UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(White Plains)

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
- v -	)	Civil Action No. 41-1395 WWC
	)	
AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al*.,	)	
	)	
Defendants.	)	
	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Civil Action No. 41-1395
	)	(WWC)
- v -	)	(relates to former
	)	Civil Action No. 42-245)
AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al*.,	)	
	)	
Defendants.	)	

MEMORANDUM OF THE UNITED STATES IN RESPONSE TO PUBLIC COMMENTS ON THE JOINT MOTION TO ENTER SECOND AMENDED FINAL JUDGMENT

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The United States hereby responds to the public comments submitted in connection with the Joint Motion To Enter Second Amended Final Judgment filed September 5, 2000.

I. INTRODUCTION

On March 4, 1941, this Court entered a consent decree settling the antitrust lawsuit brought by the plaintiff United States against the defendant American Society of Composers, Authors and Publishers ("ASCAP"). The 1941 judgment imposed various restrictions and obligations on ASCAP's dealings with its members and with music users taking licenses for the right to publicly perform musical compositions. The 1941 decree was substantially amended in 1950 by an order of this Court that has come to be known as the "Amended Final Judgment," or "AFJ." In 1960, the Court entered what has become known as the "1960 Order," which further regulated ASCAP's relationship with its members.

On September 5, 2000, the plaintiff and ASCAP filed, *inter alia*, a "Joint Motion to Enter Second Amended Final Judgment." The proposed Second Amended Final Judgment ("AFJ2") would, among other things, (1) make various changes in the licensing prohibitions and requirements imposed on ASCAP; and (2) reduce the oversight role of the plaintiff and the Court over ASCAP's relationships with its members. In the accompanying papers, the United States stated that it had tentatively agreed to entry of the proposed AFJ2, subject to review of public comments which, pursuant to a separate stipulation and order, interested parties could submit to the Antitrust Division.

The United States respectfully submits this Memorandum in response to the public comments concerning the proposed AFJ2. The United States has carefully reviewed all comments submitted and, in light of those comments, has reached agreement with ASCAP on certain changes to the proposed AFJ2. These changes are reflected in the Revised AFJ2 ("Rev. AFJ2"), attached hereto as Appendix A, and summarized in Appendix B. These changes enhance the procompetitive features of the AFJ2 and thereby further the public interest.

Not all of the proposed changes suggested by public commenters have been incorporated into the Revised AFJ2. In some cases, the United States concluded that the proposed revisions did not advance the purposes underlying the decree. In other cases, the United States and ASCAP could not reach agreement on proposed changes to the AFJ2. While some of these changes might have been desirable, their absence does not warrant rejection of the AFJ2. The United States believes that entry of the Revised AFJ2 would further the public interest in encouraging competition among PROs to serve both music users and copyright holders, encouraging competition between ASCAP and its members to license performances, eliminating ineffective and costly regulation of ASCAP's activities, and reducing the costs to the Court, ASCAP, and music users of resolving fee disputes. These issues are discussed in detail below.

The United States recognizes the danger that ASCAP and others may seek to have the AFJ2 interpreted as a shield against further scrutiny of ASCAP by the courts or by Congress. It should be emphasized, therefore, that the United States' support of the AFJ2 is not intended to, and should not be construed as, approving practices not expressly prohibited, immunizing ASCAP from further antitrust remedies or suggesting that legislative action is not warranted. The AFJ clearly did not eliminate or fully constrain ASCAP's market power. *See ASCAP v. Showtime/The Movie Channel*, 912 F.2d 563, 570 (2d Cir. 1990). The future effect of the Rev. AFJ2 remains to be seen, but the impact on ASCAP's market power, or its practices to maintain it, may well be quite modest. "And of course

changes brought about by new technology or new marketing techniques might also undercut the justification" for collective licensing by performing rights organizations. *BMI v. CBS*, 441 U.S. 1, 21 n.34 (1979).

II. LEGAL STANDARDS

A. The Procedures For Giving Public Notice Of The Pending Order And Inviting Comment Were Appropriate

The opinion in *United States v. Swift & Co.*, 1975-1 Trade Cas. (CCH) ¶60,201 at 65,703 (N.D. Ill. 1975), 1975 WL 864, at *3 (N.D. Ill), discusses a court's responsibility to implement procedures that will give non-parties 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. . . .

Id. (footnote omitted.) Over the years, the United States 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. The United States believes that giving the public notice of, and an opportunity to comment upon, the AFJ2 is desirable to ensure that both the United States and the Court properly assess the public interest. To that end, the parties have taken the following steps:

(1) The proposed Second Amended Final Judgment and Memorandum in Support were filed on September 5, 2000.

(2) The proposed Second Amended Final Judgment and Memorandum in Support were published in the Federal Register on September 26, 2000, 65 Fed. Reg. 57,828 (2000).

(3) A summary of the terms of the proposed Second Amended Final Judgment were published in the *Wall Street Journal* on Friday, September 15, 2000, and Monday, September 18, 2000; in *Billboard* on September 30, 2000, and October 7, 2000; and in *Broadcasting and Cable* on September 25, 2000, and October 2, 2000.

(4) Interested persons were invited to file comments within sixty days. The comment period commenced on October 2, 2000, and terminated on December 1, 2000. A substantial number of comments were filed, representing a broad cross-section of copyright holders, licensors and music users.

(5) The United States and ASCAP have agreed to make additional changes to the AFJ2 in response to comments.

(6) The United States herein files the comments of members of the public together with the response of the United States to the comments.

The comments regarding the AFJ2 have been thoroughly considered by the United States. Prompt modification without the delay of an additional comment and response period will best serve the public interest.

B. The Legal Standard Governing The Court's Public Interest Determination

The Court has jurisdiction to modify the AFJ under both Section XVII of the AFJ ("Jurisdiction of this cause is retained . . . for the modification thereof") and Federal Rule of Civil Procedure 60(b)(5). After receiving the United States' motion for entry of the proposed Second Amended Final Judgment, the Court must determine whether entry of the proposed order is in the public interest. In doing so, the Court should apply a deferential standard and should withhold its approval only under very limited conditions.

In reviewing a challenge to agreed-upon modifications to a decree, the "court should also bear in mind the *flexibility* of the public interest inquiry; the court's function is not to determine whether the resulting array of rights and liabilities is the one that will *best* serve society, but only to confirm that the resulting settlement is within the *reaches* of the public interest." *United States v. Western Electric Co.*, 900 F.2d 283, 309 (D.C. Cir. 1990) (emphasis in original, citations and quotations omitted). As

Judge Greene observed in entering judgment modifications in the *AT&T* case:

> If courts . . . disapproved proposed consent decrees merely because they did not contain the exact relief which the court would have imposed after a finding of liability, defendants would have no incentive to consent to judgment and this element of compromise would be destroyed. The consent decree would thus as a practical matter be eliminated as an antitrust enforcement tool, despite Congress' directive that it be preserved.

United States v. American Tel. & Tel. Co., 552 F. Supp. 131, 151 (D.D.C. 1982), *aff'd mem. sub nom., Maryland v. United States*, 460 U.S. 1001 (1983); *see also Massachusetts Sch. of Law at Andover, Inc. v. United States*, 118 F.3d 776, 783 (D.C. Cir. 1997) ("constitutional questions . . . would be raised if courts were to subject the government's exercise of its prosecutorial discretion to non-deferential review").

The United States -- not any individual third party -- represents the public interest in Government antitrust cases. *See, e.g., United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981); *United States v. Associated Milk Producers*, 534 F.2d 113, 117 (8th Cir. 1976); *United States v. International Business Machines Corp.*, 1995-2 Trade Cas. (CCH) ¶ 71,135 at 75,456 (S.D.N.Y. 1995), 1995 WL 366383, at *2 (S.D.N.Y.). No third party has a right to demand that the Government's proposed modification be rejected or modified simply because a different decree would better serve its private interests. Thus, a district court "should not reject an otherwise adequate remedy simply because a third party claims it could be better treated." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 n.9 (D.C. Cir. 1995).

With this standard in mind, the Court should review the comments of members of the public concerning the proposed AFJ2 and the United States' Response to those comments. As this Response

makes clear, entry of the Revised AFJ2 is in the public interest.

III. RESPONSE TO COMMENTS

A. Summary of Public Comments

The United States received comments from over thirty songwriters and fifty-four organizations, including the Television Music License Committee, or "TMLC" (representing most local television stations in their dealings with ASCAP, Appendix D), the Radio Music License Committee (representing many radio stations), the Digital Media Association (a trade association of Internet firms), the International Association of Assembly Managers, or "IAAM" (representing arena and stadium interests, Appendix E), and the Production Music Association, or "PMA" (representing music libraries and publishers, *et al*., Appendix F). Most broadcaster and Internet interests joined in the comprehensive comments submitted by the Television Music License Committee. The National Religious Broadcasters Music License Committee, or "NRBMLC" (representing many radio stations, Appendix G) also submitted comprehensive comments, as did Home Box Office, Inc. ("HBO", Appendix H), and Music Reports, Inc. ("MRI", Appendix I), a consulting firm that helps facilitate licensing with performing rights organizations ("PROs"). One PRO, SESAC, Inc., Appendix J, submitted comments on behalf of itself and writers. Most of the commenting songwriters participated in one of two group submissions -- the Bramson Group (Appendix K) or the Karmen Group (Appendix L.) Richard Warren, an individual songwriter, submitted independent comments (Appendix M.) A detailed listing of all of the various commenters is set forth in Appendix C. For clarity's sake, the responses to comments are organized according to the particular sections of the proposed AFJ2 to which they most directly relate.

