10-3429

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BROADCAST MUSIC, INC.,

Petitioner-Appellant,

v.

DMX INC.

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE

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INTEREST OF THE UNITED STATES

The decision below implements an antitrust consent decree entered between the United States and Defendant-Appellant Broadcast Music, Inc. The United States has an interest in the correct construction of the Decree.

ISSUE PRESENTED

Whether BMI is entitled to include an "option value" premium, an addition to the price of a blanket license, in its price for an adjustable-fee blanket license.

STATEMENT OF FACTS

BMI and the American Society of Composers, Authors and Publishers ("ASCAP") are two of the dominant music performing rights organizations ("PROs"). They aggregate rights from copyright holders, license them on a non-exclusive basis to music users, and distribute the royalties to their members. These and other functions provide some efficiencies, but also give the PROs significant market power. To cabin the exercise of their power, the government brought antitrust suits against each of them. The results were regulatory decrees which, as pertinent here, were amended to allow the district court to prescribe reasonable rates for the licenses. Under the BMI rate court provision, Article XIV(A), "[s]hould defendant not establish that the fee requested by it is a reasonable one, then the Court shall determine a reasonable fee based upon all the

evidence." *United States v. Broadcast Music, Inc.*, 1966 Trade Cases (CCH) ¶ 71,941 (S.D.N.Y. 1966), *as amended*, 1996 Trade Cases (CCH) ¶ 71,378 (S.D.N.Y. 1994) (reproduced at JA A-15-16).

The primary form of license granted by BMI and ASCAP is a "blanket license," which gives the licensees the right to use as much of the music as they want at any time. In 1998, DMX's predecessor, AEI Music Network, Inc. and another "commercial music service" ("CMS") provider, Muzak, asked for blanket licenses priced with "carve-outs" for works directly licensed from the copyright holders. BMI claimed that the decree did not require it to grant such licenses, but this Court found otherwise. It held that a "carve out" or "adjustable-fee blanket license" ("AFBL") is a form of blanket license, albeit with an alternative rate structure, and thus within the district court's rate-setting authority. *United States v. Broadcast Music, Inc.*, 275 F.3d 168 (2d Cir. 2001) ("*Muzak/AEI*"). After lengthy negotiations, however, Muzak settled with BMI in 2004 for a flat-fee blanket license, and most CMS providers have followed suit. DMX, which merged with AEI, continued to pursue an AFBL, while securing direct licenses from a number of copyright holders. BMI and DMX were unable to agree on the terms of an AFBL license, and in January 2008 BMI petitioned the district court to

prescribe a rate.[1]

As found by the district court, BMI and DMX agreed that the fee should be expressed as an annual per location rate. *Broadcast Music, Inc. v. DMX, Inc.*, 726 F. Supp. 2d 355 (S.D.N.Y. 2010); Slip op. 1. They also agreed that the rate should be computed from three components: a "blanket fee" that DMX would pay if it licensed all its music from BMI; a "floor fee" it would pay if it licensed all its music directly; and a "direct license ratio," the percentage reduction between the blanket fee and the floor fee to account for music licensed directly. They disagreed on the value of each of those components.

The court accepted some arguments from both sides, but generally decided in favor of DMX. The test of reasonableness it applied was one of "fair market value – the price that a willing buyer and a willing seller would agree to in an arm's length transaction." Slip op. 4 (quoting *United States v. Broadcast Music, Inc. ("Music Choice I")*, 316 F.3d 189, 194 (2d Cir. 2003)). Fair market value cannot be measured directly, but requires finding a suitable benchmark that takes into account the comparability of the circumstances and "the degree to which the

[1] The United States filed a Memorandum on Consent Decree Construction Issues opposing one element of BMI's proposed rate, an "option value premium," which will be described below. *Broadcast Music, Inc. v. DMX, Inc.*, No. 08 Civ. 00216 (LLS) (S.D.N.Y. filed Apr. 13, 2010).

assertedly analogous market under examination reflects an adequate degree of competition to justify reliance on the agreements it has spawned." Slip op. 5 (quoting *United States v. Broadcast Music, Inc. ("Music Choice II")*, 426 F.3d 91, 95 (2d Cir. 2005)).

The court applied this test to the two very different proposals of the parties. BMI proposed an aggregate blanket fee of $36.36 per location, derived from its agreements with Muzak and other CMS providers, plus a 15% "option value" premium for the greater flexibility of the AFBL. This produced a total per location fee of $41.81 before adjustments for direct licenses. Slip op. 6. DMX, on the other hand, separated the blanket fee into two components: a fee for the performance rights themselves, and a fee to compensate BMI for the cost and value of assembling its repertoire and its blanket coverage. The first component is the counterpart of its direct licenses, and the latter would be the floor fee. *Id.* Its direct licensing was based on a value of a $25 pool for the music rights at each location, whether the rights holders belonged to BMI, ASCAP, or another PRO, and the $25 was apportioned among the individual rights holders by calculating the amount of their music DMX used as a percentage of all the works it used. For purposes of calculating the music rights component of the proposed BMI blanket fee, $10 was allocated to BMI, because 40% of the performances on DMX's

service use the music of BMI members. The court found that adding a proposed floor fee of 11.7% of the $10 music fee would produce a blanket fee of $11.32 per location. *Id.*

Under the decree, the rate court must find BMI's proposal unreasonable before it can prescribe a different rate, and it did so. It found the Muzak-based fee neither comparable nor competitive. It was not a per location rate, but instead a flat $30 million fee for a five-year license; the $36.36 figure was derived by dividing the flat fee by the number of locations Muzak had when the contract was negotiated. The per location amount for Muzak could and did change over time; indeed, the amount increased substantially as the number of locations it served declined. Moreover, the overall settlement with Muzak included BMI's dropping its claim for about $5 million in retroactive fees, and the amount of that claim was likely folded into the prospective rates. Slip op. 7-9. BMI offered the other CMS providers flat fees derived from the same average per location rate under Muzak's settlement, but it also reserved the right to seek retroactive fees from them, making rate court litigation risky and leaving them without a realistic opportunity to negotiate their future fees. Slip op. 9-10. Thus, under the applicable legal standards, BMI's form license agreements did not establish reliable benchmarks. Slip op. 10.

On the other hand, the court found DMX's 550 direct licenses, which it used to program roughly 30% of its music, "sufficiently representative" to establish a benchmark for the performance rights component of DMX's proposal. Slip op. 14-15. It found "no credible evidence" that publishers refused direct licenses because DMX undervalued their music, or that DMX engaged in "cream skimming" as opposed to soliciting licenses from publishers whose works it used the most. Slip op. 15-16. The court thought the other values BMI attributed to its blanket licenses, such as insurance against inadvertent infringement, would be compensated by the floor fee. Slip op. 16. And it rejected BMI's argument that any unrecouped portion of a $2.4 million advance that DMX paid Sony/ATV, one of the four major publishers, should be added to the benchmark, accepting DMX's evidence that it was the "cost of entry into the market" rather than a royalty fee. Slip op. 13, 16-17.

The court then addressed the "floor fee," which "represents the value to DMX of the portion of the AFBL that is independent of the value of the music performing rights," and so does not vary with DMX's direct licensing but includes BMI's overhead costs. Slip op. 17. It accepted BMI's evidence that its overhead costs were 17% of revenue. Slip op. 17-18. It found that BMI had established its prospective incremental costs for the variable fee feature, which it allocated

between routine costs (to be borne by DMX) and initial costs (to be shared by DMX and any future AFBL licensees). Slip op. 18-21. The court rejected BMI's proposed addition of a 15% "option value" premium to the blanket license in light of DMX's expert testimony that, while the carve-out feature has value, in a competitive market a seller cannot increase the price of an improved product beyond the incremental costs associated with the improvement, which the court had already allowed in connection with the floor fee. Slip op. 22-23. Adding together all the various elements allowed and converting the figures to per location rates, the court prescribed a floor fee of $8.66, and a blanket fee of $18.91. Slip op. 23-24.

The court also resolved various issues regarding the Direct License Ratio, the primary one being whether it should be based on both off-premises (satellite delivered, used by 35% of DMX's locations) and on-premises (delivered by internet or CD, 65%) delivery methods, or whether the proportion of off-premises performances should be used as a proxy for both. Slip op. 24-25. BMI asserted that the off-premises programs contained a higher proportion of directly-licensed music than the on-premise programs, that it would be short-changed if only the off-premises programs were used, and that the on-premises deliveries might provide a more accurate method of identifying music that was actually played.

According to DMX, however, the differences were not large; it based the payments to its direct licensees on its off-premises performances; and the lists of works in its on-premises reports did not reflect how often they were programed to play. Overall, therefore, the court found the off-premises performance data to be an "acceptable" proxy, and should be used to maintain consistency between the measures used for compensating direct licensors and BMI. Slip op. 28.

ARGUMENT

THE DISTRICT COURT PROPERLY REJECTED AN ANTICOMPETITIVE "OPTION VALUE" ADDITION TO THE PRICE OF AN ADJUSTABLE FEE BLANKET LICENSE

BMI contends that the district court erred, *inter alia*, in rejecting an "option value" addition to the blanket rate. The court's decision, however, is fully supported by the Consent Decree and the record in this case.

BMI's central premise, that "the additional value created by the adjustable-fee form of blanket license should be shared" between BMI and DMX, Pet. Br. 53, is inconsistent with the reasonableness standard of the decree and the requirement for "carve-out" pricing that this court endorsed in *Muzak/AEI*. DMX's direct licensing program is an effort to secure competitive prices on the licenses it needs to operate in the CMS market, and it already faces the substantial costs of securing

and administering direct licenses, as well as the cost-based AFBL premium adopted by the district court. BMI's insistence on an additional "sharing" of the benefits of direct licensing is a transparent attempt to recapture some of the higher profits it would lose to the extent the direct licenses displace its standard blanket licenses — or better yet, from its perspective, stifle direct licensing. Such an "option value" is not part of a "reasonable rate" under the decree.

1. The Language and Context of the Decree Show That It Was Intended to Promote Competition

Although the district court decided the issue as one of fact, BMI attempts to raise the legal question of the interpretation of the underlying decree with its assertion that "consent decrees are agreements between the parties," and that "BMI would never agree to forego any share in the value created by the blanket license for its members." Pet. Br. 53. The rules for construction of a consent decree, however, are well established. "[T]he 'scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it' or by what 'might have been written had the plaintiff established his factual claims and legal theories in litigation.'"[2] To the

[2] *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 574 (1984) (quoting *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971)). *Accord Muzak/AEI*, 275 F.3d at 175.

extent a decree might contain ambiguities, "reliance upon certain aids to construction is proper, as with any other contract," and "[s]uch aids include the circumstances surrounding the formation of the consent order."[3] The antitrust context of the rate court provision is one of the circumstances to consider.[4]

Here, there is no ambiguity. BMI has unequivocally agreed to forgo rates that reflect its market power, and to accept the district court's prescription of a "reasonable fee." Under this Court's decisions, reasonableness is determined by "fair market value – the price that a willing buyer and a willing seller would agree to in an arm's length transaction," *Music Choice I*, 316 F.3d at 194, assuming a transaction in a market with "an adequate degree of competition." *Music Choice II*, 426 F.3d at 95. Thus, the rate court is not simply to rubber stamp whatever rate BMI secured from other licensees in the past without considering whether it was a product of market power. *Showtime*, 912 F.2d at 570. Instead, "[f]undamental to the concept of 'reasonableness' is a determination of what an applicant would pay

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[3] *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 238 (1975).

