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Practice Update

DOJ Rejects Modifications of ASCAP, BMI Consent Decrees

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On August 4, 2016, the Department of Justice (DOJ) rejected changes to the 1941 consent decrees with ASCAP and BMI. These decrees have been in place since 1941, when the DOJ settled antitrust claims with ASCAP and BMI relating to joint licensing of competing songs. The American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) are "performing rights organizations" (PROs). PROs provide licenses to users (e.g., bar owners, television and radio stations, and internet music distributors) that allow them to publicly perform the millions of songs of the PROs of songwriter and music publisher members, without resorting to individualized licensing determinations or negotiations. But because a blanket license provides at a single price the rights to play many separately owned and competing songs, ASCAP and BMI have long raised antitrust concerns.

ASCAP and BMI are subject to consent decrees that resolved antitrust lawsuits brought in 1941 alleging that each organization had unlawfully exercised market power acquired through the aggregation of public performance rights in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The consent decrees seek to prevent the anticompetitive exercise of market power while preserving the transformative benefits of blanket licensing. Since 1941, industry

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participants have benefited from the "unplanned, rapid and indemnified access" to the repertories of songs that each PRO's blanket licenses make available. *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 20 (1979).

The DOJ opened an investigation in 2014 after ASCAP and BMI requested that the DOJ consider modifying the consent decrees in various respects, including that large music publishers be allowed to "partially withdraw" their songs from ASCAP and BMI for purposes of licensing to digital music services such as Pandora or Spotify. The publishers believed that if they could withdraw their "digital" rights from the PROs, they could begin to address the large difference between what the music services pay the record labels in license fees for use of their recordings and what they pay ASCAP and BMI for performing rights licenses for the use of the publishers' songs in the very same recordings. That large difference arises because, under the consent decrees, ASCAP and BMI are constrained from demanding the significant increases in license fees that would be necessary to close the license fee gap with the labels.

The investigation uncovered disagreement about what rights should be conveyed by the blanket licenses (as well as other categories of licenses) that the consent decrees require ASCAP and BMI to offer. The DOJ concluded that no modification was proper. In the words of the DOJ, "[w]hile much has changed in the music industry since the consent decrees were established in 1941, they remain at the core of how performance rights have been and will continue to be licensed; these decrees enable businesses to access music efficiently and ensure that songwriters are compensated for their creative work. We believe that pursuing the requested modifications at this time would disrupt the status quo, would not be consistent with the purposes of the consent decrees, and would not be in the interest of consumers."

As an aside, the publishers always had the ability to license their catalogs to the digital music services apart from ASCAP and BMI because the consent decrees explicitly permit members and affiliates of the two organizations, respectively, to issue direct licenses to licensees. That is precisely what the publishers did when the federal judges who supervise ASCAP's and BMI's activities under their respective decrees refused to grant the relief sought by the publishers under the decrees vis-à-vis partial withdrawal of digital rights.

The DOJ concluded that non-modification was required for all participants in the industry to enjoy the benefits of the Performing Rights Organizations' (PROs) blanket licenses – benefits that differentiate the PROs from other joint price-setting entities that present antitrust issues. As noted above, the Supreme Court in *BMI* described blanket licenses as providing "unplanned, rapid, and indemnified access" to the songs in the PROs' repertories. The DOJ asserted that fractional licenses would not offer such benefits:

A full-work blanket license from ASCAP or BMI allows the music user to publicly perform, without risk of copyright infringement liability, all works in the licensing PRO's repertory. Particularly for music users – such as bars and restaurants – that cannot meaningfully control in advance the music they play in public, this feature of the PROs' licenses benefits both the licensees as well as music creators in that it ensures that users can and will continue to play the creators' music.

Fractional licensing would not offer the same benefits to users. If a PRO's license granted a user something less than a license to play a particular song, music users seeking to avoid infringement liability would face the daunting task of identifying and ensuring they obtained licenses from all fractional owners – a challenge made more difficult by the lack of a comprehensive, reliable, and transparent catalog of rights. Under those

conditions, even music users with control over the music they perform would have to curtail their performance of music until they were certain they had obtained licenses from all fractional owners. As BMI itself argued in a recent rate-court filing, a BMI license grants to a music user "insurance against copyright infringement . . . and immediate access to more than 10.5 million works in BMI's repertoire." A fractional license could not provide these benefits.

The DOJ rejected songwriters' concerns about their ability to continue to collaborate with members of other PROs if ASCAP and BMI grant full-work licenses, claiming that users would go to only one PRO to get access to songs that have multiple owners. The DOJ concluded that facts that reduce the likelihood that music users will engage in this sort of gamesmanship: "Virtually all significant music users today obtain licenses from both ASCAP and BMI (as well as from at least one other PRO, SESAC). Users will continue to have every incentive to license from both ASCAP and BMI since they each already hold 100 percent interests in a sufficient number of works that licensees will continue to regard the infringement protections offered by each PRO's license to be essential."

The DOJ also set aside the songwriters' concern that the PROs will reduce the prices of their licenses (and thus the amounts the PROs remit to their songwriter members) in order to attract significant music users, observing that a PRO that reduced its licensing fees would risk losing members to other PROs.

Query whether BMI, ASCAP and/or others will move to modify the decrees in court and/or whether the publishers will continue to offer direct licenses to licensees. The Closing Statement and DOJ Remarks are available here and here.

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