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

UNITED STATES OF AMERICA, Plaintiff, - v - AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS Defendant.	Civil Action No. 41-1395 (WCC)
UNITED STATES OF AMERICA, Plaintiff, - v - AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS Defendant.	Civil Action No. 41-1395 (WCC) (relates to former Civil Action No. 42-245)

MEMORANDUM OF THE UNITED STATES IN SUPPORT OF THE JOINT MOTION TO ENTER SECOND AMENDED FINAL JUDGMENT

The United States files this Memorandum in Support of the Joint Motion to Enter Second Amended Final Judgment ("Memorandum") pursuant to the Stipulation and Order filed with this court on September 5, 2000. The United States and the American Society of Composers, Authors and Publishers ("ASCAP") have jointly moved this Court to vacate two existing final judgments, and to enter a Second Amended Final Judgment in the above-captioned proceedings. The Stipulation and Order provides: (1) ASCAP will publish a notice of this motion and an invitation

for comments thereon in the Wall Street Journal, Broadcasting & Cable, and Billboard Magazine; (2) the United States will publish a notice in the Federal Register; and (3) the United States and ASCAP consent to the entry of the Second Amended Final Judgment at any time more than 90 days after the last publication of such notice, provided the United States has not withdrawn its consent.

This Memorandum describes the effect of the Second Amended Final Judgment on two consent decrees entered against the defendant, ASCAP, and explains why the United States has tentatively agreed that entry of the Second Amended Final Judgment is in the public interest.

I. NATURE AND PURPOSE OF THE PROCEEDINGS

This Court retains jurisdiction to modify and enforce two Final Judgments that were entered against ASCAP in two separate antitrust suits filed by the United States. The Complaint in Civil Action 41-1395, filed February 26, 1941, alleged that ASCAP and certain of its members had agreed to restrict competition among themselves in the licensing of music performance rights, and had restrained competition by allowing certain members of ASCAP to control the Society and to favor themselves in the apportionment of its revenues. Accordingly, the Final Judgment entered in that case, which has since been amended several times and is sometimes referred to as the Amended Final Judgment or

"AFJ,"[1] imposes a variety of restrictions and obligations on ASCAP related to the collective licensing of its members' works, and its relationship with its members.

The Complaint in Civil Action 42-245, filed June 23, 1947,[2] alleged that ASCAP and various foreign performance rights organizations ("PROs") had entered into exclusive agreements with one another with the purpose and effect of restraining competition among PROs in the United States. The Final Judgment entered in that case, sometimes referred to as the "Foreign Decree," prohibits ASCAP from, *inter alia*, entering into exclusive reciprocal licensing agreements with foreign PROs.

The United States and the defendant ASCAP have agreed, subject to the United States' review of any public comments and the Court's public interest determination, to modify both of these Final Judgments by replacing them with a single Second Amended Final Judgment ("AFJ2").

The proposed modifications would make a number of significant substantive changes to the current AFJ.[3] First, the

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[1] The Final Judgment first entered in Civil Action No. 13-95 was substantially modified on March 14, 1950, and again on January 7, 1960, with entry of the "1960 Order."

[2] Recently, the Court modified its filing system, apparently inadvertently assigning the same docket number, 41-1395, to both actions, although the two cases have until now been separate matters. The parties have now formally moved for consolidation of these two cases.

[3] The Foreign Decree has only two remaining substantive provisions, both of which are incorporated into the AFJ2. Thus,

AFJ2 expands and clarifies ASCAP's obligation to offer certain types of music users, including background music providers and Internet companies, genuine alternatives to a blanket license, and strengthens certain provisions intended to facilitate direct licensing by ASCAP's members. Second, it streamlines the "rate court" provisions of the AFJ in order to facilitate faster and less costly resolution of rate disputes between ASCAP and various music users. Third, the AFJ2 modifies or eliminates many of the detailed restrictions governing ASCAP's relations with its members.

The United States has tentatively concluded that entry of the proposed AFJ2 would further the public interest by encouraging competition among PROs to serve both copyright holders and music users, encouraging competition between ASCAP and its members to license performances of the members' works, eliminating ineffective and costly restrictions on ASCAP's activities, and attempting to reduce the costs to the Court, ASCAP, and users of resolving fee disputes.

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the proposed modification would not make any substantive changes to the Foreign Decree.

II. Historical Background

A. Performance Rights Organizations

The copyright laws vest in a composer of a musical composition the exclusive right to exploit the work. This power encompasses the "performance right," which is broadly defined under the copyright laws to give the composer the exclusive right to perform or broadcast a musical work. Thus, a television network, radio station, theme park, background music service, live music hall, sports arena, restaurant, or any other person or entity desiring to publicly perform a given musical composition must first obtain a license from the copyright holder or face the prospect of substantial civil and criminal penalties.