[4] *Muzak/AEI*, 275 F.3d at 175 (court may "consider the purpose of the provision in the overall context of the judgment at the time the judgment was entered"); *ASCAP v. Showtime/The Movie Channel, Inc.* ("*Showtime*"), 912 F.2d 563, 570 (2d Cir. 1990) (rate court may consider antitrust background of decree and "need not conduct itself without regard to the context in which it was created").

in a competitive market, taking into account the fact that ASCAP [or in this case, BMI], as a monopolist, 'exercise[s] disproportionate power over the market for music rights.'" *United States v. ASCAP ("RealNetworks")*, 627 F.3d 64, 76 (2d Cir. 2010).

Even if the Court wishes to look at the circumstances surrounding adoption of the rate court provision, these definitions of reasonableness under the Decree are entirely consistent with them. BMI itself proposed the provision as an addition to the pre-existing Decree, and as justification it described at length the costs of constant litigation under the status quo and the revenue lost if it did withhold licenses in the course of negotiations. Mem. in Supp. 12-22.[5] To rid itself of these burdens it was willing to "give up to the Court its power to set its own prices," *id.* at 26, and urged that this was in the public interest as defined by the antitrust laws because "the modifications sought are procompetitive" and would serve the "key purpose of the Consent Decree – limiting any alleged market power BMI may have . . . ." *Id.* at 29-30. The United States, in supporting BMI's Motion, added that it did not intend that "judicial rate setting should become a substitute for competitive rate setting," pointing to such "competitive alternatives" as direct

[5] Memorandum of Defendant Broadcast Music, Inc. in Support of Motion to Modify Consent Decree, *United States v. Broadcast Music, Inc.*, No. 64 Civ. 3787 (S.D.N.Y. filed June 27, 1994) (Attached as Addendum A to this Brief).

licensing. Mem. in Resp. 10-11.[6]

In light of this procompetitive intent, this Court has made clear that the standard of reasonableness applies to licenses with "carve-out" fee structures in light of the "direct licenses (required to be permitted by Section IV(A))," *Muzak/AEI*, 295 F.3d at 176-77. *See* 1996 Trade Cases at 83,325; JA A-11 (text of Section IV(A)). That provision establishes the basis for competition in licensing between its members and BMI, competition that could be frustrated not only by BMI's point blank refusal to allow a "carve-out" from its blanket license fees, but by its insistence on pricing an AFBL at rates significantly higher than the rates for a standard blanket license. BMI's demand for such rates, therefore, disregards the plain language, intent, and consistent interpretation of the decree to which it agreed.

2. The Record Supports the District Court's Decision

BMI, relying on the testimony of its economic expert, Dr. Bruce Owen, argues that under a willing buyer/willing seller test, the AFBL should be priced 15% higher than a standard blanket license to reflect the value of its greater

[6] Memorandum of the United States in Response to Motion of Broadcast Music, Inc. to Modify the 1966 Final Judgment Entered in This Matter, *United States v. Broadcast Music, Inc.*, S.D.N.Y. Docket No. 64 Civ. 3787 (filed June 20, 1994) (Attached as Addendum B to this Brief).

flexibility. Appellant Br. 50-55. The district court, relying on the testimony of DMX's expert witness, Dr. Adam Jaffe, found that in a competitive market BMI would be able to demand no more than its incremental costs of administering the AFBL, and refused to award more. Slip op. 22-23. In BMI's view, the court's acceptance of Jaffe's testimony and its rejection of Owen's is clear error and unreasonable. BMI is wrong.

Dr. Owen dismissed the idea of using a hypothetical "perfectly competitive" market to set reasonable BMI rates as impractical and futile. JA A-414-15. Instead, he considers fixed-fee blanket licenses the economic ideal because they are efficient and price the marginal use of a song at its marginal cost, *i.e.*, zero. *Id.* An AFBL, on the other hand, is not efficient, because every time DMX uses a BMI-licensed song, it incurs the cost of losing a credit that it would otherwise receive for direct licensing. JA A-415. His conclusion was quite explicit — AFBLs should be priced higher than blanket license to discourage their use, and the "option value" premium was the mechanism for doing so. JA A-415-16. Thus, he does not see DMX's opportunity for cost savings as an economic benefit, but rather as a reason for BMI to impose a charge in addition to its incremental costs, JA A-417, A-419, A-432, because a "willing buyer" would value the opportunity for savings. JA A-411.

Dr. Jaffe, on the other hand, started by "attempting to identify fees that correspond to what would occur in a competitive market to the extent that there might be a competitive market for music performance royalties," JA A-576, not necessarily a "perfectly competitive" market, but at least a "workably competitive" one. JA A-594. He noted that application of the "fair market value" and "willing buyer/willing seller" concepts needs to take account of the degree of competition in the market from which the values are drawn, since markets can span the spectrum from perfectly competitive to monopolistic. Competitive market transactions should be used rather than those influenced by market power. JA A-608. Thus, while the AFBL is more valuable to DMX, in a competitive market BMI could not recover more than its incremental costs of supplying the improved product. JA A-585, A-607. The district court relied on Dr. Jaffe's testimony in rejecting BMI's proposed "option value" premium and limiting it to recovery of its additional costs. Slip op. 22.

In light of the legal standards established by this Court, the district court's finding is entirely reasonable. A buyer may often be willing to pay a price in an imperfectly competitive market that the seller could not demand if it faced competition. Dr. Owen analogized the premium to the price difference between a *prix fixe* and an *a la carte* dinner, JA A-417, but BMI does not pursue that point

here, and it does not work. In a competitive market, discounts for buying a package of goods are used to encourage the customer to buy more from the seller. A restaurant, to use Dr. Owen's example, will use a *prix fixe* menu to increase sales and, so long as the additional revenues more than offset costs, increase profits, while maintaining relatively higher *a la carte* prices. In that respect, BMI's higher price for the AFBL resembles the premium for an *a la carte* meal — but there is an important difference. Most restaurants will offer both *prix fixe* and *a la carte* menus in the ordinary course of business. BMI, on the other hand, has made clear its distaste for the AFBL, and if given the right to charge an "option value" premium, there is a real risk that it would seek to use that right not to increase sales, but as a pretext for charging a sufficiently onerous premium to ensure that AFBL's are not commercially viable. Thus, BMI could achieve through its use of an "option value premium" that which it could not achieve in the *Muzak/AEI* litigation — the elimination of a viable AFBL and, with it, competition from direct licensing as envisioned by this court. That would not be a reasonable price under the Decree.[7]

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[7] Viewed from a different perspective, BMI complains that if the district court were not convinced by BMI evidence supporting a 15% premium, it should have determined an alternative reasonable amount "in light of 'all the evidence.'" Pet. Br. 55. BMI, however, points to no evidence in the record to show how large a premium, if any, a competitive market would support. Certainly, given the

On appeal, BMI presses the analogy to the price of a call option in a competitive market, Pet. Br. 51-52, but the analogy is inapt and has no record support. An option to buy confers a right to buy an asset at a specified strike price. If the option is exercised when the value of the asset exceeds the strike price, the option seller will take a loss, sometimes a substantial one. The price of the option reflects this risk to the seller. BMI has introduced no evidence that it faces a similar risk here, and that is not the basis for its claim. The district court has already directed compensation for all the incremental costs BMI has identified for administering the AFBL, and the additional premium it seeks here is based solely on the theory of benefit to DMX. JA A-418-19. BMI's argument relies on what it could demand through the exercise of market power, and substantial evidence supports the district court's rejection of it.

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thousands of dollars at stake, DMX would search hard for an alternative source if it were not a captive customer. Thus, faced with an all-or-nothing choice, the court could reasonably choose nothing.

CONCLUSION

The district court's finding that BMI is not entitled to an option value premium for an AFBL should be affirmed.

Respectfully submitted.

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April 11, 2011

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/s/
Robert J. Wiggers
Attorney for the United States
Dated: April 11, 2011

CERTIFICATE OF SERVICE

I, Robert J. Wiggers, hereby certify that on April 11, 2011, I electronically filed the foregoing Brief for the United States As Amicus Curiae with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Attorneys for each party in the case who are registered CM/ECF users will be served by the CM/ECF system.

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ADDENDUM A

MEMORANDUM OF DEFENDANT BROADCAST MUSIC, INC.
IN SUPPORT OF MOTION TO MODIFY CONSENT DECREE

Filed June 27, 1994

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff,	:	64 Civ. 3787
- against -	:	
BROADCAST MUSIC, INC., et al., Defendants.	:	

MEMORANDUM OF DEFENDANT BROADCAST MUSIC, INC.
IN SUPPORT OF MOTION TO MODIFY CONSENT DECREE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff,	:	64 Civ. 3787
- against -	:	
BROADCAST MUSIC, INC., et al., Defendants.	:	

MEMORANDUM OF DEFENDANT BROADCAST MUSIC, INC. IN SUPPORT OF MOTION TO MODIFY CONSENT DECREE

Defendant Broadcast Music, Inc. ("BMI") submits this memorandum in support of its motion to modify the consent decree entered in this action in 1966 (the "BMI Consent Decree")[1] to provide a more orderly process for licensing music users through creation of a judicial forum in this Court, available to any user of BMI music, for the determination of fees for the licensing of music performing rights from BMI. BMI has been advised that plaintiff United States tentatively consents to the proposed

1. Reported at United States v. Broadcast Music, Inc., 1966 Trade Cas. (CCH) ¶ 71,941 (S.D.N.Y. Dec. 29, 1966), attached as Exhibit A to the Affidavit of Marvin L. Berenson, Senior Vice President and General Counsel of BMI, sworn to June 28, 1994 ("Berenson Aff.") and filed herewith.

modification, except that it is neutral as to the requested paragraph providing that BMI's rate court be kept separate from the rate proceedings in this Court of its chief competitor, the American Society of Composers, Authors and Publishers ("ASCAP").

PRELIMINARY STATEMENT

The need for the proposed decree modification has become increasingly apparent over the past several decades. For lack of an independent fee-setting forum, BMI has been forced into repeated copyright infringement and antitrust litigation with many major music users when the parties fail to reach agreement over BMI's license fees. Time after time, as BMI licenses have expired, users have gone to court pressing antitrust and copyright misuse claims and seeking injunctions granting them compulsory licenses under various contrived legal theories. BMI has been forced to defend its songwriters', composers', and music publishers' rights to license or withhold their works under the copyright law and to assert copyright infringement counterclaims. Or the roles have been reversed, and it is BMI which has sought damages and/or an injunction against copyright infringement and the users which have interposed antitrust and copyright misuse defenses.

The participants in this process now agree that an orderly rate-setting procedure would be a more efficient way to deal with negotiation breakdowns. Major users of BMI music -- television and radio broadcasters and cable programmers -- have asked BMI to seek to modify its Consent Decree to establish a

rate court. Thus BMI license agreements with broadcast networks, local television stations, and many cable programmers contain provisions calling for BMI to take such action.

The proposed modification is also needed to balance competition between BMI and ASCAP more fairly. Because its consent decree provides for automatic licenses and interim fee payments when licensing terms cannot be agreed upon, ASCAP is assured a steady stream of revenue while continuing to negotiate with music users. BMI, in contrast, has no interim fee mechanism and often must choose between no license and no revenue on the one hand and a license with those same music users at rates it finds unpalatable on the other.

The proposed decree modification is in the best interests of BMI, its affiliated songwriters, composers, and music publishers, and the users of the BMI repertoire, and is clearly in the public interest.

STATEMENT OF FACTS

BMI's Business

BMI is a music performing rights licensing organization that operates on a non-profit basis. (Berenson Aff. ¶ 2.) BMI has been granted the non-exclusive right by its affiliated songwriters, composers, and music publishers to license the non-dramatic public performing rights (Section 106(4) of the

Copyright Act, 17 U.S.C. § 106(4)) in their compositions.[2] (Id. ¶ 2.)