B. Specific Responses

1. Section III. Applicability

Under the proposed AFJ2, Section III stated that, with two exceptions, "none of the injunctions or requirements herein imposed upon ASCAP shall apply to the acquisition or licensing of the right to perform musical compositions publicly outside the United States." The Television Music License Committee raises concerns about the applicability of the decree to licensing arrangements that cover both United States and foreign performances. (TMLC Comments at 38, *see also* MRI Comments at 2.) To avoid the danger that this provision could be construed to permit ASCAP to avoid its decree obligations in the United States under a license that covered both U.S. and international performances (*e.g.*, a worldwide license), this provision has now been modified to state: "none of the injunctions or requirements herein imposed upon ASCAP shall apply to the acquisition or licensing of the right to perform musical compositions publicly *solely* outside the United States." (Rev. AFJ2, §III, emphasis added.) The word "solely" has been inserted to make clear that any license that encompasses performances in the United States must comply with the provisions of the AFJ2 even if the license also covers foreign performances. If ASCAP wishes to grant licenses only covering foreign performances, it is bound by Sections IV(A) and IV(B) of the AFJ2, which incorporate the prohibitions of the so-called ASCAP "foreign decree," and the general U.S. antitrust laws as they relate to behavior that may affect imports or exports.

2. Section IV. Prohibited Conduct

a. Section IV(A)

Section IV(A) of the AFJ2 included a proviso "that ASCAP may collect and distribute royalties for home recording devices and media." MRI raised questions about the meaning of "home recording device," concerned that, as proposed, the provision gave ASCAP the unilateral ability to decide what constituted a home recording device. (MRI Comments at 3.) To ensure that this subsection cannot be construed broadly to create new rights or endorse any particular collective licensing of emerging copyrights, the proviso has now been changed to state "that ASCAP may collect and distribute royalties for home recording devices and media *to the extent such royalty collection is required or authorized by statute*." (Rev. AFJ2, § IV(A), emphasis added.)

MRI also asks whether, under Section IV(A) of the AFJ2, ASCAP is "restrained from administering rights in copyrighted sound recordings." (MRI Comments at 4.) The combination of Section IV(A) and Section II(Q) prohibits ASCAP from licensing any right in "musical compositions" other than the so-called "small performing right" held by composers and publishers. ASCAP may not license or administer any other right in a "musical composition," but is not enjoined from administering other rights.

b. Section IV(B)

SESAC requests clarification on whether it could act as an agent for an ASCAP member seeking to direct-license under Section IV(B). (SESAC Comments at 5.) Nothing in the Revised AFJ2 prevents SESAC from acting as a direct licensing agent for a songwriter who is not a SESAC member or affiliate, and Section IV(B) would prevent ASCAP from interfering with members' rights to

use SESAC for this purpose so long as SESAC is not acting as a "performing rights organization," as defined, with respect to those licenses.

c. Section IV(H)

Section VII of the AFJ essentially enjoined ASCAP from offering the traditional blanket license percentage-of-total-revenue payment scheme to radio and television broadcasters unless desired by the radio or television broadcaster. Section IV(H) of the proposed AFJ2 extends this qualified injunction to all broadcasters but adds a proviso that the injunction "shall not limit the discretion of the Court . . . to determine a license fee on any appropriate basis." The Television Music Licensing Committee offers two comments on this section: (1) that the injunction should be extended to apply to ASCAP licensing of non-broadcasters; and (2) that the proviso effectively renders the injunction meaningless. (TMLC Comments at 25.)

ASCAP would not agree to extend the injunction beyond broadcasters as the term is now broadly defined. The United States believes that the proviso simply acknowledges the Court's existing authority to establish a fee or fee structure on any basis it deems appropriate. See *United States v. ASCAP (Application of Metromedia)*, 341 F.2d 1003, 1008-09 (2d Cir. 1965).

3. Section V. Through-to-the-Audience Licenses

Section V of the AFJ2, when combined with the new definition of broadcaster in Section II, expands the class of music users entitled to a through-to-the-audience license. While commenters support extending the entitlement to "on-line transmitters" they also argue that it should be extended to all "on-line music users." (TMLC Comments at 20, HBO Comments at 6.) This shortcoming has been corrected. In the Revised AFJ2, all on-line music users are entitled to a through-to-the-audience

license.[1] (Rev. AFJ2, § V.) Expansion of the availability of through-to-the-audience licenses to all on-line music users could yield significant competitive benefits.[2]

One comment objected to the requirement that fees for a through-to-the-audience license "take into account the value of all performances made" on the grounds that ASCAP could seek fees based on the revenues of *both* the licensee and its distributors. (TMLC Comments at 21.) The provision does not support such an interpretation, but rather is simply an acknowledgment that the fee for a through-to-the-audience license shall properly reflect its expanded scope. In the case of cable television networks (the market cited by the Television Music License Committee), ASCAP would bear the burden of proving why the economic relationship between the network and the distributor does not already reflect the value of the music in the network programming licensed to the distributor (*e.g.*, why a percentage of the network's revenue is not sufficient.)[3]

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[1] As discussed below, the "on-line transmitter" concept has been removed from the Revised AFJ2.

[2] SESAC complains generally about the through-to-the-audience license requirement on the theory that music users will expect SESAC to offer one. The United States will not remove a long established right of music users merely because SESAC might have to conform its behavior to a procompetitive industry practice.

[3] MRI and the Television Music License Committee ask for clarification, generally, of the international scope of the through-to-the-audience requirement in Section V. (MRI Comments at 3, TMLC Comments at 20-21.) Both seek changes in the decree that would prevent the through-to-the-audience license from "stopping at the border." All of the provisions of the AFJ2, including Section V, apply to license agreements, such as worldwide license agreements, that purport to cover both U.S. and foreign performances. For a license that purports to cover only domestic performances (*e.g.*, an ordinary through-to-the audience blanket license covering the domestic performances of an Internet firm), the question is whether, under U.S. and international law, a performance that originates in the U.S. but is received in a foreign territory is a domestic or foreign performance. The policy implications of these issues extend beyond the scope of this decree. These questions have not yet been fully resolved by the courts, or by legislative action, and the United States does not purport to resolve them here.

Several commenters question the meaning of the phrase "with whom it has an economic relationship." (HBO Comments at 5, SESAC Comments at 6.) The phrase was intended solely to distinguish through-to-the-audience licenses from re-broadcasts outside the chain of express and implied contractual relationships.[4] The economic relationship need not be direct or involve the exchange of money.[5]

4. Section VI. Compulsory Full-Repertory License

With one exception, the AFJ2 does not change the AFJ's broad compulsory license provision for all music users.[6]

The Television Music License Committee and the NRBMLC request that program producers be included in the definition of "music users" so that program producers could remain entitled to Section VI's compulsory license.[7] (TMLC Comments at 22-23, NRBMLC Comments at 14-15.) This

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[4] The antecedent of "it" is "broadcaster, an on-line music user, a background/foreground music service, [or] operator" -- not just "operator."

[5] For example, if a radio station provides its programming to a web site in exchange for advertising space there is an "economic relationship" between those entities even if no money is exchanged. On the other hand, if a bar owner turns on the radio to entertain her customers, there is no "economic relationship" between the station and the bar and, thus, the station's through-to-the-audience license need not cover the bar.

[6] The AFJ2 adds a provision allowing ASCAP to refuse a license to a music user who is in clear default of a prior license.

[7] Under the AFJ, "user" was defined to include "any person who or which . . . is entitled to obtain a license from ASCAP under Section V of this Judgment." (AFJ, § II(E).) Section V(B) entitled a "manufacturer, producer or distributor of a composition in ASCAP's repertory which is or shall be recorded for performance on specified commercially sponsored radio programs or television programs" to a specific type of per-piece license. Section VI entitled all "users," as defined, to a full-repertory license upon request.

entitlement was removed from the AFJ2 in large part because it was seldom, if ever, used. Moreover, the United States is not persuaded that including such a provision in the proposed AFJ2 will lead program producers to request blanket licenses from ASCAP, nor does it believe that such a development would necessarily promote competition. Producers appear capable of efficiently securing performing rights licenses directly at the same time they secure other necessary rights.

