Landing on chance in the classic game of Monopoly brings a variety of potential outcomes – advance to go, get out of jail free, or go directly to jail. In 1941, the players in the music industry’s game of Monopoly landed on chance when the American Society of Composers, Authors and Publishers (“ASCAP”) and Broadcast Music, Inc. (“BMI”) entered into antitrust consent decrees with the Department of Justice (“DOJ”). Ever since then, however, players such as producers, singers, and songwriters remain in Monopoly jail, though a community chest lies a few spaces away.

Emergence of Collection Societies

In 1909, Congress passed a Copyright Act that led to the emergence of collection societies, also known as Performing Rights Organizations (“PROs”). See 35 Stat. 1075 (amended 1976). The Copyright Act of 1909 created two important rights: (1) the mechanical reproduction right; and (2) the right of public performance. See Act of March 4, 1909, ch. 320, § 1(e), 35 Stat. 1075, 1075 (amended 1976).

The right of public performance ultimately led to the creation of ASCAP in 1914 because copyright owners seeking to enforce public performance rights were unable to detect infringing activity independently. See Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1, 4-5 (1979). ASCAP collects a single fee from licensees that ASCAP then divides among its members based on a complex pro rata formula after monitoring the songs played. See United States v. ASCAP, 1960 Trade Cas. (CCH) P 69,612 (SDNY Jan. 7, 1960).

With ASCAP’s anti-competitive monopolistic power over public performance rights, broadcasters formed a second PRO in 1939–BMI—which served as a “broadcaster-friendly” alternative to ASCAP. Broadcast Music, Inc., supra, 441 U.S. at 10. However, the emergence and power of ASCAP and BMI led to the DOJ’s antitrust actions, which unbeknownst to the music industry at the time, sowed the seeds for the game of Monopoly still in existence today.

Consent Decrees

In 1941, ASCAP and BMI entered into antitrust consent decrees with the DOJ to safeguard their monop-
oly and regulate their operation as not-for-profit PROs. Notably, fellow PROs, Global Music Rights (“GMR”) and the Society of European Stage Authors and Composers (“SESAC”), are not bound by the consent decrees because they are for-profit entities.

With respect to ASCAP, the consent decree includes requirements that ASCAP: (1) offer licenses other than a blanket license; (2) hold only non-exclusive licenses; (3) issue a license to any applicant that meets certain requirements; (4) permit any composer with a copyright to license any composition they own in a non-exclusive manner; (5) issue licenses that ASCAP and BMI’s members cannot occupy any other space on the Monopoly board in an effort to generate income. As a result, in the age of streaming music, these “industry participants” that the Supreme Court identified do not include the very own members of ASCAP and BMI.

Though the antiquated consent decrees once streamlined a business model, ASCAP and BMI’s members cannot occupy any other space on the Monopoly board in an effort to generate income. As a result, in the age of streaming music, these “industry participants” that the Supreme Court identified do not include the very own members of ASCAP and BMI.

The Ongoing Battle

In the midst of the proliferation of streaming music services, ASCAP and BMI took their case to the DOJ in 2014 in order to significantly modify royalty rates in the age of musical works. Currently, in the context of digital music, the rates set for musical work royalties are about one-twelfth of the rates set for sound recordings. See U.S. Copyright Off., Copyright and the Music Marketplace 18, note 2, at 92 (2015). PROs and major publishers use this statistic to demonstrate that ASCAP and BMI’s rate courts continue to produce below-market rates for musical works.

In addition to restructuring the anticompetitive protections of the consent decrees, ASCAP and BMI also asked the DOJ to change the licensing model for musical works. Specifically, ASCAP and BMI requested that the DOJ move away from “100% licensing” and towards fractional licensing. The “100% licensing” model grants a songwriter with any ownership on a song, even as little as 1%, the right to license the entire song on behalf of all other songwriters. Furthermore, that same song can only be licensed once. Fractional licensing requires a license from every owner of a song. Since the average song has several owners, fractional licensing would require businesses to license millions of the same rights multiple times over.

On August 4, 2016, following over two years of review, the DOJ determined that the marketplace needed to preserve the protections afforded by consent decrees, and opted not to change them. Moreover, the DOJ clarified that fractional licensing is not permitted under the consent decrees. See Statement of the Department of Justice on the Closing of the Antitrust Division’s Review of the ASCAP and BMI Consent Decrees, August 4, 2016, available at https://www.justice.gov/atr/file/882101/download. BMI and ASCAP challenged the ruling in BMI’s rate court in the SDNY, which has been more accommodating to the PROs concerns than ASCAP’s rate court.

On September 16, 2016, federal rate court Judge Louis Stanton issued an order rejecting the DOJ’s recent interpretation of the antitrust consent decree with respect to BMI. Judge Stanton concluded that BMI and ASCAP are free to engage in the fractional licensing of musical works. Not surprisingly, on November 11, 2016, the DOJ filed a motion to appeal Judge Stanton’s decision. As such, in the midst of this protracted battle, many players in the music industry remain locked up in Monopoly jail.

