat[e]" the book market: attracting authors directly to Amazon with promises of higher royalties and thus threatening the publishers' gatekeeping role.[60]

The DOJ's recent decision to sue Penguin Random House and Simon & Schuster over their proposed merger was similarly based on the theory that consolidation would grant the publishers too much market power—and specifically, monopsony power—in their negotiations with authors, reducing author pay and the quality and quantity of published works.[61] The DOJ's lawsuit stood out in a publishing landscape that had seen a flurry of merger activity over the past decade, all of which had proceeded with little regulatory intervention.[62] Indeed, some have viewed it as a test of whether a more expansive interpretation of anticompetitive conduct has taken hold amongst regulators. The theories that may underlie such interventions are discussed in the next Part.

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55. Lee, *supra* note 34, at 1270–71.

56. *Id.* at 1243.

57. Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 318–19 (1970) (noting how concentrations in book publisher market affects authors' ability to reach consumers).

58. United States v. Apple Inc., 952 F. Supp. 2d 638, 645 (S.D.N.Y. 2013), *aff'd*, 791 F.3d 290 (2d Cir. 2015).

59. *Id.* at 679–82.

60. *Id.* at 671.

61. Complaint at 4–6, United States v. Bertelsmann SE & Co. KGaA, 646 F. Supp. 3d 1 (D.D.C. 2022) (No. 1:21-cv-02886).

62. *See* Harris et al., *supra* note 2.

B. "Big Tech" Market Power: Loss Leading and Winner-Take-All Strategies

Due to increased concentration among content owners, licensing content is expensive. In 2017, Spotify—a service that was already a decade old at that point—warned investors that if it could not "successfully earn revenue at a rate that exceeds [its] operational costs, including royalty expenses, associated with [its] Service, [it] will not be able to achieve or sustain profitability or generate positive cash flow on a sustained basis."[63] That year, Spotify had reported an astounding 4.1 billion EUR in revenue.[64] But what was perhaps more surprising was the amount that Spotify was paying in royalties to copyright holders: 3 billion EUR.[65] As a result of these outsized royalty obligations, Spotify had posted an overall operating loss of 378 million EUR.[66] This story holds across content industries and the new digital services that relied upon expensive licenses to that content. As late as 2019, investors worried that, notwithstanding Netflix's concerted push into original content, "[s]ecuring licensing agreements" remained "one of the biggest expenses for Netflix. At the end of 2019, Netflix had $24.5 billion of content assets on its balance sheet . . . . Of this, licensed content accounted for $14.7 billion."[67]

Companies that focus exclusively or primarily on dissemination have responded to the reality of high licensing costs in a variety of ways. One story of this response is benign, and in fact even positive. In order to differentiate itself from rivals, a disseminator might innovate its own product, i.e., the consumer-facing platform or other mechanism of distribution.[68] By adopting technologies that enhance the user experience—which often involves taking advantage of network effects[69]—such distributors can make their own product a must-have for *content owners*, thus counteracting any of their advantages. This, according to some, is the story of Spotify's continued success; by developing innovative discovery and curation tools that consumers appear to value, Spotify has prevented

63. Spotify Tech. S.A., Registration Statement (Form F-1), at 17 (Feb. 28, 2018) [hereinafter Spotify Form F-1].

64. *Id.*

65. *See id.* at 71.

66. *Id.* at 17.

67. John Engle, *Netflix Is Still Too Dependent on Licensed Content*, YAHOO SPORTS (Dec. 18, 2020), https://sports.yahoo.com/netflix-still-too-dependent-licensed-192221534.html [https://perma.cc/X4HP-T63R].

68. *See* Ben Thompson, *Aggregation Theory*, STRATECHERY (July 21, 2015), https://stratechery.com/2015/aggregation-theory/ [https://perma.cc/CC6W-CKE5] (describing innovation strategies related to user experience).

69. *See* CSS, *Spotify: An Ecosystem Powered by Network Effects*, HARV. BUS. SCH. DIGIT. INITIATIVE (Oct. 4, 2015), https://d3.harvard.edu/platform-digit/submission/spotify-an-ecosystem-powered-by-network-effects/ [https://perma.cc/RVC7-U4GF].

record labels from entering into exclusive licenses with other distributors or attempting to create their own vertically integrated distribution models.[70] Spotify's success, however, required scale, resources, and licensing arrangements (originally tied to record labels' investment in the platform) that few new entrants could hope to achieve.[71]

The other story is more problematic from the perspective of both innovation and competition policy. The very anticompetitive nature of the content industry may encourage new technological entrants to develop their own anticompetitive measures: the use of loss leading strategies in copyright content markets as a way of increasing growth in other markets and/or winning the market by shutting out potential competitors.

Digital services had long attributed high licensing costs to the disproportionate bargaining power of content holders, described above. Yet just as the crippling cost of content licensing has hobbled the ability of dedicated streaming services like Spotify and Netflix to turn a profit, other technology companies like Amazon, Google, and Apple saw an opportunity. Enter the use of content as a loss leader.

When Apple first reported that it was entering what was already a crowded field of streaming services, it announced something that was meant to distinguish itself from its competitors: fair compensation for artists. Apple's Senior Vice President Eddy Cue announced that it had negotiated deals with record labels and music publishers "based on paying [artists] a higher royalty rate" than competitors like Spotify.[72] And while it had originally intended not to pay artists royalties for streams made during a three-month trial period, a highly vocal opposition from Taylor Swift led the tech giant to immediately change its policy, announcing that it "will now pay artists during the trial period *and* '. . . keep the royalty rate at the higher rate.'"[73] Apple doubled down on its artist-friendly policies in a direct letter to artists several years after its launch, publicly stating that it was paying royalties "roughly double" that of Spotify.[74] "We believe in paying every

70. *See* Thompson, *supra* note 50.

71. Moreover, even with its success, Spotify has still not achieved buyer power sufficient to offset the record labels' complementary oligopoly power, meaning it still likely pays the labels supercompetitive prices. *See* Determination of Rates and Terms for Digital Performance of Sound Recordings and Making of Ephemeral Copies to Facilitate Those Performances (Web V), 86 Fed. Reg. 59452 (Oct. 27, 2021) (analyzing Spotify's buying power in the streaming market and concluding the market is still not competitive).

72. Shirley Halperin, *Fallout from Taylor Swift's Letter: Apple's Eddy Cue Answers 9 Burning Questions*, BILLBOARD (June 22, 2015), https://www.billboard.com/pro/fallout-from-taylor-swifts-letter-apples-eddy-cue-answers-9-burning-questions/ [https://perma.cc/N8QN-ND26].

73. *Apple Music Changes Policy After Taylor Swift Stand*, BBC (June 22, 2015) (emphasis added), https://www.bbc.com/news/entertainment-arts-33220189 [https://perma.cc/994E-XHD3].

74. *See* Anne Steele, *Apple Music Reveals How Much It Pays When You Stream a Song*, WALL ST. J. (Apr. 16, 2021, 5:38 PM), https://www.wsj.com/articles/apple-music-reveals-how-much-it-pays-when-you-stream-a-song-11618579800 [https://perma.cc/T6K4-2UZU].

creator the same rate, that a play has a value," it wrote in a dig to Spotify, which does not pay artists on a per-stream (but rather as a percentage of revenue) metric.[75]

What was left out of that particular letter, however, was how or why Apple could afford to pay artists more. Unlike Spotify, Apple can afford to pay artists more, and on more artist-friendly terms, thanks to its economies of scale and scope. It can use music as a loss leader, offsetting losses from music streaming against gains in revenue across its other product lines. Indeed, Apple's public filings do not consider music as a revenue category at all. Instead, Apple measures revenue in a broad category called "Services."[76] Apple has consistently cited three categories (Apple Store purchases, cloud services, and advertising) as the primary revenue drivers.[77] Notably, the first of these categories—Apple Store purchases, in which Apple collects a 30% commission[78]—was recently found by a court to have "enabled Apple to collect extraordinary profits," exceeding its operating margins by over 75% for years.[79]

Not only can Apple spread losses from music streaming across gains in revenue across all of its other Services, but it can also use digital content as a means of increasing its number of users and then driving these users into its ecosystem, most notably toward sales of its complementary services and products.[80] For Apple, this is primarily its hardware—the iPhones and iPads on which consumers will be listening to music or watching programming. Hardware sales constitute a greater share of Apple's revenue than the broad "Services" category, outpacing it four to one.[81] Apple is of course not the only Big Tech company that uses copyrighted content as a loss leader;

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75. *Id.*

76. The "Services" category includes a line item for "digital content." The digital content category is broad, sweeping in Apple's subscription-based content services including Apple Arcade (its gaming subscription service), Apple Music, Apple News, AppleTV+ (including Apple Original Films), and Apple Fitness+, its personalized fitness service. *See* Apple Inc., Annual Report (Form 10-K), at 2 (Oct. 28, 2021) [hereinafter Apple Form 10-K]. But more critically, digital content is itself part of a much broader category in which Apple measures revenue—a "Services" category. That category represents AppleCare (which customers purchase when they purchase Apple hardware, for priority access to Apple technical support), cloud services, and payment services, including Apple Pay. *See* Apple Inc., Quarterly Report (Form 10-Q), at 16 (July 28, 2022).

77. *See* Apple Inc., Quarterly Report (Form 10-Q), at 25 (July 27, 2021); Apple Inc., Quarterly Report (Form 10-Q) 27 (July 30, 2020); Apple Inc., Quarterly Report (Form 10-Q), at 26 (July 31, 2019); Apple Inc., Quarterly Report (Form 10-Q), at 26 (Aug. 1, 2018); Apple Inc., Quarterly Report (Form 10-Q), at 25 (Aug. 2, 2017).

78. *See* Epic Games, Inc. v. Apple Inc., 559 F. Supp. 3d 898, 1037 (N.D. Cal. 2021), *aff'd in part, rev'd in part*, 67 F.4th 946 (9th Cir. 2023).

79. *Id.* (holding that "Apple's maintenance of its commission rate stems from market power, *not competition* in changing markets.").

80. *See* Peter DiCola, *A Practical Model of Copyright Economics with Intermediaries*, 19 REV. ECON. RSCH. ON COPYRIGHT ISSUES 1, 22 (2022).

81. *See* Apple Form 10-K, *supra* note 76, at 21. Note that Apple's public filings disaggregate hardware into iPhone, Mac, iPad, and Wearables (Airpods, Apple TV, Apple Watch, etc.) components.

Amazon is also notable for bundling its content streaming offerings with its Prime shopping subscription, at no additional cost to the consumer.[82] Such loyalty programs that bundle access to loss-leading content with other services can also raise consumers switching costs.[83]

Through loss-leading strategies, large technology companies—Apple, Amazon, and the like—can use copyright content markets to bolster sales in areas like hardware and retail. But why else might a tech company enter into copyright content markets using a loss-leader strategy? Perhaps it is because they believe the market could, ultimately, be winner-take-all. Indeed, in the 2013 *United States v. Apple* case, discussed above, the U.S. District Court for the Southern District of New York noted that Amazon was selling many of its books below cost, following a loss-leader strategy intended to cement its dominance as the number one seller of e-books.[84] Amazon's gamble appears to be that low-cost pricing will enable it to force out e-book competitors and win the market. Similarly, Apple, by offering more money to artists and record labels, has been able to secure a spate of exclusive content for its music platform to the exclusion of its competitors.[85]

The streaming sector provides some of the clearest examples of this winner-take-all strategy in action. We seem to have reached the end of all-you-can-eat optimism of streaming's early days, when the world seemed awash in new content and firms like Apple, Amazon, and Netflix were all jostling to outbid each other in seven-figure acquisitions of prestige film and

82. *See* Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), 84 Fed. Reg. 1918, 1971 (Feb. 5, 2019) (final rule and order).

83. *See* DiCola, *supra* note 80, at 21.

84. *See* United States v. Apple Inc., 952 F. Supp. 2d 638, 645 (S.D.N.Y. 2013), *aff'd*, 791 F.3d 290 (2d Cir. 2015); George Packer, *Cheap Words*, NEW YORKER (Feb. 9, 2014), http://www.newyorker.com/magazine/2014/02/17/cheap-words [https://perma.cc/2HYB-4W8F] (recounting how Amazon's founder, Jeff Bezos, instructed the product manager for the Kindle launch to "[p]roceed as if your goal is to put everyone selling physical books out of a job."). However, because this fact was raised to the court by Apple defending a price-fixing allegation, the court did not have "the occasion to decide whether Amazon's choice to sell [*New York Times*] Bestsellers or other New Releases as loss leaders was an unfair trade practice or in any other way a violation of law." *Apple Inc.*, 952 F. Supp. 2d at 708.

85. *See* Tim Ingham, *Apple Music Signs Taylor Swift Exclusive in Landmark Content Deal*, MUSIC BUS. WORLDWIDE (Dec. 13, 2015), https://www.musicbusinessworldwide.com/apple-music-gets-taylor-swift-exclusive/ [https://perma.cc/75ZB-9P9M]; Brandon Shaw, *Frank Ocean Pulls Off Heist of the Year with* Endless *and* Blonde, CULT OF MAC (Aug. 27, 2016, 11:45 AM), https://www.cultofmac.com/443519/frank-ocean-endless-blonde-apple-music-exclusives/ [https://perma.cc/UK5U-VP6B].

television,[86] with a sudden crash to earth in early 2022 as Netflix announced heavy subscriber losses and began laying off employees.[87]

For some, Netflix's spectacular contraction merely confirms the long-held consensus that the current fragmented streaming market cannot hold.[88] But who will survive when the dust from the era of cheap money and venture capital recklessness ends?[89] Many suspect that it will be those firms who are best positioned to defer profits the longest: diversified, multi-product line firms like Google and Apple, who have large reserves of cash on hand and much longer time horizon to see through the success of a particular product line—*especially* if that product line, as discussed above, happens to drive consumers toward other areas of prioritized growth for the company.[90] And if the firm can do so while crowding out its single-business competitors—services like Netflix, Spotify, or Pandora for which content streaming is their only line of business—then all the better.

Loss-leader and winner-take-all strategies have clear effects on market entry. A race to the bottom when pricing streaming and other forms of dissemination may be feasible for companies that have achieved the scale of Apple or Amazon, but few other distributors could hope to compete.[91] Moreover, if it is indeed true that these firms are counting on a winner-take-all outcome, we may soon reach a stage in which a small number of technology companies control all or nearly all access points for copyright content, giving these companies tremendous market power in their licensing negotiations with copyright owners, and potentially leading licensing rates for such content to decrease.[92]

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86. *See* Shira Ovide, *Apple and the Streaming Mirage*, N.Y. TIMES (Mar. 29, 2022), https://www.nytimes.com/2022/03/29/technology/coda-apple-tv-streaming.html [https://perma.cc/AU8Y-S737] (noting that streaming companies are engaged in "irrational spending in the short term" which "can be both glorious for us, and a dangerous mirage if and when the money dries up").

87. Tristan Bove, *After Disrupting TV and Upending Hollywood, Netflix Could Be Looking More Like a Cable Network and Movie Studio*, FORTUNE (May 18, 2022, 12:46 PM), https://fortune.com/2022/05/18/netflix-movies-theaters-45-days-ads-revenue/ [https://perma.cc/8Q7L-7BPP].

88. *See* Raustiala & Sprigman, *supra* note 53, at 1608 (speculating that "in the long term . . . returns to scale will move the market toward consolidation").

89. Some have compared the COVID era of cheap borrowing and soaring valuations to earlier boom-and-bust eras—the 2000 dot-com bubble and the frothy years leading up to the 2008 financial crisis. *See, e.g.*, Alexander Osipovich & David Benoit, *Investors Big and Small Are Driving Stock Gains with Borrowed Money*, WALL ST. J. (Apr. 7, 2021, 8:52 AM), https://www.wsj.com/articles/investors-big-and-small-are-driving-stock-gains-with-borrowed-money-11617799940 [https://perma.cc/AQ4L-7K24]; Matt Phillips, *Market Edges Toward Euphoria, Despite Pandemic's Toll*, N.Y. TIMES (Jan. 8, 2021), https://www.nytimes.com/2020/12/26/business/investors-bull-market-pandemic.html [https://perma.cc/8MWS-H933].

90. *See, e.g.*, Ovide, *supra* note 86; Jill Krasny, *Why Every Music Start-Up Will Fail (and Apple Will Win)*, INC. (June 10, 2013), https://www.inc.com/jill-krasny/why-startups-are-entering-music-streaming-wars.html [https://perma.cc/2RNA-SLKW].

91. *See, e.g.*, Krasny, *supra* note 90.

92. *See* DiCola, *supra* note 80, at 39–40 (modeling how an intermediary might achieve monopsony power with respect to copyright owners and other content creators).

II. ADDRESSING MARKET POWER IN COPYRIGHT CONTENT MARKETS: COMPETING APPROACHES

Copyright content markets thus face a range of anticompetitive dynamics at multiple levels of the supply chain. Some problems are centered on copyright owners' aggregation of large copyright portfolios; through such aggregation, rightsholders can charge supracompetitive prices to distributors, vertically foreclose new distributors or producers from entering the market, or undercompensate content creators. Other problems are focused on the economies of scale and scope leveraged by large technology companies that are increasingly entering content markets. By engaging in loss leading and deferring revenue, such companies have also begun erecting barriers to entry and could, in the long term, begin undercompensating copyright owners and creators.

Competition problems are generally the purview of antitrust law. However, as this Part explores, conventional antitrust's application to copyright-related markets is far from straightforward. The dominant theoretical approaches to antitrust enforcement may yield outcomes that are either under-inclusive or lack any clear guiding principles. Instead, the peculiarities of copyright may mean that competition problems in content markets must be assessed through the lens of copyright's policy goals. However, copyright law alone may be insufficient to address such problems, suggesting that, as the next Parts explore, a hybrid copyright-antitrust enforcement regime is necessary.

A. Antitrust

The Chicago School approach to antitrust, which has dominated U.S. antitrust policy over the last several decades, has generally been skeptical of expansive antitrust enforcement.[93] This approach has maintained that violation of the antitrust laws requires a showing of harm to consumer welfare, which has typically been measured by showing proof of price increases or restrictions on output.[94] Advantages derived from economies of scale may not create actionable anticompetitive barriers to entry in the

93. *See* Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1701 (1986) ("[Chicago School] seems to favor little other than prosecuting plain vanilla cartels and mergers to monopoly. Its adherents are reasonably sure that these two things are harmful to consumers (though there are scattered doubters); these incurable skeptics doubt that other intervention is worth the costs.").