HBO requests various changes to Section VI with respect to ASCAP's obligation to grant a per-piece license. (HBO Comments at 6-7.) In *United States v. ASCAP (Application of NBC),* 1971 Trade Cas. (CCH) ¶ 73,491 (S.D.N.Y. 1970), 1970 WL 556 (S.D.N.Y.), this Court construed Section VI of the AFJ so that per-piece licensing by ASCAP, or even seeking permission from members to license on a per-piece basis, is optional. The parties were unable to agree to a modification or clarification regarding ASCAP's per-piece licensing obligations. **5.**

Section VII. Per-Program and Per-Segment Licenses

Section VII of the AFJ2 expanded the per-program entitlement to all broadcasters, broadly defined, and created a new entitlement to a per-segment license for online music users and background/foreground music users.[8] Various commenters request clarification on the parameters of

[8] The Television Music License Committee and the NRBMLC question whether the definition of "broadcaster," which included the phrase "transmits audio or audio-visual programming substantially similar to that transmitted by over-the-air or cable radio or television stations or networks," could be construed as a limitation on the kinds of technology that could qualify a firm as a broadcaster. (TMLC Comments at 21-22, NRBMLC Comments at 9 n.4.) To avoid any doubt, the phrase has been amended to read "transmits audio or audio-visual content substantially similar to *content that is* transmitted by over-the-air or cable radio or television stations or networks." (Rev. AFJ2, § II(F).) The language has been changed to reflect that anyone transmitting content, either now or in the future, which is substantially similar to content transmitted by any over the air or cable, radio or television station or network at the time of entry of the decree, is a broadcaster for purposes of the decree. Thus,

these entitlements and further requested that the United States create additional alternatives to the blanket license.

a. Expansion of the Per-Program Entitlement

The "per-program" license is a license for the entire ASCAP repertory, but payment is made only for programs that contain ASCAP music not otherwise licensed. As set forth in the Memorandum in Support, the per-program license should facilitate competition by allowing a music user to substitute competing sources of music more easily than can be done under the traditional blanket license.[9]

The AFJ2 expands the per-program entitlement in two respects:

- Under the AFJ, only "radio or television broadcaster[s]" were automatically entitled to a per-program license (AFJ § VII(B).) The AFJ2, in effect, expands the definition of broadcaster to encompass all means of delivering content similar to the content of existing radio and television stations and networks. (AFJ2 §§ II(F), VII(A).) In particular, an on-line music user that fits the definition of broadcaster is now entitled to a per-program license. (AFJ2 §§ II(I), VII(A).)

- Some music users, such as radio broadcasters and music video networks, had difficulty licensing under the per-program system, because they cannot be said to disseminate "programs." They suggested that payments should be based on *programming periods* (*e.g.*, fifteen minute increments.) Under the AFJ2, any broadcaster that does not disseminate discrete programs is entitled to a per-program license, with the parameter of the "program" to be determined by agreement or by the Court. (AFJ2 §§ II(M), VII(A).)

These modifications provide music users with alternative licensing arrangements that were not clearly

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for purposes of defining who is a "broadcaster" under the Rev. AFJ2, it is immaterial what particular media or format is used for transmission; rather, it is the nature of the content that is determinative.

[9] As explained in the Memorandum in Support at 15, under a traditional blanket license, a music user has little incentive to substitute non-ASCAP music or to direct-license because the music user will pay the same fee to ASCAP regardless of how many ASCAP songs are used or how many performances are direct licensed.

provided by the AFJ.

The general thrust of the remaining comments relating to the per-program requirement in the AFJ2 is that, without additional modifications, the per-program license option will not be attractive for many music users. The issues raised in the comments will be grouped and addressed in the following categories: the ambient/incidental component to the per-program license, administrative charges, percentage-of-revenue fee option and per-programming period.

i. Ambient/Incidental Component to the Per-Program License

Commenters argue that the wording of the new per-program license requirement ("per-program license that shall cover ambient and incidental uses") is ambiguous and could be construed as allowing a much more limited per-program license that only covers ambient and incidental uses. (NRBMLC Comments at 11-12, HBO Comments at 7-8.) This interpretation is incorrect, but, to avoid any doubt, the passage has been modified in the Revised AFJ2 to state "a per-program license that shall, *in addition*, cover ambient and incidental uses . . . . " (Rev. AFJ2 § VII(A)(1), emphasis added.) This ensures that the provision will require ASCAP to offer the per-program license, as defined, and the ambient/incidental component as well.

ii. Administrative Charges

Various commenters state that ASCAP should not be explicitly allowed, in Section VII(B) of the AFJ2, to assess a separate administrative charge for the per-program license (TMLC Comments at 27, HBO Comments at 8, NRBMLC Comments at 11); that the burden should remain on ASCAP to justify the need for the charge (TMLC Comments at 27); and that it should be made clear that the

charge may only cover incremental costs. (TMLC Comments at 27 n.11.) Under the AFJ, ASCAP was permitted to impose a separate reasonable charge for the additional costs of administering the per-program license. The statement in the AFJ2 that ASCAP may charge "a fee to recover its reasonable cost of administering the license" does not change existing practice, nor does it create any presumption or remove any existing evidentiary burden from ASCAP. If ASCAP cannot establish that there is a legitimate "cost of administering the license," then ASCAP cannot assess an administrative fee. In addition, ASCAP also retains the burden of establishing the reasonableness of any charge it proposes. (AFJ2, § IX.)

The United States also believes that "reasonable cost of administering *the* license" (Rev. AFJ2, § VII(B), emphasis added) forecloses an interpretation that would allow ASCAP to charge anything in excess of its incremental costs[10] for the particular music user or user group.

iii. Percentage-of-Revenue Fee Option

The AFJ allowed ASCAP, at its option, to base per-program payments on a percentage of program revenue (AFJ, § VII(B)(1)) and the AFJ2 maintains that option. (AFJ2, § VII(D).) Some commenters maintain that ASCAP should not have the option to price the per-program license on a percentage-of-revenue basis. (TMLC Comments at 27-28, NRBMLC Comments at 8-9, HBO Comments at 8.) The United States would have preferred not to allow one party to be in a position to dictate the payment structure of the license. However, the United States and ASCAP were unable to

[10] *I.e.*, the cost related to the administration of the license for that particular music user over and above that which ASCAP would otherwise incur in connection with its operations, including administering other per-program licenses.

reach an agreement that eliminated this option. [11]

The Television Music License Committee additionally raises the concern that a non-advertiser-supported service could be denied a workable per-program license. The concern is that ASCAP could either: (1) refuse to grant a per-program license because such a service's revenues are not traceable to a particular program; or (2) insist on attributing revenue in a manner that benefits ASCAP but has no basis in the way those revenues are derived. (TMLC Comments at 28 n.12.) The AFJ2 should not be interpreted in this fashion.

ASCAP has *no* discretion to deny a per-program license just because revenues are not allocable by program. Indeed, ASCAP is "ordered and directed to offer" this license (AFJ2, § VII(A)), and it may not exercise its pricing "option" by refusing to license at all.

Moreover, ASCAP may not elect a patently unworkable or illogical percentage-of-revenue structure because, notwithstanding the "option" granted in Section VII(D), the fee structure must be "reasonable" under Section IX, and the license must constitute a "genuine choice" and maintain its inherent "benefits" under Section VIII(A). Finally, ASCAP's decision to elect the percentage-of-revenue option should not be used to justify higher administrative charges if a different payment structure would have been less costly to administer.

iv. Per-Programming Period License

A potential problem with the per-program license is that it may be difficult to exclude or directly license all ASCAP music in longer programs. Thus, it may be difficult to use the per-program license as

[11] See Section 5. b. iv. Extending Per-Segment Licenses to Additional Music Users for discussion of extending the percentage of revenue option to per-segment licenses.

an alternative to the blanket license in some circumstances. As set forth above, under the AFJ2, the Court may determine the parameters of a "program" for those broadcasters who do not exhibit discrete programs. (AFJ2, § II(M).) This is analogous to the "per-programming-period" license desired by music users. Some commenters suggest that: (1) a full "per-programming-period" license be required that would include more music users (TMLC Comments at 19); and/or (2) the period should be defined (preferably at fifteen minutes or less) so that the determination of the appropriate base period is not left in the hands of ASCAP. (NRBMLC Comments at 7.) There was no per-programming period requirement in the AFJ. The AFJ2 establishes a per-programming period analog for certain music users, and the "per-segment" license incorporates the concept for many other music users. The United States proposed expanding the entitlement for more flexible per-programming period and per-segment licenses, but ASCAP refused.[12] It is not clear what the precise duration of the "portion" or "segment" should be for each music user or for each user group. Accordingly, the AFJ2 is silent as to the appropriate duration. In the United States' view, the guiding principle is that the portion or segment (if the segment is time-based) should be made sufficiently short for the benefits of the license to be maximized. *See* AFJ2, §VIII(A.)

v. Proportional Approach to Per-Program License

Finally, the NRBMLC argues that the premise of the per-program license (*i.e.*, that even one

[12] The final resolution of the issues pertaining to the scope of the Court's authority under *Metromedia* will have an effect on this issue. (See below.) Under the United States' interpretation of the AFJ and the AFJ2, while some music users are *entitled* to a variant of the per-programming period license under Sections II(M) and VII(A), others may seek similar license payment structures under Section IX, and the Court may grant that payment structure if ASCAP fails to establish that ASCAP's proposal is reasonable.

needle-drop of ASCAP music in a program triggers a payment for the entire program) should be rejected so that the music user is not deterred from clearing some music in a program because the task of clearing all music in the program is too daunting. (NRBMLC Comments at 8.) The United States agrees that some sort of proportional formula by which a music user would gain a partial benefit for direct licensing *some but not all* of the music in a program (or segment) is desirable so long as administrative burdens do not increase dramatically. ASCAP, however, resists this approach. The AFJ2 therefore does not automatically require a proportional approach.[13]

b. The New Per-Segment License.