The non-dramatic performance rights to almost all compositions performed in the United States are typically administered by a "performance rights organization," or "PRO."[4] A PRO typically pools the performance rights of all of its composer and publisher members[5] in some or all of their

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[4] By long tradition, performances in musical works are divided into two categories. “Dramatic,” or “grand,” performances are those designed to advance the plot of a theatrical production such as an opera or musical. Rights to dramatic performances are usually licensed directly to producers or theaters by the rights holder, and PROs are not involved in the transactions. “Non-dramatic,” or “small,” performances include other types of public performance, such as music performed over the radio, in nightclubs, and most music heard on television.

[5] Composers and songwriters typically assign their copyright in a musical work to a publisher in exchange for

compositions, issues users a license to perform all of those compositions, monitors music users to detect unauthorized performances and pursue infringement cases, conducts surveys to estimate the frequency with which various compositions are performed, and distributes payments to its members. In the United States, non-dramatic performance rights are the only copyrights in musical compositions that are typically licensed collectively, rather than on an individual basis.[6]

The defendant ASCAP has in excess of eight million compositions in its repertory. These compositions comprise between 45 and 55 percent of the music performed in most venues. There are two other significant PROs in the United States: Broadcast Music, Inc. ("BMI"),[7] which has between four and five

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specified royalties -- often they agree that each is entitled to fifty percent of any royalties received for performances of the work. The publisher then oversees the administrative and business tasks inherent in the commercial exploitation of the work.

[6] For example, synchronization rights (the rights to synchronize music with the sound track of a prerecorded audio-video work) are typically licensed either through direct negotiations between the rights holder and the user, or through an independent entity, such as the Harry Fox Agency, which licenses works on behalf of composers and publishers on an individual basis.

[7] The United States also filed an antitrust case against BMI, which was resolved by entry of a consent decree similar in many respects to the AFJ. *United States v. Broadcast Music, Inc.*, 1966 Tr. Cas.(CCH) ¶71,941 (S.D.N.Y. 1966), *modified by* 1996-1 Tr. Cas.(CCH) ¶71,378 (S.D.N.Y. 1994).

million compositions in its repertory, also comprising between 45 and 55 percent of the music performed in most venues, and SESAC, Inc. ("SESAC"), which has in excess of 200,000 compositions in its repertory, comprising less than five percent of the music performed in most venues. Annually, the three PROs collect nearly a billion dollars in licensing fees on behalf of their members. In 1999, ASCAP collected over $560,000,000.

ASCAP and other PROs in the United States operate in much the same way. A composer chooses to join a particular PRO, and informs his or her publisher. Both the composer and publisher become members or affiliates of the PRO.[8] The composer and music publisher grant to the PRO the right to license performances of all songs written or to-be-written by the composer during the course of his or her membership or affiliation.

The PRO, in turn, pools the performance rights of all its members or affiliates and generally offers to music users what is known as a "blanket license." A blanket license entitles the music user to use any and all of the compositions in the PRO's repertory at a fee set by the PRO. Typically, the fee for a blanket license is set as a percentage of the user's revenue, although it may also be a fixed fee or a fee based on such proxies as square footage or seating capacity of the music user.

[8] In the ordinary case, of course, the publisher will already be a member of, or affiliated with, the PRO. Many major publishing companies form three publishing subsidiaries, each joining a different PRO.

In any event, the fee for a blanket license does not vary with the amount, nature, or frequency with which music in the PRO's repertory is actually performed. The PRO collects the fees due under these licenses, subtracts its overhead, and distributes the remainder to composers and publishers.[9] The PRO requires a member or affiliate that directly licenses a composition to notify the PRO so that it can reduce the amount that it distributes to that member or affiliate.

There are a number of reasons why non-dramatic performance rights have historically been licensed collectively. Collective licensing can benefit both rights holders and music users. PROs provide valuable administrative and copyright enforcement services that individual rights holders may, as a practical matter, be unable to duplicate. They also provide a single source where music users can obtain rights to substantial repertories, providing them with a simple and efficient means of licensing most music performed in the United States. In addition, the PROs' practice of offering blanket licenses can benefit users by providing broad indemnification against infringement; immediate access to works as soon as they are written; and flexibility in making last-minute changes in performances. Given existing technologies and industry

[9]PROs in the United States enter into reciprocal agreements with foreign PROs whereby each collects licensing revenue on behalf of the other for performances in their respective countries.

practices, for at least some types of performances, collective licensing of performance rights under blanket licenses remains the only practical and efficient way for rights holders to protect their copyrights and for some music users to obtain licenses for the performance of copyrighted works.[10] For other types of performances, however, it should be possible for users to negotiate individual licenses with rights holders, directly or through an agent, and to benefit from competition among rights holders with respect to licensing fees.