BMI issues non-exclusive licenses to music users, collects license fees from them, and distributes royalties to its affiliated songwriters, composers, and publishers. (Id. ¶ 3.) BMI licenses its repertoire to the major broadcast television networks, cable programmers, and many thousands of local television and radio stations, as well as to concert halls, universities, restaurants, nightclubs, airlines, and other users of its repertoire. (Id.) Typically, BMI licenses its entire repertoire to music users for a designated period of time under a blanket license which entitles the licensee to use any or all of the compositions as often as desired for a flat fee or a predetermined percentage of revenue.[3] (Id.) BMI's affiliates retain the right to license their works individually. (Id.)

BMI was organized in 1939 and 1940 by about 400 members of the radio industry to compete with ASCAP, which at that time was the only substantial organization licensing music performing rights in this country. (Id. ¶ 4.) From its founding, BMI helped change the face of American music. By opening its doors in the 1940's and '50's to early country, rhythm and blues, jazz,

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2. By virtue of reciprocal agreements with 41 foreign performing rights societies it also licenses works from abroad and BMI's repertoire is licensed by those foreign societies.

3. With respect to television and radio, BMI also offers a per program license, which provides access to the entire BMI repertoire, but payment (at a different rate) is made only for those programs using BMI music.

and rock & roll songwriters and their publishers, BMI helped give direction to a powerful wave of new talent previously shut out of the mainstream due to ASCAP's restrictions on membership. See Jerry Wexler and David Ritz, Rhythm and the Blues 54-55 (1993). BMI enthusiastically sought out these new voices of American music, while ASCAP focused on writers and publishers in the then-established Tin Pan Alley tradition. (Id.) According to one music industry authority, between 1944 and 1954 "BMI licensed fully 77 percent of all songs making the Top Ten on Billboard's various country charts." Paul Kingsbury, The Explosion of American Music 1940-1990 20 (1990). It licensed an overwhelming 90 percent of weekly rhythm and blues hits after World War II. (Id. at 23.) BMI's now-legendary affiliates from those early days included Buddy Holly, Hank Williams, Sam Cooke, Thelonius Monk, Ray Charles, Little Richard, the Everly Brothers, Miles Davis, and Chuck Berry, to name a few. (Berenson Aff. ¶ 4.) BMI's importance in the music industry has continued to grow and today its repertoire is approximately 2.5 million compositions in every style, from the catalogs of approximately 150,000 songwriters, composers, and publishers. (Id.)

On the music publishing side, BMI affiliates range from the world's largest to the smallest. BMI's affiliate ranks include composers of music for films and musicals such as Beauty and the Beast and Fiddler on the Roof and songwriters comprising 75% of the inductees into the Rock & Roll Hall of Fame. (Id. ¶ 5.) Reflecting this diverse wealth of talent, in recent years

BMI affiliates have garnered the majority of music industry awards in the rock, country, and rhythm and blues categories. (Id.) BMI affiliated composers have also won a majority of all the Pulitzer Prizes ever awarded in the field of music. (Id.) At the same time, thousands of other, less established and less well-known songwriters earn a portion of their livelihood from BMI's distribution of royalties they could not collect for themselves. (Id.)

The function and operations of BMI have been described at length by this Court, the Second Circuit, and the Supreme Court. See Buffalo Broadcasting Co. v. American Society of Composers, Authors and Publishers, 744 F.2d 917 (2d Cir. 1984), rev'g 546 F. Supp. 274 (S.D.N.Y. 1982), cert. denied, 469 U.S. 1211 (1985) ("Buffalo Broadcasting"), and Columbia Broadcasting System, Inc. v. American Society of Composers, Authors and Publishers, 400 F. Supp. 737 (S.D.N.Y. 1975), rev'd, 562 F.2d 130 (2d Cir. 1977), rev'd and remanded sub nom. Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979), district court decision aff'd on remand sub nom. Columbia Broadcasting System, Inc. v. American Society of Composers, Authors and Publishers, 620 F.2d 930 (2d Cir. 1980), cert. denied, 450 U.S. 970 (1981) ("CBS").

Through the use of blanket licenses, BMI facilitates the licensing of performing rights to millions of compositions for many thousands of music users without the delay and expense of individual negotiations. See CBS, 441 U.S. at 22. Today, as

in the past, music users typically prefer the convenience of blanket licenses because such licenses provide unfettered, indemnified, and instantaneous access to millions of compositions for one fee. (Id.)

ASCAP's Consent Decree

Prior to the creation of ASCAP in 1914, individual composers had no effective means for licensing or enforcing the performing rights to their compositions. See CBS, 400 F. Supp. at 741. By 1939, however, ASCAP had become a monopoly with the power to deny virtually all users of popular music -- most importantly radio broadcasters and movie theaters -- access to its repertoire if its license fee demands were not met. When negotiations between ASCAP and the broadcasters broke down in 1940, ASCAP did withhold its repertoire. See Sigmund Timberg, The Antitrust Aspects of Merchandizing Modern Music: The ASCAP Consent Judgment of 1950, 19 Law & Contemp. Probs. 294, 306 (1954) ("Timberg"). The broadcasters then formed BMI, but for many months little or no copyrighted music was heard on the radio anywhere in the United States. Id.

As a result of ASCAP's conduct, the Department of Justice sued ASCAP in 1941 for antitrust violations, alleging that ASCAP had acted to raise artificially music performing rights license fees. Timberg at 307. To settle that complaint, ASCAP entered into a consent decree with the government. United States v. American Society of Composers, Authors and Publishers, 1940-43 Trade Cas. (CCH) ¶ 56,104 (S.D.N.Y. March 4, 1941). In

1950, following a successful private action by a motion picture theater operator finding ASCAP liable for monopolization,[4] the Department of Justice moved this Court for extensive modification of its existing consent decree with ASCAP, and its proposed modifications were allowed. ASCAP's consent decree has since been amended at least once. See United States v. American Society of Composers, Authors and Publishers, 1993-1 Trade Cas. (CCH) ¶ 70,153 (S.D.N.Y. Feb. 26, 1993).[5]

For purposes of this motion, the most significant feature of ASCAP's consent decree is Article IX, which provides that, if ASCAP and a would-be licensee are unable to agree on the license fee to be paid, the music user may obtain a license from ASCAP automatically simply by requesting one. (Berenson Aff. ¶ 6 and Exh. B.) The licensee then may apply to this Court for determination of a "reasonable" fee, upon which ASCAP bears the

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4. Alden-Rochelle, Inc. v. American Society of Composers, Authors and Publishers, 80 F. Supp. 888, relief, 80 F. Supp. 900 (S.D.N.Y. 1948). See also M. Witmark & Sons v. Jensen, 80 F. Supp. 843 (D. Minn. 1948), appeal dismissed sub nom. M. Witmark & Sons v. Berger Amusement Co., 177 F.2d 515 (8th Cir. 1949).

5. The ASCAP Consent Decree as modified in 1950 is reported at United States v. American Society of Composers, Authors and Publishers, 1950-51 Trade Cas. (CCH) ¶ 62,595 (S.D.N.Y. March 14, 1950). The current form of the principal ASCAP consent decree is attached to the Berenson Aff. as Exhibit B. That decree requires ASCAP to offer a per program license to television and radio broadcasters in addition to the blanket license it traditionally offered. ASCAP's licensing authority was also made non-exclusive: the ASCAP Consent Decree provides that music users may bypass ASCAP entirely and negotiate for a desired license directly with the composer or a publisher holding the individual copyright.

burden of proof.[6] Under Article IX(B), ASCAP or the music user may apply to this Court for the setting of an interim fee pending final determination of what constitutes a "reasonable" fee. If the Court fixes an interim fee, ASCAP then issues a license providing for such payments, from the date of the application for an interim fee. ASCAP then includes these interim fees in its next distribution to its members. Final fees are made retroactive to the date of the original license application. Interim fees being paid to ASCAP at any given time can represent a substantial percentage of ASCAP's total revenues.[7]

BMI's Consent Decree

BMI's licensing practices are also governed by a consent decree. In 1941, the Department of Justice commenced a suit alleging that BMI had conspired to control the business of licensing performing rights to radio broadcasters. (Berenson Aff. ¶ 8.) BMI and the Department of Justice settled that action

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6. The ASCAP Consent Decree was administered for many years by then-Chief Judge Sylvester J. Ryan and now by Judge William C. Conner.

7. As of December 1992, for example, it appears that ASCAP was receiving interim fees from the entire local television industry, the CBS and ABC television networks, and virtually all major cable programmers. U.S. v. American Society of Composers, Authors and Publishers (In the Matter of the Application of Turner Broadcasting System, Inc.), No. 13-95 (S.D.N.Y. Oct. 12, 1989) (setting interim fees for various cable programmers); U.S. v. American Society of Composers, Authors and Publishers (In the Matter of the Applications of Capital Cities/ABC, Inc. and CBS, Inc.), 831 F. Supp. 137, 143 (S.D.N.Y. 1993) (noting that in 1991-92, CBS paid $9.8 million per year in interim fees and that ABC paid that amount per year in 1986-92).

by entering into a consent decree that, inter alia, required BMI to offer, on request, certain types of per program licenses with fee arrangements tied to music use. See United States v. Broadcast Music, Inc., 1940-43 Trade Cas. (CCH) ¶ 56,096 (E.D. Wis. Feb. 3, 1941), attached to the Berenson Aff. as Exh. C.

In 1964, following repeated complaints from ASCAP, the Department of Justice brought a new action in this Court against BMI and a class of its stockholders asserting that BMI was an illegal combination used by the broadcasters to control the business of acquiring performing rights to the detriment of ASCAP and its members. (Berenson Aff. ¶ 9 and Exh. D.) The relief sought by the Department was divestiture of BMI's stock by its broadcaster-owners to assure that BMI operated fairly to represent the interests of songwriters, composers, and publishers, not broadcasters.[8]

The action was settled in 1966, with the transfer of the 1941 decree to this Court and entry of a new decree in its place which ensures, inter alia, that composers retain the right to license their works directly to music users, and that

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8. Notwithstanding the Government's allegations in the 1964 action, Government lawyers eventually conceded privately that no evidence had been adduced in discovery that BMI had actually employed the improper tactics alleged, such as aiding broadcasters to disfavor ASCAP music or using license fees unfairly to favor certain composers over others. (Berenson Aff. ¶ 9 and Exh. D.) The Government's internal memorandum candidly stated: "[u]nfortunately, the complaint was filed without first obtaining any hard facts . . . . After the case was filed we began the investigation -- hoping to uncover evidence to support the complaint." (Id. Exh. D at 4-5.)

broadcasters can receive per program licenses from BMI. (Berenson Aff. ¶ 10 and Exh. A.) Jurisdiction was retained by this Court to consider, inter alia, possible future modifications. (Id. Exh. A, Article XIII.)

The 1964 action and the BMI consent decree were assigned to the late Judge Edward C. McLean of this Court, and it appears that no proceedings have taken place since the decree was entered. (Berenson Aff. ¶ 11 and Exh. E.) At no time, to BMI's knowledge, have BMI and ASCAP consent decree proceedings been treated as related or consolidated by this Court.

BMI's consent decree does not provide for the automatic grant of a license on request or for court adjudication of "reasonable" licensing rates in the event of a fee dispute between BMI and a prospective licensee. It has no mechanism for obtaining interim fees while a fee dispute is unresolved, and consequently cannot make distributions to its writers and publishers from these music users. (Id. ¶ 12 and Exh. A.)

BMI has been negotiating for some years now with the Antitrust Division for its consent to a modification of the BMI Decree to establish a licensing and rate-setting procedure similar to that of ASCAP. (Id. ¶ 13.) BMI has been advised that plaintiff United States tentatively consents to the proposed modification, except that it is neutral as to the requested text providing expressly that BMI's rate court be kept separate from the rate proceedings in this Court of its chief competitor, ASCAP. (Berenson Aff. ¶ 14.)

Litigation Against the Major Performing Rights Societies

The impetus for modification to BMI's decree is its desire to remain competitive with ASCAP, satisfy the frequently expressed preference of its customers -- the music users -- and avoid repeated, expensive, and fruitless antitrust litigation with those users. (Berenson Aff. ¶ 15.)