The AFJ2 adds a new conditional license entitlement -- the "per-segment license" -- for background/foreground music users and on-line music users. (AFJ2, § VII(B).) Commenters were generally in favor of this new licensing alternative. However, music users felt that: (1) the lack of a clear definition of "segment" could be problematic (NRBMLC Comments at 8-9); (2) the provision places undue evidentiary burdens on music users, unlike the per-program license entitlement (NRBMLC Comments at 8-9, TMLC Comments at 16-19); (3) without an express ambient/incidental use component, the license could prove unworkable; and (4) the per-segment license should be available to additional user groups including broadcasters. (TMLC Comments at 18-19, NRBMLC Comments at 9-10, MRI Comments at 3.)

i. Definition

[13] The final resolution of the Court's authority under *Metromedia*, will also have an effect on this issue. Under the United States' interpretation of the AFJ and the AFJ2, a music user may seek a proportional fee structure within a per-program, or per-segment license under Section IX.

The lack of a clear definition of "segment" is intentional. On-line music users are so diverse, and the pace of change in the Internet is so rapid, that any entitlement to a specific type of segment (*e.g.*, "per-hit") runs the risk that the requirement is, or will soon be, unworkable for many music users.[14] It is true that ASCAP may have the initial advantage in that it can propose an unacceptable segment definition and force the music user to go to the rate court. However, the music user, after making its threshold showing, *see infra*, is entitled to its preferred per-segment license *regardless of whether ASCAP's proposed per-segment structure is itself reasonable*.[15] Thus, unlike the more rigid per-program license requirement, the per-segment requirement provides the *music user* with the flexibility to fashion the form of license it desires, and the music user's choice is given significant weight in the rate court.

ii. Evidentiary Burden

Before the Court may order a per-segment license, it must find that: (1) performances in the chosen "segment" can be monitored with reasonable accuracy; (2) performances can be attributed to commonly recognized segments in the music user's industry; and (3) the administration of the license will not impose an unreasonable burden on ASCAP. (AFJ2, § VII(A)(2).) The music user has the burden on elements (1) and (2), and ASCAP has the burden on element (3).

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[14] For example, creating a rigid per-*program* requirement for radio made perfect sense in 1941, when radio stations played programs. It made much less sense once many radio stations went to music-intensive formats.

[15] For example, an on-line music user requests a "per-hit" version of a per-segment license. ASCAP responds with a quote for a "per-page-view" version. If the rate court determines that usage can be reasonably monitored on a per-hit basis and that "hits" are a commonly recognized segment, the music user is entitled to that license unless *ASCAP* can demonstrate some unreasonable burden. The court need not even consider the merits of ASCAP's proposed license.

Given the flexible nature of the per-segment license, *some* burden on the music user to show feasibility and general applicability seems appropriate. The United States does not, however, regard this burden as particularly onerous. The requirement that the music user select a "segment" in which music use can be reasonably monitored is fair; the ability to track ASCAP performances in each segment is, after all, the crux of the license.[16] Moreover, "segments commonly recognized within the music user's industry" should be a minor constraint, only preventing a music user or user group from requesting licenses that cannot easily be offered to similarly situated music users. This requirement does *not* limit the license to particular industry characteristics.[17]

iii. Ambient/Incidental Use Component

Under the proposed AFJ2, Section VII(A) did not specify that a per-segment licensee was entitled to so-called ambient and incidental use coverage. The Parties have therefore added an explicit requirement that ASCAP offer, if reasonably necessary, an ambient/incidental component to a per-segment license. (Rev. AFJ2, § VII(A)(2).)

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[16] Absolute accuracy in monitoring is not required. The United States explicitly rejected the phrase "determine accurately" because it might lead to an interpretation that insisted on an unrealistic degree of precision.

[17] For example, an on-line music user could seek a license based on industry-specific characteristics, such as a "per-page-view," "per-download," "per-stream," "per-site," etc., even though the norm over time had become "per-hit." Similarly, it could seek a per-program, per-period, or even per-performance license -- since these bases for payment would be "commonly recognized" within many industries, including on-line industries, as an appropriate basis for payment. And of course, it may be the case that a music user is an industry unto itself, in which case this factor would have no relevance whatsoever.

iv. Extending Per-Segment Licenses to Additional Music Users

The Television Music Licensing Committee, the NRBMLC, and MRI all criticize the failure of the AFJ2 to extend the "per-segment" license to broadcasters. (TMLC Comments at 18-19, NRBMLC Comments at 9-10, MRI Comments at 3.) The Television Music Licensing Committee, on behalf of the Internet services who joined in its comments, further objected to denying the per-segment licenses to "on-line transmitters," (defined in the originally proposed AFJ2 as on-line music users that transmit material similar to material transmitted by broadcasters) on the grounds that there was no logical reason to exclude such firms and that the distinction itself was unworkable in practice. (TMLC Comments at 18-19, 23-24.) .[18]

In response to the commenters' concerns, the Revised AFJ2 includes the following changes:

- The on-line transmitter definition has been removed from the decree. Note, however, that any music user that satisfies the definition of a broadcaster, including any on-line music user that would have qualified as an on-line transmitter, is entitled to a per-program license and, if it does not exhibit discrete programs, is entitled to have a "portion" of the transmission be defined as a program by agreement or by the Court. (Rev. AFJ2 §§ II(M), VII(A)(1).)

- In the definition of "broadcaster," the word "programming" has been replaced by "content" to ensure no confusion with the word "program." The last sentence of the prior definition of broadcaster ("neither a background foreground music service nor an on-line music user is a broadcaster unless it is an on-line transmitter") has been deleted.

[18] The United States agrees with MRI that it makes little sense that a background/foreground music service that also provides its music services directly to homes should get a per-segment license for the commercial portion of its operations and a "per-program" license for the residential portion. (MRI Comments at 3.) One possible solution to this problem lies in the fact that, as a broadcaster that does not transmit "programs," the residential service is entitled to a flexible "program" definition. (AFJ2, § II(M).) It may be that the service could fashion a "program" and segment license that is functionally a per-segment license proposal for all of the music user's operations.

- All on-line music users are conditionally entitled, in addition to any entitlement to a per-program license, to a per-segment license. If a portion of an on-line music user's transmissions include programs, it shall be rebuttably presumed that programs are the relevant segment. For that portion, the music user would not have to meet any of the other proof elements of Section VII(A)(2). (Rev. AFJ2 § VII(A)(2).)

ASCAP agreed to these changes in return for an option to set the per-segment license fee on a percentage-of-segment revenue basis for on-line music users. The United States reluctantly agreed to this option in order to secure ASCAP's agreement to make the per-segment option available to more on-line music users, (Rev. AFJ2, §VII(D)).

These modifications represent an improvement over the originally proposed AFJ2 language in the following respects.

- ASCAP may not defeat access to the per-segment license by arguing that an on-line music user is a "transmitter" and thus entitled only to a per-program license. Whether or not an on-line music user is entitled to a per-program license, it is conditionally entitled to a per-segment license under the Revised AFJ2.

- All on-line music users -- even those that exhibit nothing but programs and in all other respects resemble traditional broadcasters -- will be able to argue that a segment other than a program should be used as the basis for payment.

- The potentially confusing distinction between "transmitters" and "on-line music user" has been eliminated.

- Clearer guidance is provided as to how to handle hybrid Internet services. Under the Revised AFJ2, ASCAP is obligated to offer a per-segment license to cover whatever content is *not* a program. Additionally, the music user may rebut the presumption that a program is the appropriate segment.

These changes may make the per-segment option more accessible to on-line music users.

ASCAP refused to extend the per-segment option to broadcasters who are not on-line music users. The United States does not favor the presumption that programs are necessarily the proper

segments. These aspects of the Revised AFJ2 are justifiable, on balance, only in the context of securing other incremental improvements in the decree, *i.e.*, extending the availability of the per-segment license to on-line users.

c. Requests For Alternative Licensing Arrangements

Commenters urged the United States to adopt additional required alternative licensing arrangements (HBO Comments at 9-10) or to insert clarification in the decree that the Court has the discretion to order such alternatives if they are reasonable. (NRBMLC Comments at 12-13.) The United States and ASCAP could not reach agreement on these issues. However, as set forth below, the United States does not interpret the AFJ2 to restrict in any way the pre-existing authority of the Court to order alternative licensing arrangements under the AFJ.

