

ANTITRUST TRADE AND PRACTICE

Expert Analysis

DOJ Review Creates Possibility for Large Scale Change in the Music Industry

Last month, the Department of Justice Antitrust Division (DOJ) announced its plans to review two music licensing antitrust consent decrees which have been in place, in some shape or form, for almost 80 years. Due to the newly-initiated review, the competitive mechanisms that dictate how music is broadcasted, streamed or played live could soon drastically change.

In 1941, the DOJ entered into two separate consent decrees with the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI)—the two largest performing rights organizations (PROs) in the United States, controlling nearly 90% of the market—to address competitive concerns arising from their significant market power. PROs, including ASCAP and BMI, distribute licenses to publicly perform musical works to entities, such as radio broadcasters, streaming services and live venues, that transmit the performance of musical works to listeners. In their current manifestations, the consent decrees require ASCAP and BMI to license the



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public performance rights to all musical works in their respective catalogues upon request and at a reasonable rate.

Upon conclusion of the newly initiated review, the DOJ has two options: (1) leave the consent decrees in place, in favor of consistency and predictability in the marketplace; or (2) modify or terminate the consent decrees, which may serve as a catalyst for wholesale reform of the music licensing rules currently in place. While it is difficult to predict what the DOJ might do, it is clear that modifying or terminating the decrees, even over time, would have far-reaching implications for the entire music industry.

Public Performance Rights And Industry Background

The public performance right is just one of many copyrights in a recorded piece of music. It confers on its owner,

typically the creator of a musical work such as a songwriter or a composer, the exclusive ability to play the composition in public, online or on the television or radio. Owners of public performance rights can grant others, via a license, permission to play the song as well. Songwriters and composers can also assign their copyrights to a publishing company and, in return, the company will then license and promote the compositions, help monitor where the compositions are used and collect

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royalties and distribute them to the composers. Songwriters, composers and music publishers can all agree to become members of a PRO, and then will receive royalties directly from that PRO instead of, for example, the radio station or venue where their composition was played.

As a result of the consent decrees, ASCAP and BMI can only distribute “blanket” licenses, which cover the entirety of their catalogues. They

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cannot license individual compositions and cannot charge different fees for different compositions. The licensing fees for the “blanket” license must be reasonable, and any pricing disputes are settled by a judge in the Southern District of New York. PROs cannot deny any request from music users to license their repertoire of musical works.

Consent Decrees In the Antitrust Context

A consent decree is a negotiated agreement between the government and a private party entered as a court order that is enforceable by the court. See Department of Justice Office of Public Affairs, *Justice Department Releases Memorandum on Litigation Guidelines for Civil Consent Decrees and Settlement Agreements* (Nov. 8, 2018). In the antitrust context, parties enter into consent decrees to mitigate regulatory concern over potential or actual market abuses. Consent decrees have the same effect as litigated decrees, binding the government and the consenting defendant to their terms. The DOJ has long maintained a practice of entering into consent decrees with defendants to resolve investigations, saving both parties the cost of litigation. Prior to 1979, antitrust consent decrees typically did not have temporal limitations. In 1979, the DOJ began the common practice of including “sunset” provisions, such that the decree ceases to have effect after a certain date, usually 10 years from entry of the judgment. Many of the consent decrees entered into before 1979 (including the music licensing consent decrees) still have no set expiration dates and remain open on courts’ dockets even though the vast majority are likely

outdated as a result of changes in industry conditions, economics, law or other reasons.

Prior Review of the ASCAP And BMI Consent Decrees

Given that ASCAP and BMI control nearly 90% of the PRO market, their consent decrees essentially govern the competitive landscape for the licensing of public performance rights today. The consent decrees have been reviewed several times over the years, most recently in 2014 after ASCAP and BMI petitioned to modify them to allow writers and publishers to “partially withdraw” from the PROs in order to negotiate licensing deals directly with streaming services. The review involved two rounds of public comments and took over two years to complete before the DOJ ultimately concluded that it would make no formal changes to the music licensing rules.

Notably, in the 2014 review the DOJ reinterpreted the consent decrees to require “full-works” licensing, which would allow any one co-owner of a work to license all of the work without needing the permission of the other co-owners. Historically and currently, BMI and ASCAP operate under a fractional licensing model where each PRO collects for and pays out for only the shares of musical works it represents in its respective repertoire. Under the current fractional licensing model if, hypothetically, Paul Simon and Art Garfunkel each own 50% of “The Sound of Silence,” both Simon and Garfunkel have to agree to license their respective rights to the song. Under a “full-works” regime, either songwriter could license the full song without the permission of the other.