The modern history of such litigation began in 1969, with the CBS television network, during negotiations over the renewal of CBS's license with BMI. BMI terminated CBS's blanket license as of January 1, 1970 upon learning that CBS and ASCAP had agreed to rates for prior years which "had the effect of sharply widening the historical ratio between BMI and ASCAP fees from CBS." CBS, 400 F. Supp. 737, 753-54 (S.D.N.Y. 1975). On December 31, 1969, CBS launched an antitrust lawsuit which challenged the legality of the television network blanket licenses offered by both BMI and ASCAP. Id. Using a claim that BMI was guilty of copyright misuse as a pretext, CBS continued to perform BMI music without paying for it. BMI was obliged to seek a mandatory injunction from Judge Lasker requiring CBS to pay license fees pendente lite. Columbia Broadcasting System, Inc. v. American Society of Composers, Authors and Publishers, 320 F. Supp. 389, supp. op., 168 U.S.P.Q. 460 (S.D.N.Y. 1970). In the meantime, CBS continued to be licensed by ASCAP using the fee-setting procedure contained in Article IX of the ASCAP Consent Decree.

After 10 years of litigation, CBS's case was rejected by the Supreme Court and the Second Circuit. CBS, 441 U.S. 1

(1979), district court decision aff'd on remand sub nom. Columbia Broadcasting System, Inc. v. American Society of Composers, Authors and Publishers, 620 F.2d 930 (2d Cir. 1980), cert. denied, 450 U.S. 970 (1981). The Supreme Court held that the BMI and ASCAP blanket licenses were not per se illegal, specifically noting the existence of the BMI and ASCAP Consent Decrees and, especially, the existence of the ASCAP judicial fee-setting mechanism as indicia that the licensing practices of ASCAP and BMI were reasonable. 441 U.S. at 10-13. On remand, the Second Circuit found the offer of the blanket license to be no restraint at all because of the availability of direct licensing, basing its ruling in part on the existence of ASCAP's rate court:[9]

> "Pervading these assessments of each of the CBS contentions of alleged barriers to direct licensing is one indisputable fact that perhaps overshadows all others. If CBS were to forgo the blanket license, seek direct licenses, and then discover, contrary to the facts found by Judge Lasker, that a competitive market among copyright owners was not a feasible alternative to the blanket license, it would be entitled under the consent decree, to assure itself of continued performing rights by immediately obtaining a renewed blanket license [at] . . . whatever fees are subsequently negotiated or determined to be reasonable by the [rate] court if negotiations fail."

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9. In CBS, the parties stipulated that licensing from BMI and its affiliates was no more difficult than licensing from ASCAP. 441 U.S. at 12 n.20.

CBS, 620 F.2d 930, 938.

In November 1978, the All-Industry Television Station Music License Committee attacked the blanket licenses offered by BMI and ASCAP to local television stations under various antitrust theories. Plaintiffs sought to obtain compulsory licenses from Judge Gagliardi pendente lite by temporary restraining order and preliminary injunction, once again claiming copyright misuse. BMI was effectively required by the Court to grant the stations licenses at rates frozen for the duration of the litigation. (Berenson Aff. ¶ 16.) However, the legality of the blanket license was once again upheld by the Second Circuit, again relying in part on the existence of the ASCAP rate court. Buffalo Broadcasting, 744 F.2d 917 (2d Cir. 1984). Judge Newman's opinion for the court said:

> "[E]ven if there were evidence that showed the program license rate to be too 'high', that price is always subject to downward revision by Judge Conner, who currently supervises the administration of the Amended Final Judgment . . . . The availability of a judicially enforceable requirement of a 'reasonable' fee precludes any claim that the program license rate is too high."

744 F.2d at 927.[10] In his concurring opinion, Judge Winter expressed the hope that music users would refrain from bringing

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10. See also K-91, Inc. v. Gershwin Publishing Corp., 372 F.2d 1 (9th Cir. 1967), cert. denied, 389 U.S. 1045 (1968), an antitrust case brought by a radio broadcaster where the court held:

(Footnote continued on next page)

any further antitrust litigation against BMI and ASCAP, since their licensing practices, as regulated by their consent decrees, were clearly lawful. 744 F.2d at 933-34.

BMI's Negotiations with Broadcasters in the 1980's

In the aftermath of CBS and while Buffalo Broadcasting was pending, the broadcast networks and their owned and operated local television stations entered into negotiations with BMI to renew their licenses. (Berenson Aff. ¶ 17.) These negotiations, however, led to additional litigation before new license agreements were reached. See Columbia Broadcasting System, Inc. v. Broadcast Music, Inc., Index No. 11847/83 (N.Y. Sup. Ct. complaint filed July 1, 1983); Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 1983-2 Trade Cas. (CCH) ¶ 65,551 (S.D.N.Y. July 20, 1983); Broadcast Music, Inc. v. National Broadcasting Co., 83 Civ. 4222 (S.D.N.Y. complaint filed June 3, 1983).

(Footnote continued from previous page)

> "ASCAP cannot be accused of fixing prices because every applicant to ASCAP has a right under the consent decree to invoke the authority of the United States District Court for the Southern District of New York to fix a reasonable fee whenever the applicant believes that the price proposed by ASCAP is unreasonable, and ASCAP has the burden of proving the price reasonable. In other words, so long as ASCAP complies with the decree, it is not the price fixing authority . . . . In short, we think that as a potential combination in restraint of trade, ASCAP has been 'disinfected' by the decree."

372 F.2d at 4.

BMI's negotiations with the radio industry in the mid-1980's were no less contentious. (Berenson Aff. ¶ 18.) In 1984 BMI's some 8,000 radio broadcast licensees -- represented by the All-Industry Radio Music License Committee -- engaged in a bitter and prolonged dispute over BMI's license fees. (Id.) On December 31, 1983, BMI's license agreements with most radio broadcasters expired. (Id.) Two subsequent three-month extensions of the licenses were made. (Id.) In early June 1984, BMI made a final proposal to the All-Industry Radio Committee regarding the form of a new license agreement. (Id.) When no agreement was reached, BMI sent new radio license agreements directly to radio broadcasters as the end of June (and the last license extension expiration) approached. (Id.) The All-Industry Radio Committee immediately informed all radio broadcasters that the terms of the new license agreements had not been approved by the All-Industry Radio Committee and were therefore being "imposed" by BMI on radio broadcasters. Many stations did not sign their new BMI licenses and those that did said that they did so "under protest." (Id.) They continued broadcasting BMI music. (Id.) In mid-July 1984, the All-Industry Radio Committee again wrote to its member radio broadcasters and described BMI and the All-Industry Radio Committee as "at loggerheads" and "on the brink of a major confrontation regarding BMI's new music licenses." (Id.) This description was, unfortunately, entirely accurate. After weeks of frequent and often vitriolic communication, an agreement was

achieved between BMI and the All-Industry Radio Committee to commence negotiations over the terms and fees of a new radio station license agreement. (Id.) At the request of the radio broadcasters this agreement contained a provision that such disputes should be avoided at the expiration of the agreement through creation of a judicial forum in this Court for the determination of BMI license fees, if possible. (Id.)

BMI's agreement with the radio stations, however, was not the end of BMI's tough negotiations with the broadcasting industry. After several months of fruitless negotiation with the All-Industry Television Station Music Licensing Committee in 1985 during which BMI granted temporary license extensions, BMI sent out proposed licenses to the 700-odd local television stations around the country not owned by CBS, ABC, or NBC and warned of the risks of infringement. (Berenson Aff. ¶ 19.) The All-Industry Television Committee responded by urging broadcasters who were BMI stockholders to start a proxy contest to pass stockholder resolutions, inter alia, to prevent BMI management from implementing the new licenses and recommending that management seek a modification of the BMI Consent Decree to provide for judicial fee-setting. (Id.) BMI's management did not oppose the concept of judicial fee-setting, but did oppose what it saw as improper interference with its negotiations. (Id.) BMI then sued the All-Industry Television Committee, alleging a buyers' price-fixing conspiracy against BMI, and sought a preliminary injunction; the All-Industry Television

Committee's members cross-moved for an order requiring the immediate holding of a special BMI stockholders meeting. (Id.) The Court denied BMI's motion and ordered that a stockholders meeting be held. Broadcast Music, Inc. v. All-Industry Television Station Music License Committee, 611 F. Supp. 868 (S.D.N.Y. 1985). Once again, after great anguish and substantial cost, a settlement on new license agreements was reached. As part of that settlement, BMI agreed to seek a modification of the BMI Consent Decree to provide for a judicial rate-setting procedure substantially similar to Article IX of the ASCAP consent decree. (Berenson Aff. ¶ 19.)

BMI's Negotiations with the Cable Industry

The rise of the cable television industry presented BMI with a new set of licensing issues and led to a new round of litigation. At the outset of the cable industry, BMI had licensed the few programmers in existence, such as Home Box Office, Inc. ("HBO"), now a subsidiary of Time Warner, at experimental rates. (Berenson Aff. ¶ 20.) By the mid-1980's, several cable program suppliers had taken BMI licenses which were "through-to-the viewer", meaning that they covered both (1) the programmers' own satellite and microwave transmissions to their distributors, including cable system operators and (2) retransmissions by the distributors to their retail subscribers. (Id.)

In or about 1989, BMI sought to modify its licensing approach for cable programmers and system operators. (Berenson

Aff. ¶ 21.) Instead of licensing both programmers and operators under a single "through-to-the-viewer" license granted to the cable programmer, BMI sought to license each user in the chain of distribution separately ("split" or "dual" licensing). (Id.) BMI discussed split licensing with HBO in the summer of 1989, as HBO's existing through-to-the-viewer license was due to expire at the end of 1989. (Id.) When BMI and HBO's negotiations over the new license structure broke down, BMI unsuccessfully sought a preliminary injunction to prevent unauthorized use of its affiliates' music. See Broadcast Music, Inc. v. Home Box Office, Inc., 89 Civ. 8579 (S.D.N.Y. complaint filed Dec. 28, 1989) ("BMI v. HBO"). At the same time, HBO instructed its program suppliers to avoid using BMI music. (Berenson Aff. ¶ 21 and Exh. F.) On appeal of the preliminary injunction ruling to the Second Circuit, BMI reached a settlement with HBO.[11] (Berenson Aff. ¶ 21.) In that settlement, BMI expressly agreed to seek an amendment of its Consent Decree to establish a rate court. (Id.)

During the BMI v. HBO litigation, two other cable programmers (the Disney Channel and Black Entertainment Television) and the National Cable Television Association

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11. At the request of the United States, BMI hereby formally commits itself, to the same extent and so long as ASCAP is so bound by consent decree with the United States, to offer per program (or per programming period) and through-to-the-viewer licenses to cable television programmers which deliver a line-up of scheduled programs to multiple independently-owned cable systems -- as those terms are currently understood -- to the same extent BMI is bound to offer them to television broadcasters and television broadcast networks pursuant to Articles VIII(B) and IX(A) (as modified by the present motion) of the BMI Consent Decree, respectively.

("NCTA") commenced an antitrust suit against BMI in Washington, D.C., see National Cable Television Ass'n, Inc. v. Broadcast Music, Inc., 772 F. Supp. 614 (D.D.C. 1991) ("NCTA v. BMI"), and several cable systems owned by Time Warner started an antitrust action against BMI in California, American Television and Communications Corp. v. Broadcast Music, Inc., 90 Civ. 0447 (C.D. Cal. complaint filed Jan. 29, 1990). The California suit was settled in conjunction with the HBO license agreement, but NCTA v. BMI proceeded to trial on the plaintiffs' claims that BMI's blanket license for cable television constituted an unreasonable restraint of trade. (Berenson Aff. ¶ 22.)