B. The History of the Consent Decrees

On February 5, 1941, the United States filed an information in the United States District Court for the Eastern District of Wisconsin against ASCAP and its board, alleging criminal violations of the Sherman Act. Thereafter, on February 26, 1941, the plaintiff filed a civil suit against ASCAP in the United States District Court for the Southern District of New York. *United States v. ASCAP*, 1941 Tr. Cas. (CCH) ¶ 56,104 (S.D.N.Y.

[10] Technologies that allow rights holders and music users to easily and inexpensively monitor and track music usage are evolving rapidly. Eventually, as it becomes less and less costly to identify and report performances of compositions and to obtain licenses for individual works or collections of works, these technologies may erode many of the justifications for collective licensing of performance rights by PROs. The Department is continuing to investigate the extent to which the growth of these technologies warrants additional changes to the antitrust decrees against ASCAP and BMI, including the possibility that the PROs should be prohibited from collectively licensing certain types of users or performances.

1941). The civil complaint was in substance identical to the criminal information except with respect to the relief requested. Both cases alleged that ASCAP and its members had entered into a combination to license performance rights exclusively through ASCAP and thereby eliminate competition among members, to require music users to take a blanket license covering all of the compositions in ASCAP's repertory, to refuse to grant licenses to music users that had protested the fees demanded by ASCAP, and to allow large publisher members to control the Society and the distribution of its revenues to the detriment of ASCAP's other members.

By March 1941, the parties had reached a settlement regarding both the civil and criminal actions. On March 4, 1941, this Court entered a consent decree resolving the civil case.[11] The most significant provisions of the initial 1941 consent decree prohibited ASCAP from obtaining exclusive rights to license its members' compositions; prohibited ASCAP from discriminating in price or terms among similarly situated licensees; required ASCAP to offer licenses other than a blanket license, including, in particular, licenses for radio broadcasters for which the fee varied depending on how much ASCAP music was used (a "per-program" license); required that radio

[11] *See United States v. ASCAP*, 1941 Tr. Cas. (CCH) ¶56,104 (S.D.N.Y. 1941). Nine days later, ASCAP, its president and its entire board of directors were convicted in the criminal case on pleas of *nolo contendere*.

network licenses also cover the local radio stations' broadcast of the networks' programs (a "through-to-the-audience" license); and imposed on ASCAP various obligations relating to its relationship with its members.

On June 23, 1947, the plaintiff brought a second civil action against ASCAP, Civil Action No. 42-245, (the "foreign cartel case"). The complaint alleged that, by joining an international organization of PROs and entering into exclusive arrangements with those PROs, ASCAP had denied competing PROs -- in particular, the fledgling BMI -- access to business relationships that were essential for those competitors to compete with ASCAP in the United States.

While the foreign cartel case was pending, a private civil action brought against ASCAP by movie theaters, *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1948), was decided. In *Alden-Rochelle*, the Court found that ASCAP had prohibited its members from directly licensing performance rights to motion picture producers in competition with ASCAP itself.[12] The Court also found that, because copyright holders could directly negotiate with movie producers to license performance rights at the same time that they negotiated with those producers to license synchronization rights, there was no efficiency justification for allowing ASCAP to collectively license movie

[12] *Id*. at 893.

producers or theaters. Accordingly, the Court issued an injunction prohibiting ASCAP from licensing theaters *at all*.[13]

As a direct result of *Alden-Rochelle*, ASCAP and the government entered into discussions to modify the 1941 ASCAP decree. The parties consented to substantial amendments to the decree, including addition of provisions enjoining ASCAP from licensing movie theaters for performances of compositions in motion pictures.[14] In addition, among other changes, the Amended Final Judgment (1) extended per-program requirements to television broadcasters (an industry that for all practical purposes did not exist at the time of the original decree) and generally strengthened the provisions of the decree related to per-program licenses; (2) strengthened "through-to-the audience" provisions in the decrees; (3) added provisions to facilitate competition among PROs to attract members; and (4) created a process in the district court for resolving license fee disputes between ASCAP and music users, generally referred to as the "rate court" provisions.

At the same time that it entered the AFJ, the Court also

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[13] *Id*. at 896; *see also Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 900, 902-03 (S.D.N.Y. 1948) (decision on remedy).