94. To be sure, courts have also applied the consumer welfare standard to strike down non-price-related practices, such as those that harm innovation or worker wages. *See* Michael A. Carrier, *How the Federal Trade Commission Can Use Section 5 to Strengthen the Right to Repair*, 37 BERKELEY TECH. L.J. 1145, 1195 (2022).

absence of such effects on consumers or clear evidence of cartel-like behavior.[95]

Some have argued that there is not, and has never really been, a single approach to antitrust policy over the last decades and that the Chicago School has faced dissenters from the very beginning.[96] Nonetheless, recent years have seen the rise of a group of antitrust scholars and policymakers who have self-consciously framed themselves in opposition to prevailing Chicago School orthodoxies. Under this "neo-Brandeisian" approach, antitrust should be concerned with the broader problems posed by corporate consolidation, intervening in markets even in the absence of clear price effects.[97]

While a full analysis of this debate is outside the scope of this Article, it is worthwhile to consider how each approach might respond to the dynamics outlined in the last Section.

1. Chicago School Antitrust

The aggregation of large copyright portfolios by a small number of firms certainly gives these firms a significant amount of bargaining power. But traditional antitrust law might struggle to identify a cause of action that encompasses such consolidation or any licensing demands that record labels, book publishers, or movie studios might make. In particular, the market power derived from aggregation is often the product of legitimate practices—the purchasing of back catalogues, the signing of new artists or authors, or vertical integration into the distribution market. And, as the FTC's IP licensing guidelines explain, the mere ownership of an intellectual property right, without more, does not confer market power actionable under the antitrust laws—nor would the government intervene in markets in such instances.[98]

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95. *See* Herbert Hovenkamp & Fiona Scott Morton, *Framing the Chicago School of Antitrust Analysis*, 168 U. PA. L. REV. 1843, 1862 (2020).

96. *See generally* Herbert Hovenkamp, *Whatever* Did *Happen to the Antitrust Movement?*, 94 NOTRE DAME L. REV. 583 (2018) [hereinafter Hovenkamp, *Antitrust Movement*]; Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?*, 45 J. CORP. L. 65, 81 (2019) [hereinafter Hovenkamp, *Consumer Welfare Principle*].

97. *See, e.g.*, TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 127–39 (2018).

98. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY 4–5 (2017), https://www.ftc.gov/system/files/documents/public_statements/1049793/ip_guidelines_2017.pdf [https://perma.cc/H8F7-7WQK] ("[M]arket power (or even a monopoly) that is solely 'a consequence of a superior product, business acumen, or historic accident' does not violate the antitrust laws."); *see also* Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 31 (2006); Robin C. Feldman & Mark A. Lemley, *Atomistic Antitrust*, 63 WM. & MARY L. REV. 1869, 1872 (2022) ("A fundamental premise of modern antitrust law is that monopoly itself is not illegal. Monopolies can exist—and charge monopoly prices—without fear of antitrust liability. Big is not bad if a company's strength is earned through legitimate competition.").

Thus, the accumulation of large portfolios of copyrights would itself not necessarily subject a firm to antitrust liability. Nor would a Chicago-School account find fault with a copyright owner that chose to vertically integrate and enter the distribution market. The efficiencies associated with such integration are generally understood to outweigh the risks of vertical foreclosure.[99]

The Chicago School approach is also skeptical that loss leading is anticompetitive. While predatory pricing can be actionable, this requires proof that the below-cost pricing scheme will lead to recoupment; i.e., proof that the loss-leading scheme will ultimately lead to monopoly power and monopoly pricing sufficient to generate a profit.[100] Recoupment is incredibly difficult to prove.[101] The kind of goals that seem to inform the loss-leading strategies used by new disseminators—taking advantage of economies of scale to bring consumers into other markets and/or engaging in a long-term winner-take-all play—would likely not be actionable.[102]

2. *Neo-Brandeisian Antitrust*

The neo-Brandeisian approach might be more willing to subject the creative industries to antitrust scrutiny. As the nomenclature suggests, neo-Brandeisian antitrust advocates, alternately called "progressive" antitrust (or, more negatively, "hipster" antitrust), wish to resurrect an older form of antitrust that dominated from the 1920s through to the 1960s.[103] As the writings of the movement's namesake, Louis Brandeis,[104] suggest, neo-Brandeisians are willing to sacrifice economic efficiency, especially as measured solely based on price effects, in order to tackle broader problems

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99. Hovenkamp & Morton, *supra* note 95, at 1868–69 ("The Chicago position on foreclosure was, once again, insistence that markets will work themselves pure. A firm claiming foreclosure was simply a whining loser who was unable to compete in the marketplace."); Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 937–38 (1979); *see also supra* Section I.A (explaining concerns over vertical foreclosure).

100. *See* Christopher R. Leslie, *Predatory Pricing and Recoupment*, 113 COLUM. L. REV. 1695, 1747 (2013) ("The monopoly power element reduces the risk that predatory pricing claims will deter beneficial competition. Because section 2 applies only to monopolists (and would-be monopolists), the vast majority of American businesses are completely unaffected by section 2 predatory pricing law. Firms without significant market share can use all variety of loss leaders and promotional discounts without incurring section 2 liability. If the predator reduces price below cost and injures its rivals, but fails to acquire the power to raise prices above supracompetitive levels, then its conduct may be anticompetitive, but section 2 liability does not attach." (footnote omitted)).

101. *See* Hovenkamp & Morton, *supra* note 95, at 1869.

102. *See* Daniel A. Crane, *Mixed Bundling, Profit Sacrifice, and Consumer Welfare*, 55 EMORY L.J. 423, 474 (2006) ("[O]rdinary predation analysis generally permits loss-leading pricing on individual items in a portfolio for promotional purposes.").

103. Hovenkamp, *Consumer Welfare Principle*, *supra* note 96, at 81–83.

104. *See generally* LOUIS D. BRANDEIS, THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS (Osmond K. Fraenkel ed., 1934).

posed by corporate consolidation, such as protecting labor, reducing political concentration, and bolstering democratic institutions.[105]

In a general sense, some of the market dynamics that the neo-Brandeisians find particularly problematic are characteristic of the copyright content industries. Proponents of neo-Brandeisian antitrust might find concerning the loss-leading strategies we describe above, in which Apple uses its dominance in hardware to subsidize below-cost pricing in competitive markets like music and content streaming.[106] They are also particularly wary of vertical integration,[107] which is prevalent among both traditional content copyright owners as well as new digital entrants.[108]

The neo-Brandeisian critique of loss leading and vertical integration, however, may not offer an obvious way forward for addressing these problems in copyrighted content markets. As some critics of the New Antitrust have argued generally, the approach lacks clear guiding lines for policing the tradeoffs between, on the one hand, classic antitrust concerns like efficiency, innovation, and related economic welfare priorities, and more amorphous ones like justice and democratic accountability, on the other.[109] What, for example, is the line between lowering costs as an efficient growth strategy and predatory pricing?[110] And what of the

105. *See* WU, *supra* note 97, at 33–44, 127–39.

106. *See* Hovenkamp, *Consumer Welfare Principle*, *supra* note 96, at 83–84 (summarizing arguments of neo-Brandeisians and their precursors); *see also, e.g.*, Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 760–68 (2017) (criticizing Amazon's loss-leading practices).

107. *See, e.g.*, Khan, *supra* note 106, at 731–34.

108. *See* Christopher Jon Sprigman, *What Does Antitrust's Revival Mean for Copyright?*, 68 J. COPYRIGHT SOC'Y U.S.A. 401, 424–26 (2021) (noting the trend of vertical integration among new digital entrants like Netflix); Olivia Pakula, Comment, *The Streaming Wars+: An Analysis of Anticompetitive Business Practices in Streaming Business*, 28 UCLA ENT. L. REV. 147, 150–58 (2021) (surveying the history of vertical integration in the entertainment business, from the "Big Eight" major studios to today's streaming wars); Rachel Landy, Comment, *Copyright Cartels or Legitimate Joint Ventures? What the MusicNet and Pressplay Litigation Means for the Entertainment Industry's New Distribution Models*, 19 UCLA ENT. L. REV. 371, 380 (2012) ("The acceptance of new technology into the entertainment industry is often accompanied by an attempt at vertical integration: content owners try to exert greater control over downstream dissemination of copyrighted material by integrating with other entities in the distribution chain.").

109. *See, e.g.*, A. Douglas Melamed, *Antitrust Law and Its Critics*, 83 ANTITRUST L.J. 269, 284–85 (2020) ("[T]he institutions of antitrust law are not well suited to address multiple and often conflicting objectives . . . . Were antitrust law to serve multiple objectives, it would need criteria to guide decisions in the many instances when those objectives would conflict. There is, however, no algorithm for weighing inequality or political power, on the one hand, against economic welfare, on the other. There is not even a common metric for measuring them. Absent such a metric or algorithm, antitrust decisions would necessarily be arbitrary and perceived as arbitrary."); *see also* Hovenkamp, *Consumer Welfare Principle*, supra note 96, at 67 ("[T]he neo-Brandeis movement at this writing has not provided much in the way of a calculus for determining how these goals should be applied to specific practices, other than highly general ones of the nature that Amazon should be regulated in some fashion.").

110. *See* Hovenkamp, *Antitrust Movement*, *supra* note 96, at 588–89.

instances in which a firm's vertical integration into a new level of the supply chain yields innovation that ultimately benefits the public?[111]

As we explore further in Part IV, the recent challenge to the Simon & Schuster-Penguin Random House merger—widely considered to be a rare win for neo-Brandeisian antitrust[112]—might nonetheless have failed to fully address the line-drawing difficulties at play when regulating creative industries.[113] Thus, while we are sympathetic to the more expansive vision of antitrust enforcement embraced by the neo-Brandeisians, their project has not yet demonstrated a coherent normative approach to regulating copyrighted content markets.

B. Copyright

How, then, should we conceptualize market power in markets for copyrighted works? The lens provided by antitrust law may alone be insufficient to guide what, if any, intervention is warranted. In this Section we propose that the policy agenda that underlies copyright law writ large can supply the normative criteria for understanding both the problem of market power in the creative industries and how to handle the tradeoffs that regulation will inevitably require. However, as we also argue, copyright law alone is poorly equipped to provide the legal tools necessary to create effective regulation in such industries.

1. The Challenges of Market Power in Copyright Industries

Plotting a way forward requires recognizing that, in many cases, competition policy can be copyright policy. Understanding why requires considering copyright's own first principles. Copyright, at least in the U.S. tradition, reflects a utilitarian bargain. Copyright provides creators with not only exclusive rights in order to incentivize the creation of new creative works, but also limits these rights in order to ensure that the public maintains sufficient access to creative content.[114] In economic terms, copyright law allows owners to price above marginal cost (which, given the fact that copyright goods are nonrivalrous and cost very little to reproduce, can be

111. *See* Melamed, *supra* note 109, at 284 (citing examples such as Apple's and Walmart's innovations at new levels of the supply chain).

112. *See* Brent Kendall & Jeffrey A. Trachtenberg, *Justice Department Sues to Block Penguin Random House's Acquisition of Simon & Schuster*, WALL ST. J. (Nov. 2, 2021, 6:23 PM), https://www.wsj.com/articles/justice-department-sues-to-block-penguin-random-houses-acquisition-of-simon-schuster-11635866422 [https://perma.cc/6SKK-NDSU].

113. *See infra* Section IV.B.1.

114. *See* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 11–14 (2003); Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257, 285 (2007).

close to zero).[115] This generates a deadweight loss; some consumers will be priced out even though they would otherwise receive access in a world without copyright protection.[116] But such inefficiencies are (so the story goes) outweighed by the necessity of allowing creators to receive a return on the fixed costs of creativity; without allowing pricing above marginal cost, creators and their investors would lack any incentive to enter the market at all.[117] But overprotection of copyright works—to the point, for example, that all of the positive externalities of creativity are internalized by the copyright owner[118]—would itself overly harm social welfare. Moreover, overprotection can actually undermine copyright's incentive function by preventing authors from building on existing works. Copyright law is thus an effort to maximize social welfare by balancing between the twin goals of incentives and access (commonly framed as the "incentives-access" tradeoff).[119] But because copyright applies uniformly to all creative works,[120] rather than by attempting to tailor protection to the actual costs of creative expression in a given industry (an impossible task), the copyright system is far from the first-best solution to managing this tradeoff.[121]

While this incentives-access story is primarily discussed when considering individual works and the numerous entitlement-level limitation and exceptions designed to prevent overprotection,[122] copyrighted works do not exist in a vacuum: the economic infrastructure in which most creativity occurs involves large firms that finance numerous creative works. As explained in the last Part, book publishers, record labels, and movie studios invest in new creativity and spread their risk across multiple works. While some have argued that such intermediaries are increasingly unnecessary,[123] the fact is that the "incentives" side of copyright's policy agenda, as a story of return on investment, is inextricably bound to the overall structure of

115. *See* Bracha & Syed, *supra* note 30, at 239.

116. *Id.*

117. *Id.*

118. *See* Frischmann & Lemley, *supra* note 114, at 285.

119. Bracha & Syed, *supra* note 30, at 239–40 ("[T]he exclusive entitlements should be so crafted that the pricing power conferred on the copyright owner is not stronger than necessary to incentivize the creation of the work. Any pricing power beyond this level means additional access cost without the corresponding incentive benefit." (footnote omitted)).

120. For example, the term of copyright protection is the same for all works, regardless of their cost of creation or production.

121. *See* Bracha & Syed, *supra* note 30, at 240; *see also* Adi Libson & Gideon Parchomovsky, *Toward the Personalization of Copyright Law*, 86 U. CHI. L. REV. 527, 528 (2019).

122. *See, e.g.*, Glynn S. Lunney, Jr., *Fair Use and Market Failure:* Sony *Revisited*, 82 B.U. L. REV. 975, 975 (2002).

123. *See* Molly Van Houweling, *Authors Versus Owners*, 54 HOUS. L. REV. 371, 372 (2016).

copyright markets.[124] What might appear as a "supracompetitive" license price may in fact be necessary to ensure adequate creative incentives.[125] As Professor Neil Netanel explains, since copyright allows pricing above marginal cost anyway, it can be "extraordinarily difficult to determine what are 'normal' profits for copyright holders" and to answer "the question of how much market power and supracompetitive pricing we are willing to tolerate."[126]

At the same time, market concentration can also "exacerbate" the ways in which copyright already restricts access, generates deadweight loss, or reduces positive externalities related to dissemination.[127] In particular, vertical foreclosure and other barriers to entry in new dissemination markets can limit innovation in technologies of dissemination, and consolidation of copyright catalogues can allow owners to charge licensing prices that dramatically reduce the number of consumers who can access works to begin with.[128] Moreover, market power can also distort copyright's incentive function by creating barriers to entry at the content-creation level as well. As discussed in the last Part, the consolidation of book publishers, record labels, and music studios has indeed made it difficult for new content producers to enter the market.

The market power dynamics in many copyright markets thus present a policy dilemma that layers onto copyright's inherent tradeoff.[129] We know

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124. *See, e.g.*, Dan Sinykin, *Cormac McCarthy Had a Remarkable Literary Career. It Could Never Happen Now.*, N.Y. TIMES (June 19, 2023), https://www.nytimes.com/2023/06/19/opinion/cormac-mccarthy-publishing.html?smid=nytcore-ios-share&referringSource=articleShare [https://perma.cc/C4SC-SA82] (noting that the rise of large publishing houses, with dedicated marketing teams, allowed otherwise obscure writers to achieve commercial success).

125. C. Scott Hemphill, *Intellectual Property and Competition* Law, *in* THE OXFORD HANDBOOK OF INTELLECTUAL PROPERTY LAW 872, 877–79 (Rochelle Dreyfuss & Justine Pila eds., 2018) ("Taking dynamic effects into account might argue in favor of a measure of latitude to the innovator in some cases, thereby undercutting the static analysis. The prospect of higher prices is an ex ante inducement to innovate.").

126. Netanel, *supra* note 52, at 165–66; *see also* Lee, *supra* note 34, at 1277 ("[I]dentifying instances of 'problematic' industry concentration is difficult given that no consensus exists regarding the optimal industry structure for fostering innovation."); Hemphill, *supra* note 125, at 877 ("The pro-monopoly perspective on innovation, as reinforced by IP policy, might be taken to alter the internal cost-benefit calculus of antitrust law.").

127. *See* Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1, 24–27 (2003) (noting this "excerbat[ing]" effect).

128. *See* Wu, *supra* note 34, at 325–29 (examining examples of these phenomena historically); Jacob Victor, *Reconceptualizing Compulsory Copyright Licenses*, 72 STAN. L. REV. 915, 979 (2020) (examining these dynamics in contemporary music market).

129. *See* Netanel, *supra* note 52, at 157 ("Copyright holders' propensity to use copyright as a vertical restraint presents an unacceptable burden on independent speech. But the untrammeled and unlicensed deployment of new distribution technologies might undercut copyright's incentive to create original expression."); *cf.* Carrier, *supra* note 28, at 768 (exploring similar tension in the patent-antitrust intersection and noting that "monopolists . . . often reduce output, raise prices, limit innovation (so as not to introduce products that might dislodge their market position), and fail to allocate resources to the

that market power may be undesirable to the extent it restricts market entry (and, by extension, innovation at the content-creation or distribution level),[130] but concentration, and its associated high prices, *may* be desirable to the extent it allows creators and their intermediaries to receive a return on their investment, thus preserving copyright's incentive function.

This insight is not new; Justice Stephen Breyer, in his seminal article on the publishing industry, recognized as early as 1970 that while ownership of a copyright in a particular title does not "interfere with competition between titles, the power to *accumulate* these exclusive licenses to publish may nonetheless . . . inhibit such competition."[131] Thus, aggregation "can curtail book circulation (by raising prices) and may even limit the number of titles produced (by restricting royalties)."[132] The calibration of copyright and competition policies, then, may require market intervention. But, reflecting the realities of copyright's policy agenda, this intervention can look different than what antitrust alone might provide.[133]

2. *The Limits of a Copyright-Internal Approach*

To provide solutions to this problem, some scholars have looked to copyright's internal doctrines and institutions, rather than antitrust law. Professor Randal Picker has argued that copyright is better equipped to make decisions about "creation incentives and subsequent use rights" in a way that antitrust cannot.[134] Picker, and others, have noted that copyright contains several internal regimes that govern market entry in various ways, such as safe harbors and compulsory licenses.[135] For example, copyright's first sale doctrine removes the ability of copyright owners to restrict resale or rental of objects that embody copyrighted works, such as hardcopy books

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uses most highly valued by consumers. But many acts undertaken by patentee monopolists or agreements between patentees and licensees restrict competition by their very operation." (emphasis omitted) (footnote omitted)).

130. *See* Tim Wu, *Taking Innovation Seriously: Antitrust Enforcement if Innovation Mattered Most*, 78 ANTITRUST L.J. 313, 318 (2012) (exploring link between innovation and market entry).

131. Breyer, *supra* note 57, at 318 (footnote omitted).

132. *Id.* at 318–19.

133. Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 928 (2005) (noting tension "between the respective values of supporting creative pursuits through copyright protection and promoting innovation in new communication technologies"); Tim Wu, *Intellectual Property, Innovation, and Decentralized Decisions*, 92 VA. L. REV. 123, 123–24 (2006) ("[W]e must weigh the benefits of intellectual property assignments, which include subsidizing or making possible desirable economic activity, against the costs of the centralization of economic decisionmaking and the creation of barriers to innovation and market entry."); Mark A. Lemley & Mark P. McKenna, *Unfair Disruption*, 100 B.U. L. REV. 71, 113 (2020).