In the view of the United States, the plain language of Sections VI and IX of the AFJ and AFJ2[19] authorizes the Court, at the very least,[20] to determine the appropriate payment scheme under its "reasonable fee" authority, *see Metromedia*, 341 F.2d at 1008, which may include any discount

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[19] The AFJ and the AFJ2 use identical relevant language to describe the compulsory licensing obligation of ASCAP and the Court's power to resolve licensing disputes. Section VI of both decrees states: "ASCAP is hereby ordered and directed to grant to any music user making a written request therefor a non-exclusive license to perform all of the works in the ASCAP repertory." Section IX(A) of both decrees states: "ASCAP shall, upon receipt of a written request for a license for the right of public performance of any, some or all of the works in the ASCAP repertory, advise the music user in writing of the fee that it deems reasonable for the license requested . . . . If the parties are unable to reach agreement . . . the music user [or, now, ASCAP] may apply to the Court for a determination of a reasonable fee . . . ."

[20] The Second Circuit eschewed a "literal reading" of Section IX in *United States v. ASCAP (Application of Shenandoah)*, 331 F.2d 117, 122 (2d Cir. 1964) holding that the AFJ should not be read to allow the Court to require licenses of less than the full ASCAP repertory. The United States disagrees with the *Shenandoah* decision. The United States and ASCAP could not reach agreement to clarify the scope of the Court's discretion to order alternative license arrangements.

system the Court feels is reasonable. The United States is aware that ASCAP has filed a brief taking the opposite view in the pending appeal of *United States v. BMI (Application of AEI Music Network, Inc.*), 2000-2 Trade Cas. (CCH) ¶ 72,979 (S.D.N.Y. 2000), 2000 WL 280034 (S.D.N.Y.).

The Television Music License Committee asks whether the new definition of "blanket license" could be read to bolster ASCAP's argument that only a particular fee structure (one where payments do not vary with the way music is used or licensed) could be ordered by the Court. (TMLC Comments at 31.) In fact, the *omission* of this defined term in Section VI (which is the compulsory license section) confirms that the compulsory license does *not* prescribe a particular fee structure.[21] Particularly now that the Revised AFJ2 has been modified to include a large number of defined terms, the United States expects that the phrase "license to perform all works in the ASCAP repertory" will be given its natural meaning rather than a meaning imputed from a defined term used elsewhere in the decree.[22]

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[21] *See, e.g.*, *Harris v. Sullivan*, 968 F.2d 263, 265 (2d Cir. 1992) ("'unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.'") (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)); *Arcoren v. United States*, 929 F.2d 1235, (8th Cir. 1991); *Derry Finance N.V. v. Christiana Companies, Inc.*, 797 F.2d 1210, 1213 (3d Cir. 1986).

[22] *See Duchow v. New York State Teamsters Conference Pension and Retirement Fund*, 691 F.2d 74 (2d Cir. 1982), *cert. denied*, 461 U.S. 918 (1983). Section IV(H) of the AFJ2 further acknowledges "the discretion of the Court in a proceeding conducted under Section IX . . . to determine a license fee on any appropriate basis" in the context of changing the payment structure.

6. Section VIII. Genuine Choice

The AFJ required ASCAP, "in fixing its fees," to use its "best efforts to avoid any discrimination among the respective fees fixed for various types of licenses which would deprive the licensees . . . of a genuine choice from among such various types of licenses." The AFJ2 sought, in Section VIII, to expand and clarify ASCAP's genuine choice responsibilities.

a. Section VIII(A)

Section VIII(A) of the AFJ2 differs from the genuine-choice provision in the AFJ in two important respects. First, it prohibits discrimination among *licenses* generally, not just among the *fees* charged for the license. Second, the subsection prevents ASCAP from discrimination that would "depriv[e] . . . music users . . . of the benefits of " the license. These two additions require ASCAP to offer per-program or per-segment licenses on terms that are not significantly less attractive than the terms for the blanket license. Moreover, Section VIII(A) limits ASCAP's ability to use its administration of the licenses to defeat direct licensing.

Section VIII(A) may address a number of commenters' fears that ASCAP will continue to restrict the availability of per-program, and now per-segment, licenses through obstructionist practices. In particular, commenters worry about efforts by ASCAP to manipulate the licensing system by making unfounded assumptions about music usage, imposing burdensome reporting requirements, and front-loading per-program or per-segment license payments. (MRI Comments at 4-5, NRBMLC Comments at 6.) Section VIII(A) would provide a basis, in conjunction with Section VIII(D) and the

Court's inherent authority under Section IX, to challenge these and similar practices. See *United States v. ASCAP (Application of Buffalo Broadcasting Co.)* 1993-1 Trade Cas. (CCH) ¶ 70,153 at 69,700-02, 69,705 (S.D.N.Y. 1993), 1993 WL 60687, at *73-80, 85 (S.D.N.Y.), (asserting the Court's broad jurisdiction over the mechanics of the per-program license).

b. Section VIII(B)

Section VIII(B) of the proposed AFJ2 provides:

> For a representative music user, the total license fee for a per-program or per-segment license shall, at the time the license fee is established, approximate the fee for a blanket license; for the purpose of making that approximation, it shall be assumed for the purposes of this Section VIII(B) that all of the music user's programs or segments that contain performances of ASCAP music are subject to an ASCAP fee.

Section VIII(B) adopts, with important caveats, the analytical approach to genuine choice taken in the *Buffalo Rate Proceeding*.[23] According to the *Buffalo Rate Proceeding* decision, a group of music

[23] The AFJ2 departs from the *Buffalo Rate Proceeding* in two important respects. First, the AFJ2 requires that the ratio between the per-program and blanket license fees shall be based on music use at the time the fees are established. (AFJ2, § VIII(B).) The AFJ2 thus rejects the suggestion that the per-program-to-blanket fee ratio should reflect prospective actions of the licensee (*e.g.*, efforts to directly license some works after the fees are established). *Cf. Buffalo Rate Proceeding*, 1993 WL 60687, at *66-67. Second, as discussed in the text, the AFJ2 requires that any ambient/incidental use charges be included into the calculation of the per-program-to-blanket ratio. *Cf. id.* at 73-77. The fact that the AFJ2 adopts the general mode of analysis of the *Buffalo Rate Proceeding* should not be taken as an endorsement of the actual result in any rate court proceeding, including *Buffalo* or *United States v. ASCAP (Application of Salem Media*) 981 F. Supp. 199 (S.D.N.Y. 1997).

users have a genuine choice between the per-program and blanket licenses if the typical member of the group would pay about the same license fee if it selected either a blanket or per-program license.

Under *Buffalo Rate Proceeding*, the Court calculated the per-program-to-blanket price ratio and then permitted ASCAP to impose additional charges for: (1) ambient and incidental use licenses; and (2) administrative fees. Our investigation revealed that the combination of these two add-on charges made the per-program effectively uneconomical for many broadcasters. Accordingly, the AFJ2 requires that any ambient and incidental use charges be included in the "total fee" for the per-program and per-segment licenses. Some commenters urge the United States to include administrative charges as well. ASCAP rejected proposals in this regard.[24]

In general, comments on Section VIII(B) focused on two areas: (1) the ratio between per-program and blanket license fees; (2) and the definition of a representative music user.

i. The Ratio Between the Per-Program Fee and the Blanket License Fee

Section VIII(B) provides the basis for setting the price relationship, or "ratio", between the per-program (or per-segment) license and the blanket license. This ratio numerically describes the relationship between the maximum possible price of the per-program license (the price that a music user would pay if every program contained ASCAP music not otherwise licensed) to the total price of the blanket license. For example, if a representative music user has at least some ASCAP music in 100% of its programs, its per-program and blanket license fees would, under Section VIII(B), be set at a 1:1

[24] Because add-on administrative charges may have a substantial impact on the number of music users who can take the per-program or per-segment license, the United States urges the Court to carefully scrutinize the reasonableness of ASCAP's administrative charges.

ratio, *i.e.*, the maximum total price of the per-program license and the total price of the blanket license would be equal. If a representative music user has ASCAP music in 50% of its programs, its fees would be set at a 2:1 ratio so that the total fee actually paid under the per-program license (with only 50% of programs triggering any payment) would be equal to the total price of the blanket license.

The NRBMLC comments that, under Section VIII(B), "[p]erversely, the less intensive music use of the Applicant group . . . , the greater the likelihood that the AFJ2 standard, like the current Decree standard, would support substantial disparities between the per-program and blanket rates." (NRBMLC Comments at 5.) However, a user has a "genuine choice" between the blanket and per-program licenses if the *fee* for either license will be approximately the same. Under the AFJ2, music intensive users will get (relatively) high blanket license fees and a low per-program-to-blanket price ratio, whereas non-intensive music users will obtain (relatively) low blanket fees and a high ratio of the per-program to blanket license fee.[25] The key point is that total fees under both the per-program and the blanket license will be equal.