[14] *See United States v. ASCAP*, 1950-51 Tr. Cas. (CCH) ¶62,595 (S.D.N.Y. 1950). In light of those amendments, on the same day that the amended decree was entered, the presiding judge in the *Alden-Rochelle* case vacated the *Alden-Rochelle* order and dismissed that action.

entered a separate consent decree (the "Foreign Decree") settling the foreign cartel case.[15] That decree prohibited ASCAP from entering into agreements with members giving ASCAP exclusive rights to license foreign performances of their works, and from entering into exclusive reciprocal licensing with foreign PROs.

In 1960, in response to complaints by various ASCAP members, the AFJ was further amended by consent with the addition of what has come to be known as the “1960 Order.” The 1960 Order deals exclusively with ASCAP’s relationship with members. It imposes requirements with respect to the way ASCAP surveys music use for purposes of allocating license fees among its members; imposes various obligations on ASCAP with respect to the way it allocates revenue to members, including requirements that certain changes to the formulas and rules it uses be filed with and/or approved by the Department of Justice and/or the Court; requires ASCAP to create and maintain a Review Board to resolve disputes with members; and requires ASCAP to make full payment to a resigning member for any compositions that remain in the ASCAP repertory.[16]

Most recently, on November 12, 1997, the Court entered a consent order substantially amending the Foreign Decree. The amendments removed certain restrictions on ASCAP’s ability to

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[15] *United States v. ASCAP*, 1950-51 Tr. Cas. (CCH) ¶62,594 (S.D.N.Y. 1950).

[16] *United States v. ASCAP*, 1960 Tr. Cas. (CCH) ¶69,612 (S.D.N.Y. 1960).

deal with foreign PROs, but retained prohibitions on ASCAP entering into exclusive agreements with foreign PROs.

C. The Competitive Concerns Raised By ASCAP's Licensing and Membership Practices

As discussed above, the specific anticompetitive conduct by ASCAP, and the specific provisions contained in the Final Judgments to remedy that conduct, have varied over the years. However, the competitive concerns that ASCAP's conduct has raised, and the basic approach of the consent decree to remedying those concerns, have been consistent.

First, at the time the AFJ was entered, ASCAP had, and it continues to have, market power over most music users. This is especially true of music users that are unable to anticipate, track, or otherwise control their music use, such as establishments with live music performances. Because ASCAP's repertory includes such a large number of compositions, many users have no choice but to obtain a license from ASCAP covering performances of those compositions. They cannot substitute performances of works licensed by other PROs. Moreover, obtaining licenses for all, or even the most commonly performed, compositions in ASCAP's repertory directly from rights holders often would be prohibitively costly.

With respect to users that have some control over the music that they perform, competition from other PROs and from ASCAP's members could place some constraints on ASCAP's ability to

exercise market power over those users. However, ASCAP historically refused to offer users anything other than a blanket license. Blanket licenses reduce music users' ability and incentive to take advantage of competition among rights holders; under a blanket license, users realize no cost savings from using another PRO's music or from direct licensing unless they succeed in substituting away from or directly licensing *all* ASCAP music.

The AFJ includes numerous provisions that were intended to promote competition between ASCAP and other PROs and between ASCAP and its members. First, the AFJ prohibits ASCAP from obtaining exclusive rights to any compositions, so that members remain free to directly license performances of any of their works. Second, the AFJ requires ASCAP to offer to broadcasters a per-program license in addition to the blanket license, to ensure that a music user has an incentive to try to license some of its music directly even if it must license other music from the PRO.[17] Third, the AFJ requires ASCAP to maintain a list of its repertory, to enable a music user to identify works not part of the pool.

In addition, the AFJ contains a number of provisions intended to provide music users with some protection from ASCAP's

[17] Under the AFJ, the fee for a per-program license varies depending on the number of programs that contain ASCAP-licensed music. Thus, a broadcaster with a per-program license pays a lower fee if it substitutes non-ASCAP music, or directly licenses ASCAP music from the rights holder, for any of its programs.

market power. It requires ASCAP to offer licenses to all similarly situated users on non-discriminatory terms, and allows users who cannot reach agreement with ASCAP to petition the Court to set a reasonable fee for their licenses.

Furthermore, at the time the 1941 complaint was filed, ASCAP was the only significant organization offering copyright administration services for performance rights to rights holders in the United States. Compositions in its repertory accounted for roughly 98 percent of the performances of music, and it remained overwhelmingly dominant for many years. As a result, ASCAP had market power with respect to authors and composers. If an author or composer believed that she was being unfairly compensated by ASCAP (because, for example, ASCAP's distribution of revenues favored large composers that governed ASCAP), her only alternative to licensing through ASCAP was to attempt to independently license, monitor and enforce her performance rights, an inherently impractical exercise.