134. Picker, *supra* note 35, at 425–26 ("Antitrust really is not about calibrating the returns from an innovation or copyrighted work that results in substantial market power and monopoly profits.").

135. *See id.* at 425; *see also, e.g.*, Christina Bohannan & Herbert Hovenkamp, *IP and Antitrust: Reformation and Harm*, 51 B.C. L. REV. 905, 906 (2010); Wu, *supra* note 34, at 325–29.

or DVDs. By removing such control, the doctrine allows libraries, video rental stores, and the like to operate without concern over restrictive licensing demands stemming from the market power of copyright owners, who may prefer that consumers purchase, rather than rent, works.[136]

However, as we have each argued in recent work, copyright law is becoming increasingly ill-equipped to ensure that new market entrants compete against incumbent copyright owners and their large copyright portfolios.[137] To return to the example of the first sale doctrine: recent decisions have held that the doctrine has no applicability when it comes to digital distribution. The Second Circuit, for example, rejected the idea that a digital file embodying a work can be "resold" such that the copyright owner's rights are not implicated; such resale will always entail the creation of an infringing copy.[138] In the absence of the first sale doctrine, entities that wish to lend copyrighted works digitally—including libraries—can only do so after receiving a license with the copyright owners.[139] Thus, while lending was once immune from copyright owner market power, thanks to the first sale doctrine's safe harbor, copyright owners will now be able to impose their licensing demands, however restrictive, on lenders as well.

A copyright-internal approach also struggles with how to handle the loss-leading practices of new market entrants. Recent scholarship has sought to define how the law can police the line between legitimate business practices that are consistent with IP's policy agenda, and anticompetitive conduct that should be legally actionable. Professors Mark Lemley and Mark McKenna, in particular, have attempted to provide a more comprehensive way to respond to "market disruption," particularly the challenges to copyright-owner incumbents posed by new technologies seeking to enter the market.[140] They argue that only those practices by new entrants that are directly traceable to an act of copyright *infringement* should be actionable as unfair competition. They explain: "treat[ing] market disruption as relevant to an IP case only if the disruption is traceable to the act of infringement itself . . . will . . . give us a metric by which to decide when

136. *See* Noti-Victor, *supra* note 18, at 1781–89 (discussing this and other copyright-internal market-opening mechanisms); *see also infra* Section II.B.2 (discussing compulsory licenses).

137. *See* Noti-Victor, *supra* note 18, at 1823–24; Xiyin Tang, *Privatizing Copyright*, 121 MICH. L. REV. 753, 805–06 (2023).

138. Capitol Records, LLC v. ReDigi Inc., 910 F.3d 649, 657–59 (2d Cir. 2018); *see also* Disney Enters., Inc. v. Redbox Automated Retail, LLC, 336 F. Supp. 3d 1146, 1156, 1158 (C.D. Cal. 2018) (granting preliminary injunction and endorsing *ReDigi*).

139. Thus, for example, in recent litigation between book publishers and the Internet Archive over its unlicensed "digital lending program," established to provide the public with access to books during the COVID-19 pandemic, the Internet Archive has relied on a fair use, rather than first sale doctrine, defense. *See* Peter M. Routhier, *Internet Archive Opposes Publishers in Federal Lawsuit*, INTERNET ARCHIVE (Sept. 3, 2022), https://blog.archive.org/2022/09/03/internet-archive-opposes-publishers-in-federal-lawsuit/ [https://perma.cc/R4X7-5R3H].

140. Lemley & McKenna, *supra* note 133, at 75–77.

disruption is unfair."[141] In their view, and by reference to "what political economist Joseph Schumpeter called 'creative destruction,'" disruption that does *not* hinge on an act of infringement is generally good for innovation: "the world usually benefits from disruptive new technologies" because "[n]ew technologies frequently shake up the market."[142] Moreover, using infringement as a metric would allow courts and policymakers to "differentiate cases in which disruption would actually interfere with the purposes of IP law from those involving simple harm to the plaintiff that does not interfere with incentives."[143]

But it is unclear whether such an approach would in fact capture the practices that may be contributing to concentration in the traditional content industries. Take loss leading, for example. It could be said that the Big Tech loss leader is, in many ways, merely engaged in the type of behavior that copyright law has long sanctioned—indeed, assumed was *necessary* for sustaining content creation. After all, copyright's proponents have long told us that, because the costs of content creation are so high, large firms are best positioned to spread losses from risky projects across multiple works.[144] Technology firms, then, are simply spreading losses from content across multiple other product lines. Viewed through this lens, it is no surprise that some of the most record-breaking numbers offered for content recently have been by large technology firms: Apple shattered previous records when it acquired the film *CODA* for $25 million.[145] While Apple is notoriously secretive about how it values its content acquisitions, industry consensus is that Apple is not making a profit on its film acquisitions through its film streaming service.[146] And other technology platforms like Amazon have been far more transparent about their aims in content acquisition: when questioned on the wisdom of spending $46 million on films that netted $26 million at the box office, the head of Amazon Studios admitted frankly that the deals were smart—simply because they boosted subscriptions to Amazon Prime, for which, of course, the main allure is e-commerce, not content.[147]

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141. *Id.* at 77.

142. *Id.* at 75.

143. *Id.* at 113.

144. *See supra* Section I.B.

145. Matt Donnelly, *Apple Studios Wins 'CODA' in Record-Breaking $25 Million Sale*, VARIETY (Jan. 30, 2021, 11:31 AM), https://variety.com/2021/film/news/apple-studios-wins-coda-in-record-breaking-25-million-sale-1234896460/ [https://perma.cc/T822-9M32].

146. *See* Ovide, *supra* note 86 (noting that Apple charges about one-third of the cost of streaming subscriptions from Netflix and HBO Max and that "the conventional wisdom is that streaming video is part of its strategy to keep Apple device owners loyal and entice them to spend a bit more money").

147. Mike Fleming Jr., *Last Sundance's Top Buyer Amazon Is All In at Park City: Jennifer Salke Q&A*, DEADLINE (Jan. 23, 2020, 3:57 PM), https://deadline.com/2020/01/amazon-studios-jennifer-salke-sundance-film-festival-plans-1202839716/ [https://perma.cc/FX68-LXZM].

And while Apple and Amazon's practices certainly do not constitute copyright infringement—if anything, loss-leading practices may in fact entail paying rightsholders *more* under voluntarily negotiated licensing agreements—these practices, in the long run, may instead just reshuffle market concentration from traditional content holders to large technology companies, as explained above. And it does so in ways that are, while not infringing, nonetheless unfair: to other new technology competitors, who cannot offset the high costs of licensing content across their other business lines, and even to the traditional content holder, whose short run profits may eventually give way to sustained long-term losses.[148]

Thus, while the Lemley-McKenna approach recognizes that anticompetitive practices in content industries must be assessed through the lens of copyright policy—i.e., "[w]here IP is at stake, courts should focus on whether the disruption will do too much to undermine private incentives to invest in new creation"[149]—tying intervention to infringement is not always fully satisfactory in capturing the ways that new market entrants may be engaging in socially detrimental anticompetitive practices.

In addition to policing industry structure through safe harbors and infringement litigation, modern copyright law also contains a number of regimes that directly regulate copyright markets using the apparatuses of the administrative state. These regimes, in particular the various compulsory licenses enumerated in the Copyright Act,[150] are the closest analogues to the kind of price regulation that can occur under the antitrust laws or within public utility regulatory regimes. While the statutory compulsory license approach might appear to be a promising avenue for addressing market power in the copyright industries, we explain below why its broad-brush approach to regulation, as well as persistent political economy problems, makes it inadequate.[151]

Thus, rather than using solutions that are solely grounded in copyright law, we suggest the proper approach is regulation that correctly captures the intricacies of both IP and competition policy. Doing so is best achieved by borrowing the most useful features from *antitrust and copyright*—copyright's recognition of the complex tradeoffs necessary to achieve social welfare goals when assessing competition problems in markets for intangible goods, but also the flexibility of certain antitrust tools, which run in contrast to copyright law's tendency to use across-the-board

148. *See supra* Section I.B (explaining that a successful long-term win-the-market play by a new digital entrant will ultimately provide them with the market power to dramatically reduce payments to content creators).

149. Lemley & McKenna, *supra* note 133, at 113.

150. *See, e.g.*, 17 U.S.C. §§ 114–15, 118–19.

151. *See infra* Section IV.A.4.

interventions. The existing ASCAP/BMI consent decrees provide precisely such a model, as the next Part discusses.

III. THE ASCAP/BMI CONSENT DECREES

In the antitrust context, consent decrees are negotiated settlement agreements between the Antitrust Division of the Department of Justice (DOJ) and those the DOJ has accused of engaging in anticompetitive conduct.[152] Because they undergo court approval, they are treated like litigated judgments, rather than simply private contracts between the Attorney General and the defendant.[153] They are also the most widely used remedy the DOJ wields in civil antitrust enforcement: one estimate in the mid-1970s concluded that "70 to 80 percent of all Antitrust Division civil complaints terminate in consent decrees."[154] Because the use of decrees allows the government to reach resolution without the need to prove its antitrust allegations at trial, critics of the mechanism have argued that it turns the DOJ into a regulatory agency.[155] On the other hand, others have praised the consent decrees' ability to "shape remedies to the requirements of industrial order . . . reach[ing] beyond the persons in legal combat to comprehend all the parties to the industry."[156] Like regulatory agencies, the DOJ can use consent decrees to "accord some protection to weaker groups and safeguard to some extent the rights of the public."[157]

While the copyright industries—the motion picture, music, and publishing industries—are no strangers to antitrust allegations,[158] the DOJ's

152. *See generally* Stanley N. Barnes, *Settlement by Consent Judgment*, *in* AN ANTITRUST HANDBOOK 235 (1958).

153. *See* United States v. Swift & Co., 286 U.S. 106, 115 (1932) ("We reject the argument . . . that a decree entered upon consent is to be treated as a contract and not as a judicial act.").

154. Note, *The* ITT *Dividend: Reform of Department of Justice Consent Decree Procedures*, 73 COLUM. L. REV. 594, 595 (1973).

155. *See* STAFF OF SUBCOMM. ON ANTITRUST, H. COMM. ON THE JUDICIARY, 86TH CONG. 1ST SESS., REP. ON CONSENT DECREE PROGRAM OF THE DEP'T OF JUST. 145 (Comm. Print 1959).

156. STAFF OF S. TEMP. NAT'L ECON. COMM., 76TH CONG. 3D SESS., ANTITRUST IN ACTION 88 (Comm. Print 1940) (written by Walton Hamilton & Irene Till). While consent decrees only *bind* the specific parties in suit, Professor Hamilton argues in the foregoing that their sweep and reach can shape entire industries, affecting those beyond the technical scope of the decree. *Id.* at 92; *see infra* Section IV.A.2 (discussing the chastening effect that the ASCAP/BMI consent decrees have had on other unregulated PROs).

157. STAFF OF S. TEMP. NAT'L ECON. COMM., 76TH CONG. 3D SESS., ANTITRUST IN ACTION 88 (Comm. Print 1940) (written by Walton Hamilton & Irene Till).

158. *See, e.g.*, Alden-Rochelle, Inc. v. Am. Soc'y Composers, 80 F. Supp. 888, 893 (S.D.N.Y. 1948) (noting that "[a]lmost every part of" the "structure" of the music performing rights organization ASCAP "involve[s] a violation of the anti-trust laws"); Complaint at 24–25, United States v. Bertelsmann SE & Co. KGaA, 646 F. Supp. 3d 1 (D.D.C. 2022) (No. 1:21-cv-02886) (alleging that the publishing house Penguin Random House's proposed acquisition of Simon & Schuster is in violation of antitrust laws); *In re* Digit. Music Antitrust Litig., 812 F. Supp. 2d 390, 403 (S.D.N.Y. 2011) (holding that plaintiffs sufficiently alleged price-fixing allegations against the major record labels for conspiring to fix the price of digital downloads).

consent decrees with ASCAP and BMI are unique, and uniquely expansive, for several reasons. First, the decrees are uniquely expansive in that they provide for a judicial court to exercise continuous jurisdiction over the settling defendant, stepping in to determine a reasonable royalty if the would-be licensee and copyright holder disagree over a reasonable rate.[159] Second, unlike other consent decrees that contain a "nominal" role for the rate-setting court (in which the court is never called upon to set rates)—the ASCAP/BMI rate courts are utilized with (comparatively) more frequency.[160] As Professor Daniel Crane put it, of the "fifty-two cases in which [he] identified a retention-of-jurisdiction provision . . . only three of them" contained any evidence in which a court was ever called upon to set a rate for intellectual property—two of them being ASCAP and BMI, and a third in the patent context.[161] This leads toward the final, related point: DOJ consent decrees, while somewhat common in the patent context, are rare in the copyright context.[162] Indeed, the ASCAP/BMI consent decrees are two of the most well-known examples of government regulation of copyright markets.[163]

The remainder of this Part first outlines the history of the consent decree system, as well as recent debates about their role. Second, we examine the way in which the consent decree system has hybridized copyright and competition policy to address some of the peculiarities of antitrust regulation in copyright markets described in the last Part.

A. The Consent Decree System

ASCAP and BMI are the two largest performing rights organizations (PROs) in the United States.[164] ASCAP, short for the American Society of Composers, Authors and Publishers, is the oldest PRO.[165] Indeed, ASCAP was instrumental to the very establishment of the PRO as a private rights collective—a one-stop "clearinghouse" that can aggregate copyrights held

159. *See* Daniel A. Crane, *Bargaining in the Shadow of Rate-Setting Courts*, 76 ANTITRUST L.J. 307, 310–11 (2009).

160. *See id.* at 311–12.

161. *Id.* at 312.

162. *Id.* at 311 (noting that "the run-of-the-mill antitrust decree with a reasonable royalty licensing provision" is "typically for patents").

163. *See* Molly Shaffer Van Houweling, *Author Autonomy and Atomism in Copyright Law*, 96 VA. L. REV. 549, 597 (2010); Mark A. Lemley & Philip J. Weiser, *Should Property or Liability Rules Govern Information?*, 85 TEX. L. REV. 783, 836 (2007); Wu, *supra* note 34, at 310–11.

164. *See* Meredith Corp. v. SESAC LLC, 1 F. Supp. 3d 180, 185 (S.D.N.Y. 2014).

165. *See About Us*, ASCAP, https://www.ascap.com/about-us#:~:text=ASCAP%20is%20a%20membership%20association,use%20their%20music%20every%20day [https://perma.cc/EY2D-2E4L].

by thousands of individual composers and publishers and license them out on a blanket basis.[166]

1. *The 1930s and 1940s: ASCAP/BMI Price-Fixing Allegations and the Establishment of the Decrees*

As one court recounts, "[a]t the time of ASCAP's formation, the users of copyrighted music—principally theaters, dance halls and taverns—were so numerous and widespread, and performances so fleeting, that it was impossible for individual composers and publishers to negotiate licenses with each user and to detect unauthorized uses."[167] In fact, ASCAP *established* the right of musical works owners to demand payment for performances of their songs in restaurants, with one of the founders of ASCAP serving as plaintiff in the 1917 Supreme Court case that held in its favor, *Herbert v. Shanley Co.*[168] Not long after its formation and the successful establishment of its blanket licensing model for musical performances, ASCAP began fielding antitrust allegations from private parties and the government alike.[169] In particular, the National Association of Broadcasters (NAB), an organization representing the radio industry, embarked on a concerted effort to limit the bargaining power of ASCAP.[170] Complaints over ASCAP's market power are perhaps unsurprising: the aggregation of so many rights within one entity made it an easy target for claims of concerted action.[171] After an unsuccessful initial petition in 1934, the Justice Department renewed its antitrust complaint in 1941, arguing that ASCAP's blanket license constituted "an illegal copyright pool" in violation of Section 1 of the Sherman Act.[172] The DOJ made similar allegations against Broadcast Music, Inc. (BMI), a rival PRO that was established by the NAB in 1939.[173]

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166. *See* Buffalo Broad. Co. v. Am. Soc'y Composers, 546 F. Supp. 274, 277 (S.D.N.Y. 1982), *rev'd*, 744 F.2d 917 (2d Cir. 1984).

167. *Id.*

168. 242 U.S. 591 (1917).

169. *See* Wu, *supra* note 34, at 305–10.

170. *Id.* at 306–10.

171. *See* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 10 (1979); *see also* discussion *supra* Section I.A.

172. Complaint at 3–4, United States v. Am. Soc'y Composers, No. 41-cv-01395 (S.D.N.Y. Feb. 26, 1941).

173. *See BMI's Timeline Through History*, BMI, https://www.bmi.com/about/history [https://perma.cc/HL8W-NHE2]; United States v. Broad. Music, Inc., No. 64 Civ. 3787, 1966 U.S. Dist. LEXIS 10449, at *1 (S.D.N.Y. Dec. 29, 1966), *amended by* 1994 U.S. Dist. LEXIS 21476 (S.D.N.Y. Nov. 18, 1994).

Yet the government never proved its case. Instead, the DOJ settled both cases by consent decree that same year.[174] The structures of both settlement agreements are complex, with substantial restrictions on the PROs' licensing activities.[175] Under the agreements, PRO members may only grant nonexclusive rights to license their works, retaining the ability to license their works on a non-blanket basis.[176] Meanwhile, the PROs *must* grant a license to anyone who requests one—even if the parties cannot agree to what the fee should be for that use.[177] This, critically, is where the rate court comes in. While the license is effective from the date the licensee requests it, if the parties cannot come to an agreement on a fee within sixty days from the date of the licensee's written request, the licensee may apply to the rate court "for determination of a reasonable fee, with [the PRO] having the burden of proving reasonableness."[178]

The consent decrees, by regulating the PROs' licensing markets, dealt head on with the market power problems created by copyright aggregation. While ASCAP was more of a horizontal cartel arrangement between various copyright owners,[179] its market power was essentially the same as that of rightsholders with large copyright portfolios: the ability to charge high prices through control of an input necessary to downstream distributors.[180] By prohibiting exclusive licenses and providing a neutral authority for rate setting, the consent decrees prevented the PROs from using their market power to overcharge venues like restaurants or to thwart market entry by new forms of dissemination, like radio.