The Television Music License Committee raises a similar issue: whether a music user, having eliminated ASCAP music during the course of a prior license, should have its ratio "re-set" when the next fee is established. (TMLC Comments at 29-30.) First, the ratio will not be re-set if the music user "clears" music in programs through direct licensing. However, the United States believes that re-setting the ratio at the time the next fee is established may be appropriate when the music user has cleared programs by substituting music from another PRO. In those circumstances, a music user that has

[25] High per-program fees on particular programs may create incentives to direct-license music on those programs.

substituted music from another PRO would have compelling grounds under Section IX of the AFJ2 for simultaneously seeking a lower blanket license fee when the ratio is reset. Given the goal of maintaining genuine choice, the Court should view with skepticism any ASCAP argument that a substantial reduction of uncleared ASCAP music is grounds for a higher ratio but not for a lower blanket fee when the blanket license is renegotiated.[26]

ii. Representative Music User

The NRBMLC seeks clarification that the "fee equivalence comparison [under Section VIII(B)] must be based on the representative user in the entire group of users to which the applicable blanket license is offered." (NRBMLC Comments at 5.) The United States believes that no clarifying language is required because "representative music user" is already defined as "typical of a group of similarly situated music users." (AFJ2, § II(P).)[27] In the ordinary case, therefore: (1) a group of similarly situated music users is defined; (2) a representative music user is determined for the entire similarly situated group; (3) a blanket license fee is determined; and (4) the per-program or per-segment license fee is determined. The relevant similarly situated group is not necessarily the group applying for the fee determination (the "Applicant Group"), but all music users in the industry that are

[26] Any argument by ASCAP that blanket fees should remain the same when a new license is negotiated despite a decline in use of ASCAP music may be inconsistent with the principles of genuine choice outlined in the Revised AFJ2.

[27] HBO states that the definition of "similarly situated" in Section II(R) is ambiguous and unhelpful. This provision should be read as consistent with the Court's holding in *Salem Media* that identifies factors to be used in determining whether entities are similarly situated. However, other factors indicating that users are similarly situated are not excluded and may be raised with the Court.

similarly situated. [28]

The NRBMLC asks that the United States clarify the word "typical" as used in the definition of "representative music user." (NRBMLC Comments at 12.) There are likely to be distinct groups of similarly situated music users within the various broadcast and on-line industries whose use of music is similar enough that an actual or hypothetical representative user can be identified *for that distinct group*. While ASCAP and the United States reached general agreement that approximately half of the music users in a particular similarly situated group should, on Day One of the license agreement, either be price-indifferent or have a price incentive to take the per-program or per-segment license, the parties could not agree on more precise wording than appears in the AFJ2. In almost all cases, the most important factor will be "frequency" of use, meaning the percentage of programs or segments containing ASCAP music.

The NRBMLC asks that AFJ2 be revised to explicitly define a "'typical' music user in the relevant similarly situated group as a user in the industry making use of music at the average level of users in the relevant similarly situated group. For further clarity, the NRBMLC recommends that the

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[28] Thus, there may be many groups of similarly situated music users within one industry, such as is apparently the case in the cable television industry. One would expect each group to obtain a specific blanket license fee and a specific ratio based in large part on each group's typical percentage of programs or segments containing ASCAP music. Similarly, the fact that one negotiating group within an industry reached an agreement with ASCAP purporting to set a rate for the industry should not preclude a second group from establishing a different blanket license fee and a different ratio even if there is some overlap in the membership of the two groups. Additionally, the Television Music License Committee asks whether the AFJ2 can be interpreted so that one music user may qualify as its own similarly situated group or as its own representative music user. The United States believes that such an interpretation is possible but does not foresee a proliferation of single user groups. (TMLC Comments at 30.)

'median' be specified as the appropriate average." (NRBMLC Comments at 12.) The United States and ASCAP could not agree as to whether the proper measure of "typical" should *always* be the statistical median. The United States suggests that the statistical median is the appropriate measure of "typical" music use unless the use of the statistical mean would make the per-program or per-segment license a realistic alternative for more music users.

7. Section IX. Determination of Reasonable Fees

Commenters generally applauded the proposed modifications to Section IX of the AFJ, which were intended to streamline rate court proceedings. However, there were a number of suggestions made for improving the functioning of the rate court and certain requests for clarification of the relevant provisions.

As a general matter, the Television Music License Committee proposes creating a presumption that any prior *adjudicated* rate shall be the basis for a fee "such that ASCAP may not receive a fee increase in the ensuing license term beyond an inflationary or cost-of-living increase unless it can demonstrate, through clear and unequivocal evidence, special or extraordinary circumstances . . . ." (TMLC Comments at 36.)[29] The United States does not believe that such a presumption should be codified in the decree. Having created a rate court to address these problems, the United States is unwilling to add restrictions on the Court's abilities to set and structure fees. Nothing prevents the parties from raising *stare decisis* arguments before the Court nor prevents the Court from establishing a presumption on its own.

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[29] The Committee does not appear to be proposing that a similar presumption be applied against music users seeking a reduction in fees.

a. Section IX(C)

Section IX(C) provides an evidentiary "safe harbor" for licenses negotiated in the first five years after ASCAP begins licensing in an industry. Such licenses cannot be used as evidence of the reasonableness of a fee. The Television Music License Committee asks whether an established media entity (*e.g.*, a television network) entering a new media (*e.g.*, Internet programming), is entitled to the protection of Section IX(C). (TMLC Comments at 37-38.) The United States believes it is.

The Television Music License Committee also requests that, for Internet licensees, the five year period established in Section (IX)(C) should start to run from the date of entry of the AFJ2 rather than the date of ASCAP's first Internet license. The United States is unwilling to create an exemption that would create disparities in the protections to which users are entitled. There is no principled reason why some existing licensees should receive a longer "safe harbor" period than future licensees.[30] The United States recognizes the danger that the five year period may not preclude ASCAP from making arguments based on very early Internet licenses. However, the purposes underlying this provision should inform the Court's view on any application in which a party seeks to use licenses to emerging industries as evidence.

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[30] Moreover, the Internet is a medium and not necessarily an industry for purposes of Section IX(C). By way of illustration, television is a medium but not an industry for licensing purposes. Fees for network, local and public television are all negotiated and licensed in very different ways and the resulting license fees have little evidentiary value, if any, across these groups. While the United States is not prepared at this time to identify industry groups within the Internet, the United States assumes that many distinct industries exist or will develop within the medium. If so, the five-year safe harbor of Section IX(C) would run from the date of the first license within each industry group and not from the first license granted to any firm using the Internet medium.

b. Section IX(D)

HBO asks that the United States delete from Section IX(D) the phrase "[s]hould ASCAP not establish that the fee it requests is reasonable, then" on the grounds that this could be misinterpreted to prevent the Court from determining the most appropriate fee. (HBO Comments at 10.) This new provision conforms the ASCAP procedures to the language of the 1994 modifications to the BMI Decree, which created a rate court system for BMI. No substantive change is intended. Under both the AFJ and AFJ2, ASCAP bears the burden of proof and persuasion as to the reasonableness of its fee proposal. The rate court historically has properly weighed all of the evidence, including competing proposals, in determining whether ASCAP has met its burden and in setting a final reasonable fee.

c. Section IX(E)

Section IX(E) of the proposed AFJ2 requires that:

> [t]he parties shall have the matter ready for trial by the Court within one year of the filing of the application unless all parties request that the Court delay the trial for an additional period not to exceed one year. No other delay shall be granted unless good cause is shown for extending the schedule.

The Television Music License Committee and the NRBMLC express the concern that requiring the consent of all parties in multi-party litigation could be problematic. (TMLC Comments at 33-34, NRBMLC Comments at 14.) Accordingly, the Revised AFJ2 allows the automatic extension of the one year deadline upon the agreement of ASCAP and one other party. (Rev. AFJ2, §IX(E.)) As

before, other extensions may be granted if good cause is shown.[31]

The Television Music License Committee and the NRBMLC express concern that, with the adoption of a deadline for trial, ASCAP may have the incentive to delay or ultimately deny meaningful discovery to the applicants. NRBMLC suggests decree language to the effect that a party's unjustified failure to produce discovery materials constitutes *per se* "good cause" for an extension. It also asked that ASCAP be required to provide music use data to fee applicants. The United States believes these are matters better left to the sound discretion of the Court.

d. Section IX(F)

Interim fee determinations have become a substantial factor in the astonishingly long proceedings that characterize rate court litigation. Section IX(F) of the proposed AFJ2 therefore imposes a 90-day limit on ordinary interim fee proceedings and imposes a rebuttable presumption that prior license agreements, either with the applicant or with similarly situated music users, establish the appropriate interim fee. The Television Music License Committee suggests a number of revisions to Section IX(F).[32] The overriding policy concern at the interim fee stage is the need for a quick resolution, and the United States believes that the suggested revisions would virtually eliminate the beneficial effects of the provision. Ultimately, the Court has plenary control of its docket and has the

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[31] The United States does not believe it is necessary to insert clarifying language that any party may move for a "good cause" extension, since the inherent authority of a Court to grant such an extension is well settled.