Moreover, ASCAP had engaged in a variety of practices that made it more difficult for new PROs to enter. Among other things, ASCAP had required its members to enter into long-term exclusive agreements with ASCAP, and discriminated against members that left ASCAP in distributing its revenues. As a result, new PROs such as BMI found it difficult to attract enough rights holders and compositions to compete effectively with ASCAP.

The existing AFJ contains a number of provisions intended both to facilitate entry of new competitors to ASCAP in administering music performance rights, and to provide some constraint on ASCAP's ability to discriminate against certain groups of members. It requires ASCAP to make public its rules and formulas concerning the distribution of revenue to its members, and to submit changes to certain of those rules to the Department or the Court for approval or disapproval. These provisions were intended to reveal whether ASCAP was unfairly favoring certain members, and to allow members to make informed choices about whether to remain with ASCAP or join another PRO. In addition, the decree prohibits ASCAP from entering into long-term agreements with members, and from imposing other obstacles to members seeking to leave ASCAP to join another PRO.

III. EXPLANATION OF THE DIFFERENCES BETWEEN THE AFJ AND THE AFJ2

The United States has been conducting a comprehensive review of the markets for music performance rights, and of the efficacy of the AFJ in promoting competition among rights holders and limiting ASCAP's ability to exercise market power. Although that review continues, the United States has tentatively concluded that the AFJ should be modified in a number of significant respects.

As the markets for licensing performance rights to music

users and administering performance rights for rights holders have evolved over time, many provisions of the AFJ have become outdated, and much of its language now seems antiquated and convoluted. Some provisions of the AFJ have been overtaken by changes in technology, while other provisions have proven to be ambiguous or ineffective in practice. Still others have become less important in preventing ASCAP from exercising market power, and provide few, if any, competitive benefits while imposing significant costs on ASCAP, the Department, and the Court. Below, we summarize each the provisions of the AFJ2, describe the differences between the AFJ2 and the existing AFJ,[18] and explain why the United States believes these changes to be in the public interest.

A. Section III - Applicability

Section III of the AFJ2, which describes the applicability of the decree, reflects that certain provisions of the judgment now apply to the licensing of performances outside the United States, whereas the AFJ applied only to domestic performances. The parties have agreed to consolidate the original ASCAP case and the foreign cartel case into a single proceeding, with a single final judgment. Accordingly, the Foreign Decree will be

[18] Rather than simply amend provisions of the existing AFJ, which is written in a complex and outdated manner, the United States and ASCAP agreed to completely rewrite and reorganize the judgment using simpler language and a more logical structure. In this memorandum, we describe only the substantive modifications to the existing AFJ.

vacated and its remaining provisions incorporated into the AFJ2. This consolidation would make no substantive changes to the existing Foreign Decree.

B. Section IV -- Prohibited Conduct

Section IV(A) of the AFJ2 prohibits ASCAP from administering its members' copyrights other than performance rights.[19] This provision replaces an analogous provision in the existing AFJ, except that the AFJ2 applies to foreign as well as domestic performances.

Section IV(B) of the AFJ2 prohibits ASCAP from limiting its members' rights to license their compositions directly or through an agent other than another PRO. The AFJ also prohibits ASCAP from interfering with direct licensing by its members, but is ambiguous as to whether ASCAP can prohibit (or refuse to recognize) licenses granted by its members through "music libraries." Such libraries, which consist of collections of works, often of a particular genre, may be able to directly license users more easily and efficiently than individual rights holders, and thus may encourage competition between ASCAP and its members. Section IV(B) clarifies that ASCAP cannot impede members from licensing through agents such as music libraries. Like Section IV(A), Section IV(B) applies to both foreign and

[19] As did the AFJ, the AFJ2 exempts from this prohibition the collection and distribution of royalties for home recording devices and media.

domestic performances.

Section IV(C) prohibits ASCAP from treating similarly situated users differently with respect to license fees, terms or conditions. Section IV(D) prohibits ASCAP from granting licenses to users in excess of five years. Section IV(E) prohibits ASCAP from licensing movie theaters. Section IV(F) prohibits ASCAP from restricting performances of any work by its licensees in order to extract additional consideration from the licensee. Section IV(G) prohibits ASCAP from pursuing copyright infringement proceedings against motion picture theaters on behalf of its members. None of these provisions makes any substantive changes to the existing AFJ.

Section IV(H) enjoins ASCAP from charging broadcasters a percentage-of-total-revenue fee for a license unless requested to do so. The existing AFJ contained a similar prohibition, but the AFJ2 includes language intended to clarify that the Court may impose such a percentage-of-revenue fee structure in any rate court proceeding.