Plaintiffs in NCTA v. BMI sought a preliminary injunction precluding BMI from suing them or any cable system for copyright infringement in any other court, and also requested a mandatory injunction requiring BMI to grant them a license for which they would pay BMI a court-set "reasonable" royalty during the litigation. The court denied the preliminary injunction. (Berenson Aff. Exh. G.) After a three-week bench trial, the District Court for the District of Columbia rejected all the plaintiffs' antitrust claims, dismissed the complaints, and awarded BMI damages for copyright infringement. NCTA v. BMI, 772 F. Supp. 614 (D.D.C. 1991). In reaching her decision, Judge Joyce Hens Green noted that the most significant difference between ASCAP's Consent Decree and BMI's was that ASCAP's "decree provides for a 'rate court'." 772 F. Supp. at 618. The court also observed

> "There will be, inevitably, future rate disputes between BMI and cable industry licensees. Although not a matter presently before the Court, it bears mention that all parties would apparently benefit from the mechanism of a rate court comparable to the one utilized for ASCAP."

772 F. Supp. at 650 n.88 (emphasis added).

The HBO and NCTA cases have been the most extensive of BMI's litigations with the cable industry to date. (Id. ¶ 24.) These cases also typified the use of lawsuits in BMI's licensing process: either BMI was forced to withhold its repertoire when negotiations failed as in BMI v. HBO, or music users sought mandatory injunctions for interim licenses in suits brought under the antitrust law as in NCTA v. BMI. (Id.) Other cable suits, all of which ultimately settled, followed this pattern: Broadcast Music, Inc. v. Hearst/ABC Viacom Entertainment Services, 746 F. Supp. 320 (S.D.N.Y. 1990) (Lifetime Television); Broadcast Music, Inc. v. The Christian Broadcasting Network, 89 Civ. 6246 (S.D.N.Y. complaint filed Sept. 21, 1989) (The Family Channel); Arts & Entertainment Cable Network v. Broadcast Music, Inc., 89 Civ. 3526 (S.D.N.Y. complaint filed May 19, 1989); Broadcast Music, Inc. v. Rainbow Programming Services Co., 88 Civ. 7158 (S.D.N.Y. complaint filed Oct. 7, 1988) (American Movie Classics, Bravo, and others).

Since this flurry of litigation, BMI has continued to license other cable programmers and to settle these lawsuits by entering into short-term license agreements subject to adjustment if a BMI rate court is established. (Berenson Aff. ¶ 24.) Cable

programmers generally refused to pay license fees in excess of the interim rates set in the ASCAP rate court, citing possible prejudice in the ASCAP final fee proceedings for these years, which have not yet been scheduled for trial.[12] (Id.)

Proceedings in the ASCAP Rate Court

Since its inception, numerous music users have applied for licenses under Article IX of the ASCAP consent decree, and the rate court has frequently been called upon to set interim fees while ASCAP and its prospective licensee attempt to negotiate the terms of a license. Until 1988, ASCAP and its licensees had always been successful in working out final license fees without the need for a plenary rate court trial.

In January 1988, the ASCAP rate court conducted its first trial to determine the "reasonable" fee for an ASCAP blanket license. The case concerned the music use of two pay cable program services, Showtime and The Movie Channel, for

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12. The electronic media are not the only music users to litigate rather than license. When BMI and ASCAP, separately, and the International Show Car Association were unable to agree on the terms of a license, suit was commenced against both BMI and ASCAP. International Show Car Ass'n v. American Society of Composers, Authors and Publishers, No. 92 Civ. 70786DT (E.D. Mich. complaint filed Feb. 13, 1992). The case was subsequently transferred to this Court as 92 Civ. 8000, and the music user subsequently settled with BMI by agreeing to a short-term license subject to retroactive adjustment if a BMI rate court is created.

In the early 1980's an infringing tavern owner litigated an antitrust counterclaim to an unsuccessful conclusion against BMI. Broadcast Music, Inc. v. Moor-Law, Inc., 527 F. Supp. 758 (D. Del. 1981), aff'd per curiam, 691 F.2d 490 (3d Cir. 1982).

several years through 1988. See United States v. American Society of Composers, Authors and Publishers (In the Matter of the Application of Showtime/The Movie Channel, Inc.), 912 F.2d 563 (2d Cir. 1990) ("ASCAP v. Showtime").[13]

Rate court trials have since been held concerning the license fees to be paid ASCAP by local television stations, see United States v. American Society of Composers, Authors and Publishers (In the Matter of the Application of Buffalo Broadcasting Co.), 1993-1 Trade Cas. (CCH) ¶ 70,153 (S.D.N.Y. Feb. 26, 1993), appeal docketed, No. 94-6030 (2d Cir. Jan. 27, 1994); and by two broadcast networks, United States v. American Society of Composers, Authors and Publishers (In the Matter of the Applications of Capital Cities/ABC, Inc. and CBS, Inc.), 831 F. Supp. 137 (S.D.N.Y. 1993).

Proposed Modification of the BMI Consent Decree

BMI seeks by this motion to modify its Consent Decree to provide for court determination of reasonable performing rights licensing fees in the event of disputes between BMI and music users. (Berenson Aff. ¶ 26 and Exh. H.) The modification contemplates that a would-be licensee would automatically obtain

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13. In the district court decision, attached to the Second Circuit's affirmance as an Appendix, Magistrate Judge Dolinger observed, in speculating as to why BMI fees in one instance were lower than ASCAP's, that "it must be noted that BMI operates under a potential disadvantage compared to ASCAP in that it does not have a rate court to which it can repair to obtain a fee order." ASCAP v. Showtime, 912 F.2d 563, 595 (2d Cir. 1990).

a BMI license by requesting one. (Id.) If BMI and the applicant were unable to agree on a reasonable license fee within sixty days from the date when application for a license is made, the licensee could apply to this Court for the determination of a reasonable fee. (Id.) BMI would have the burden of going forward in any such proceeding to establish the reasonableness of the fee requested by it.[14] (Id.) During the pendency of the fee determination proceeding, the applicant would have the right to utilize any compositions in the BMI repertoire, subject to payment of an interim licensing fee fixed by the Court. (Id.) The full text of the proposed modification, which requires the insertion of provisions in the BMI Consent Decree which are in substance parallel to those contained in Article IX of the ASCAP consent decree, is set forth in the Berenson Aff. as Exhibit H.

In addition to these requested modifications, BMI seeks two minor modifications to its Consent Decree which are unrelated to its request for an independent rate court. BMI seeks to modify the definition of "programming period" contained in Article II(B) of the 1966 decree. (Berenson Aff. ¶ 27 and Exh. H.) The purpose of this modification is to facilitate BMI's use of its option, provided in Article VIII(B), to offer licenses

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14. BMI understands that this burden of going forward would have these consequences: BMI would first present its affirmative case that its proposal was a reasonable one, the applicant would then present its case, BMI could present a rebuttal case if appropriate, and, if the Court were to find that BMI's proposal was not within the range of reasonableness, the Court would determine a reasonable fee based on all the evidence presented.

on a per programming period basis instead of a per program basis. The current definition of programming period is such that it is never in BMI's economic interest to grant licenses on a per programming period basis, as BMI may elect to do pursuant to Article VIII(B), because the 15-minute "periods" are shorter than virtually all actual television or radio programs. (Id. ¶ 27.) The second minor modification to the BMI Consent Decree is to amend Article IX(A) concerning network licensing. (Berenson Aff. ¶ 27 and Exh. H.) The purpose of this proposed modification is to clarify that BMI is permitted to issue licenses to those stations which are broadcasting a network's programming in the event that the network itself does not request a license covering the stations' broadcasts. (Id.)

ARGUMENT

I. BMI'S MOTION TO MODIFY ITS CONSENT DECREE SHOULD BE GRANTED.

It is beyond dispute that this Court has the power to modify the 1966 BMI Consent Decree where circumstances warrant. Article XIII of the Consent Decree expressly provides that:

> "[j]urisdiction is retained by this Court for the purpose of enabling either of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for . . . the modification of any of the provisions thereof . . . ."

(Berenson Aff. Exh. A.) See also Local Number 93, International Association of Firefighters v. City of Cleveland, 478 U.S. 501,

524-28 (1986) (noting trial court's power to modify a consent decree).

A. The Standards for Modification of BMI's Decree.

While there are numerous cases discussing the standard for modifying consent decrees,[15] the present motion differs from those cases in one important respect. For in this case the defendant is not seeking to be relieved of obligations it previously agreed to. Rather, the modification requested will serve to further constrain BMI's licensing practices. Here, BMI is offering to give up to the Court its power to set its own prices for its licenses and the concomitant right to withhold its repertoire from (and sue for infringement) anyone seeking a license but unwilling to pay the price requested by BMI.

We have found no case stating the standard for judicial consideration of a consensual modification of a consent decree where the defendant's obligations are being increased and not diminished. Nevertheless, the Second Circuit's reasoning in United States v. American Cyanamid Co., 719 F.2d 558 (2d Cir. 1983), cert. denied, 465 U.S. 1101 (1984), is particularly

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15. See, e.g., Rufo v. Inmates of Suffolk County Jail, 112 S. Ct. 748 (1992); Board of Education of Oklahoma City Public Schools v. Dowell, 498 U.S. 237 (1991); United States v. United Shoe Machinery Corp., 391 U.S. 244 (1968); United States v. Swift & Co., 286 U.S. 106, 114 (1932); Patterson v. Newspaper & Mail Deliverers' Union, 13 F.3d 33 (2d Cir. 1993), pet. for cert. filed, 62 U.S.L.W. 3775 (U.S. May 24, 1994); Still's Pharmacy, Inc. v. Cuomo, 981 F.2d 632 (2d Cir. 1992); New York State Association for Retarded Children, Inc. v. Carey, 706 F.2d 956 (2d Cir.), cert. denied, 464 U.S. 915 (1983).

helpful. In that case, the Second Circuit addressed whether the lower court erred in applying a "public interest" standard to a consented-to termination of a consent decree provision, where the decree itself provided a somewhat different standard for relief from the provision at issue. 719 F.2d at 564. It held that the district court should have applied the specific standard set out in the parties' decree. Id. Significantly for this case, however, the Second Circuit observed that:

> "it is appropriate for the court to look beyond the words of the decree itself in situations such as this, where the parties jointly seek a modification of the decree.
>
> "In performing this quasi-judicial role, the court must, of course, consider protection of the 'public interest.' We note, however, that the 'public interest' should be based on more than a broad and undefined criterion such as promotion of the public welfare. Rather, 'the words [should] take meaning from the purposes of the regulatory legislation,' here, the Sherman Anti-trust and Clayton Acts."

719 F.2d at 565 (footnote and citation omitted).[16]

Unlike the decree in American Cyanamid, BMI's consent decree does not have a specific provision establishing the

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16. In a footnote, the Court of Appeals noted that its reasoning was consistent with its interpretation of the Antitrust Procedures and Penalties Act, 15 U.S.C. §16(b)-(h) (1988) ("Tunney Act"). 719 F.2d at 565 n.7. In that footnote, the court stated that the Tunney Act was not applicable to a decree termination proceeding. Id.

standard for modifications, consensual or otherwise. Thus, we believe the tentatively-consented-to modifications requested must be measured against the public interest, as stated by the Second Circuit in its American Cyanamid decision. See also United States v. Western Electric Co., 969 F.2d 1231, 1235 (D.C. Cir. 1992) ("Changes uncontested by any party to the decree are granted if 'within the reaches of the public interest'") (citing United States v. Western Electric Co., 900 F.2d 283, 306 (D.C. Cir.), cert. denied, 498 U.S. 911 (1990)), cert. denied, 113 S. Ct. 1363 (1993); accord United States v. Loew's, Inc., 783 F. Supp. 211 (S.D.N.Y. 1992) ("Where, as here, the United States consents to the proposed termination of the judgment in a Government antitrust case, the issue before the Court is whether termination of the judgment is 'in the public interest.'").