[32] The Television Music License Committee suggests that the 90-day time limit should be extendable on a showing of good cause, that limited discovery should be expressly allowed, that the interim fee presumption should be limited to prior adjudicated rate court outcomes and that the protections of Section IX(C) should be extended to the establishment of interim license fees. (TMLC Comments at 34-36.)

power to extend any schedule or order such discovery that it deems necessary.

e. Fair Debt Collection Practices Act and Arbitration

IAAM comments that the rate court is not a useful means of resolving disputes between ASCAP and smaller, more local music users. They request that the United States: (1) require ASCAP to adhere to the requirements of the Federal Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq*.; and (2) add a requirement for local arbitration of rate disputes.[33] (IAAM Comments at 2.)

The Fair Debt Collection Practices Act regulates the rights of, and limitations on, debt collectors in their communications with consumers. It generally prohibits harassing and abusive behavior by debt collectors. Small businesses consistently complain about harassment and abusive licensing practices by ASCAP and other PROs. Partially in response to these complaints, Congress enacted The Fairness in Music Licensing Act of 1998, Pub. L. No. 105-398, 112 Stat. 2830 (1998) to address issues about the licensing practices of both ASCAP and BMI. The Act provides licensing exemptions and an alternative to the rate court for fee disputes for businesses under a certain size. In light of the recent Congressional review of these complaints, the United States is reluctant to incorporate into the Revised AFJ2 specific requirements relating to the Federal Fair Debt Collection Practices Act, 15 U.S.C. § 1692.

The possibility of local arbitration of rate disputes for smaller licensees was a subject of negotiation between the parties. ASCAP opposed local arbitration. Again, given recent Congressional

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[33] IAAM also requested that the decree include a provision requiring ASCAP to sell licenses online. The United States believes that it would be inappropriate to require in a decree that ASCAP sell licenses online. The United States has, however, brought this comment to ASCAP's attention. It should be noted that license forms can be downloaded from ASCAP's website.

attention to this area, the United States sees no further need to pursue arbitration as a remedy.

8. Section X. Public Lists

Commenters generally approved of provisions updating the public list requirements as required in Section X of the AFJ2. However, many of them suggested additional requirements. Specifically, the NRBMLC recommends including a requirement that works not listed on the publicly accessible repertory list will not trigger per-program or per-segment license fees. (NRBMLC Comments at 10-11.) The Television Music License Committee requests that ASCAP be required to include several additional categories of information on its public lists.[34] (TMLC Comments at 32.)

This Section was the subject of long, complex negotiations between ASCAP and the United States. The current provision is a compromise which, by its nature, does not fully satisfy either party's concerns. The United States believes Section X of the AFJ2 is an improvement over the current repertory list provision and thus is in the public interest. Additionally, the United States notes that ASCAP, although not required by the AFJ or the AFJ2, currently publishes an electronic list that includes the title code, publishers, and, in some instances, performers, as requested by the Television Music License Committee and other commenters.

The NRBMLC asks that the AFJ2 allow licensees to enforce the requirements of Section VIII(C) (up-to-date tracking system) and Section X (public list.) (NRBMLC Comments at 15.) As a

[34] The Committee requested that the following categories of information be required: Title codes or other internal identifying information used by ASCAP, cue sheets, identification of so-called split works, date of copyright registration, writer(s) and percentage of copyright held, publisher(s) and percentage of copyright held, performer, industries in which the song was performed in the last five years and whether ASCAP has distributed revenues for the song in the last five years.

matter of policy, it is quite rare that beneficiaries of an antitrust consent decree are granted standing to enforce the decree. Under the AFJ2, licensees have limited standing to apply to the rate court to resolve licensing disputes. Otherwise, licensees do not have independent standing to enforce decree provisions. *See Metromedia*, 341 F.2d at 1008.

9. Section XI. Membership

Section XI of the AFJ2 contains provisions governing ASCAP's relationship with its members. The AFJ2 substantially modifies the membership provisions of the AFJ. In particular, the AFJ2 vacates the 1960 Order governing distribution of revenues, voting rights, surveys of performances and dispute resolution mechanisms. These membership provisions have proven costly and have been ineffective in preventing ASCAP from exercising market power over members. The AFJ2 instead focuses on ensuring that ASCAP cannot impede its members' ability to move to competing performing rights organizations. Thus, the AFJ2 is designed to protect members through the availability of competitive alternatives rather than burdensome and ineffective regulation. Several songwriters submitted comments on the new proposed membership provisions.

Many of the commenting songwriters and publishers are concerned that, once the 1960 Order is vacated, members will not have access to an impartial forum for resolution of disputes over distribution of licensing fees. (Karmen Group Comments at 7-8, PMA Comments at 11, Bramson Comments at 2.) Similarly, several commenters allege that ASCAP is controlled by an "entrenched minority" that has maintained its position on the Board of Directors through the system of weighted voting established in the 1960 Order. (Karmen Group Comments at 7-9, PMA Comments at 5-6, Warren Comments at 5-6.) Accordingly, they recommend that the AFJ2 require reform of ASCAP

procedures for elections to the Board of Directors. Commenters also question the extent of meaningful competition between performing rights organizations. (PMA Comments at 5.) As a general matter, the commenting songwriters recommend increased scrutiny of ASCAP activities rather than less.

a. Membership Dispute Resolution

The Karmen Group asks that, in light of the vacation of the 1960 Order, ASCAP members be permitted unrestricted access to the courts for dispute resolution. (Karmen Group Comments at 7-8.) The group further requests that, for internal grievances, members should be able to choose from a pool of arbitration organizations and that arbitration panelists be required to disclose any potential conflict of interest issues. The PMA also requests access to impartial forums. (PMA Comments at 11.) The Bramson Group requests that the United States mandate, within the AFJ2, a system of review for ASCAP distribution decisions. (Bramson Comments at 2.)

Section V(D) of the 1960 Order provided for the establishment of a special Board of Review which has jurisdiction over complaints by members concerning distributions to a member and over rules and regulations affecting distribution. The members of the Review Board are elected in the same manner as members of the Board of Directors. Members have a right of direct appeal from the Review Board to an impartial panel of the American Arbitration Association. Vacating the 1960 Order eliminates the decree requirement that ASCAP maintain a Board of Review. The United States believes that competition will be more effective in protecting members' rights than regulation.

It should be noted, however, that ASCAP is still required to maintain a Board of Review by its Articles of Association. Article XIV of the Articles of Association provides substantially the same mechanism as Section V (D) for handling disputes. Neither ASCAP's Board of Directors nor

ASCAP's management has the ability to unilaterally dismantle the Board of Review. Such an action would require a vote by the membership to amend the Articles of Association. Amendment requires the approval of majorities of both publisher and songwriter members voting and by an overall two-thirds majority of voting members. At least one third of the total membership must vote on any such proposed amendment. Although the requirement to maintain the Board of Review has been removed from the AFJ2, the United States believes that the protections offered by the Board of Review will continue to be available as long as the membership wishes to retain it.

b. Weighted voting

The PMA, the Karmen Group, and Richard Warren comment unfavorably about the weighted voting system established in the 1960 Order.[35] (PMA Comments at 7-9, Karmen Group Comments at 5-6, Warren Comments at 5-6.) They claim that weighted voting has led to control of the Board of Directors by an entrenched minority of so-called "popular songwriters" at the expense of lesser-known commercial and background music writers. ASCAP's Board of Directors consists of twelve writer members and twelve publisher members. Writers are elected by writers and publishers are elected by publishers. Members' voting rights are tied to the number of performance credits they receive. Members with higher numbers of credits may receive more than one vote. No member may exercise more than one hundred votes no matter how many credits the member has received. A member who has not received any performance credits in the latest survey is not entitled to vote. The current system was created as a reform of an earlier, more heavily weighted system and is prescribed in Article IV of

[35] Related to the weighting issue, the Karmen group also complains that ASCAP has never conducted objective surveys as required under the 1960 Order.

the Articles of Association.

The commenters advocate a rule abolishing ASCAP's weighted credit system of allocating revenue in favor of distribution based on performance duration. While this seems in principle a good way of eliminating chronic complaints that ASCAP's distribution unfairly favors various classes of writers, there is nothing wrong in theory with some amount of weighting, and as discussed below, the United States no longer believes that government involvement in ASCAP's distribution practices will be as effective as emerging competitive constraints (such as BMI, SESAC and direct licensing) in protecting members' rights.

c. Competition Will Be More Effective than Regulation in Securing Member Rights

As previously discussed, at the time of the 1960 Order, songwriters had limited alternatives to ASCAP. BMI was an organization with a much smaller pool of licensing fees to distribute. At that time, given ASCAP's near monopsony position with respect to members, it made sense for the AFJ to provide some regulation of ASCAP's internal governance. With the increased viability of BMI and SESAC as competitive alternatives for dissatisfied members, the United States believes that competition will provide a better check on unfair practices than regulation, so long as songwriters are able to move freely among PROs.