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

Section V of the AFJ2 requires ASCAP to offer a "through-to-the audience" license to any broadcaster, on-line transmitter (defined as an Internet firm that broadcasts or streams material similar to that of traditional radio and television broadcasters), background music provider, and any operator of any new technology that transmits programs in an analogous manner. Through-to-the-audience licenses allow more licensing decisions to be made by the entities that control the musical content of programs or other broadcasts, and thus are in the best position to benefit from potential competition among PROs or individual rights holders.[20]

The existing AFJ requires ASCAP to offer through-to-the-audience licenses for radio and "telecasting" networks, as well as background music services such as Muzak. It does not clearly

[20] For example, a major television network has at least some ability to control what music is used in its programs, and may be able to negotiate lower fees for performance rights to the music when it still has the option of using other music. Unless the network obtains performance rights for its local television affiliates at the same time, those stations would have to obtain performance rights for their own broadcasts of network programs at a point in time where the choice of what music to use already has been made, and the station has no ability to play one rights holder off against another. This phenomenon, and its effect on licensing fees, is described more fully in *United States v. ASCAP (Application of Buffalo Broadcasting Co.*), 1993 Tr. Cas. (CCH) ¶ 70,173, 69,660-66 (S.D.N.Y 1993) (hereinafter "*Buffalo Broadcasting Rate Proceeding*"). It is also part of the rationale for the *Alden-Rochelle* decision and the AFJ's prohibition on ASCAP licensing movie theaters.

define “telecasting” networks, however, and as a result, ASCAP and the cable industry engaged in protracted litigation over ASCAP’s obligation to provide the industry with such licenses. Although the Court ultimately concluded that ASCAP was obligated to offer such licenses,[21] the through-to-the-audience provisions in the existing AFJ do not expressly apply to other developing industries, such as the Internet, where through-to-the-audience licenses could have significant competitive benefits. To ensure that such licenses are made available to users in these industries, and to avoid further litigation over the scope of the decree, the AFJ2 clarifies that the through-to-the-audience requirement applies to on-line transmitters, as well as to any other as yet unanticipated industry that transmits programs in a manner similar to television and radio broadcasters.

D. Section VI -- Licensing

Section VI of the AFJ2 requires ASCAP to offer a full-repertory license to any user upon request. The existing AFJ contains a similar provision, but in response to concerns raised by ASCAP, the AFJ2 includes new language designed to ensure that ASCAP need not license a music user “that is in material breach or default of any license agreement by failing to pay to ASCAP any license fee indisputably owed to ASCAP.” Section VI also

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[21] *United States v. ASCAP (Application of Turner Broadcasting System, Inc.)*, 782 F. Supp. 778 (S.D.N.Y. 1991), *aff’d*, 956 F.2d 21 (2d Cir. 1992).

prohibits ASCAP from granting licenses for one or more specified works in its repertory except under certain narrow circumstances. The AFJ contained the same limitation.

E. Section VII -- Per-Program and Per-Segment Licenses

Section VII of the AFJ2 requires ASCAP to offer certain types of users per-program or per-segment licenses -- licenses for which the fee varies depending upon how many of the users' "programs" or "segments" contain performances of ASCAP music not otherwise licensed. This Section replaces a provision in the existing AFJ that requires ASCAP to offer radio and television broadcasters a per-program license (Section VII(B) of the AFJ). The AFJ2 expands ASCAP's obligation to offer this type of license to include on-line transmitters, on-line users, and background/foreground music services, and expressly delineates the way fees for such licenses must be structured.

ASCAP originally refused to offer music users anything other than a blanket license -- a license whose fee does not vary with the amount, nature, or frequency with which ASCAP music is actually performed. The AFJ's requirement that ASCAP offer broadcasters a per-program license was intended to ensure that broadcasters, who generally have some ability to anticipate and control the music that they perform, could reduce the fees they would otherwise owe to ASCAP by substituting music from another PRO's repertory or obtaining licenses directly from rights

holders. It was hoped that by ensuring that users could take advantage of alternative sources of performance rights, the AFJ would stimulate competition in music licensing.

The per-program provisions of the AFJ have proved to be less effective than intended in facilitating direct licensing and promoting competition among PROs. As this Court has recognized, notwithstanding the clear requirement in the AFJ that ASCAP offer broadcasters a genuine choice between a per-program and a blanket license, ASCAP has consistently resisted offering broadcasters a realistic opportunity to take a per-program license.[22] Among other things, ASCAP has sought rates for the per-program license that have been substantially higher than the rates it has offered for the blanket license,[23] and it has sought to impose substantial administrative and incidental music use fees and unjustifiable and burdensome reporting requirements on users taking a per-program license.[24] In addition, ASCAP has refused to offer a per-program or per-program-like license to users other

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[22] *See, e.g., United States v. ASCAP (Application of Capital Cities/ABC Inc., et al)*, 157 F.R.D. 173, 200 (1994) ("ASCAP's per-program proposal is designed to further its aim of keeping the per-program license technically available but practically illusory . . ."); *Buffalo Broadcasting Rate Proceeding*, *supra*, 1993 Tr. Cas. ¶70,153 at 69,663 (Dollinger, M.J.)("ASCAP was loath to offer a real per-program alternative, . . . ").