An often-overlooked feature of the original consent decrees, however, is their role in also thwarting potentially anticompetitive practices by a new *disseminator*. While ASCAP was a cartel of incumbent copyright owners, BMI was in fact created and controlled by the radio stations, who were desperate to provide an alternative to the ASCAP monopoly.[181] BMI sought

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174. *See Antitrust Consent Decree Review – ASCAP and BMI 2019*, U.S. DEP'T JUST. (Jan. 15, 2021) [hereinafter *Antitrust Consent Decree Review 2019*], https://www.justice.gov/atr/antitrust-consent-decree-review-ascap-and-bmi-2019 [https://perma.cc/QA2A-6ZXE]; *see also* United States v. Am. Soc'y Composers, No. 41-1395 (WCC), 2001 WL 1589999 (S.D.N.Y. June 11, 2001) ("ASCAP Consent Decree"); *Broad. Music, Inc.*, 1966 U.S. Dist. LEXIS 10449, at *1 ("BMI Consent Decree").

175. *See Columbia Broad. Sys., Inc.*, 441 U.S. at 11.

176. *See id.* at 11.

177. *See id.* at 11–12.

178. *Id.* Note that the BMI consent decree did not provide for judicial rate-setting until it was amended in 1994, but it did provide that BMI license to all comers at similar rates. *See* Crane, *supra* note 159, at 311.

179. Authors and publishers provide ASCAP with control over one specific segment of the licensing market, public performance, rather than with a total exclusive license or outright ownership of the copyright. *See In re* Application of MobiTV, Inc., 712 F. Supp. 2d 206, 227–28 (S.D.N.Y. 2010), *aff'd sub nom.* ASCAP v. MobiTV, Inc., 681 F.3d 76 (2d Cir. 2012).

180. Wu, *supra* note 34, at 328–29.

181. *Id.* at 309–10.

out songwriters operating in less commercially successful genres—including early forms of R&B and country music—who had been excluded from ASCAP.[182] Eventually, its catalogue was sufficiently large that the radio stations were able to boycott ASCAP for all of 1941, relying solely on the BMI catalogue.[183] When the DOJ ultimately brought an antitrust action against ASCAP, it also brought an equivalent action against the radio broadcasters and BMI, despite protestations from the NAB that BMI was just an innocent effort to provide competition in the market.[184] Both ASCAP and BMI ultimately reached the same settlement, which, by forbidding exclusive licenses for BMI as well, prevented the radio broadcasters from ever using their control over the BMI catalogue to shut out new distributors.[185] The consent decrees thus (perhaps inadvertently) showcase efforts to control both the market power of copyright owners posed by aggregation as well as the market power of disseminators seeking to shut out new entrants.[186]

2. *The Persistence of the Decrees*

It has become rather fashionable to complain of regulation by consent decree and, concomitantly, of rate court oversight. The U.S. Copyright Office, in its extensive 2015 study on Copyright and the Music Marketplace, stated at the outset that "[m]usic publishers and performance rights organizations are frustrated that so much of their licensing activity is subject to government control."[187] In recent years, the DOJ has twice opened reviews of the consent decrees with the aim of potentially sunsetting them[188]—a goal that was made transparent by the assistant Attorney General under the Trump Administration, Makan Delrahim. In public remarks made while the 2019 review of the ASCAP/BMI reviews was still open, Assistant Attorney General Delrahim underscored the general approach "that the free market, not enforcement by government decree, should be the default."[189]

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182. *Id.* at 310.

183. *Id.*; *see also* Peter DiCola & Matthew Sag, *An Information-Gathering Approach to Copyright Policy*, 34 CARDOZO L. REV. 173, 206–07 (2012).

184. *See* DiCola & Sag, *supra* note 183, at 207.

185. *Id.*

186. Recall that part of Apple's loss-leading strategy is to woo artists into entering into exclusive licensing deals, to the detriment of other distributors, by offering higher royalties. *See supra* Section I.B.

187. COPYRIGHT OFF. MUSIC STUDY, *supra* note 41, at 1.

188. *See Antitrust Consent Decree Review 2019*, *supra* note 174; *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/Ws3A-KZ8X].

189. Makan Delrahim, Assistant Att'y Gen., Dep't of Just. Antitrust Div., Opening Remarks at the Antitrust Division's Public Workshop on Competition in Licensing Music Public Performance Rights (July 28, 2020) [hereinafter Delrahim Opening Remarks], https://www.justice.gov

Indeed, the DOJ under Trump had undertaken a Judgment Review Initiative as part of a "broader effort across the Antitrust Division . . . to systematically revisit old consent decrees."[190] As Delrahim noted, while older decrees were often perpetual—containing no sunset clause—decrees entered since 1979 are generally limited to a ten-year period.[191]

Even so, the ASCAP/BMI consent decrees have withstood repeated investigations into their obsolescence. The 2015 investigation under the Obama Administration's DOJ concluded that "[a]lthough stakeholders on all sides have raised some concerns with the status quo, the Division's investigation confirmed that the current system has well served music creators and music users for decades and should remain intact."[192] And even a DOJ more intent on loosening government regulation under Trump concluded its investigation by leaving the consent decrees exactly as they are, notwithstanding Assistant Attorney General Delrahim's telegraphed plans to sunset them.[193]

What can explain the persistence of the decrees, notwithstanding repeated invocations of their seeming exceptionalism?[194] The simplest explanation might just be that the alternative—unregulated performing rights organizations operating in the "free market"—haven't really fared much better.[195] While it is common to invoke the fact that two performing rights organizations, SESAC and GMR, are not subject to government regulation in the same manner as ASCAP or BMI, the reality is that both PROs have been the subject of ongoing antitrust litigation.[196] While SESAC

/opa/speech/assistant-attorney-general-makan-delrahim-delivers-opening-remarks-antitrust-division-s [https://perma.cc/7F2N-8WG4].

190. *Id.*; *see also Judgment Termination Initiative*, U.S. DEP'T JUST. (Jan. 21, 2022), https://www.justice.gov/atr/JudgmentTermination [https://perma.cc/DQ7K-TN4K].

191. Delrahim Opening Remarks, *supra* note 189.

192. 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 (Aug. 4, 2016), https://www.justice.gov/atr/file/882101/download [https://perma.cc/C7E6-8SM7].

193. Malan Delrahim, Assistant Att'y Gen., Dep't of Just. Antitrust Div., Statement of the Department of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees (Jan. 15, 2021) [hereinafter DOJ Closing Statement], https://www.justice.gov/atr/page/file/1355391/download [https://perma.cc/4H9E-B5P2].

194. This view was best summed up by the Copyright Office when it stated that "[t]he government's involvement in the music marketplace is unusual and expansive relative to other kinds of works created and disseminated under the Copyright Act." COPYRIGHT OFF. MUSIC STUDY, *supra* note 41, at 3.

195. DOJ Closing Statement, *supra* note 193, at 5 (warning that, even as the DOJ has decided not to sunset the ASCAP/BMI consent decrees, "[c]ompulsory licensing . . . runs counter to the principles that form the very foundation of the free market and rights in intellectual property").

196. *See, e.g.*, COPYRIGHT OFF. MUSIC STUDY, *supra* note 41, at 34 n.119 ("Licensing of performance rights from SESAC and GMR occurs without direct antitrust oversight, and those smaller PROs may refuse to license their repertoires to potential licensees."); DOJ Closing Statement, *supra* note 193, at 2 ("[T]he decrees regulate only ASCAP and BMI, leaving other PROs free to operate without the same constraints.").

and GMR are, compared to ASCAP or BMI, tiny, even their relatively small market share—less than 10% total—has not insulated them from allegations of anti-competitive conduct.[197] Since almost their formation (SESAC in the 1930s and GMR much later, in 2013), both PROs have been accused of charging supracompetitive pricing for their blanket licenses, which the PROs offered on a take-it-or-leave-it basis.[198]

B. Consent Decree Rate Setting as Hybrid Antitrust-Copyright Regulation

The modern PRO consent decrees[199] continue to intervene in music licensing in a variety of ways. Three are particularly important. First, the PRO must license *all* music in its catalogue to *any* licensee; i.e., it cannot enter into exclusive licenses.[200] Second, the PRO is prohibited from licensing to similarly situated licensees at different rates.[201] Third, and perhaps most significantly, the U.S. District Court for the Southern District of New York is charged with setting license rates, if, and only if, "the parties are unable to agree upon a reasonable fee."[202]

1. Data on Outcomes in Rate Court Litigation

While the ASCAP/BMI rate courts have been more active than other rate courts established by consent decrees that contain reasonable royalty provisions, rate-setting is, overall, a "[r]elatively [l]ittle [p]racticed [a]rt," as Professor Daniel Crane writes.[203] We located only twelve instances in which the ASCAP rate-setting court was called upon to set rates in the almost eight decades the ASCAP decree has been in operation and four in which the BMI rate court was called upon to set rates in the almost three

197. *See* COPYRIGHT OFF. MUSIC STUDY, *supra* note 41, at 20 (noting that ASCAP and BMI "together represent more than 90% of the songs available for licensing in the United States," and that in addition to these two PROs, "there are two considerably smaller, for-profit PROs that license performance rights outside of direct government oversight").

198. *See* Meredith Corp. v. SESAC, LLC, 87 F. Supp. 3d 650, 654–55 (S.D.N.Y. 2015) ("Plaintiffs alleged that, by insulating this 'all or nothing' license from competition and effectively forcing local television stations to purchase it, SESAC was able to set an exorbitant price for its blanket license, even though the stations have no interest in purchasing the rights to SESAC's entire repertory."); Radio Music License Comm., Inc. v. SESAC, Inc., 29 F. Supp. 3d 487, 492 (E.D. Pa. 2014); Radio Music License Comm., Inc. v. Glob. Music Rts., LLC, No. 16-6076, 2017 WL 8682117, at *2 (E.D. Pa. Nov. 29, 2017).

199. United States v. Am. Soc'y Composers, No. 41-1395 (WCC), 2001 WL 1589999 (S.D.N.Y. June 11, 2001); United States v. Broad. Music, Inc., No. 64 Civ. 3787, 1966 U.S. Dist. LEXIS 10449, (S.D.N.Y. Dec. 29, 1966), *amended by* 1994 U.S. Dist. LEXIS 21476 (S.D.N.Y. Nov. 18, 1994).

200. *Am. Soc'y Composers*, 2001 WL 1589999, at *3–4.

201. *Id.* at *3 (listing prohibited conduct in § IV(C)); *see also id.* at *3 ("'Similarly situated' means music users or licensees in the same industry that perform ASCAP music and that operate similar businesses and use music in similar ways and with similar frequency.").

202. *Id.* at *6.

203. Crane, *supra* note 159, at 310.

decades since the decree was amended to provide for rate-setting.[204] This tells us that most licensees are able to reach a negotiated rate with the PRO without the need to resort to rate-setting—this, as explained below, is likely due to the shadow cast by the prospect of rate setting.[205]

In our study of these sixteen instances in which a rate court was called upon to set a royalty rate,[206] the rate court more often aligned itself with the licensee, setting rates that matched or were close to those the licensee requested in just under 40% of the cases.[207] This result might be counterintuitive—one might expect, instead, that the rate court would more often than not "split the baby," deciding a rate more or less in between that asked for by the licensor and that asked for by the licensee. But instead, the court did so in just under 30% of the cases we examined. Finally, in just two cases did the court simply choose the rate requested by the PRO.[208] (In two of the sixteen rate-setting cases, redactions made it difficult to determine whether the final rate set by the court was closer to what the licensee or the licensor requested. If, in both these cases, the court sided with the licensor, this would bring the percentage to just under 30%—still less than the number of cases in which we know that the court sided with the licensee. On the other hand, if the results in that batch are more mixed, constituting some combination of "split-the-baby" approaches, licensee-skew, or licensor-skew, or else a predominance of the latter two, the results still suggest that licensees more often than not get what they ask for in rate court proceedings.)

2. *Copyright Policy Via Rate Court Adjudication*

In deciding on a rate, a judge in a consent decree rate court is specifically empowered to take into account the market-distorting power that ASCAP

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204. *See infra* Appendix. Note that we exclude cases in which courts were called upon to adjudicate some other matter relating to the consent decrees. *See, e.g.*, WPIX, Inc. v. Broad. Music Inc., No. 09 Civ. 10366 (LLS), 2011 WL 1630996, at *1 (S.D.N.Y. Apr. 28, 2011) (motion to rate court to determine whether consent decrees require BMI to offer broadcasters a carve-out license).

205. *See infra* Section IV.A.1.

206. This excludes instances in which the rate court was called upon to construe certain provisions of the consent decree but did not set a rate. *See, e.g.*, United States v. Am. Soc'y Composers, 309 F. Supp. 2d 566, 568 (S.D.N.Y. 2004), *as clarified*, 323 F. Supp. 2d 588 (S.D.N.Y. 2004) (seeking a construction of the "per-segment license" provision of the amended ASCAP consent decree).

207. *See infra* Appendix.

208. *See infra* Appendix. In a third case, involving the licensee Music Choice, Judge Stanton first sided with the licensee, and then, upon remand, sided with the licensor. The case was vacated and remanded a third time, and appeared to have settled subsequently. United States v. Broad. Music, Inc., No. 64 Civ. 3787 (LLS), 2004 WL 1171249 (S.D.N.Y. May 26, 2004), *vacated and remanded*, 426 F.3d 91 (2d Cir. 2005). We do not count this case as either "for" licensee or "for" licensor, given the two differing outcomes that effectively cancel each other out.

and BMI, as duopolists, exercise in the market.[209] Rate-setting requires that the royalty amount also reflect "fair market value—'the price that a willing buyer and a willing seller would agree to in an arm's length transaction.'"[210] Because this rate is purely "hypothetical,"[211] given the PROs' market-distorting power, courts have come to consider "fairness" to mean something broader: fairness to both individual composers who require incentives to create musical works and fairness to the disseminator that has created innovative new ways to distribute works. The rate must avoid compensating the author for contributions made by the disseminator and vice versa.[212]

The use of these criteria suggests that the courts have come to incorporate copyright policy concerns—i.e., incentives and access—in assessing the problems posed by the PROs' monopoly power. The rate-setting decision in *In re Pandora* provides a helpful example. In that decision, Judge Cote, at the time the exclusive administrator of the ASCAP rate court, was asked by Pandora to set a rate for licensing ASCAP's catalog.[213] Judge Cote adopted a rate closer to Pandora's requested amount.[214] In her decision, Judge Cote explicitly noted the difficulty of determining a fair market rate for a blanket music license that will provide composers sufficient economic incentives to create while simultaneously avoiding economic windfalls (i.e., compensating composers for new technological innovations), a rate that overall eschews "distorting incentives in the marketplace."[215]

In the specific case of Pandora, the court carefully considered how to allocate the revenue from non-interactive streaming between copyright owners and Pandora so as to achieve balance. Among other things, Judge Cote rejected the idea that copyright owners should be entitled to higher royalties thanks to Pandora's success, noting that much of Pandora's success can be attributed to innovation in their dissemination technologies.[216] The court's rate also reflected that Pandora's service might in fact promote music sales in other markets, increasing copyright owner revenue overall.[217]

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209. *See* Am. Soc'y Composers v. Showtime/The Movie Channel, Inc., 912 F.2d 563, 577 (2d Cir. 1990).

210. United States v. Broad. Music, Inc., 316 F.3d 189, 194 (2d Cir. 2003) (quoting *Showtime*, 912 F.2d at 569).

211. *See Showtime*, 912 F.2d at 569, 577 (noting that the determination of fair market value is a "hypothetical" matter because "there is no competitive market in music rights").

212. *See In re* Application of MobiTV, Inc., 712 F. Supp. 2d 206, 209 (S.D.N.Y. 2010), *aff'd sub nom.* ASCAP v. MobiTV, Inc., 681 F.3d 76 (2d Cir. 2012).

213. *In re* Pandora Media, Inc., 6 F. Supp. 3d 317, 353 (S.D.N.Y. 2014), *aff'd sub nom.* Pandora Media, Inc. v. Am. Soc'y Composers, 785 F.3d 73 (2d Cir. 2015).

214. *Id.* at 355 (rejecting ASCAP's request for rate increases).

215. *Id.* at 321 (quoting *In re Application of MobiTV, Inc.*, 712 F. Supp. 2d at 209).

216. *Id.* at 367–69 (discussing Pandora's innovations, such as the music genome project).

217. *Id.* at 367.

Other rate court decisions have also evinced a similar concern with disentangling the value added by the copyright-content industry in producing music from the value added by new technology companies innovating in areas like content distribution. In the 2010 decision *In Re Application of MobiTV*, for example, Judge Cote addressed a rate setting petition by a company that, at the time, provided both the technology infrastructure and content licenses to enable wireless phone carriers to provide specialized content channels of music and television to their customers.[218] ASCAP had demanded to use, as a revenue base for assessing a percentage-based licensing fee, the wireless services' *overall* revenue (over $54 billion), reasoning that the base should reflect "revenue that the wireless carriers receive from the sale of the data plans that consumers must buy to gain access to [copyrighted] content."[219] Judge Cote rejected this metric—which would have yielded astronomically high royalty rates—to arrive at a rate that excluded the valuable services added by Mobi, such as "aggregating content [or] providing technical services that enable distribution."[220]

Similarly, in 2001, Judge Stanton rejected a rate proposed by BMI for the cable, digital, and satellite radio service MusicChoice.[221] Among other things, Judge Stanton found that the proposed rate sought to include revenue that properly belonged to MusicChoice as the provider of the infrastructure and services through which the consumer gains access to the music.[222] Such infrastructure and services "are not contributed by the author of the music, and there is no reason why the author should be compensated for their cost."[223] Though the Second Circuit ultimately vacated Judge Stanton's proposed rate for skewing *too* in favor of the licensee, it agreed that "selling the music at retail involves expenses not attributable to the music itself[, which] explains why the appropriate royalty for the copyright owner will be only a small percentage of the fair market value of the music" with respect to the consumer.[224] In this respect, the rate court decisions have attempted to calibrate the value of creative incentives for composers, on the one hand, and the value of ensuring that distributors are able to continue innovating in technologies of dissemination, on the other. This balancing evokes the more copyright-sensitive approach to market power problems in copyright markets, described above; rather than trying to assess ASCAP's monopoly

218. 712 F. Supp. 2d 206 (S.D.N.Y. 2010).
219. *Id.* at 236–37.
220. *Id.* at 245–46.
221. United States v. Broad. Music, Inc., No. 64 Civ. 3787 (LLS), 2001 WL 829874, at *6 (S.D.N.Y. July 23, 2001), *vacated on other grounds*, 316 F.3d 189 (2d Cir. 2003).
222. *Id.*
223. *Id.*
224. United States v. Broad. Music, Inc., 316 F.3d 189, 196 (2d Cir. 2003).

power solely through the lens of antitrust law, the court seemed to consider the overall policy agenda of copyright (and the general allocation problem posed by above-marginal-cost pricing in any copyright market) when assessing how to set a fair rate.[225]

IV. TOWARD A COPYRIGHT-ANTITRUST REGULATORY MODEL

As the last Part explained, the rate-setting consent decree system showcases a regulatory model that successfully bridges the gap between antitrust and copyright law. This Part builds on that analysis to argue that the system is a particularly helpful model for crafting better copyright market regulation in the digital age. The first Section begins by drawing out the particularly valuable features of the existing rate court regime, especially in contrast to other existing forms of market regulation in the copyright system. The second Section provides some examples of how a rate setting consent decree might be used, in practice, to address the market power problems identified in Parts I and II. Finally, the third Section explores the need for targeted hybrid copyright-antitrust regulation, akin to the consent decree model, grounding it in current theoretical debates about the evolution of both antitrust intervention and copyright limitations.