Based on its four-year investigation, the United States believes that competition to attract and keep composers and songwriters presently exists among ASCAP, BMI, and SESAC. The more songwriters an organization has, the greater its prestige, the greater the license fees it can command, and the greater the number of users that it can require to take licenses.

The PMA questions whether competition for songwriters truly exists between ASCAP, BMI and SESAC and, therefore, whether members will receive any protections flowing from competition. (PMA Comments at 5.) They have submitted a study by economist Dr. Barry Massarsky in support of their position. (See PMA Comments, Exhibit 1 in Appendix F) The United States is not persuaded by Dr. Massarsky's opinions on the nature and degree of competition for writers between PROs.

Dr. Massarsky asserts that copyright holders of production music are currently underpaid by ASCAP and BMI relative to the true value of their contribution, and that this situation will worsen if the AFJ2 is adopted. Dr. Massarsky offers little factual support for his conclusions or his concerns. For example, he cites the fact that production music accounts for a large share of the volume of music used on broadcast television, but he does not provide any evidence that the value of this music is greater than the compensation its owners are now receiving from ASCAP or BMI.

Dr. Massarsky argues that "[t]elevision stations . . . are willing to pay only for *demonstrated* consumption of music, not access to copyrights that are 'prestigious' but unrelated to their music usage patterns." (Massarsky Rep. at 9, emphasis added.) But Dr. Massarsky also believes that ASCAP and BMI, while making efforts to gain "marketing advantages" by overcompensating famous songwriters, are undercompensating copyright holders of production music who -- he asserts -- provide the bulk of music licensed on television. These views are internally inconsistent and undermine the strength of the argument.

Dr. Massarsky also believes that ASCAP and BMI have been slow in developing the technology for tracking music use and that this tardiness is both a symptom of market power and a cause of unfair distribution of ASCAP and BMI revenue. (Massarsky Rep. at 3, 10-11; See also

PMA Comments at 20-22.) Dr. Massarsky points out, however, that SESAC has been an early adopter of such new technology. (Massarsky Rep. at 11.) Dr. Massarsky does not explain why the presence of such a rival to ASCAP and BMI does not provide copyright holders of production music an alternative to the distribution schemes of ASCAP and BMI, nor why the competition from SESAC would not give ASCAP and BMI an incentive to improve their distribution technology, if such improvements are needed.[36] The United States believes that SESAC's use of technology has pushed ASCAP to improve its music tracking systems. Moreover, the new provisions allowing easier exit for ASCAP members will provide additional incentives for ASCAP to improve its technology for music tracking and royalty distribution so as to retain members.

d. Section Specific Comments

i. Section XI(B)(1). Special Awards

Many commenters, including songwriters, SESAC and various music users, object to allowing ASCAP to make "special awards" under Section XI(B)(1). SESAC and songwriters think that this provision will allow money to be unfairly diverted to writers favored by the Board. SESAC contends that ASCAP will make special awards to writers that SESAC is soliciting to become SESAC members in order to retain members who might be inclined to leave ASCAP. (SESAC Comments at 2.) Similarly, music users object that these funds will be channeled to those songwriters most likely to direct license their work as a means for ASCAP to discourage or defeat those efforts. (TMLC Comments at 39.)

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[36] Note that Section VIII(C) requires ASCAP to maintain an up-to-date system for tracking music use in per-program and per-segment licenses. Members should also benefit from this requirement.

SESAC's complaint that ASCAP will be able to "lock up the writers who are currently in the highest demand" (SESAC Comments at 2) is in fact a request that ASCAP not be permitted to bid to keep those high-demand writers. Matching or even beating competitive offers is not "locking up" anything, nor is it "[e]recting . . . barriers;" it is *competition*. The AFJ2 is intended to foster such competition between rival PROs.

ASCAP's primary competitor for members is BMI. There are no restrictions in BMI's decree on its ability to provide awards for members. The United States believes that this existing handicap on ASCAP's ability to compete with BMI should be removed in order to foster more vigorous competition between ASCAP and BMI to attract and retain members. ASCAP's ability to divert large sums of money in the guise of special awards will continue to be restrained by its need to keep its overall membership satisfied that money is being fairly distributed.[37] If some groups of songwriters or individual songwriters are being unfairly compensated at the expense of other groups or individuals, the AFJ2 is intended to provide those unhappy members with the option to leave ASCAP for a competing PRO.

ii. Section XI(B)(3)(c). Licenses-in-Effect

The "licenses-in-effect" provision of the AFJ, Section IV(G), required songwriters to continue to license works with ASCAP so long as licenses that were negotiated while the songwriter was an

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[37] ASCAP also may not use special awards to defeat direct licensing. The "special awards" exception to the general rule that distribution must be based "primarily on the basis of performances of its members works" is limited to works that "have a unique prestige value, or which make a significant contribution to the ASCAP repertory." (AFJ2, §XI(B).) This exception is not broad enough to justify special awards to likely direct-licensors.

ASCAP member were still in effect - even if the writer had resigned from ASCAP. Originally intended to protect music users, the provision had the unforeseen consequence of preventing members who wanted to leave ASCAP from being able to take their catalogs with them when they joined a competing PRO. With five-year broadcast licenses, it was often years before dissatisfied writers could truly sever their connection to ASCAP. Section XI(B)(3)(c) of the AFJ2 provides that the licenses-in-effect provision of the AFJ decree shall be vacated except as to existing licenses negotiated under the AFJ.

SESAC and the PMA favor getting rid of the licenses-in-effect provision. (PMA Comments at 10, SESAC Comments at 4.) However, SESAC objects to the grandfather provision protecting music users who have negotiated contracts under the AFJ as an unnecessary restraint on a writer's ability to move. SESAC argues that ASCAP does not issue licenses nor price its licenses based on having specific compositions in its repertory but rather on the breadth of the repertory. SESAC also requests clarification that interim licenses will not be considered licenses-in-effect for the purposes of the grandfather clause. (SESAC Comments at 4.) The United States' position is that interim licenses should not be considered licenses-in-effect for purposes of the grandfather clause; however, it would be unfair to licensees to remove the grandfather provision for existing licenses that were negotiated and agreed to while this protective provision was in effect.

The Television Music License Committee expresses concern about freeing members from the licenses-in-effect provision. (TMLC Comments at 39.) The Committee is concerned that, should ASCAP lose substantial numbers of members, there could be a significant decline in the number of compositions in ASCAP's repertory during the term of a user's license. Other PROs who gain the right to license these members' works will seek higher fees from users to reflect their increased

repertories. At the same time, ASCAP is unlikely to reduce its fees under the pre-existing license. Therefore, the Television Music License Committee requests a provision to the effect that, if there is a five percent or greater reduction in the amount of ASCAP music played by a user as a result of ASCAP member resignations, then the music user's fee should be subject to reduction. (TMLC Comments at 40-41.)

Neither BMI or SESAC has a comparable licenses-in-effect provision, but lack of this protection has not been cited by music users as a significant obstacle to licensing with either of those PROs. The United States suggests that reductions in license fees to reflect decline in membership over the term of a license should be a matter for individual license negotiations.

iii. Section XI(C)

This section provides that the provisions of Section XI(B) shall only become effective upon entry of an order containing substantially identical provisions in *United States v. Broadcast Music, Inc.* No. 64 Civ. 3787 (S.D.N.Y.) SESAC believes the new provisions governing ASCAP's relationships with members are reasonable and should be imposed without regard to whether BMI has adopted these provisions. (SESAC Comments at 5.) Further, SESAC maintains that, even accepting the argument that ASCAP would be competitively handicapped unless BMI has similar membership regulations, ASCAP does not warrant protection from its smaller competitors. Therefore, SESAC argues, these provisions ought to be effective immediately with respect to any member seeking to switch from ASCAP to SESAC or another smaller PRO. SESAC also fails to see why the term of membership agreements in the ASCAP decree should be extended to five years in the absence of a BMI agreement. (SESAC Comments at 5.) SESAC requests that the maximum membership length

remain at one year.

The United States sought in its negotiations with ASCAP to ease restrictions on members' ability to exit regardless of BMI's willingness to adopt similar exit provisions. However, ASCAP refused to agree to such provisions unless BMI agreed to similar provisions. Given a choice between contingent relief or no relief, the United States chose to accept ASCAP's condition.

IV. CONCLUSION

The Memorandum of the United States in Support of the Joint Motion to Enter the Second Amended Final Judgment and this Response to Public Comments demonstrate that the Revised AFJ2 serves the public interest and should be entered by the Court.