[23] *Id.* at 69,664.

[24] *See, e.g., United States v. ASCAP (Application of Salem Media)*, 981 F. Supp. 199, 218, 221 (S.D.N.Y. 1997).

than those explicitly named in the decree, although, over time, such licenses would be practical for more and more types of users.

Broadcasters have had some success in obtaining per-program licenses by invoking this Court's authority to set reasonable fees under the rate court provisions of the AFJ but, as we discuss below, these proceedings are costly and are not realistically available to all users. Accordingly, the AFJ2 expands and clarifies ASCAP's obligations to offer licenses for which fees vary depending on the users' performances of ASCAP-licensed music.

Section VII(A)(1) requires ASCAP to offer a per-program license, upon request, to broadcasters and on-line transmitters. As defined in Sections II(K) and (N) of the AFJ2, a per-program license is a license the fee for which varies depending on the number of programs or other agreed-upon portions of the users' transmissions that contain music licensed by ASCAP.[25] The term "broadcaster" is defined in Section II(F) of the AFJ2 to include any person that transmits or retransmits programming similar to

[25] To the extent a broadcaster or on-line transmitter does not transmit discrete programs, ASCAP and the user may agree to assess fees under the license depending upon whether ASCAP music is used in some other portion of the transmission, such as each 15-minute interval (analogous to what is called a per-program-period license in the final judgment entered against BMI). If ASCAP and the user cannot agree upon what portion of the users' transmission should be used in assessing fees owed under the license, the Court may determine the appropriate portion in a rate court proceeding.

that broadcast today by television and radio stations. Section II(I) of the AFJ2 defines an on-line transmitter to include any person that transmits such programming via the Internet or similar transmission facility, including any yet-to-be-developed technologies for such transmission.

Section VII(A)(2) requires ASCAP to offer a per-segment license, upon request, to any background/foreground music service or on-line music user provided: (1) the user's performances of ASCAP music can be tracked with reasonable accuracy, (2) performances can be attributed to "segments" commonly recognized within the users' industry for which a fee can be assessed; and (3) administration of the license will not place unreasonable burdens on ASCAP.

The per-segment license requirement is intended to ensure that users that could obtain competitive benefits from a license that varies with music use, but that do not transmit "programs" to which the music they perform can be attributed, are not forced to take a blanket license. The AFJ2 does not define the word "segment" in order to allow ASCAP, users, and the Court as much flexibility as possible to determine an appropriate portion of the user's business to consider in assessing fees owed to ASCAP under the per-segment license.[26] This flexibility is especially

[26] Among the possible per-segment licenses that might be found to be appropriate are, for Internet users, a license for which the fee is based on the number of web pages, or "hits" on web pages, containing ASCAP music, and for background/foreground

important in the Internet context, where business models as well as methods of using music are still evolving.

Section VII(B) allows ASCAP to charge a reasonable administrative fee for per-program and per-segment licenses. Because a per-program or per-segment license allows ASCAP to assess fees that vary depending on the user's performances of music, the per-program and per-segment licenses require both users and ASCAP to track music use in a way that the blanket license does not. This necessarily leads to somewhat higher administrative costs for both ASCAP and the user relative to the blanket license, and ASCAP should be able to recover any reasonable added costs associated with offering such licenses.[27] The requirement that administrative fees be reasonable is intended to ensure that ASCAP cannot penalize music users that opt to take advantage of a per-program or per-segment license. Pursuant to Section IX of the AFJ2, the Court may determine whether ASCAP's administrative costs or fees are reasonable.

Section VII(C) clarifies that nothing in the AFJ2 prevents ASCAP and any user from agreeing on another form of license not specifically required to be offered by the decree.

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services such as Muzak, a license under which a fee is assessed based on the number of channels that perform ASCAP music.

[27] To the extent ASCAP exercises its market power by charging supra-competitive fees for blanket licenses, many users may be willing to pay the added administrative costs of the per-program or per-segment license in order to obtain the benefits of more competitively priced music rights from other sources.

Section VII(D) provides that ASCAP has the option of assessing a fee for a per-program license in terms of either a flat fee for, or a percentage of revenue attributable to, each program containing ASCAP-licensed music. The AFJ contains a substantively identical provision.