A. Benefits of the Rate-Setting Consent Decree Model

The ASCAP/BMI consent decree system is, of course, a form of regulatory intervention. As a potential model, then, it must be compared with other existing regulatory structures that govern copyright markets, namely, the various compulsory licenses (also known as statutory licenses) managed by the Copyright Office and Copyright Royalty Board. A compulsory license is essentially a liability rule imposed by statute: rather than negotiating a license with a copyright owner, any licensor may rely on the compulsory license to make certain uses of certain works without permission, as long as they pay the owner a government-determined fee.[226] The first compulsory license, for mechanical reproduction of musical works, was established in the 1909 Copyright Act.[227] The 1976 Copyright

225. Indeed, the rate courts appear to be particularly adept at incorporating copyright policy goals into their rate setting outcomes even while operating under an ostensible market-mimicking "willing buyer and willing seller" rate-setting standard. In contrast, the Copyright Royalty Board (CRB), which, in 2018, switched to a similar standard for all rate-setting proceedings, has struggled with how to apply such a standard in ways that account for the fact that a true "free market" rate will never really be deducible in a regulated market. *See* Victor, *supra* note 128, at 985–88 (examining this problem generally and exploring how the CRB has struggled with it).

226. *See id.* at 918; *see also* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1106 (1972).

227. 35 Stat. 1075 (1909) (amended 1976).

Revision Act added three additional compulsory licenses: for cable television carrying over-the-air broadcast signals,[228] jukebox performances,[229] and public broadcasting.[230] Another three were added in 2006: for secondary transmissions by satellite carriers,[231] certain types of digital sound recording transmissions,[232] and the manufacture and importation of digital recording devices.[233]

While these statutory licenses also evince a concern with remedying market power problems in certain industries,[234] they lack many of the features that have rendered the consent decree system successful: as-needed rate setting, actor specificity, sensitivity to copyright policy concerns, and distance from the political economy problems at play in most copyright legislation. Each of these benefits of the rate-setting consent decree system is discussed in turn.

1. Incentivizing Effective Private Negotiation

The mere shadow of rate court proceedings significantly shapes and likely constrains the unfettered power of ASCAP or BMI to demand supracompetitive prices for music performance rights.[235] Rate setting is only triggered if the PRO and licensee cannot reach a negotiated license. As Daniel Crane has argued, "the shadow of a rate-setting court . . . makes equality the dominant norm in the licensing of intellectual property."[236] The uncertainty of the court-set price serves to "incentivize[] both parties to view the district court's decision as an unappetizing risk," galvanizing private negotiations and making actual rate-setting comparatively rare.[237] Thus, even when the PRO and a licensee agree to a specific rate, the shadow of the rate-setting regime is likely playing a role in motivating an agreement, preventing abuse of market power or strategic behavior.[238] Moreover, while judicially set rates apply only to the specific licensee that petitions the court,

228. 1976 Copyright Revision Act, Pub. L. No. 94-553, § 111(d), 90 Stat. 2541 (codified as amended at 17 U.S.C. § 111(d)).

229. *Id.* § 116.

230. *Id.* § 118.

231. 17 U.S.C. § 119.

232. *Id.* §§ 114–15.

233. *Id.* §§ 1001–10.

234. *See* Wu, *supra* note 34, at 320; Noti-Victor, *supra* note 18, at 1822–29.

235. *See* Crane, *supra* note 159, at 312–13.

236. *Id.* at 308.

237. Daniel A. Crane, *Intellectual Liability*, 88 TEX. L. REV. 253, 293–94 (2009); *see also* Mark A. Lemley, *Contracting Around Liability Rules*, 100 CALIF. L. REV. 463, 478 (2012).

238. *See* Lemley & Weiser, *supra* note 163, at 836 ("[T]he threat of judicial oversight of the relevant rates may well have simply contributed to a more reasonable bargaining posture on both sides, thereby facilitating effective bargaining in the shadow of a liability rule. This may well be the best of all worlds.").

the PRO must offer the same rate to any "similarly situated" licensees going forward.[239] Thus a PRO would have little motivation to resort to rate setting for some parties while attempting to exercise its market power to demand high rates for others; the shadow cast by the rate-setting regime ultimately affects the PRO's behavior with respect to the whole industry.[240]

In contrast to the consent decree approach of providing rate setting as a backstop, copyright's statutory license regimes provide repeated rate setting every five years as a matter of course by an administrative panel called the Copyright Royalty Board (CRB).[241] While the periodic, as-needed rate setting of the consent decrees can be avoided via negotiated settlement, the industry-wide nature of the compulsory license means that settlements can be difficult to achieve.[242] Thus, CRB compulsory license proceedings often occur at the five-year mark, leading to expensive rate-setting proceedings and time-consuming appeals to the U.S. Court of Appeals for the D.C. Circuit.[243] In fact, the most recent rates and terms for the Section 115 license were contested for so long that the final rates had not even been released by the time the Copyright Office began issuing its call for participants for the next five-year rate-setting proceeding.[244]

The PRO consent decrees' approach to rate regulation can also be contrasted to the use of fair, reasonable, and non-discriminatory (FRAND) commitments for the licensing of standard essential patents. Holders of patents that are "essential" to industry standards—such as those used in industries where interoperability is highly valued, for example, mobile phones—can achieve a significant amount of market power. Firms will often make investments that rely on the standard (and thus rely on the standard essential patent), meaning the patent holder could demand high

239. United States v. Am. Soc'y Composers, No. 41-1395 (WCC), 2001 WL 1589999, at *7 (S.D.N.Y. June 11, 2001).

240. *See supra* note 156 (on how consent decrees can shape entire industries).

241. 17 U.S.C. §§ 114(f), 111(d), 119(c).

242. For example, the most recent settlement for the Section 115 license took several months to achieve. The CRB, in fact, rejected an earlier settlement thanks to the objection of just one proceeding participant. *See* Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords IV), 87 Fed. Reg. 18342, 18349 (Mar. 30, 2022) (withdrawing the proposed rule published June 25, 2021 (86 Fed. Reg. 33601)).

243. *See, e.g.*, *In re* Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), No. 16-CRB-0003-PR (C.R.B. Aug. 1, 2022) (Initial Ruling and Order After Remand), https://app.crb.gov/document/download/27063 [https://perma.cc/2MBG-D5FP] (issuing final rates after nearly four years of proceedings before both CRB and the D.C. Circuit); *see also* Chris Castle, *Are You Tired of Winning Yet? The Legal Bill for the Phonorecords III Remand and Other Stories*, ARTIST RTS. WATCH (Mar. 27, 2022), https://artistrightswatch.com/2022/03/27/are-you-tired-of-winning-yet-the-legal-bill-for-the-phonorecords-iii-remand-and-other-stories/ [https://perma.cc/4F4W-FWJS].

244. Castle, *supra* note 243.

licensing fees or threaten to "hold up" any commercialization efforts.[245] To address this concern, many standard essential patent holders voluntarily agree to license on FRAND terms.[246] FRAND commitments have been somewhat effective in chastening hold-up behavior, but their voluntary nature and vague scope make them "fragile," especially if a standard is highly successful and the patent holder realizes there is a potential for higher royalties.[247] And recent decisions have cemented that fragility by making it highly difficult to prove that a failure to license on FRAND terms is also a violation of the antitrust laws.[248] Critics of such decisions have noted that, without the force of the antitrust laws, patent holders may be able to evade their FRAND commitments.[249] In contrast to FRAND commitments, rate regulation via a consent decree is agreed to by a rightsholder as a condition of settling an alleged *violation* of the antitrust laws; this means that any attempt to evade the regulatory regime would subject the firm to renewed scrutiny and the potential for costly antitrust damages.

In sum, the PRO consent decree system's use of rate setting as a backstop is more efficient than the alternative of industrywide rate setting every few years or voluntary FRAND commitments.[250] Because parties must attempt to negotiate before resorting to using the rate court, the shadow cast by the prospect of rate setting—and the uncertainty of the judge-determined rates—galvanizes private agreements while still ensuring that market power cannot be abused. And the fact that an agreement is made to settle an alleged violation of the antitrust laws significantly raises the costs of evading regulatory responsibilities.[251]

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245. Jorge L. Contreras, *A Brief History of FRAND: Analyzing Current Debates in Standard Setting and Antitrust Through a Historical Lens*, 80 ANTITRUST L.J. 39, 42 (2015).

246. *See id.*

247. *See* Herbert Hovenkamp, *FRAND and Antitrust*, 105 CORNELL L. REV. 1683, 1685 (2020); *see also* Carl Shapiro & Mark A. Lemley, *The Role of Antitrust in Preventing Patent Holdup*, 168 U. PA. L. REV. 2019, 2044 (2020) (describing the vagueness of FRAND commitments).

248. FTC v. Qualcomm Inc., 969 F.3d 974, 997 (9th Cir. 2020).

249. Herbert Hovenkamp, *Antitrust and Platform Monopoly*, 130 YALE L.J. 1952, 2019 (2021) ("By taking away antitrust law as an enforcement tool, even in cases involving competitive harm and higher prices, the Ninth Circuit's recent decision in *FTC v. Qualcomm Inc.* threatens this fragile system."); *see also* Hovenkamp, *supra* note 247, at 1695–96 (explaining why the prospect of breach-of-contract damages alone is insufficient).

250. To be sure, these efficiency gains are not inherently tied to the PRO consent decrees' practice of using judges for rate setting (discussed further below), instead of centralized regulators like the CRB. Indeed, a worthwhile reform to the existing CRB system would be to switch to individualized rate setting as a backstop when private agreements cannot be reached, rather than periodic industrywide regulation. We are, however, skeptical that such a dramatic overhaul of the existing CRB system could occur in light of the political economy problems that have plagued the compulsory licensing regimes. *See infra* Section IV.A.4.

251. *See* discussion accompanying sources *supra* notes 247–49.

2. *Actor Specificity*

A related efficiency benefit of the PRO consent decree system is that the regulatory regime is narrowly focused on specific actors. By grounding regulation in a specific antitrust suit brought by the DOJ, the regulatory solution is narrowly targeted to the specific market power problem at issue. In contrast, the various compulsory licenses bind entire industries: for example, the Section 114 license affects licensing between any sound recording copyright owner and any digital or satellite radio station.[252]

The sweeping nature of the centralized compulsory licensing regimes is frequently criticized by copyright owners who argue that it is unfair, for example, to set rates that bind both large record labels as well as smaller independent labels.[253] Moreover, the fact that any licensee, regardless of size or market share, can take advantage of the compulsory license (and pay the same rate) can promote strategic behavior.[254]

In contrast to the compulsory licensing system, the PRO consent decree system binds only two specific sets of copyright owners (ASCAP and BMI) and each rate-setting determination applies only to the licensee who petitioned the rate court (though, as mentioned above, the PRO must offer the same rate to "similarly situated" licensees).[255] In this respect, the system borrows some of the more distinctive features of antitrust law: the use of what Mark Lemley and Dan Burk have called "micro policy levers," designed to target specific market failures between specific actors.[256] This stands in contrast to the across-the-board policy levers utilized in most IP regimes.[257] At the same time, as the last Part explored, the PRO consent decree system has nonetheless remained sensitive to copyright's specific policy concerns.[258] Thus, the PRO system seems to borrow some of the best features of both antitrust and copyright: sensitivity to the nuances of

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252. Licensors and licensees can enter into private agreements, and they often do, especially thanks to the burdensome nature of some of the compulsory licensing formalities and the efficiency gains of creating more comprehensive licensing arrangements. *See* Kristelia García, *Super-Statutory Contracting*, 95 WASH. L. REV. 1783, 1808 (2020) (discussing Taylor Swift's private deal circumventing Section 114).

253. *See, e.g.*, Aloe Blacc, Irina D. Manta & David S. Olson, *A Sustainable Music Industry for the 21st Century*, 101 CORNELL L. REV. ONLINE 39, 47 (2016).

254. *See infra* Section IV.A.4 (discussing rate seeking behavior in the compulsory licensing system by both licensors and large licensees).

255. The definition of similar situated includes "whether the music users or licensees compete with one another, and the amount and source of the music users' revenue." United States v. Am. Soc'y Composers, No. 41-1395 (WCC), 2001 WL 1589999, at *3 (S.D.N.Y. June 11, 2001).

256. Mark A. Lemley, *Industry-Specific Antitrust Policy for Innovation*, 2011 COLUM. BUS. L. REV. 637, 648–51.

257. *Id.* at 651.

258. *See supra* Section III.B (examining rate setting decisions).

particular industries and relationships, on the one hand, and an explicit concern with innovation policy, on the other.[259]

One might worry that an actor-specific regulatory approach could unduly restrict the ability of those regulated entities to compete with unregulated ones. This, to be sure, has long been one of ASCAP and BMI's chief complaints.[260] Yet it is unclear how much actual evidence bears out this intuition. ASCAP and BMI have both been under consent decree regulation for the past century, while their competitor SESAC has been operating for nearly as long without any such formal, government regulation. Nonetheless, the regulated ASCAP and BMI remain the two largest and most dominant performing rights organizations in the United States, together comprising some 85% of market share, with SESAC a distant third (and newer performing rights organization GMR a far fourth).[261] While perhaps one reason for this is that both SESAC and GMR are invitation-only (though, as discussed below, SESAC, not satisfied to be relegated to the role of niche PRO, has long aimed for expansion),[262] an additional explanation is the possibility that SESAC and GMR will ultimately be regulated as well. Indeed, both have been embroiled in numerous antitrust disputes that mirror the allegations leveled against ASCAP and BMI—with SESAC agreeing to regulation by private settlement as a result.[263] In this respect, regulation of just a handful of actors in a given industry may ultimately affect even unregulated actors who continue to operate under the specter of possible government action.[264]

3. *Setting Rates that Are Attuned to Copyright Policy*

As the last Part explored, the existing consent decree system for ASCAP and BMI has shown itself remarkably able to recognize how addressing anticompetitive conduct in copyright industries implicates copyright policy.[265] Thus, for example, some rate-setting decisions for streaming services explicitly considered copyright's basic allocation problem—how much of revenue for streaming should go toward rewarding copyright

259. *Cf.* Lemley, *supra* note 256, at 652 (discussing the need for a more nuanced innovation policy).

260. *See supra* note 196.

261. *See supra* note 197.

262. *See infra* Section IV.B.1.

263. *See infra* Section IV.B.1.

264. *See supra* note 156 (on the power of a consent decree to shape the industry in which it applies, including those not bound by the decree); *cf.* Kristelia A. García, *Penalty Default Licenses: A Case for Uncertainty*, 89 N.Y.U. L. REV. 1117, 1156 (2014) (examining how uncertainty over regulation can promote beneficial private ordering). Furthermore, in the case of a merger review, competing as a regulated, merged entity may be preferable to no merger at all. This, certainly, has been the self-stated preference of entities subject to merger scrutiny, which we discuss in Section IV.B.2 *infra*.

265. *See supra* Section III.B.

owners for their role in creating the music versus how much should go to streaming services for their role in ensuring access—to arrive at appropriate rates.[266]

Some might argue that this more nuanced approach is driven by the simple luck that particularly thoughtful judges, Judge Cote in particular, have maintained jurisdiction over the consent decrees (something that has changed with the Music Modernization Act).[267] Still, the consent decree system's decision to vest rate-setting authority in district court judges, rather than centralized regulators like the CRB, may provide a more general explanation for its success. District court judges, especially those that frequently hear copyright cases, are constantly weighing copyright policy questions through their application, in the litigation context, of doctrines like fair use and first sale and concepts like originality and the idea-expression dichotomy.[268] As the Supreme Court has noted, the adjudication of an infringement dispute often requires consideration of the "sound balance between the respective values of supporting creative pursuits through copyright protection and promoting innovation in new communication technologies by limiting the incidence of liability for copyright infringement . . . . [T]he administration of copyright law is an exercise in managing the tradeoff."[269] Providing district court judges, many of whom are directly familiar with the intricacies of this balancing act, with the authority to set rates under the consent decrees may thus contribute to the particularly policy-sensitive approach taken in many prior rate setting decisions.

While the use of district judges may partially account for the consent decree system's more effective approach to rate regulation, we recognize that it is naïve to hope for the random assignment of thoughtful judges who are able to grasp the intricacies of accounting for copyright policy goals when setting rates. While Judge Cote on several occasions, and Judge Stanton in the Second Circuit on at least one occasion,[270] showcased such sensitivity, the existing ASCAP/BMI consent decrees provide little substantive guidance to judges engaged in rate setting. As a failsafe, we propose that future consent decrees incorporate substantive rate-setting criteria to guide rate-setting proceedings. Indeed, as one of us has argued, such policy guidelines were used successfully in the compulsory licensing system for years, until their recent removal from the Section 115 statute

266. *See supra* Section II.B.1 (discussing how the assessment of market power in copyright markets will invariably implicate copyright policy).

267. *See* 28 U.S.C. § 137 (division of business among district judges).

268. For a more detailed discussion of the link between fair use and market-regulatory questions, see generally Jacob Victor, *Utility-Expanding Fair Use*, 105 MINN. L. REV. 1887 (2021).

269. Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 928 (2005).

270. *See supra* Section III.B.2.

altogether (for reasons that are discussed below).[271] Thus, consent decrees remain one of the most plausible near-term solutions to injecting public policy considerations back into the rate-setting process. Providing substantive rate-setting criteria, using public-policy factors that balance the copyright owner's interests against the interests of the public and the contributions of the licensee[272]—criteria that could even draw from the existing fair use factors[273]—would help judges see their role as shaping markets in the long run, guiding them toward competitiveness, diversity, and a sound balance between creative incentives and public access.

4. *Avoiding Copyright's Political Economy Problems*

The last sub-sections identified three advantages that the consent decree system has shown itself to have over the existing Copyright Act compulsory licensing schemes. Of course, none of these advantages are inherent to the use of consent decrees as opposed to market regulation created via statute or via rulemaking. In theory, such advantages could be incorporated into the creation of new statutory compulsory licenses and/or reforms to the current system.

However, a final advantage of the consent decree system relates to its institutional origins, i.e., the fact that it was created by the DOJ pursuant to the generally applicable antitrust laws. This stands in contrast to copyright's regulatory regimes, including the various compulsory licenses, which were explicitly crafted by Congress in lengthy pieces of legislation, especially the 1976 Copyright Act, the 1995 Digital Performance Right in Sound Recordings Act (DPRSA), and the 1998 Digital Millennium Copyright Act (DMCA).

The significance of this distinction requires some understanding of the political economy problems that have generally plagued copyright legislation, resulting in inefficient, needlessly complex, and sometimes

271. *See* Victor, *supra* note 128, at 938.

