

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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Broadcast Music, Inc.,	:
	:
Petitioner,	: 13 Civ. 4037 (LLS)
	:
v.	: Related to <i>United States v.</i>
	: <i>Broadcast Music, Inc.</i> , 64 Civ.
Pandora Media, Inc.,	: 3787 (LLS)
	:
Respondent.	:
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MEMORANDUM OF THE UNITED STATES ON DECREE CONSTRUCTION

Pursuant to Section XIII of the BMI Consent Decree, *United States v. Broad. Music, Inc.*, 1966 Trade Cases (CCH) ¶ 71,941 (S.D.N.Y. 1966), *as amended* by 1996–1 Trade Cases (CCH) ¶ 71,378 (S.D.N.Y. 1994), the United States hereby submits its views regarding the interpretation of certain language in the BMI Consent Decree in light of the recent ruling by the Honorable Denise Cote that ASCAP’s parallel consent decree (“AFJ2”) prohibits partial assignment/withdrawal of performance rights. *In re Petition of Pandora Media, Inc.*, No. 12 Civ. 8035 (DLC), slip op. (S.D.N.Y. Sept. 17, 2013).

The United States has a strong interest in ensuring that the consent decrees it designs to protect competition continue to do so. BMI and ASCAP compete against each other to provide licensing and ancillary services to music composers and publishers. If the comparable licensing and rate court provisions in AFJ2 and the BMI Consent Decree were interpreted to be at odds with each other, it would create a significant risk to that competition. The appellate or decree modification processes might eventually address disparate interpretations. But until that possible reconciliation, the risk to competition still could fundamentally and irreparably change the music industry by creating incentives for publishers and composers to switch from ASCAP to BMI

solely because of divergent consent decree interpretations. This threat to competition could be avoided by this Court interpreting the BMI Consent Decree language at issue in a manner consistent with the result reached by Judge Cote.

I. Consistent Interpretation of AFJ2 and the BMI Consent Decree Ensures That the Decrees Themselves Do Not Impede Competition Between ASCAP and BMI

The ASCAP and BMI Consent Decrees, both originally entered in 1941, are important to the music industry in part because they substantially control the activities of the two major performing rights organizations (“PROs”) as they compete against each other. *See Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 11, 12 & n.20 (1979). The decrees address the same fundamental competition concerns that flow from the aggregation and collective licensing of performing rights by ASCAP and BMI. The decrees are not identical (although, on the point at issue here, their language is extremely close),¹ but they are intended to provide for evenhanded treatment of the two PROs. Music composers/publishers, music users, and ultimately music consumers benefit from ASCAP and BMI competing against one another under what amounts to a common set of licensing rules.

Accordingly, courts interpreting the BMI Consent Decree have relied on decisions interpreting AFJ2 in circumstances where the consent decrees on their face do not require substantive divergence. For example, in the DMX litigation, the ASCAP district court rejected ASCAP’s argument that it was not bound by the Second Circuit’s decision in *United States v. Broadcast Music, Inc. (Application of AEI Music Network, Inc.)*, 275 F.3d 168 (2d Cir. 2001), because “the BMI decree construed therein is significantly different in its entirety from AFJ2.”

¹ In fact, Sony-EMI claims that the BMI Consent Decree provisions before this Court “were taken, virtually verbatim, from the 1950 ASCAP Amendment.” Sony-EMI Br. at 14. *See also* Zakarin Decl. ¶¶ 13-19 (explaining that the 1994 BMI Consent Decree amendment to introduce the repertory definition and rate court requirement was “simply copying wholesale the language from the 1950 ASCAP Amendment”).

United States v. American Soc’y of Composers, Authors and Publishers (Applications of Muzak, LLC and DMX Music, Inc.), 309 F. Supp. 2d 566, 578 (S.D.N.Y. 2004). While the court agreed that “[i]t is indisputable that the BMI and ASCAP decrees are not entirely identical,” it rejected “ASCAP’s contention that the *AEI* decision is merely extrinsic evidence that should not be used for construing the AFJ2.” *Id.* at 580. Rather, decisions interpreting the BMI Consent Decree are highly relevant to construing AFJ2, and vice versa.

II. The Potential Risk to Competition Is Avoided if This Court Interprets the BMI Consent Decree in a Manner Consistent with the Result Reached by Judge Cote

Where, as here, there is no substantive divergence between the relevant provisions of the two consent decrees, free competition and market clarity are advanced by consistent interpretation of the consent decrees. An interpretation of the BMI Consent Decree that diverges sharply from the law governing AFJ2, on the other hand, could tilt the competition between ASCAP and BMI and increase confusion for music composers/publishers and music users alike.

The provisions of the BMI Consent Decree at issue in this case are functionally equivalent to the provisions of AFJ2 relied on by Judge Cote in her recent decision. In considering the question “whether any provisions of AFJ2 prevent ASCAP from withdrawing from Pandora the permission to use works whose New Media licensing rights have purportedly been withdrawn from ASCAP,” slip op. at 10, Judge Cote found that the language of AFJ2 “unambiguously requires ASCAP to provide Pandora with a license to perform all of the works in its repertory.” *Id.* at 2. Judge Cote explained that, because AFJ2 requires ASCAP to grant licenses upon application to “any, some or all of the works in the ASCAP repertory,” the “[k]ey to resolving” Pandora’s summary judgment motion against ASCAP was “determining the proper meaning of the term ‘works in the ASCAP repertory’ in AFJ2.” *Id.* at 11-12. To do so, Judge

Cote looked to (1) the definition of “repertory” and (2) the operative provisions guaranteeing music users the right to use all of the works in that repertory. *Id.* at 11-17.