Even if BMI's motion did not call for further constraint to be placed on BMI, the Second Circuit's recent decision in Patterson v. Newspaper & Mail Deliverers' Union, 13 F.3d 33 (2d Cir. 1993), pet. for cert. filed, 62 U.S.L.W. 3775 (U.S. May 24, 1994), would give this Court a "rather free hand" in modifying the BMI Decree to deal with current conditions.[17]

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17. Patterson is not authority for the proposition that the Court could make modifications in the BMI Consent Decree over BMI's objection, however, since BMI's decree was entered on consent before trial and without any finding of wrongdoing. See, e.g., Lorain NAACP v. Lorain Board of Educ., 979 F.2d 1141, 1153 (6th Cir. 1992) ("In the absence of an adjudication or admission of constitutional violation, the district court's authority to impose additional obligations on a defendant is constrained by the terms of agreement entered by the parties to the consent decree.").

In Patterson, a defendant union successfully moved this Court to vacate a 20-year-old consent decree on the ground that its essential purpose had been fulfilled. The Second Circuit held that the "flexible" standard set out in Rufo v. Inmates of Suffolk County Jail, supra, and New York State Association for Retarded Children, Inc. v. Carey, supra, was applicable even where the defendant was not a governmental entity such as the jail in Rufo or the hospital in Carey.

The "flexible" standard of Patterson has now been applied to modifications of antitrust consent decrees, even where the government opposed the modifications. See United States v. Eastman Kodak Co., 1994 U.S. Dist. LEXIS 7449 (W.D.N.Y. May 20, 1994); United States v. Agri-Mark, Inc., 1994-1 Trade Cas. ¶ 70,512 (D. Vt. Jan. 21, 1994). In both Kodak and Agri-Mark, the Government opposed the defendants' motions to remove antitrust consent decree provisions in the light of changed conditions. The district courts granted the defendants' motions, over the Government's opposition, and held that the correct standard for modification or termination of a consent decree was the flexible standard of Patterson.

B. A BMI Rate Court Will Further the Goals of the Consent Decree and is in the Public Interest.

The requested modifications to BMI's Consent Decree are in the public interest, when measured against the backdrop of the "regulatory legislation" under which it was entered. American Cyanamid, 719 F.2d at 565. Here, the regulatory legislation is

the Sherman and Clayton Acts, and because the modifications sought are procompetitive, under those statutes they are in the public interest.

The overriding goal of the BMI Consent Decree was to permit BMI to continue to offer its efficient, bulk performing rights licenses to music users while restraining whatever market power BMI allegedly derived from its accumulation of a massive number of copyright rights in a single entity. The decree modification now sought by BMI simply takes this approach one step further by eliminating BMI's copyright law-derived right to withhold access to its repertoire should it be unable to agree on the terms of its licenses with any music user willing to apply for a license.[18] The proposed modification substitutes a rate court mechanism for BMI's right to withhold access to its repertoire, thus further limiting any possible market power BMI might derive as a result of its accumulation of performing rights to over 2 million compositions. Therefore, the proposed modification is clearly consistent with a key purpose of the Consent Decree -- limiting any alleged market power BMI may have -- as it now exists.

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18. In Stewart v. Abend, 495 U.S. 207 (1990), the Supreme Court recognized that "nothing in the copyright statutes would prevent an author from hoarding all of his works during the term of the copyright." Id. at 228-29. The Court noted that "the limited monopoly granted to the artist is intended to provide the bargaining capital to garner a fair price for the value of the works passing into public use." Id. at 229.

The proposed modification is also procompetitive because a rate court for BMI should lead to more efficient transactions in licensing. Parties to licensing negotiations will have the time and incentive to develop realistic bargaining positions, rather than continue the practice of brinkmanship and resort to litigation when negotiations become difficult. Knowledge that truly inflexible negotiators will eventually be subjected to established procedures and an impartial decision-maker can only encourage rational settlement of disputes and reduction of industry upheaval and uncertainty. As a result, the value of music performing rights licenses will be based more closely on economic conditions, as consideration of extraneous noncompetitive factors (such as the probability of success or failure of hard-line litigation tactics grounded on antitrust or other causes of action that are not truly the heart of the dispute) lessens.

Moreover, creation of a BMI rate court is procompetitive because it adds a licensing alternative and does not detract from the parties' existing ability to reach privately negotiated agreements. Nor would the creation of a rate court have any impact upon the right of any music user to obtain music rights directly from BMI's songwriters, composers, and publishers in the free market. As the Second Circuit found in the CBS network and Buffalo Broadcasting cases, BMI and its licensing practices do not prevent music users from contacting individual copyright owners -- directly or through brokers -- and

negotiating free market prices for music they want to perform. See Buffalo Broadcasting, 744 F.2d at 928-29; CBS, 620 F.2d at 938-39. Since BMI will continue to hold only non-exclusive rights to the works in its repertoire, any music user seeking to license directly will be unaffected by the proposed decree modification. If direct licensing and private negotiations are unacceptable, the music user could apply to the BMI rate court for determination of a reasonable fee for a BMI license. By the same token, songwriters, composers, and publishers will remain free to leave BMI for ASCAP or some other method of licensing their works if they are not satisfied with the royalties they receive.

Modification of BMI's consent decree to establish a rate court is, therefore, manifestly in the public interest. The objective of BMI's motion is supported by almost every major music user group requiring BMI licenses. The addition of a rate court provision to the BMI consent decree has been advocated by the All-Industry Television Station Music License Committee, the All-Industry Radio Music License Committee, National Broadcasting Co., CBS Inc., Capital Cities/ABC, Inc., the National Cable Television Association's Music Licensing Committee, Home Box Office, Inc., Showtime/The Movie Channel, Inc., The Disney

Channel, Turner Broadcasting System, Inc., and almost every other significant cable programmer.[19]

Nor will the proposed modification impose any new burden on the courts. As we have described, in the absence of a rate-setting court, BMI and its customers have all too often wound up in court anyway, usually this Court, when their negotiations have reached an impasse and a deadline has arrived. (See Berenson Aff. ¶¶ 15-24.) Instead of presenting baseless antitrust claims, music users will now be able to present their real grievance to the court: their contention that BMI's requested fees are too high. Instead of temporary restraining orders, orders to show cause, motions for emergency stays pending appeal, races to the courthouse, forum shopping in parallel lawsuits, and the like, the parties and the Court will be able to proceed in an orderly manner while the music user is assured that it is not committing copyright infringement and BMI is assured of interim license fees subject to later readjustment.

Unable to rely on the protection of a judicial forum for the resolution of licensing fee disputes, BMI has become entangled in a never-ending cycle of litigation. ASCAP, on the other hand, enjoys the security of knowing that a licensee's unreasonable bargaining posture will eventually be subject to close judicial scrutiny. As noted above, knowledge that use of

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19. Admittedly, music users have urged that the BMI and ASCAP should be before the same rate court.

this outlet is the mandated remedy for an unreasonable stance on license rates by an ASCAP licensee promotes rational negotiation of fee disputes and reduces the likelihood that brinkmanship, threats, and other extreme bargaining tactics will be used.

ASCAP today also enjoys another competitive advantage over BMI because of its license fee court: ASCAP customers and program producers know that if they use ASCAP music in their pre-recorded programs, the broadcasters of those programs will always be able to get an ASCAP license to perform that music at a reasonable fee. A user of BMI music can never be equally certain that BMI will not, because of a fee dispute, refuse to grant the user a license. To that extent, music users could perceive ASCAP as more user-friendly than BMI.

Implementation of the proposed decree modification will also provide BMI with the same shield against unwarranted allegations of price-fixing now held by ASCAP. Courts reviewing the licensing practices of both BMI and ASCAP have in fact noted the importance of a rate court mechanism in eliminating the possible exercise of market power. See, e.g., supra at 13-14. BMI here seeks simply to garner the benefits of the judicial supervision which ASCAP now enjoys. There is no reason why ASCAP should have a preferred legal position over BMI.

Finally, ASCAP enjoys another competitive advantage over BMI because of its license-fee court procedure. During ASCAP fee disputes with music users, its members continue to receive a steady flow of royalties from interim fees. By

contrast, BMI cannot pay its affiliates if license negotiations break down. Even on those occasions when music users have sued both ASCAP and BMI, ASCAP has always been assured that it would receive interim payments from the music user during the litigation. BMI has never had this assurance. (Berenson Aff. ¶ 31.) During the CBS television network litigation, for instance, BMI had to get an extraordinary mandatory injunction from the Court to receive payments for use of its music during the ten years of litigation.

II. BMI'S CONSENT DECREE MODIFICATION MUST ESTABLISH A RATE COURT SEPARATE FROM ASCAP'S RATE COURT.

A. An Independent Rate Court is Key to BMI's Motion.

The proposal embodied in this motion includes a paragraph calling for assignment of the BMI Consent Decree to a judge other than one having continuing jurisdiction of any decree involving any other performing rights society. (Berenson Aff. ¶ 32 and Exh. H, ¶ V.) The proposed modification also specifically precludes assignment or reference of any issues in the BMI rate court to a magistrate or master handling any matter of any other performing rights society. (Id.) The intent of this provision is to establish a rate court for BMI that is in every respect independent from the rate proceedings for ASCAP. (Id.)

This guaranteed separation from ASCAP is critical to BMI's motion. BMI steadfastly believes that a joint rate court for both it and ASCAP is less acceptable than the status quo.

BMI does not want to risk becoming in any way associated with ASCAP proceedings. BMI has spent its entire existence as ASCAP's principal competitor, distinguishing itself from ASCAP in every practical manner and cannot compromise its status by being thrown into the same rate court as ASCAP.

B. A Joint Rate Court Would Be Anticompetitive and Therefore Contrary to the Public Interest.

A rate court (for either BMI or ASCAP) should be used as a last resort, to set final fees only if the parties are unable to reach agreement voluntarily. BMI has been able over the years to reach agreements with nearly all of its prospective licensees without the benefit of a rate court, sooner or later, although this course has frequently been marred by unnecessary and expensive litigation. ASCAP too has been able to reach agreement on its licensing fees through private negotiations and without ultimate resort to the rate court for determination of a reasonable fee, having had only three rate court trials in 43 years.

A joint rate court for BMI and ASCAP would change that pattern forever. Instead of being a last resort, a joint court would be asked to decide virtually every license fee. The reasons for this are several and the results are plainly anticompetitive and contrary to the public interest.

First, a joint rate court would turn license negotiations into purely pre-litigation posturing. Music users would be reluctant to enter into license agreements with one

organization knowing that a related and possibly binding adjudication with the other is in the offing. By the same token, negotiators for ASCAP and BMI would be less likely to enter into voluntary agreements with music users, knowing that their rivals could stand to do better by continuing to litigate and that any adverse result would also apply to their competitors. If any voluntary agreements were reached they would occur solely on the basis of lawyers' perceptions of their tactical evidentiary value in the rate proceedings of the competing performing rights society. As in most multi-party cases, BMI and ASCAP would inevitably get enmeshed in each other's settlement strategies.

Second, a fact finder asked to decide rates for both BMI and ASCAP would likely seek to place both organizations in lockstep to avoid duplicative proceedings and the perception of inconsistent findings. BMI and ASCAP licenses with music users would be dealt with as a single item. Instead of engaging in private negotiations with the organization with which its licenses are about to expire, as is now the case, a music user would simply deal with both at once on a joint timetable. In a joint rate court, licenses for ASCAP and BMI would likely be set to start and end at the same dates. This would further suppress competition between BMI and ASCAP. In the present market there is now a staggered schedule where a music user's license with ASCAP usually expires at a time different from its license with BMI, thereby allowing for further maneuvering by licensees and

licensors. The same would be true if an independent BMI rate court were created.