272. This, indeed, was the approach taken under the older compulsory licensing rate-setting criteria. *See* 17 U.S.C. § 801(b)(1) (2006) (instructing regulators "(A) To maximize the availability of creative works to the public[;] (B) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions[;] (C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication[; and] (D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.").

273. *See generally* Victor, *supra* note 268 (exploring the relevance of fair use's approach to copyright policy even when setting a positive price, such as via a compulsory license).

incoherent[274] regulatory interventions. As Professor Jessica Litman in particular has documented, modern copyright law is primarily a product of backroom deals by industry players that are implemented by Congress with few changes.[275] The various compulsory licensing regimes are no exception; almost all of them emerged as compromises between various industries, such as broadcast television and cable television, record labels and early streaming services, and more.[276]

The industry-driven origin of these various regulatory regimes does not mean they were unsuccessful in addressing competition problems in copyright industries—as directly negotiated settlements, many of them were explicitly designed to allow a new form of dissemination to enter the market.[277] However, many of these regimes were crafted to respond to highly specific conflicts and often failed to contemplate the myriad ways that party behavior or technological development might complicate future regulation.

The clearest example of this lack of foresight is showcased by the Section 114 compulsory license that governs the relationship between the owners of sound recording copyrights—record labels, primarily—and technologies that provide radio-like access to music via the Internet (often called non-interactive streaming services or webcasters). As Professors Peter DiCola and Matthew Sag have documented, the initial creation of the Section 114 license in the 1995 DPRSA led to a "quagmire" that required several direct statutory interventions by Congress—through the DMCA and four more pieces of legislation[278]—to resolve stalemates or problematic rate-setting decisions.[279] Many of these changes were necessary to address underlying inefficiencies in the regimes,[280] but they were also brought about

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274. *See* Pamela Samuelson, *Justifications for Copyright Limitations and Exceptions*, *in* COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS 12, 40 (Ruth L. Okediji ed., 2017) (describing cable and satellite compulsory licenses as "incomprehensible").

275. JESSICA LITMAN, DIGITAL COPYRIGHT 35–63, 122–40 (2d ed. 2006) (describing political economy of copyright legislation at various points in history); Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 870–79 (1987) (focusing on 1976 Act); *see also* Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1245 (1996).

276. *See* Wu, *supra* note 34, at 284, 325; DiCola & Sag, *supra* note 183, at 206–07.

277. *See* DiCola & Sag, *supra* note 183, at 206–07.

278. Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, 116 Stat. 2780 (codified in scattered sections of 17 U.S.C.); Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, 118 Stat. 2341 (same); Webcaster Settlement Act of 2008, Pub. L. No. 110-435, 122 Stat. 4974 (same); Webcaster Settlement Act of 2009, Pub. L. No. 111-36, 123 Stat. 1926 (same).

279. DiCola & Sag, *supra* note 183, at 222–40.

280. Professors DiCola and Sag in particular note that:

> Congress could have established a better foundation for royalty arbitration by initially tying sound recording royalties to the royalties paid to songwriters and then waiting to see what happened. Alternatively, Congress could have allowed Internet radio stations to remain exempt

thanks to constant lobbying by the regulated industries, who believed that going through Congress represented the best way to achieve their goals.[281]

Or consider the recently passed Music Modernization Act (MMA).[282] Among the MMA's many reforms to the compulsory licensing system was to change the rate-setting standard used by streaming services to license from music publishers, from a more policy-based standard to a market-mimicking standard. The policy-based standard had been critiqued as yielding rates beneficial to streaming services; in the MMA, it was replaced with a standard that some viewed as more beneficial to rightsholders.[283] As with much copyright legislation, the MMA was a product of an industry-wide compromise, including by large streaming services, in which services traded this concession in exchange for other desirable reforms.[284]

In contrast, the consent decree system has remained relatively stable, thanks in part, we think, to its origins in the DOJ's antitrust divisions and its continued supervision by the federal courts, each of which have remained relatively sheltered from the machinations of the content industries.

Perhaps more importantly, the consent decrees' grounding in the generally applicable antitrust laws has enabled them to adapt quite readily to new technologies of dissemination. While originally designed to govern the licensing of musical compositions by broadcast radio stations or restaurants, the consent decrees now also govern licensing by streaming services and digital radio stations. In contrast, the compulsory licenses, created to respond to specific challenges between incumbent industries and new technological entrants, have often struggled to keep up with technological change. Indeed, the current regimes govern only technologies such as cable, satellite TV, and digital radio; new technologies such as on-demand streaming are not regulated.[285]

> as they were under the 1995 legislation. Instead, the arduous process of arbitration resulted in royalties that were expensive and inflexible.

Id. at 240.

281. *See id.* ("The prospect of continuing congressional intervention may have actually discouraged the recording industry from accepting any compromise earlier in the process.").

282. Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (codified in scattered sections of 17 U.S.C.).

283. *See* Victor, *supra* note 128, at 948–71 (comparing the two rate-setting standards).

284. Indeed, the MMA removed the specter of costly class-action litigation against Spotify for failing to comply with the formalities then required by the Section 115 license.

285. Efforts to expand the regimes by reinterpreting their scope have largely failed. For example, Aereo, the digital television rebroadcast system that was found by the Supreme Court to infringe copyright owners' public performance rights, later attempted to take advantage of the cable compulsory license. But several courts found that Aereo's digital technology was outside the scope of that regime. *See* Fox Television Stations, Inc. v. FilmOn X LLC, 150 F. Supp. 3d 1, 18 (D.D.C. 2015); Am. Broad. Cos. v. Aereo, Inc., Nos. 12-cv-1540, 12-cv-1543, 2014 WL 5393867, at *3 (S.D.N.Y. Oct. 23, 2014); Fox Television Stations, Inc. v. Aereokiller, LLC, 851 F.3d 1002, 1006, 1015 (9th Cir. 2017).

Thus, while in theory legislative changes to the Copyright Act might incorporate some of the efficiencies that have characterized the ASCAP/BMI consent-decree system, we are not confident such a solution is likely in the immediate future.[286] Instead, as the next Section explains, we propose the continued use of the consent decrees under the generally applicable antitrust laws as a means to craft regulation, modeled after the existing ASCAP/BMI consent decree system, that can address some of the current competition problems in copyright markets.

B. Putting Our Proposal to Practice

It is important to emphasize here that we do not argue that every single copyright industry should be subject to consent-decree regulation. Rather, we argue that settlement by consent decree may, in some instances, be preferable over alternatives such as continuous litigation over price-fixing—which, as we discuss below, has plagued ASCAP and BMI's two unregulated competitors, SESAC and GMR—or, in the case of merger regulation, remedies like divestiture or a complete block. We discuss how regulation by consent decree might work in various contexts below.

1. Price-Fixing and Pooling Claims

As we detailed in the prior Part, ASCAP and BMI's pooling practices are precisely what led to the entry of the consent decrees against them. As also detailed in that Part, price-fixing allegations have likewise continuously plagued ASCAP and BMI's two unregulated competitors, SESAC and GMR.[287] Examining the case of SESAC and GMR showcases the continued utility of consent-decree-based regulation in response to price fixing, cartel-like practices, or other Sherman Act violations.

SESAC, which was founded around the same time as ASCAP and BMI, was a relatively small player for most of the twentieth century.[288] That it managed to avoid the scrutiny of the DOJ at the same time that the government negotiated settlement agreements with both ASCAP and BMI is suggestive of its demure status. This status quo remained effective for

286. Centralized regulatory solutions face other problems. David Fagundes and Saurabh Vishnubhakat have recently argued that the CRB appointment process is unconstitutional in the aftermath of *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021), which found that administrative patent judge appointments violated the Appointments Clause. *See* Saurabh Vishnubhakat & Dave Fagundes, *The Coming Copyright Judge Crisis*, 98 N.Y.U. L. REV. ONLINE 1, 4 (2023). If this theory is correct, the CRB may be hamstrung by constitutional challenges unless and until Congress reforms its appointment process. Such concerns would not affect regulation using Article III district court judges via antitrust consent decree.

287. *See supra* notes 196–98.

288. *See* Meredith Corp. v. SESAC LLC, 1 F. Supp. 3d 180, 191 (S.D.N.Y. 2014).

many years; perhaps, as we speculate above, because the mere specter of antitrust scrutiny and consent-decree based regulation was sufficient to chasten SESAC's behavior.[289] However, following a change in ownership in 1992, SESAC began using more aggressive tactics. While remaining invitation-only, it expanded its repertoire, recruiting high-profile composers and publishers away from ASCAP and BMI.[290] It moved into music licensing for syndicated television programs, which required it to negotiate with local television stations.[291] By doing so, SESAC put itself in the crosshairs of greater antitrust scrutiny: starting in 1995, it came to an industry-wide agreement with the association that represents local television stations in music licensing, which constrained how much SESAC could charge for blanket licenses and subjected disputes to private arbitration.[292]

In SESAC's case, attempts by the industry to self-regulate fell apart in 2008 when SESAC and the television stations could not agree to a new license.[293] The antitrust allegations began soon thereafter: according to the television stations, SESAC, having expanded rapidly in the past two decades and having made its music "ubiquitous" in television programming, was setting "an exorbitant price" for its "all or nothing" license.[294] Radio stations made similar allegations against SESAC, arguing that "[s]ince 2009, SESAC has increased the price of the blanket license by a compounded rate of 8% to 20% a year for analog and website broadcasting."[295]

In 2014, SESAC settled allegations that its actions violated Sections 1 and 2 of the Sherman Act by paying $58.5 million to the television industry and by agreeing to private arbitration to determine reasonable licensing rates.[296] In other words, SESAC, while not under government regulation and federal rate court oversight, has been subject to some constraints, including private rate adjudication, for well over two decades.

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289. *See supra* Section IV.A.2.

290. *Meredith Corp.*, 1 F. Supp. 3d at 191.

291. *Id.*

292. *See id.* at 191–92.

293. *Id.* at 192.

294. *Id.* at 186.

295. *See* Radio Music License Comm., Inc. v. SESAC, Inc., 29 F. Supp. 3d 487, 494 (E.D. Pa. 2014).

296. *See* Declaration of Eric S. Hochstadt in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Settlement at 4–9, Meredith Corp. v. SESAC LLC, 1 F. Supp. 3d 180 (S.D.N.Y. 2014) (No. 09 Civ. 9177). That settlement followed a district court's denial of SESAC's motion for summary judgment on the Sherman Act claims, where the court held that sufficient evidence existed to show that SESAC "engaged in an overall anti-competitive course of conduct designed to eliminate meaningful competition to its blanket license." *Meredith Corp.*, 1 F. Supp. 3d at 196. A year later, it agreed to pay $3.5 million to settle similar allegations brought by the radio stations, accompanied with an agreement to submit licensing disputes to private arbitration.

But this far more limited compromise has proven itself unsatisfactory. Unlike the ASCAP/BMI consent decrees, which cover all licensing, the private settlements cover only two discrete licensing sectors: radio and television. These settlements do not, for example, cover digital streaming, which has dramatically grown in size and scope over the course of the past few years. And, thanks to developments in the ASCAP/BMI consent-decree space, SESAC is becoming an increasingly powerful player in the streaming sector. Most notably, recent rulings by the ASCAP and BMI rate courts prohibit music publishers from partially "withdrawing" their repertoires from ASCAP and BMI, for purposes of negotiating higher rates with digital streaming services like Spotify or Pandora, while otherwise continuing to take advantage of ASCAP and BMI's blanket licensing in other contexts.[297] Such rulings will likely make SESAC, which is not subject to these rulings, a more enticing option for publishers seeking to avoid the ASCAP/BMI consent decrees' restraints, especially as digital streaming begins to account for larger and larger shares of music industry revenue.[298]

But if more music publishers begin to put their repertoires into SESAC for express purposes of obtaining higher licensing revenue from digital services, those services could well file their own antitrust lawsuit, mirroring the allegations made by the radio and television industries. If they do so, there could come a point where SESAC, as well as its younger rival GMR (which has likewise been subject to antitrust litigation since almost its

297. *See* Pandora Media, Inc. v. Am. Soc'y Composers, 785 F.3d 73, 75 (2d Cir. 2015); Broad. Music, Inc. v. Pandora Media, Inc., Nos. 13 Civ. 4037 (LLS), 64 Civ. 3787 (LLS), 2013 WL 6697788, at *1 (S.D.N.Y. Dec. 19, 2013). The issue of partial withdrawal clarifies distributors' continued reliance on blanket rather than per-work licenses. The need for many distributors to license music on a mass scale, see *supra* Section I.A, coupled with continued difficulties in obtaining ownership information for musical compositions, see COPYRIGHT OFF. MUSIC STUDY, *supra* note 41, at 123–24, means that blanket licensing remains necessary for most services. Thus, despite predictions that technology might enable more seamless per-work licensing that would remove the transaction costs-savings offered by the PROs (and thus reduce their market power without substantial regulation), the blanket license appears to be here to stay. *Cf.* C. Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*, 116 COLUM. L. REV. 927, 986 (2016) (noting that "ASCAP's [cartel-like] conduct ought to be judged against the [least restrictive alternative] of per-song, per-use negotiation between ASCAP and a broadcaster. Such licenses would introduce price competition among songwriters for public performance rights" and speculating that technology could enable such "à la carte" licensing).

298. In 2014, when Pandora challenged music publishers' attempt to "withdraw" their repertoires from ASCAP and BMI only with regard to new digital services, digital revenue was only a "small component" of overall music industry revenues. *In re* Petition of Pandora Media, Inc., 6 F. Supp. 3d 317, 369 (S.D.N.Y. 2014) ("Internet radio remains in its infancy. There is little likelihood that the landscape of today will remain unaltered. Indeed, remarkable changes occur with lightning speed in the digital age."). Seven years later, streaming has now surpassed radio as the primary means by which Americans consume music. *See* Fred Backus, *Streaming Surpasses Radio as the Top Way to Listen to Music*, CBS NEWS (Apr. 9, 2021, 12:04 PM), https://www.cbsnews.com/news/streaming-tops-radio-as-the-top-way-to-listen-to-music/ [https://perma.cc/7HFX-HWMY].

inception),[299] decides it would prefer to have global peace rather than piecemeal settlements, each with their own distinct arbitration provisions.

This is precisely where a rate-regulating consent decree might have the most efficacy. Indeed, some scholars, like Professor Christopher Sprigman, have already suggested using the enormous leverage from the prospect of a new price-fixing lawsuit to negotiate new decrees that apply to all of the PROs, including SESAC and GMR.[300] At the very least, modifying the existing consent decrees to sweep in the two unregulated PROs seems less daunting. And the existence of large-scale settlements and ongoing antitrust litigation makes the government's case of anticompetitive conduct the same type of credible precursor to settlement as those that led to the formation of the ASCAP and BMI consent decrees.

2. *Merger Regulation*

The use of rate-regulating consent decrees to address price fixing or collusion is the most obvious, considering this was precisely the goal of the original ASCAP/BMI consent-decree system. But our model may have broader utility, especially when it comes to merger regulation. Rather than either prohibiting or permitting a proposed acquisition of two content companies—a binary choice exercised only once at the time of a proposed merger—antitrust regulators may, instead, choose to allow mergers to proceed and exercise jurisdiction over the merged firm (until those consent decrees are sunset),[301] ensuring that the content holder exercises its market power fairly.

We note that, in fact, given the choice between a blocked merger or a permitted merger with some ongoing supervision via a rate-regulating consent decree, firms may very well prefer the latter. In 2007, when the satellite radio disseminators XM and Sirius were facing regulatory scrutiny over their proposed merger, for example, the CEO of Sirius specifically offered to submit to a more draconian version of ongoing supervision—in the form of a price-freeze commitment.[302] AT&T and BellSouth, in their December 2006 merger, also agreed to submit to post-merger price-freeze

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299. *See* Complaint, Radio Music License Comm., Inc.. v. Glob. Music Rts., LLC, No. 2:16-cv-06076-CDJ (E.D. Pa. Nov. 18, 2016).

300. Sprigman, *supra* note 108, at 421–22.

301. The DOJ engages in regular reviews of consent decrees to determine whether the decrees should be modified or terminated. *See, e.g.*, *The Paramount Decrees*, U.S. DEP'T JUST. (Aug. 7, 2020), https://www.justice.gov/atr/paramount-decree-review [https://perma.cc/Q3G6-TDAC] (opening a review of the *United States v. Paramount*, 334 U.S. 131 (1948), consent decrees); *Antitrust Consent Decree Review 2019*, *supra* note 174 (opening a review of the ASCAP and BMI consent decrees).

302. *Competition and the Future of Digital Music: Hearing Before the Antitrust Task Force Subcomm. of the H. Comm. on the Judiciary*, 110th Cong. 84 (2007) (testimony of Mel Karmazin, CEO, Sirius Satellite Radio).

commitments.[303] Economists have noted that since mergers "create[] both market power and efficiencies unique to the merged firm, the firms would rationally relinquish their power over price as a condition of merger approval."[304]

In the new era of expanded antitrust regulatory ambitions, politicians and enforcers are re-thinking earlier, completed mergers. In April of 2023, a group of lawmakers, including Senator Elizabeth Warren, sent a letter to the DOJ urging it to investigate the consummated merger between WarnerMedia and Discovery, which they argue had enabled the merged firm to "adopt potentially anticompetitive practices that reduce consumer choice and harm workers in affected labor markets."[305] The group of lawmakers specifically cited the merged entity's plan to combine the HBO Max and Discovery+ streaming service into one platform, while raising prices on the subscription plan.[306] And the new antitrust enforcers have made it clear that consummated transactions are ripe for re-review.[307] But the new WarnerMedia would likely prefer entering into a consent decree containing a price-freeze commitment on subscriptions (it already made one such price hike in January 2023)[308] over unwinding the deal.

While many firms would prefer to be subject to price regulation rather than having their merger blocked entirely, this does not necessarily mean this outcome is ideal from the perspective of antitrust and copyright policy. But we believe that such behavioral remedies[309] may often provide a better solution than the binary merger/no-merger choice. Consider the completed

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303. *In re* AT&T Inc., 22 FCC Rcd. 5662 (2007) (memorandum opinion and order). Note that some have argued that price-freeze commitments are unwise antitrust policy because they in fact act as price floors, rather than price ceilings. *See* Farrell Malone & J. Gregory Sidak, *Should Antitrust Consent Decrees Regulate Post-Merger Pricing?*, 3 J. COMPETITION. L. & ECON. 471, 482 (2007).

304. Malone & Sidak, *supra* note 303, at 490.

305. Letter from Rep. Joaquin Castro, Sen. Elizabeth Warren, Rep. David N. Cicilline & Rep. Pramila Jayapal to Merrick B. Garland, U.S. Att'y Gen. & Jonathan Kanter, U.S. Assistant Att'y Gen., at 1 (Apr. 7, 2023), https://castro.house.gov/imo/media/doc/2023.04.07%20Letter%20to%20DOJ%20.pdf [https://perma.cc/H7FP-YHJT].