Although the BMI Consent Decree is structured somewhat differently than AFJ2, the definition of “repertory” and the operative provisions guaranteeing music users access to that repertory hew very closely to AFJ2. Minor framing differences aside,² both AFJ2 and the BMI Consent Decree define the PRO’s “repertory” as those works/compositions, the right of public performance of which the PRO has or hereafter shall have the right to license. AFJ2 § II(C); BMI Consent Decree § II(C). Similarly, the operative provisions of both AFJ2 and the BMI Consent Decree require the PROs to grant, to any music user that requests one, a license to perform “any, some or all” of the works in that PRO’s repertory. AFJ2 §§ IX(A), IX(E); BMI Consent Decree § XIV(A).³ There is nothing in any of these provisions that would warrant divergent constructions of the two decrees.

III. Consistent Interpretation of AFJ2 and the BMI Consent Decree Would Not Require BMI to Grant Licenses Beyond the Scope of Its Authority

From the transcript of this case’s October 29, 2013 hearing, it appears the Court may be concerned that following Judge Cote’s holding could result in BMI being compelled to issue licenses beyond the authority granted to it by the music composers/publishers of the “partially withdrawn” works (referred to at the hearing as the “syllogism”). Judge Cote directly addressed

² For example, the decrees use the terms “works” and “compositions” interchangeably. Slip op. at 15 (“The term ‘works’ in AFJ2 has its origin in Copyright law, and it is clear from Copyright caselaw that works means ‘compositions’ in that context.”).

³ Judge Cote also referenced AFJ2 Section VI’s compulsory license language. While the exact language in AFJ2 Section VI does not appear in the BMI Consent Decree, that section’s straightforward requirement that ASCAP must offer a blanket license to its entire repertory is one that the courts have long understood to be required by Section XIV of the BMI Consent Decree. *AEI*, 275 F.3d at 175-76.

this concern, and her analysis could be applied just as well to the terms of the BMI Consent Decree.

Simply put, Judge Cote found that the publishers had granted ASCAP the right to license their works, and that ASCAP's attempts to permit partial withdrawals of those works were ineffective due to the unambiguous language of AFJ2. Since the publishers understood that AFJ2 governs ASCAP's actions and forbids it from denying licenses to applicants, enforcement of AFJ2's plain language cannot have unjustly harmed them. Because AFJ2 merely sets the rules by which publishers and composers may engage in collective licensing that otherwise would run afoul of the antitrust laws, Judge Cote noted that ASCAP's attempt to argue that "AFJ2 restricts copyright holders is misplaced." Slip op. at 25. "AFJ2 only restricts ASCAP; it does not restrict copyright holders directly. Obviously, a restriction on ASCAP has an ancillary impact on how copyright holders may use ASCAP, but this is the case with respect to third parties any time an entity is regulated by a consent decree." *Id.*

Reaching the opposite conclusion here—that purportedly "partially withdrawn" works are included in no licenses instead of all licenses—would introduce inconsistency between AFJ2 and the BMI Consent Decree. Such an outcome could grant BMI a significant commercial advantage over ASCAP, as well as creating confusion (and potential infringement liability) for all music users (both New Media and other users alike) currently operating under BMI blanket licenses. See BMI Br. at 4, 25 (noting that such a ruling could result in "mass confusion" and "potentially catastrophic effects").

IV. The United States Is Considering Whether Partial Assignment/Withdrawal Should Be Allowed, But Is Not Taking a Position on That Issue at This Time

From a competition policy standpoint, whether publishers should be allowed to include works in ASCAP and BMI for some purposes but not others (and, if so, how, if at all, they

should be constrained in so doing) is a question that requires far more information than the narrow decree interpretation question currently before the Court in this rate case. That broader policy question is one that the United States is actively considering, with input from the PROs and other interested parties, in the context of its ongoing consent decree oversight. If the United States ultimately concludes that allowing the partial assignment/withdrawal of performance rights would be procompetitive, the best path to that result likely is simultaneous parallel modification of both consent decrees.⁴

Respectfully submitted,

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⁴ Sony/ATV suggests in a footnote that some Antitrust Division staff may have signaled their agreement that partial assignment/withdrawal of performance rights theoretically may be procompetitive. *See* Sony/ATV Br. at 8 n.5. The United States has not reached any conclusion, however, and its ongoing examination is necessary to develop a concrete factual record to aid in decisionmaking. In any event, the United States does not issue advisory opinions, and no PRO or publisher has availed itself of the Antitrust Division's formal business review process. *See* 28 C.F.R. § 50.6.

CERTIFICATE OF SERVICE

I, Daniel McCuaig, hereby certify that on the 13th day of December, 2013, I caused a true and correct copy of the foregoing Memorandum of the United States on Decree Construction to be served electronically via the CM/ECF system on the lead attorneys to be noticed in this matter, including those counsel of record identified below.

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