Third, a joint rate court would tend to rigidify the license fees of both BMI and ASCAP artificially. One possible scenario would call for multi-stage proceedings where an overall level of fees for all music usage would first be decided, probably based purely on history, and BMI and ASCAP would then haggle about their shares of licensing revenues as they have done in the now-abolished Copyright Royalty Tribunal. E.g., National Ass'n of Broadcasters v. Copyright Royalty Tribunal, 809 F.2d 172 (2d Cir. 1986); Christian Broadcasting Network, Inc. v. Copyright Royalty Tribunal, 720 F.2d 1295 (D.C. Cir. 1983). Instead of a market-driven dynamic reflecting the importance of BMI music to the overall success of the particular music user, which has allowed songwriters, composers, and publishers to stay almost-caught-up with the explosive growth of the television and radio outlets for music over the decades, performance royalties could become a fixed dollar item that, at most, would be adjusted from time to time for inflation. The focus of joint proceedings, however structured, would be Music in the abstract, not the specific contribution of the BMI repertoire to the licensee.

Fourth, a joint rate court would hinder BMI's ability to compete with ASCAP for new affiliates and members to build the best repertoire. For years, BMI has attracted new songwriters, composers, and publishers by offering lower administrative fees, higher royalty payments, and more liberal affiliation

requirements, and by searching for the best new talent. A joint rate court, by tending to place BMI and ASCAP in lockstep, would handicap this competition between BMI and ASCAP, which has so greatly benefited the music community, music users, and the public.[20] It would also immeasurably compromise BMI's ability to serve as a vigorous competitor to ASCAP, which is one of BMI's most important roles.

Finally, a joint rate court would result in unnecessary litigation for BMI. Every time a licensee believed that either

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20. To the extent that music users argue that judicial efficiencies would be accomplished by having the BMI rate court consolidated with the existing ASCAP rate court, this argument must be rejected for the following reasons: the ASCAP court has heard and drawn conclusions -- sometimes erroneous -- about BMI for years now in proceedings where BMI had no standing and no voice. For example, in ASCAP v. Showtime, 912 F.2d 563, 596 n.49 (2d Cir. 1990), the ASCAP court came to the erroneous conclusion that BMI music must be performed less frequently than ASCAP's because there are fewer separate titles claimed in its repertoire. Moreover, the ASCAP rate court has been a forum where ASCAP has repeatedly denigrated BMI, its repertoire, its management, and its songwriters. See, e.g., United States v. American Society of Composers, Authors and Publishers, 586 F. Supp. 727, 731-32 (S.D.N.Y. 1984) (where ASCAP claimed that BMI's ownership by broadcasters would lead to discrimination by the networks against ASCAP in music selection and in license choice); ASCAP v. Showtime, 912 F.2d at 595 (where ASCAP challenged a BMI license as the product of a "sweetheart arrangement" because BMI is "an instrument of the broadcast industry"). Music users in the ASCAP rate court have also frequently cited to their dealings with BMI -- putting their own self-interested gloss on how and why BMI has acted; in ASCAP v. Showtime, supra, the cable programmers argued that BMI held "monopoly power" and that its licenses "should be viewed as the product of coercive market power". 912 F.2d at 563.

    Consolidation of BMI rate proceedings with ASCAP's would also be unfair because it would be more difficult for BMI (or ASCAP) to maintain the confidentiality of its relations with customers, songwriters, composers, and publishers; legitimate trade secrets concerning negotiating strategy, novel licensing forms, and initiatives by BMI (or ASCAP) would become the very focus of all rate proceedings, and protective orders could not adequately shield them.

BMI or ASCAP's requested price for a license was unreasonable, a rate proceeding would most likely ensue involving both entities.

CONCLUSION

BMI seeks a decree modification whose primary objective is universally supported by its television and radio broadcast licensees, is not in derogation of the purposes of the decree and in fact supports those purposes, is not novel or untested, and would greatly aid the business and competitive health of BMI to the detriment of no one. The Court should grant BMI's motion to modify the 1966 BMI Consent Decree to provide for separate, judicial determination of reasonable license fees, as requested herein.

Dated: New York, New York
June 27, 1994

Respectfully submitted,

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ADDENDUM B

MEMORANDUM OF THE UNITED STATES IN RESPONSE TO MOTION OF BROADCAST MUSIC, INC. TO MODIFY THE 1966 FINAL JUDGMENT IN THIS MATTER

Filed June 20, 1994

U.S. Department of Justice

Kursh
dan
echter -3208

Hollander
Tierney
Chrono

Hold
Official

Antitrust Division

GK:BMH
60-22-5-DP

Judiciary Center Building
555 Fourth Street, N.W.
Washington, D.C. 20001

June 24, 1994

FEDERAL EXPRESS

Michael E. Salzman, Esquire
Hughes, Hubbard and Reed
One Battery Park Plaza
New York, New York 10004-1482

Re: United States v. Broadcast Music, Inc.,
64 Civ. 3787 (S.D.N.Y.)

Dear Mr. Salzman:

Pursuant to our telephone conversations, enclosed for filing with the Court are (1) the signed Stipulation between the United States and BMI, and (2) the Memorandum of the United States in Response to the Motion of Broadcast Music, Inc. to Modify the 1966 Final Judgment Entered in this Matter. It is our understanding that these will be filed promptly with your motion papers.

I have also enclosed three extra copies of the Memorandum for your use.

Sincerely yours,

Bernard M. Hollander
Senior Trial Attorney

Enclosures

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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. BROADCAST MUSIC INC., et al., Defendants.	64 Civ. 3787

MEMORANDUM OF THE UNITED STATES IN RESPONSE TO MOTION OF BROADCAST MUSIC, INC. TO MODIFY THE 1966 FINAL JUDGMENT ENTERED IN THIS MATTER

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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	64 Civ. 3787
BROADCAST MUSIC INC., et al.,	)	
	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OF THE UNITED STATES IN RESPONSE TO MOTION OF BROADCAST MUSIC, INC. TO MODIFY THE 1966 FINAL JUDGMENT ENTERED IN THIS MATTER

Broadcast Music, Inc. ("BMI"), defendant in this action, has moved this Court to modify the Final Judgment entered herein against it on December 29, 1966 ("the Judgment"), so as to establish a judicial mechanism for adjudicating disputed fees for the licensing of music performing rights to music users. In a stipulation between BMI and the United States, BMI has agreed to publish notice of its motion and an invitation for comments thereon in (a) two consecutive issues of the national edition of The Wall Street Journal, (b) two consecutive issues of Broadcasting & Cable and (c) two consecutive issues of the weekly edition of Variety, and the

United States, with one exception 1/, has tentatively consented to the entry of an Order modifying the Judgment at any time more than seventy (70) days after the last publication of such notice.

This memorandum summarizes the Complaint which led to entry of the Judgment, and the nature of that Judgment. It discusses the legal standards and precedents respecting judgment modification, and explains the reasons why the United States has tentatively consented to judgment modification in this instance. Also addressed are the procedures proposed by the United States and agreed to by BMI for giving notice of the pending motion and obtaining public comment thereon, while assuring the right of the United States to withdraw its consent at any time until an order modifying the Judgment is entered.

1/ The United States takes no position at this time with regard to BMI's proposed addition to Article XIII, which would both deprive any Judge assigned to any ASCAP matter of jurisdiction in this case, and enjoin the Court from referring or assigning "any issue or matter under this Final Judgment... to a Magistrate Judge or Master" who handled any corresponding ASCAP issue or matter. Judicial assignments being a matter solely within the Court's discretion, we believe that it would be inappropriate for the Department of Justice now to support or oppose BMI's request for a separate "rate court."

I. BACKGROUND OF THE COMPLAINT AND FINAL JUDGMENT

The Complaint from which the Judgment evolved was filed by the Government on December 10, 1964. 2/ In addition to defendant BMI, the Complaint named as class defendants some 517 broadcasters, represented by RKO General, Inc., all of whom owned voting stock in BMI. BMI and the defendant broadcasters allegedly constituted a combination to restrain and monopolize, and an attempt to monopolize, the business of acquiring and licensing to broadcasters copyrighted music rights, in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. The Complaint sought divestiture by the defendant broadcasters of their stockholdings in BMI, 3/ and "such other, further and different relief as to the Court may appear to be just and proper in the premises." In actuality, the 1966 consent Judgment generally incorporated, clarified, updated and

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2/ In a previous related action, filed in the Eastern District of Wisconsin on January 27, 1941, the Government charged that BMI had conspired with the broadcast networks and others to restrain trade "in radio broadcasting, sheet music and electrical transcriptions in violation of Section 1 [of the Sherman Act]". That action was settled on February 3, 1941, with entry of a consent decree that was vacated on December 29, 1966 upon entry of this Court's Judgment.

3/ This prayed-for divestiture relief was not granted, but the three networks had already divested their BMI stock in response to an antitrust inquiry by Congressman Celler in the late 1950s. Today, BMI is owned by independent radio and television stations.

replaced the earlier Wisconsin decree which had been entered prior to the advent of commercial television. The Government had encountered no enforcement problems to that time, and indeed has encountered none since.

In view of the fact that the BMI Judgment has no provision for court adjudication of licensing fees, if necessary, such as that contained in the comparable ASCAP decree, 4/ the Government has tentatively concluded that there is no apparent reason why the modification proposed by BMI to establish a "rate court" 5/ would be inconsistent with the public interest.

II. THE PUBLIC INTEREST STANDARD APPLIES WHERE MODIFICATION OF AN ANTITRUST JUDGMENT WITH THE CONSENT OF THE GOVERNMENT IS INVOLVED

This Court has jurisdiction to modify the Judgment pursuant to: Section XIII of the Judgment, Rules 60(b)(5) and (6) of the Federal Rules of Civil Procedure, and "principles inherent in the jurisdiction of the chancery." United States v. Swift & Co., 286 U.S. 106, 114 (1932).

4/ The decree in U.S. v. ASCAP, Civ. No. 13-95 (WCC) (S.D.N.Y. 1950), established the ground rules under which that performing rights organization licenses music users to perform the works of its members, and distributes the revenue it collects to those members for the use of their music.

5/ As already explained, the United States takes no position at this time with regard to BMI's request for a separate "rate court." See note 1.

Where, as here, the United States tentatively consents to the proposed judgment modification in a Government antitrust case, the issue before the Court is whether modification of the judgment is "in the public interest." United States v. Loew's Incorporated, et al., 783 F. Supp. 211 (S.D.N.Y. 1992), and United States v. Columbia Artists Management, Inc. 662 F. Supp. 865, 869 (S.D.N.Y. 1987), citing United States v. Swift & Co., 1975-1 Trade Case. ¶ 60,201, at 65,702 (N.D. Ill. 1975); cf. United States v. American Cyanamid Co., 556 F. Supp. 361, 367 (S.D.N.Y. 1983), rev'd on other grounds, 719 F.2d 558 (2d Cir. 1983), cert. denied, 104 S. Ct. 1596 (1984). 6/ This

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6/ The judgment in American Cyanamid specifically provided that the defendant could be relieved from its obligations

> 'upon a showing . . . that the effect of such relief will not be substantially to lessen competition or tend to create a monopoly in any line of commerce in any section of the country.' American Cyanamid, 719 F.2d at 561.

In light of this language, which is nearly identical to that used in Section 7 of the Clayton Act, 15 U.S.C. § 18, the court of appeals concluded that the district court should have carried out its "public interest" obligations by applying the "standard framework for analysis of the legality of a vertical merger." American Cyanamid, 719 F.2d at 566. The Second Circuit did not reject the rule that the "public interest" is the generally applicable standard. To the contrary, the court observed that "the court must, of course, consider protection of the 'public interest.'" The court agreed with the Government "that the 'public interest' should be based on more than a broad and undefined criterion such as promotion of the public welfare," and that the words take meaning from the antitrust laws. Id. at 565. Here, unlike American Cyanamid, the judgment does not establish any special standard to be applied to a motion for its modification.

is the same standard that a district court applies in deciding whether to enter an initial consent decree submitted by the Government in an antitrust proceeding. See 15 U.S.C. § 16(e); United States v. AT&T, 552 F. Supp. 131, 147 n.67 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983).