306. *Id.* at 3.

307. *See, e.g.*, Holly Vedova, *Adjusting Merger Review to Deal with the Surge in Merger Filings*, FTC: COMPETITION MATTERS BLOG (Aug. 3, 2021), https://www.ftc.gov/enforcement/competition-matters/2021/08/adjusting-merger-review-deal-surge-merger-filings [https://perma.cc/WD3Q-MU4X] ("[T]he law permits the antitrust agencies to determine that a merger is illegal even after the companies have merged and even if the merger was subject to premerger review."). *See generally* Menesh S. Patel, *Merger Breakups*, 2020 WIS. L. REV. 957, 1022–24 (2020) (on specific completed mergers that regulators are now considering unwinding).

308. *See* Todd Spangler, *HBO Max Announces First Price Hike, Effective Immediately*, VARIETY (Jan. 12, 2023, 8:21 AM), https://variety.com/2023/digital/news/hbo-max-announces-price-increase-1235487428/ [https://perma.cc/J67J-NBK9].

309. We return to the broader question of structural versus behavioral remedies *infra* Section IV.C.

merger of Universal Music with EMI in 2013.[310] While U.S. regulators allowed the deal to move forward without any behavioral remedies in place, regulators in the EU imposed a conduct-based remedy on the merged entity as a condition of approval.[311] When the deal was completed, digital streaming—which, as discussed previously, relies on access to each of the major record labels' catalogs—was in its infancy.[312] Streaming has, however, now become the dominant mode of music consumption.[313] Yet the licensing landscape that streaming services face is more concentrated than ever, with the completed merger reducing the number of licensors from four down to three.[314] If regulators had determined that the merger of Universal and EMI created efficiencies that were impossible to achieve without the merger—or, in the alternative, if regulators decide in the future to challenge the consummated merger—a possible solution would be to place the merged entity under consent-decree supervision, subjecting Universal/EMI to the same rate-setting procedures that the PROs are already subject to. And the accumulation of multiple rate-setting decisions, too, could prove valuable in determining whether a consent decree is, in fact, required, with the DOJ having the option of sunsetting the consent decrees when it determines that they are no longer necessary for ensuring a competitive industry.[315]

Moreover, a regulatory solution would have also been preferable to the recent blocking of the proposed acquisition of the publisher Simon & Schuster by book powerhouse Penguin Random House, described above.[316] The move was widely seen as emblematic of the Biden Administration's new, tougher stance on corporate consolidation—and talismanic of the neo-

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310. *See* Press Release, Fed. Trade Comm'n, Statement of Bureau of Competition Director Richard A. Feinstein *In the Matter of* Vivendi, S.A. and EMI Recorded Music (Sept. 21, 2012), https://www.ftc.gov/sites/default/files/documents/closing_letters/proposed-acquisition-vivendi-s.a.emi-recorded-music/120921emifeinsteinstatement.pdf [https://perma.cc/6K2N-9LWU].

311. *Id.* at 2 (noting that the FTC "did not conclude that a remedy was needed to protect competition in the United States" but that "the remedy obtained by the European Commission to address the different market conditions in Europe will reduce concentration in the market in the United States as well"); MUSIC AND STREAMING REPORT, *supra* note 44, at 68 n.154 (noting that Universal had given the European Commission a behavioral commitment that it would not enter into certain most favored nation, or MFN, clauses with streaming companies). On the anticompetitive nature of MFNs, in particular in the music industry, see *id.* § 3.9–.15.

312. *See supra* notes 44–46 and accompanying text.

313. *See supra* note 298 and accompanying text.

314. *See supra* note 41 and accompanying text.

315. *See* United States v. Paramount Pictures, Inc., No. 19 Misc. 544 (AT), 2020 WL 4573069, at *1 (S.D.N.Y. Aug. 7, 2020) (terminating the *Paramount* consent decrees, which regulated motion picture theatrical distribution for seven decades, following a two-year sunset period on certain provisions of the decrees).

316. *See supra* Section I.A; *see also* Elizabeth A. Harris, Alexandra Alter & David McCabe, *Justice Dept. Sues Penguin Random House Over Simon & Schuster Deal*, N.Y. TIMES (Nov. 2, 2021), https://www.nytimes.com/2021/11/02/books/penguin-random-house-simon-schuster-merger-lawsuit.html [https://perma.cc/PJE3-EZG3].

Brandeisians' broadened focus away from consumer pricing toward other goals, such as protecting labor markets.[317]

When the district court ultimately sided with the DOJ, finding that the acquisition was "likely to substantially lessen competition to acquire 'the publishing rights to anticipated top-selling books,'"[318] the decision was hailed as a rare court victory for the new, aggressive antitrust agenda.[319] But the response from the actual publishing industry was far from sanguine. Publishing employees, agents, and executives agreed that they had significant anxiety about the merger—but noted that such anxiety remained, even after it was blocked.[320] As one media industry outlet put it: "Penguin Random House, a private German company, faces little pressure from stockholders. But if Simon & Schuster were bought by a publicly traded company or a rapacious private equity firm, the results could be catastrophic—here, the Big Five gets reduced to the Big Four by brutal subtraction."[321] And indeed, a little over half a year later, the private equity firm KKR announced that it had purchased the storied publishing house.[322] While it is too early to speculate what KKR plans on doing with its newly acquired asset, industry commentators are not optimistic. Commentators noted: "Private equity . . . swoop[ing] in and seal[ing] Simon & Schuster's fate—[that's] a move that would likely lead to absolute devastation and wholesale job loss."[323]

From the perspective of copyright policy, the destruction of a publishing house—the industry apparatus through which creative works can ultimately be financed—is not optimal, even if consolidation also presents problems.[324] To simply block an acquisition and leave the acquiree to fend for itself afterwards—including through further consolidation or else bankruptcy—ignores the unique peculiarities of why certain industries, copyright content markets among them, are so deeply consolidated in the first place. As we explored in Parts I and II, there are particular reasons that copyright content markets veer toward concentration, including advantages in risk-spreading and the high cost of content creation. A better approach, then, might be to *permit* the merger but with a rate court as the backstop. This approach might have allowed the continuation of the publishers' valuable role in financing

317. *See* Harris et al., *supra* note 316; *see also supra* Section II.A (discussing neo-Brandeisian approach to antitrust).

318. United States v. Bertelsmann SE & Co. KGaA, 646 F. Supp. 3d 1, 12 (D.D.C. 2022).

319. *See* Wolfe, *supra* note 4.

320. Shephard, *supra* note 15.

321. *Id.*

322. *See* Blair, *supra* note 15.

323. Shephard, *supra* note 15; *see also supra* note 15 (noting that private equity takeovers in the journalism space have been criticized for leading to job loss and the reduced production of quality content).

324. *See supra* Section II.B.1.

new works but prevented the abuse of market power posed by the prospect of even further consolidation in the publishing industry. This, of course, is not to say that blocking a merger is never appropriate. But a brute yes/no approach can miss the mark.

It is important to note here that we are agnostic as to the preferred term length of any such possible consent decree. Consent decrees are subject to sunsetting for a reason: it allows regulators to be flexible in response to changing market conditions. The sunset Paramount consent decree,[325] for example, reflects the reality of changing modes of motion picture distribution and consumption: movie theaters are no longer king. Other consent decrees that the DOJ has entered into previously explicitly contained term limits: when Ticketmaster and Live Nation merged in 2010, the DOJ and Live Nation entered into a consent decree that contained a number of behavioral remedies, including prohibitions on retaliation against concert venue customers and prohibitions on tying practices, which sunset after a term of ten years.[326] However, rumors that the DOJ is once again looking into potential antitrust violations by Ticketmaster and its parent Live Nation (triggered, no less, by a Taylor Swift ticket debacle) suggests that perhaps the ten-year term was too short.[327] Regulators might determine that a better option is for a consent decree that has no specified time limit, instead regularly reviewing it for sunset (as it does with the ASCAP/BMI consent decrees), rather than continuously reinvestigating merged entities after a designated time frame has passed.

3. *Loss Leading*

The final area where rate-regulating consent decrees might have some utility is in dealing with the Big Tech loss leader, which, as explained above, may be underpricing consumer content and deferring revenue in order to funnel consumers toward more lucrative products or make a long-term play to win the market.[328]

Whether such practices are a violation of the antitrust laws is a difficult question. As discussed above, loss leading that reaches the level of illegal predatory pricing is extraordinarily difficult to prove.[329] This difficulty

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325. *See supra* note 315.

326. *See* United States v. Ticketmaster Ent., Inc., No. 1:10-cv-00139, 2010 WL 5699134, at *9–10 (D.D.C. July 30, 2010) (proscribing behavioral provisions designed to promote competition), *amended by* No. 1:10-cv-00139-RCM, 2020 WL 1061445 (D.D.C. Jan. 28, 2020); *id.* at *13 (noting that the consent decree expires ten years from the date of entry).

327. *See* David McCabe & Ben Sisario, *Justice Dept. Is Said to Investigate Ticketmaster's Parent Company*, N.Y. TIMES (Jan. 24, 2023), https://www.nytimes.com/2022/11/18/technology/live-nation-ticketmaster-investigation-taylor-swift.html [https://perma.cc/HH2A-PYZY].

328. *See supra* Section I.B.

329. *See supra* Section II.A.1.

makes a certain amount of sense: to the extent antitrust is largely concerned with prices charged to consumers, the overpolicing of loss leading would "court[] intolerable risks of chilling legitimate price-cutting."[330] While the neo-Brandeisians have attempted to articulate a much looser definition of predatory pricing—in which forgoing short-term profits alone could be evidence of predation, even absent financial staying power or the promise that any short-term losses will be recouped after a firm's rivals have been destroyed[331]—this new definition remains theoretical. Until it is adopted by courts and policymakers, we are skeptical that existing antitrust law would provide a sufficient nexus to subject a large technology company to consent-decree based regulation simply because of loss-leading practices.

That being said, such companies may ultimately end up subject to de facto regulation by virtue of participating in a supply chain where some copyright owners may be regulated for their own anticompetitive behavior. After all, the existing ASCAP/BMI consent decrees already implicitly regulate large technology companies, as these companies must license musical work public performance rights in order to stream content on services like Amazon Music and Apple Music, and thus could potentially have their license rates set via the rate courts in the event negotiations break down.[332]

While this has yet to occur, the Copyright Act's existing compulsory licenses also regulate some Big Tech services' relationships with content owners. And, thanks to these regimes, we have some examples of what a regulator should *not* do when setting rates between copyright owners and a technology company engaged in loss leading and/or revenue deferment.

In a recent regulatory proceeding setting the rates paid by streaming services for musical composition reproduction (sometimes called "mechanical") rights,[333] the CRB affirmatively recognized that some digital music services engage in "revenue deferral to promote a long-term growth strategy."[334] Further still, at least some evidence existed that technology firms that have successfully deferred revenue or used content as a loss leader to subsidize other product lines have also used this to manipulate existing compulsory royalty rate structures in the Copyright Act.[335] The CRB,

330. Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223 (1993).

331. *See supra* note 106 and accompanying text.

332. *See supra* Part III (explaining structure of the consent decree and rate court system).

333. These rights are regulated by the Section 115 compulsory license.

334. *See* Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), 84 Fed. Reg. 1918, 1927 (Feb. 5, 2019) (final rule and order).

335. Some royalty rate structures, such as the Section 115 (mechanical) compulsory license for musical works, were based almost exclusively on a percentage of revenue received by the digital service. In revising the Section 115 to include more substantial minimum floors, the CRB explicitly noted that digital services might take advantage of percentage of revenue structures by purposefully "deferring

however, scarcely used the opportunity to regulate amongst the different market competitors on the licensee side, perhaps by using different rate structures for an Amazon Music verses a Spotify. Instead, it took a narrower view of its dictate: to decide between competing claims by the licensors—traditional content holders (music publishers)—and the licensees (*all* streaming services).[336]

A judge in a rate-setting case might have instead crafted a rate structure that does not provide an advantage for large companies best able to absorb high royalties through loss-leading practices. Indeed, a dissenting CRB judge took the majority to task precisely for failing to ensure a diversity of streaming services in the market, such that both the supply of and access to copyrighted works might ultimately be harmed.[337]

C. Hybrid Copyright-Antitrust Regulation: Implications

Antitrust is having a resurgence. Thanks to the efforts of a new generation of scholars and practitioners, many assumptions about industry consolidation, especially in the technology sector, are being called into question. Whether this change reflects a new neo-Brandeisian theoretical orientation for antitrust, or merely, as some have argued, a reprioritization of goals that have always been present—even amongst Chicago School proponents[338]—the appetite for antitrust intervention today is higher than it has been for decades. Yet, as some of the problems posed by the recent blocking of the Simon & Schuster-Penguin Random House merger illustrate,[339] antitrust enforcement decisions must be considered through the lens of copyright's complex policy goals.[340] One goal of this Article, then, is to begin the difficult work of clarifying when and how market power

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shorter-term profits through temporarily lower downstream pricing in a manner that suppresses revenue over that shorter-term." *Id.* Worse still, digital services might also "obscure royalty-based streaming revenue by offering product bundles that include music service offerings with other goods and services, rendering it difficult to allocate the bundle revenue between royalty-bearing service revenue and revenue attributable to other products in the bundle." *Id.* Amazon, for example, bundles its content streaming offerings with its Prime shopping subscription, at no additional cost to the consumer. *Id.* at 1971 (Strickler, C.R.J., dissenting).

336. This is perhaps best exemplified by the CRB's oft-repeated position that the rates they set are "business model neutral." *Id.* at 1990 n.263 ("In keeping with the Judges' long-standing position, I believe the Judges should remain *business model neutral*, and decline to favor one challenged business model over another."). Instead, the CRB often describes themselves as mediating between two different sides: the copyright holders, on the one side, and the new technology users, on the other. *Id.*) ("[T]his issue pits the *music publishing business model* against *the interactive streaming business model*."). But, as discussed in Part I, there is not one uniform "streaming business model."

337. *Id.* at 1986 n.253 (criticizing "the simple cliché that the Judges should be 'business model neutral.'").

338. *See* Hovenkamp, *Consumer Welfare Principle*, *supra* note 96, at 87.

339. *See supra* Section IV.B.2.

340. *See supra* Section II.B.1.

problems in copyright industries should warrant antitrust intervention. Since the problems of market power can layer onto copyright's inherent tradeoff between creative incentives and public access, any intervention will need to simultaneously account for the economic infrastructure within which creativity occurs, while ensuring that consolidation does not overly restrict the public's ability to consume those works they find valuable at a reasonable price.[341] The ASCAP/BMI consent decree model showcases an antitrust intervention that has proven itself able to account for these competing priorities, making it a particularly useful model—though certainly not the only one—for antitrust enforcers.

That being said, this Article's main proposal—the use of rate-regulating consent decrees—may strike some as a surprising embrace of an often-critiqued form of antitrust intervention: behavioral remedies (also known as conduct remedies).[342] The DOJ's current Policy Guide to Merger Remedies eschews ongoing regulation of merged entities, stating instead that it prefers "structural" remedies, such as forcing the merged firm to sell off assets.[343] The current guidelines are the product of the Trump-era DOJ's general antagonism for government intervention generally, with then-assistant Attorney General of the Antitrust Division, Makan Delrahim, making it clear that he viewed behavioral remedies as "fundamentally regulatory, imposing ongoing government oversight on what should preferably be a free market."[344] On the other hand, the Obama-era administration took a much

341. As noted above, this balancing act can sound in allocative efficiency concerns. *See supra* notes 114–32 and accompanying text. But, as many scholars have discussed, the incentive-access tradeoff can also reflect a more normatively pluralistic account centered on distributive justice, democracy, and freedom of expression. *See generally* Oren Bracha & Talha Syed, *Beyond Efficiency: Consequence-Sensitive Theories of Copyright*, 29 BERKELEY TECH. L.J. 229 (2014) (outlining various normative accounts). *See also, e.g.*, Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 285 (1996). In this respect, the concerns of copyright law should not be viewed as inconsistent with the Neo-Brandeisians' more normatively pluralistic approach to antitrust policy.

342. *See generally* Michael A. Carrier & Gwendolyn J. Lindsay Cooley, *Prior Bad Acts and Merger Review*, 111 GEO. L.J. ONLINE 106, 135–36 (2023) (describing criticisms of behavioral remedies); Rory Van Loo, *In Defense of Breakups: Administering a "Radical" Remedy*, 105 CORNELL L. REV. 1955, 1962 (2020).

343. U.S. DEP'T OF JUST., ANTITRUST DIV., MERGER REMEDIES MANUAL 4 (2020) [hereinafter DOJ MERGER REMEDIES], https://www.justice.gov/atr/page/file/1312416/download [https://perma.cc/J3HQ-GDU7].

344. Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Just., Antitrust Div., Keynote Address at American Bar Association's Antitrust Fall Forum (Nov. 16, 2017), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar [https://perma.cc/4NEY-VBWG]. A general preference for self-regulating markets with little government intervention characterizes dominant antitrust thinking. *See, e.g.*, Kevin A. Bryan & Erik Hovenkamp, *Startup Acquisitions, Error Costs, and Antitrust Policy*, 87 U. CHI. L. REV. 331, 331 (2020) ("[A] prominent feature of modern antitrust law [is] a strong preference for erring on the side of nonenforcement. A leading rationale for this preference is the claim that market power self-corrects by attracting new entrants who discipline incumbents."); *see also* Herbert Hovenkamp, *Prophylactic Merger Policy*, 70 HASTINGS L.J. 45, 48 (2018) (noting that consent decrees "can blur the important line

more permissive stance toward behavioral remedies. The 2011 Merger Remedies Guide stated that "[i]n certain factual circumstances, structural relief may be the best choice to preserve competition. In a different set of circumstances *conduct relief may be the best choice*."[345]

In any event, regardless of whether the current preference for structural remedies will persist, the prevailing concerns about behavioral remedies—monitoring costs, administrability, and general inefficiency[346]—are less pronounced with respect to the ASCAP/BMI consent decree model. As we explained above, rate-court-as-backstop differs from mandated rate-setting, the latter of which has been criticized for thrusting district court judges into the role of public utility commissioners.[347] Nor is it the same as imposing a price cap at the time of merger, which, while more draconian, has been critiqued as acting as a floor (rather than a ceiling) by freezing rates and thus reducing incentives to drive toward future cost savings or competition.[348] Nor, as the history of the ASCAP and BMI rate-setting proceedings show, will such "rate courts" be flooded with unwieldy, expensive, and taxing litigation. Our study of every single rate court challenge that has been filed in the ASCAP/BMI consent decrees' eight-decade (though, in the case of BMI, slightly shorter) existence shows that rate court challenges are rare, a "last resort" for when negotiations break down.[349] And, our review of the history of the ASCAP/BMI consent decrees shows that, despite multiple attempts to sunset them by the DOJ, almost all parties to the system agree that they are largely working—and better than other available alternatives.[350]

Furthermore, as we explored above, the difficult line-drawing presented by copyright writ large—between owner compensation and consumer access, in particular—lends itself well to price regulation, in ways that might not be true for non-IP markets. As Professors Christina Bohannan and Herbert Hovenkamp have noted, U.S. antitrust laws stem from Congress's commerce power—which "says nothing about encouraging competition or

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between antitrust and regulation, sometimes thrusting general jurisdiction Article III courts into roles for which they are not well-suited"). Note that Professor Hovenkamp's critique of ongoing supervision by federal judges, however, does not specifically examine the functioning of the ASCAP/BMI courts.

