

Weakening the ASCAP and BMI Consent Decrees Would Undermine Fair and Efficient Music Licensing

Issue

The Department of Justice (DOJ) is currently reviewing the consent decrees governing the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), the performing rights organizations (PROs) that have been granted the right to license the public performances of musical works owned by songwriters and publishers. These consent decrees enable any entity that publicly performs a song – including restaurants, shopping malls, sports stadiums, digital music services and both radio and television broadcasters, among others – to do so without running afoul of copyright laws, while ensuring that the copyright owner of the musical work is fairly compensated.

History

There are a number of ways in which radio and television stations publicly perform music for their audiences, the selection of which they may have little control over. Broadcasters play music as primary programming to serve listeners, as bridges between different programs, as ambient music in their coverage of live events, such as a local sporting event or a parade, in the background of movies and television shows (some of which they produce, but many of which they do not), or as part of commercials.

To not infringe the copyrights of the hundreds of thousands of rights holders whose works may air on their stations, broadcasters must obtain licenses from ASCAP and BMI (as well as a third unregulated performing rights organization, the Society of European Stage Authors and Composers (SESAC)). Since broadcasters cannot avoid playing works contained in the ASCAP and BMI repertoires, these PROs wield significant market power, and absent these consent decrees could leverage that market power to achieve supra-competitive rates to the detriment of music licensees and would-be listeners.

The ASCAP and BMI consent decrees, first entered into in 1941, limit each PRO's ability to exercise market power against broadcasters and other licensees that results from the aggregation of rights held by their member songwriters and publishers. Under the consent decrees, ASCAP and BMI are subject to court oversight of the terms and conditions of the licenses, including the rates, cannot withhold the music in their repertoires to any entity willing to pay a fair market rate, and cannot discriminate against similarly situated parties.

NAB Position

The DOJ periodically reviews the consent decrees to examine their operation and effectiveness. In June 2014, DOJ initiated such a review, and both the National Association of Broadcasters (NAB) and our industry's music licensing committees filed comments to inform that process. These comments highlight that:

- The consent decrees provide important protections against the inherently anti-competitive features of PRO licensing, which remain essential and should not be diminished. The unique history and nature of the marketplace for musical works render the terms of the consent decrees necessary to enable fair and efficient licensing, and the DOJ's general policy favoring sunset provisions inapplicable.
- One needs only to look at broadcasters' ongoing litigation with SESAC – the lone PRO operating outside of a consent decree – to see the anticompetitive conduct possible by one entity with the power to blanket license musical works outside of court oversight. SESAC significantly increased broadcasters' license rates without any justification, such as significant growth of the catalog or increase in broadcaster use. Threatened with litigation, broadcasters were forced to give in to SESAC's demands. SESAC's monopoly power was clearly demonstrated by its ability to raise its price dramatically without suffering any loss in business.

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- ASCAP and BMI should not be permitted to discriminate against certain types of licensees by allowing music publishers to selectively withdraw their catalogs for only some licensees but not others.
- Unleashing the market power of ASCAP and BMI, even selectively, would be economically inefficient and harmful to broadcasters' audiences. Broadcasters invested in their businesses under the expectation of a licensing structure that remains protected from ASCAP's and BMI's unbridled leverage. Any modifications could allow ASCAP and BMI to threaten this investment.
- In addition, ASCAP's and BMI's unrestrained market power would threaten ongoing investment in broadcasting, particularly in the digital arena where Web simulcasting and digital services are expanding the listening options available to broadcasters' audiences.
- Improving the availability and reliability of information concerning the PROs' repertoires can facilitate alternative licensing of performance rights and otherwise introduce a degree of competition to the licensing process.

Action Needed

Ultimately, the consent decrees remain essential to the efficient functioning of the market for musical composition performance rights and should not be modified or eliminated.

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