The Supreme Court has held that where the words "public interest" appear in federal statutes designed to regulate public sector behavior, they "take meaning from the purposes of the regulatory legislation." NAACP v. FPC, 425 U.S. 662, 669 (1976); see also, System Federation No. 91 v. Wright, 364 U.S. 642, 651 (1961). The purpose of the antitrust laws, the "regulatory legislation" involved here, is of course to protect competition. E.g., United States v. Penn-Olin Chemical Co., 378 U.S. 158, 170 (1964) (antitrust laws reflect "a national policy enunciated by the Congress to preserve and promote a free competitive economy."). Thus, the ultimate question before the Court at this time is whether modification of the Judgment would serve the public interest in "free and unfettered competition as the rule of trade." Northern Pacific Railway v. United States, 356 U.S. 1, 4, (1958); see also United States v. Western Electric Co., 900 F. 2d 283, 308 (D.C. Cir. 1990), cert. denied, 111 S.Ct. 283 (1990); American Cyanamid, supra, 719 F. 2d at 565; U.S. v. Loews Inc., supra, 783 F. Supp. at 213.

It has long been recognized that the Government has broad discretion in settling antitrust litigation on terms that will best serve the public interest in competition. See Sam Fox Publishing Co. v. United States, 366 U.S. 683, 689 (1961). The judiciary's role in determining whether the initial entry of a consent decree is in the public interest, absent a showing of abuse of discretion or a failure to discharge its duty on the part of the Government, is to determine the reasonableness of the Government's explanation and not to substitute its opinion. United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977); see also United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981). The Government has at its disposal a range of settlements that are consistent with the public interest. See, e.g., Western Electric, 900 F.2d at 307-309; Bechtel, 648 F.2d at 665-66; United States v. Gillette Co., 406 F. Supp. 713, 716 (D. Mass. 1975). The court's role is to conduct a limited review to "insure that the government has not breached its duty to the public in consenting to the decree," Bechtel, 648 F.2d at 666, through malfeasance or by acting irrationally. 7/

7/ The Supreme Court's decision in Rufo v. Inmates of Suffolk County Jail, 112 S. Ct. 748 (1992), does not affect either the applicability of the public interest standard to consensual modification or termination of decrees in government antitrust cases or the scope of judicial review under that standard. In Rufo, a case involving an "institutional reform" decree requiring specified changes in prison conditions, the proposed modification was not consensual. The governmental defendant
(Footnote continued on next page.)

The roles of the Government and the Court are the same when the Government consents to the modification of a judgment. United States v. Swift & Co., 1975-1 Trade Cas. at 65,702-03. Where the Department of Justice has offered a reasoned and reasonable explanation of why the modification of a judgment vindicates the public interest in free and unfettered competition, and there is no showing of corruption affecting the Government's recommendation, the Court should conclude that the modification is "within the reaches of the public interest". Bechtel, 648 F.2d at 666. 8/

(Footnote continued from previous page.)
sought modification of its decree obligations; the plaintiffs opposed the modification.

8/ Over the years, courts have approved literally hundreds of consent orders modifying or terminating Government antitrust decrees. Recent instances include:

United States v. National Broadcasting Company, Inc., United States v. American Broadcasting Companies, Inc., United States v. CBS, Inc., 842 F. Supp. 402 (C.D. Cal. 1993); United States v. Linen Supply Institute of Greater New York, Inc., et al., 1993-1 Trade Cas. (CCH) ¶ 70,271 (S.D.N.Y. 1993); United States v. Saks & Company, et al., 1992-1 Trade Cas. (CCH) ¶ 69,845 (S.D.N.Y. 1992); United States v. Loew's Inc., et al., 783 F. Supp. 211 (S.D.N.Y. 1992).

III. THE UNITED STATES BELIEVES THAT ESTABLISHMENT OF A RATE COURT WOULD BE IN THE PUBLIC INTEREST AND HAS THEREFORE TENTATIVELY CONSENTED TO MODIFICATION OF THE JUDGMENT

The Government's tentative consent to BMI's motion to modify the Judgment to establish a judicial rate-setting mechanism has been given only after extensive consideration. We were reluctant initially to join in imposing a significant administrative and regulatory burden on the Court. For several reasons, however, we have concluded that empowering the Court to resolve licensing disputes when negotiations between BMI and music users break down is sound enforcement policy, and is in the public interest.

First, there is the obvious anomaly that ASCAP licensees have for over forty years been able to invoke the jurisdiction of the Court to establish reasonable fees under the ASCAP consent decree, but the same licensees, when dealing with BMI, have not had that option.

Second, courts, including the Supreme Court, when considering the antitrust implications of ASCAP and BMI blanket licensing of music, have cited with apparent approval the rate court provision in the ASCAP judgment as an effective restraint on potential abuse of market power. See Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 11-12, 24 (1979); Columbia Broadcasting System, Inc. v. American Society of Composers, Authors and Publishers, 620 F.2d 930, 933, 938

(2d Cir. 1980), cert. denied 450 U.S. 970 (1981); Buffalo Broadcasting Co. v. American Society of Composers, Authors and Publishers, 744 F.2d 917, 923, 927 (2d Cir. 1984, cert. denied 469 U.S. 1211 (1985).

Third, it is clear from BMI's recitation of its recent licensing history with the broadcasting and cable industries that the absence of a rate-setting mechanism in the BMI consent decree has not deterred litigation as a means of resolving licensing disputes. On the contrary, it appears that BMI or its licensees have raised copyright infringement and antitrust issues in cases filed in several forums. One court, in deciding such a lawsuit, commented pointedly on the desirability of making available a BMI rate court mechanism. National Cable Television Ass'n, Inc. v. Broadcast Music, Inc. 772 F. Supp. 614, 650, n.88 (D.D.C. 1991.)

Finally, we have given some weight to the fact that all major users of BMI music -- the radio and television broadcasters and the cable television broadcasters -- have urged the Government to consider favorably BMI's request for modification.

We wish to emphasize, however, that the Government's tentative consent to establishment of a "rate court" mechanism does not reflect our intention that judicial rate setting should become a substitute for competitive rate setting. The Judgment already contains important provisions to assure that

music users have competitive alternatives to the blanket license, including direct and per-program licensing, and source licensing for prerecorded programming.

Under the Judgment, BMI may obtain only nonexclusive licenses from composers, thereby leaving the composers free to license any of their works directly to any music user who chooses to negotiate with them. The Judgment further requires BMI to offer a form of license to radio and television networks and cable programming services, which includes music performance rights to be conveyed to local stations or cable systems which transmit programs to the listening or viewing audience ("through-to-the-viewer" licenses). This requirement places the licensing obligation closer to the source of the program. The ASCAP decree court has found this requirement to make more feasible insistance by the networks that the program producer acquire performance rights from the composer, if the price of the blanket license is considered excessive. See United States v. ASCAP (Application of Turner Broadcasting), 782 F. Supp. 778 (S.D.N.Y. 1991), aff'd 956 F.2d 21 (2d Cir. 1992)

Finally, the judgment requires BMI to offer to radio, television and cable broadcasters, a per-program license as an alternative to its blanket license. A music user seeking to move away from reliance on an overpriced blanket license to direct or source licensing of music performance rights, may use a per-program license as a "bridge", to cover programs for

which music licenses cannot be immediately acquired from the composer or the producer. 9/

Thus, the Judgment provides important protections against supracompetitive pricing of the BMI blanket license for those music users wishing to explore competitive licensing alternatives. For most bulk music users, however, the convenience and efficiency of blanket licensing may make it the licensing method of choice. For these users, the opportunity to ask the decree court to determine a reasonable licensing fee may provide additional protection against any attempt by BMI to exercise market power in the pricing of its blanket license.

9/ In the memorandum in support of its motion, BMI acknowledges its obligation to offer through-to-the viewer and per program licenses to cable programmers. It is the position of the United States that this obligation is already established by controlling precedent. In United States v. ASCAP (Application of Turner Broadcasting), supra, this Court has construed parallel provisions of the ASCAP decree to require that these licenses be offered to cable television. Indeed, one court already has held expressly that BMI must offer through-to-the-viewer licenses to cable television program services under Section IX of this judgment. National Cable Television Ass'n, Inc. v. Broadcast Music, Inc., supra, at 647-650.

IV. THE PROPOSED PROCEDURES FOR GIVING PUBLIC NOTICE OF THE PENDING MOTION AND INVITING COMMENT ARE APPROPRIATE

The opinion in United States v. Swift & Co., 1975-1 Trade Cas. at 65,703, discusses a court's responsibility to implement procedures that will give nonparties notice of, and an opportunity to comment upon, antitrust judgment modifications proposed by consent of the parties:

> Cognizant . . . of the public interest in competitive economic activity, established chancery powers and duties, and the occasional fallibility of the Government, the court is, at the very least, obligated to insure that the public, and all interested parties, have received adequate notice of the proposed modification. . . . [Footnote omitted.]

The Department of Justice believes that giving the public notice of the filing of a motion to modify the final judgment in a Government antitrust case, and an opportunity to comment upon that motion, is generally necessary to insure that both the Department and the Court properly assess the public interest. Accordingly, over the years, the Department has adopted and refined a policy of consenting to motions to modify or terminate judgments in antitrust actions only on condition that an appropriate effort be undertaken to notify potentially interested persons of the pendency of the motion. In the case at bar, the Government has proposed, and the movant has agreed to, the following:

1. When the motion is filed, the Department will publish in the Federal Register a notice (a) announcing the motion and the Government's tentative consent to it; (b) summarizing the Complaint and the Judgment; (c) explaining that copies of the relevant papers can be inspected at the offices of the Antitrust Division and the Clerk of the Court; (d) stating that copies of the papers can be obtained from the Antitrust Division, upon request and payment of the copying fees prescribed by Justice Department regulations; and (e) inviting all interested persons to submit comments concerning the proposed modification to the Antitrust Division.

2. BMI will publish notice of the motion in two consecutive issues of the national edition of The Wall Street Journal, in two consecutive issues of Broadcasting & Cable and in two consecutive issues of the weekly edition of Variety. The latter two periodicals are trade journals likely to be read by persons interested in the markets affected by the Judgment. The published notices will invite public comment during the following sixty days and contain essentially the same information about the contemplated proceeding as appears in the Department's Federal Register notice.

3. The Department of Justice will file with the Court copies of all comments that it receives.

4. The parties will stipulate that the Court will not rule upon the motion for at least seventy days after the last publication by movants of the notices described above (and thus

for at least ten days after the close of the period for public comments), and the Government will reserve the right to withdraw its consent to the motion at any time until an order is entered modifying the Judgment. 10/

We believe that this procedure is well designed to provide all potentially interested persons with notice that a motion is pending to modify the Judgment and to provide an adequate opportunity for comment. The movant here has agreed to follow this procedure, including publication of appropriate notices in The Wall Street Journal, Broadcasting & Cable and weekly Variety. The parties are therefore submitting to the Court a stipulation and order establishing this procedural approach, and we ask that it be entered forthwith.

10/ Withdrawal by the Department of Justice of its consent would be significant because the legal standard applicable to a motion to modify or terminate an antitrust judgment over the Government's objection is stricter than the standard applicable to a modification or termination with its consent. United States v. American Cyanamid Co., supra, 556 F. Supp. at 367; see also, United States v. AT&T, supra, 552 F. Supp. at 147 n.67.

CONCLUSION

For the foregoing reasons, the United States tentatively consents to the modification of the Judgment and asks the Court to enter now the Order submitted herewith directing publication of notice of the motion.

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Respectfully submitted,

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