345. U.S. DEP'T OF JUST., ANTITRUST DIV., ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 4 (2011) (emphasis added), https://www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf [https://perma.cc/7J72-V2WP].

346. *See supra* note 342.

347. *See, e.g.*, Stephen G. Breyer, *Antitrust, Deregulation, and the Newly Liberated Marketplace*, 75 CALIF. L. REV. 1005, 1043 (1987) ("Regulation exacts a price . . . in terms of delayed decisions, expensive bureaucracy, diminished predictability, and imperfect replication of the free market."); *see also supra* Section IV.A.1.

348. *See* FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34, 65, 67 (D.D.C. 1998) ("In the absence of real competition, . . . the prices set today could in effect become the floor tomorrow.").

349. *See supra* Sections III.B, IV.A.1.

350. *See supra* Sections III.A.2, IV.A.

efficiency as an exclusive or even an articulated goal."[351] Copyright laws, on the other hand, are "affirmative regulatory provisions": they "begin with the premise—fully justified by the Constitution's IP Clause—that the market operating alone will not produce the optimum amount of innovation. . . . [M]arket failure is the starting point for IP laws, and it is market failure that gives rise to the need for legal entitlements."[352] Indeed, as explained above, the market dynamics in concentrated copyright industries often layer onto the basic balancing difficulties in copyright writ large, suggesting that market regulation can be an important tool for providing a more effective copyright system.[353] In this respect, the argument for behavioral remedies presented here may not be generalizable to other markets.

Moreover, fundamentally, our argument is only that behavioral remedies—even with their greater difficulties in administrability—should be part of the possible range of tools available to the antitrust enforcer.[354] Indeed, it is important to reiterate that the rate-setting consent decree model is only one potential policy tool that might help achieve the goals of competition and copyright policy in creative content markets. Other approaches, such as structural separations,[355] promoting private ordering through class actions,[356] or regulation of upstream harms in copyright labor markets,[357] may also be necessary when considering competition problems in copyright markets. These alternative approaches, which we separately explore in other research, could certainly exist in tandem with the model we propose here.

Our argument also has implications for debates occurring within copyright law. As we explored in Part II, existing models addressing competition in copyright markets too often see copyright as mediating solely between a rightsholder and a would-be infringer.[358] This fits into a broader pattern of copyright as a pitched battle between two diametrically opposed sides: the so-called minimalists, who argue that most creativity

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351. Bohannan & Hovenkamp, *supra* note 135, at 917.

352. *Id.* at 922–23.

353. *See supra* notes 114–32 and accompanying text.

354. A similar position was embraced by the Obama administration in 2011. *See* ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES, *supra* note 345, at 4 ("In certain factual circumstances, structural relief may be the best choice to preserve competition. In a different set of circumstances *conduct relief may be the best choice*." (emphasis added)).

355. *See generally* Jacob Noti-Victor, Structural Separations in Copyright Markets: *Paramount* Revisited (unpublished manuscript) (on file with author).

356. *See generally* Xiyin Tang, *The Class Action as Licensing and Reform Device*, 122 COLUM. L. REV. 1627 (2022).

357. *See generally* Xiyin Tang, A Labor Theory of Intellectual Property (unpublished manuscript) (on file with author).

358. *See supra* Section II.B.2 (discussing proposals that ground assessment of market disruption in copyright infringement context).

happens outside of copyright protection, and the maximalists, who want as much protection as constitutionally permissible.[359] In this framework, copyright infringement proceedings involving new technologies, in answering "yes" or "no" to the question of infringement, inevitably choose a side in the copywars.

But copyright policy is, in reality, far more nuanced. As noted above, while copyright infringement proceedings receive the overwhelming bulk of scholarly attention, much of copyright policy is actually made in administrative or court-supervised royalty proceedings that do not choose an obvious winner or loser, but rather, a royalty rate that the judges believe can be borne by the licensee and constitute fair returns to the licensor.[360] And even infringement proceedings may not be the stark declaration of allegiances that some may envision them being: as some scholars have recognized, the Supreme Court's decision in *eBay Inc. v. MercExchange, L.L.C.*[361]—by holding that IP holders may in many instances only be entitled to damages, not injunctive relief, allowed for a middle path—permitted but paid infringement.[362]

Though this Article has argued that, in the current political reality, regulation of copyright markets can be accomplished via antitrust consent decree,[363] we are mindful that broader copyright reform could also achieve a better regulatory system for the copyright industries. While we are skeptical that any such reforms are imminent, the ASCAP/BMI consent decree model, especially its greater efficiency when compared to existing compulsory licenses,[364] could provide a model for general copyright reform as well.[365]

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359. The battle has, quite literally, been described as a "war." *See* PETER BALDWIN, THE COPYRIGHT WARS: THREE CENTURIES OF TRANS-ATLANTIC BATTLE (2014).

360. *See* Spotify Form F-1, *supra* note 63, at 15 (noting that the "rates that the Copyright Royalty Board set apply both to compositions that we license under the compulsory license in Section 115 of the Copyright Act . . . and to a number of direct licenses that we have with music publishers for U.S. rights, in which the applicable rate is generally pegged to the statutory rate"); Pandora Media, Inc., Registration Statement (Form S-1), at 17 (Feb. 11, 2011) ("[M]usical works administered by ASCAP are licensed to us pursuant to the provisions of a consent decree, similar to the BMI consent decree referred to above.").

361. 547 U.S. 388 (2006).

362. *See* Victor, *supra* note 268, at 1934; Peter S. Menell & Ben Depoorter, *Using Fee Shifting to Promote Fair Use and Fair Licensing*, 102 CALIF. L. REV. 53, 76 (2014).

363. *See supra* Section IV.A.4.

364. *See supra* Sections IV.A.1–3.

365. Any regulatory solution pursuant to the antitrust laws could also be a stop gap until more comprehensive copyright reform can be realized. Indeed, the 1982 AT&T Consent decree was ultimately supplanted by the 1996 Telecommunications Act, which provided a more comprehensive regulatory framework. *See* Press Release, U.S. Dept. of Just., Justice Department Seeks Complete Removal of AT&T Consent Decree (Feb. 28, 1996), https://www.justice.gov/archive/atr/public/press_releases/1996/0552.htm [https://perma.cc/435P-3AUJ].

CONCLUSION

For those who initially viewed digital disruption as a welcome salve to the dominance of traditional content incumbents, this Article has called into question such optimism. Parts I and II argued that consolidation, as well as practices like loss leading and winner-take-all strategies, are not fair attempts to gain a competitive advantage in the content ecosystem, but instead threaten core values that both antitrust and copyright recognize, including the quality and variety of products downstream. The digitization story—in which initial fragmentation lends itself to new forms of industry concentration—suggests that it would be ill-advised to leave copyright markets to their own forces, relying exclusively on private disruption to reorder the entertainment industry. Indeed, Part II's review of the conventional wisdom that copyright and antitrust law may each work separately to address anticompetitive harms, through copyright-internal and antitrust-only approaches, shows that they have proved inadequate. Instead, Part III introduced the oft-overlooked ASCAP/BMI consent decree model as an example of a policy lever that blends the DOJ's antitrust enforcement powers with the unique complexities of copyright policy.

As Part IV concluded, what we need is an expansion of what this Article calls a copyright-antitrust regulatory model, *away* from an overreliance on ex-post mediation through individual litigation, or else through a simple yes/no approach to merger enforcement that may deliver illusory wins while condemning the would-be acquiree to be split up and sold for parts. In this way, the ASCAP/BMI consent decrees, often viewed as arcane, complex, highly technical, and bizarre relics of some century-old government settlement, may instead serve as a model for the 21st century's new landscape of ever-greater digitization—and a salve against the threat of ever-increasing consolidation.

We emphasize here that our approach may not always be the best approach. Consent decrees are, after all, settlements that both the government and the party accused of violating an antitrust law must agree to. They are arrived at after both parties have viewed the available evidence and made a determination that governance by decree—one that may be sunset, of course, but perhaps not for many decades—is preferable to other possible outcomes (a blocked merger, divestiture, asset sales).[366] They often do not generate headlines; they work behind the scenes. Some may even say our proposal is to make copyright and antitrust "boring" again.[367] The

366. *See supra* Part IV.

367. *Cf.* Paul Krugman, *Making Banking Boring*, N.Y. TIMES (Apr. 9, 2009), https://www.nytimes.com/2009/04/10/opinion/10krugman.html [https://perma.cc/3DH7-P3NE] (arguing that the post-Great

chicken breast on the menu is seldom the star. But at the very least, it deserves a place amongst the panoply of options.

Depression "banking industry that emerged from that collapse was tightly regulated, far less colorful than it had been" but that this "boring" system was far more effective than alternatives).

APPENDIX: RATE COURT DECISIONS

A. ASCAP Rate Court Decisions

Case Name	Licensee Requested Rate	Licensor Requested Rate	Court Determined Rate
United States v. Am. Soc'y Composers, Civ. No. 13-95 (WCC), 1989 WL 222654 (S.D.N.Y. Dec. 20, 1989).	$0.08 per subscriber.	$0.25 per subscriber.	$0.15 per subscriber.
United States v. Am. Soc'y Composers, 831 F. Supp. 137 (S.D.N.Y. 1993).	Base fee of $9.8 Million, inflation-adjusted.	$11.3 Million plus .44% of gross income for 1992 and 1993, with interest.	ABC – $10.47 million per annum. CBS – $9.75 million per annum.
United States v. Am. Soc'y Composers, Civ. No. 13-95 (WCC), 1993 WL 60687 (S.D.N.Y. Mar. 1, 1993), *aff'd in part, vacated in part*, 157 F.R.D. 173 (S.D.N.Y. 1994).	Blanket license: (1) 56% of fees paid by networks or (2) pay the ratio between total fees payable by the stations and the networks (1.38:1 for the years in question, meaning fees would be 138 percent of the total network fees for each of those years).	Annual fees measured by a two-step formula: 1. Base fee of two percent of the station's average net revenue for the years 1964 and 1965. 2. Incremental fee of one percent of all revenue over the base revenue (increasing based on inflation to be 1.423 percent of revenues).	$19.3 Million flat fee (adjusted annually to reflect cost-of-living increases and number of stations covered).

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	Per Program license – same as the blanket fee price, plus a small admin fee.	Per program license – four times the effective percentage rate of the blanket fee, plus an admin fee.	Per program license – 140% of the station's blanket fee (133% adjusted for admin costs) (vacated in later hearing).
United States v. Am. Soc'y Composers, 870 F. Supp. 1211 (S.D.N.Y. 1995).	Fox should not have to pay license fees for transmission of Fox programming to affiliates because the affiliates already paid license fees.	The Shenandoah license didn't cover Fox's transmission to the local stations, and therefore Fox must pay licensing fees.	ASCAP is not entitled to collect license fees for Fox's transmission of programs to its local stations where the local stations already paid license fees.
United States v. Am. Soc'y Composers, 981 F. Supp. 199 (S.D.N.Y. 1997).	Blanket fee: 0.91% of gross revenue Per program fee: 1.73% of gross revenues and an incidental use fee of 0.06% of adjusted gross revenue.	Blanket fee: 1.6% of gross revenue Per program fee: 4.22% of revenue for featured music, 1.82% of revenues for incidental music.	ASCAP's terms are reasonable, but the incidental music fee under the per-program form of license will be 0.06% of the licensee's adjusted gross revenue.
United States v. Am. Soc'y Composers, 559 F. Supp. 2d 332 (S.D.N.Y. 2008), *vacated and remanded*, 627 F.3d 64 (2d Cir. 2010).	(a) 2.5% of net revenue "directly attributable" to on-demand audio streaming content; (b) 1.615% of net revenue "directly attributable" to audio webcasting services; (c) 0.9% of revenue "directly	A rate of 3.0% applied to the music-adjusted revenues for AOL and Yahoo!, and a rate of 3.0% applied to all domestic revenues of RealNetworks and AOL Music Now.	A rate of 2.5% applied to the music-adjusted revenues for all three parties *Note:* Later vacated and remanded.

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	attributable" to streaming music videos; (d) 0.375% of revenue "directly attributable" to performances of music in audiovisual programming, such as movie trailers and television programming; and (e) 0.1375% of revenue "directly attributable" to non-entertainment audio-visual programming such as sports and news.		
In re Application of Cellco P'ship, 663 F. Supp. 2d 363 (S.D.N.Y. 2009).	Downloading ringtones is not public performance of musical works, and no blanket license is needed.	Downloading ringtones to a customer constitutes public performance of musical works, and a blanket license is needed.	Court approves licensee proposal, summary judgment granted.
United States v. Am. Soc'y Composers, 616 F. Supp. 2d 447 (S.D.N.Y. 2009).	Flat fee of $79,500 for launch in 2005 through end of 2008. $80,000 per year going forward.	$1.5 million for 2005–2006, $3.5 million for 2007, $7.0 million for 2008, and $7.0 million for 2009.	Interim fees of $1,610,000 for launch in 2005 through March 31, 2009; $70,000 per month going forward.
United States v. Am. Soc'y Composers, 607 F. Supp. 2d 562 (S.D.N.Y. 2009).	A "blended" royalty rate of 0.5%, (derived from ASCAP's cable licenses (0.9% for music video, 0.375% for general	Fee rate of 3.0% of the total revenue, with a rate of 2% for ringtones.	Interim fees of $1,800,000 accrued through March 2009, $60,000 per month of interim fees thereafter.

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	entertainment, and 0.1375% for news/sports/weather)) applied directly to premium cellular video and ring tone revenues and applied with a music use adjustment factor (minutes spent streaming basic CV content over total billable minutes browsing the internet) to basic cellular video.		
In re Application of THP Capstar Acquisition Corp., 756 F. Supp. 2d 516 (S.D.N.Y. 2010), *aff'd sub nom.* Broad. Music, Inc. v. DMX Inc., 683 F.3d 32 (2d Cir. 2012).	Music fee of $10.74 per location (an unbundled music fee of $22.50 per location multiplied by the share of all DMX's ASCAP affiliated music that is licensed to DMX solely by ASCAP (48%)) and a floor fee of $3 per location.	Either (1) flat blanket fee of $15,677,777 with no carve out for direct licensing program for 2005–2009, and annual per location rate of $49 for 2010–2012 or (2) For 2005–2009, same flat fee of $15,677,777 with carve out of 45% of payments made for direct licenses, plus a $25,000 annual admin charge ($15,410,096 in total). For 2010–2012, annual per location rate of $49 (CPI adjusted in 2011 & 2012) with	Court adopts licensee's proposal.

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		a $230,000 carve out each year based on royalties paid to direct licensors, plus $25,000 annual admin cost.	
In re Application of MobiTV, Inc., 712 F. Supp. 2d 206 (S.D.N.Y. 2010), *aff'd sub nom.* Am. Soc'y Composers v. MobiTV, Inc., 681 F.3d 76 (2d Cir. 2012).	Use the rates governing cable television programming (separating content into "music intensive," "general entertainment," or "news and sports," with licensing rates, respectively, of 0.9%, 0.375%, and 0.1375% of network revenue), with exceptions for audio programming and music video channels. For audio, apply a 2.5% rate to payments to content providers, for music video channels apply a .9% rate for ad revenues and revenues from wireless carriers. ($301,257.99 for 2003–2009)	2.5% rate applied to wireless carriers' retail revenues as the revenue base for the license fee, with revenue to be adjusted with a use-adjusted factor (based on minutes of usage) and music-intensity-use-adjusted factor (based on intensity of music within the products) (Total license fee of $41 million for the years 2003 through 2011)	Approves licensee proposal (rates based on wholesale revenue "all-audio offerings," "music intensive," "general entertainment," or "news and sports," with licensing rates, respectively, of 2.5%, 0.9%, 0.375%, and 0.1375%.
Pandora Media, Inc. v. Am. Soc'y Composers, 785 F.3d 73 (2d Cir. 2015).	1.7% of revenue for all 5 years.	1.85% of revenue for 2011–2012, 2.50% for 2013, and 3.00% for 2014–2015.	1.85% of revenue for all 5 years.

B. BMI Rate Court Decisions

Case Name	Licensee Requested Rate	Licensor Requested Rate	Court Determined Rate
United States v. Broad. Music, Inc., No. 64 Civ. 3787 (LLS), 2004 WL 1171249 (S.D.N.Y. May 26, 2004), *vacated and remanded*, 426 F.3d 91 (2d Cir. 2005).	Between 1.35% and 1.75% of gross revenue.	3.75–4% of adjusted gross revenues.	1.75% of gross revenues; on remand, 3.75% of revenue. *Note:* Decision was subsequently vacated a second time.
Broad. Music, Inc. v. Weigel Broad. Co., 488 F. Supp. 2d 411 (S.D.N.Y. 2007), *aff'd*, 340 F. App'x 726 (2d Cir. 2009).	Rate based on "the total BMI fees paid by the entire local television industry over the 1999–2004 time period as a percentage (approximately 0.33% to 0.41% by different calculations) of the industry's estimated program revenues during that period.	Use the rates established by the BMI/TMLC license agreement.	Use the rates established by the BMI/TMLC license agreement.
Broad. Music, Inc. v. DMX, Inc., 726 F. Supp. 2d 355 (S.D.N.Y. 2010), *aff'd*, 683 F.3d 32 (2d Cir. 2012).	Blanket Fee of $11.32 per location plus annual floor fee of $10 per location.	Blanket Fee of $41.81 per location.	Annual blanket fee of $18.91 per location plus annual floor fee of $8.66 per location.

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Broad. Music, Inc. v. N. Am. Concert Promoters Ass'n, No. 2018 Civ. 8749 (LLS), 2023 WL 2660656 (S.D.N.Y. Mar. 28, 2023).	Retroactive: Tiered rates of 0.3% to 0.15% of gross revenue. Current: Rate between 0.21%–0.275% of gross revenue. Revenue Base: Ticket revenue.	Retroactive: Tiered rates of 0.8% to 0.15% of gross revenue. Current: 0.8% of gross revenue. Revenue Base: Ticket revenue, plus service fees, VIP package revenues, and sponsorship revenues.	Retroactive: Court accepts licensor proposal. Current: 0.5% of gross revenue. Revenue Base: Court accepts licensor proposal but excludes sponsorship and advertising revenues.