Four Bail Bondsmen and Community Chest

As the monopoly battle rears its head in the music industry, there are several bail bondsmen that offer sureties to correct the pitfalls of the contemporary music licensing system. The goal of the bail bondsmen—if they are truly going to extricate music industry players from Monopoly jail—must involve marketplace participation by musical work owners and licensees in which sound recording royalties
are considered in musical work proceedings. The bail bondsmen in this case are: (1) the Copyright Royalty Board (“CRB”); (2) the Songwriter Equity Act; (3) the Fair Play Fair Pay Act; and (4) Publishers. The aforementioned bail bondsmen seek to drive the players in the music industry out of Monopoly jail and toward that a much more preferable Monopoly square: community chest.

**CRB**

The Copyright Office published a 2015 report that proposed a shift of rate-setting proceedings in the SDNY rate courts to the CRB. The CRB, the first bail bondman, would become the arbiter in the musical works rate-setting procedure, though the antiquated process would remain the same. Rate decisions under the CRB could encourage marketplace participation by consolidating information into a single entity. Nevertheless, the CRB method is too narrow-minded by itself.

**Songwriter Equity Act**


The essence of these proposed laws is to amend the portion of the Copyright Act (17 U.S.C. § 114(i)) that currently prohibits PRO rate courts from considering the rates media services paid for sound recording public performance royalties when setting a “reasonable rate” for musical works. The proposed section 114(i) seeks to eliminate the prohibitory language and provide that “it is the intent of Congress that royalties payable to copyright owners of musical works for the public performance of their works shall not be diminished in any respect as a result of the rights granted in section 106(6).” See H.R. 1283 at § 2; S. 662 at § 2.

The Songwriter Equity Act would allow PRO rate courts to consider sound recording royalties as part of the formula when setting musical work royalty rates. If this bill passes along with the implementation of the CRB, the CRB may be able to work with all parties – publishers, record labels, and licensees – to develop a reasonable and more open marketplace.

**Fair Play, Fair Play**

The Fair Play Fair Pay Act (“FPFP”) could result in more drastic changes to the music licensing system. The FPFP was introduced in the House of Representative in 2015. See H.R. 1733, 114th Cong. (2015). The FPFP extends a full public performance right to sound recordings based on the idea that sound recording owners should have a complete public performance right. H.R. 1733, § 2(b). Also, similar to the Songwriter Equity Act, the FPFP amends the language of section 114(i) to permit the PRO rate courts to consider sound recording royalties in musical work proceedings. H.R 1733, § 8(a)(1).

**And…the Publishers**

Last but not least, music publishers have pushed to amend the PRO antitrust consent decrees while withdrawing new media rights. Recently, some publishers have already done direct deals with Digital Service Providers, such as Pandora and Spotify. Notably, in 2011, EMI Music Publishing, which later merged with Sony/ATV to become the largest music publisher in the United States, was the first of the major publishers to eliminate ASCAP and BMI’s right to license its songs to certain new media services in order to gain leverage in direct license negotiations. If publishers choose the “all out” option and withdraw from PROs, an additional $261 million in revenue could flow into the music industry that ASCAP and BMI otherwise collect as overhead and expenses. See ASCAP 2015 Annual Report, available at http://www.ascap.com/-/media/files/pdf/about/annual-reports/2015-annual-report.pdf; BMI Annual Review 2015, available at http://www.bmi.com/pdfs/publications/2015/BMI_Annual_Review_2015.pdf.

Ultimately, publishers may decide to withdraw from PROs to create a more lucrative free market. If publishers decide to do so, the DOJ may lift the age-old consent decrees, thereby generating more revenue streams for producers, performers, and songwriters. Should publishers withdraw from PROs, all of these players in the music industry may get out of Monopoly jail and move onto the coveted community chest that lies ahead.

**Advancing to Go**

The fragmented history of PROs and copyright law in the United States caused the piecemeal changes in a rapidly evolving music industry that ultimately developed into a game of Monopoly. Now, all of the players in the music industry’s game of Monopoly—ironically spawned by consent decrees aimed at preventing a “small m” monopoly—want to “advance to go” and collect their $200, but it is not that easy.

The transaction costs that sit in the community chest must undergo reform in order to reduce the overhead associated with participation in the music industry licensing game. Owners and licensees must work more creatively in the marketplace, and not sit behind the façade of outdated consent decrees. Whether the PRO rate courts remain the arbiters or the CRB assumes that role, sound recording royalties must be considered in musical work proceedings. New legislation ought to redefine the music industry licensing system by subtracting gamesmanship and adding an open marketplace without a monopoly.