BMI and ASCAP objected to the DOJ’s “full-works” licensing reinterpretation

and sought clarification from the District Court. Ultimately, the case was appealed, and the Second Circuit disagreed with the DOJ, finding that because the consent decrees are silent on fractional licensing, PROs may offer them “unless a clear and unambiguous command of the decree would thereby be violated.” See *United States v. Broadcast Music, Inc.*, 720 Fed. Appx.14 (2017).

Why Now?

The DOJ’s decision to initiate another review of the ASCAP and BMI consent decrees is likely the result of its current departmental initiatives, changes in the music industry and lingering questions about fractional and “full-works” licensing.

Last year, the DOJ announced it would review over one thousand open antitrust consent decrees. Assistant Attorney General Makan Delrahim articulated the motivation for the initiative, noting that the DOJ will “pursue the termination of outdated judgments around the country that presently do little more than clog court dockets, create unnecessary uncertainty for businesses or, in some cases, may actually elicit anticompetitive market conditions.” See Department of Justice Office of Public Affairs, *Department of Justice Announces Initiative to Terminate “Legacy” Antitrust Judgments* (April 25, 2018).

The DOJ’s review of the ASCAP and BMI consent decrees is also motivated, in part, by the sweeping changes to the music industry brought on by the rise of streaming services. Streaming is often heralded as having “saved” the music industry. Where CD sales of music were in decline, leading to massive losses and layoffs, streaming services have created new revenue

opportunities. They have also given listeners the opportunity to easily discover new, and perhaps niche, music.

Finally, the DOJ's review may answer lingering questions around fractional and "full-works" licensing raised by its most recent review. PROs, publishing companies and songwriters are generally opposed to the idea of "full-works" licensing, fearing that the music users who license works from their repertoires will shop for rate discounts among the co-owners of a musical work. On the other hand, music users, including digital services, argue that "full-works" licensing will increase free market competition.

Possible Outcomes

The DOJ's review will address the music licensing regime in two ways, either (1) maintain the status quo, or (2) modify or terminate the consent decrees.

On the one hand, maintaining the status quo would enhance predictability and stability in the music industry, but may not update the consent decrees for the modern age or address open questions surrounding fractional licensing. Supporters of the status quo argue that the consent decrees create a stable regime that allows for the fair and efficient licensing of musical works. See, e.g., Future of Music Coalition, "ASCAP-BMI Consent Decrees Fact Sheet" (2016). They also argue that the consent decrees help mitigate anti-competitive behavior while ensuring that songwriters and music creators are paid when their music is played. Ultimately, proponents of the status quo argue that the modification or termination of the decrees would create chaos in the industry in the form of higher licensing fees that could be passed on to consumers.

On the other hand, supporters of modification or termination argue that a free market for music licensing would create a more productive, efficient and level playing field for all parties involved. As would be expected, ASCAP and BMI favor change. An ASCAP representative stated that altering the rules could lead to a "more flexible framework with less government regulation [which would] allow [it] to compete in a free market ..." See Diane Bartz, *U.S. Justice Department to Review 1941 ASCAP, BMI Consent Decrees*, Reuters (June 5, 2019). Some supporters for change argue that the consent decrees should be terminated altogether, and view the consent decrees as "burdensome regulations

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which have unfairly devalued the work of thousands of songwriters for far too long." See Anna Steele and Brent Kendall, *Justice Department Opens Formal Review of Music-Licensing Rules*, Wall St. J. (June 5, 2019). Yet, terminating the consent decrees would also terminate the antitrust protections afforded to ASCAP and BMI, which could raise serious competitive concerns given that the two PROs have such a large combined share in the market.

Conclusion

Given that the industry has grown up around ASCAP and BMI, the DOJ has promised that it will not make any changes "lightly or without due care and consideration." See Matthew Perlman, *DOJ Again Mulling Decades-Old Music Licensing Orders*, Law360.com (June 5, 2019). Additionally,

President Trump recently signed the Music Modernization Act, which made major changes to the way streaming services pay mechanical royalties to songwriters when a musical work is reproduced. The Music Modernization Act was premised on the idea that PROs would continue to operate under the current licensing regime. Any major alteration to the consent decrees would seem to undermine whatever progress was achieved by passage of that Act.

In any event, the culmination of the DOJ's review will shed light on how it is choosing to use its resources. The DOJ has become increasingly interventionist, filing amicus briefs and initiating reviews of a wide range of long standing decrees. Should the DOJ choose to rewrite the ASCAP and BMI consent decrees, thus reinforcing its interventionist streak, future revisions and policy changes could be expected in other areas.