F. Section VIII -- Genuine Choice

Section VIII of the AFJ requires ASCAP to offer music users a genuine choice between any licenses made available to those users. As explained in Part III of this Memorandum, notwithstanding the AFJ's requirement that ASCAP offer broadcasters a genuine economic choice between the per-program and blanket license, ASCAP has resisted offering a reasonable per-program license, forcing users desiring such a license to engage in protracted litigation, and often successfully dissuading users from attempting to take advantage of competitive alternatives to the blanket license. Accordingly, Section VIII of the AFJ2 modifies the existing AFJ by setting forth in detail what is meant by a genuine choice.

Section VIII(A) of the AFJ2 requires ASCAP to use its best efforts to avoid discrimination among the various types of licenses offered to any group of users. This provision applies not only to users entitled to choose between a blanket and a per-program license, but also to any other forms of license that ASCAP may make available to users.

Section VIII(B) requires that, for a representative music user, the total license fee for a per-program or per-segment license approximate the fee for a blanket license at the time the license fees are established. Section II(U) of the AFJ2 defines "total license fee" as the sum of all fees paid by the music user in connection with the license, including any fees for ambient or incidental music use, but excluding any administrative fees authorized by Section VII(B).

In the past, ASCAP has sought to impose per-program license fees that, for the vast majority of users in an industry, would be economical relative to the blanket license only if those users were able to eliminate ASCAP-licensed music (by substituting music from another PRO's repertory, obtaining direct licenses for music in ASCAP's repertory, or eliminating music altogether) from a substantial portion of their programs. In this way, ASCAP attempted to artificially discourage users from taking a per-program license. Disputes over the proper ratio between blanket and per-program fees have led to protracted and costly litigation under the rate court provisions of the AFJ.

Section VIII(B) thus is intended to clarify that a representative user has a "genuine choice" between a per-program or per-segment license and a blanket license only if it would pay roughly the same total license fee under the per-program or per-segment license that it would have paid under the blanket license (excluding any added administrative costs), assuming it did not

reduce or directly license any of its performances of ASCAP music.[28] In other words, ASCAP may not collect greater royalties for its members for the same music use simply because the user has opted for a different form of license.

The total license fee for a per-program or per-segment license is defined to include any charges for incidental or ambient music used by the licensee. So-called "incidental" music (*e.g.*, commercial jingles) and "ambient" music (e.g., music in the background of a news report or sporting event) are extremely difficult to control or anticipate, to track and report to ASCAP, or to directly license from rights holders. Thus, as this Court has held, a license covering incidental and ambient uses must be part of a per-program license, and any separate fee for such uses must be fixed (in other words, it may not vary depending upon actual usage, so users do not need to track and report such

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[28] For example, if a typical music user in a given group of similarly situated users broadcasts ten programs, 8 of which contain ASCAP music, and its blanket license fee would be $80,000, its per program fee would be $10,000, plus a reasonable administrative fee. (More typically, fees have been set as a percentage of the users' revenue, but the same ratios between fees would apply.) Assuming the user makes no changes in the way it uses music, and continues to license its music performances through ASCAP, ASCAP and its members will collect the same fees for the same performances under either license ($80, 000 under the blanket; 8 x $10,000 under the per-program). If, however, the user can directly license music for some programs for less than $10,000 (perhaps a relatively unknown composer whose works are rarely played, and who thus receives little income from ASCAP and could be induced to license outside of the PRO), it will have the appropriate incentives to pursue such licensing opportunities.

usage), if the per-program license is to be a realistic alternative to the blanket license.[29] Sections II(U) and VIII(B) codify that holding, and clarify that any such fee be included when comparing the total fee for a per-program or per-segment license with the fee for a blanket license in determining whether the users have a genuine choice between the two forms of license.[30]

The AFJ2 requires that fees for the blanket and per-program or per-segment license be approximately the same for a "representative music user," defined in Section II(Q) as a music user whose frequency, intensity, and type of music use is typical of a group of similarly situated users.[31] ASCAP usually negotiates with industry-wide groups of similarly situated users to set license fees applicable to all users in the industry. Users within any such group inevitably vary in the nature and extent of their use of ASCAP music. It would be impractical to require ASCAP or the Court to tailor license fees to ensure that

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[29] *United States v. ASCAP (Application of Salem Media)*, *supra*, 981 F.Supp. at 218.

[30] Because it is unclear whether on-line providers or background music services will need such a license or, if so, what its scope might be, Section VII(A)(2) does not explicitly require that a per-segment license include a license for ambient and incidental uses of music. However, the AFJ2 is not intended to supercede this Court's holding in *Salem Media* that ASCAP must provide such a license if necessary to ensure that users have a genuine alternative to the blanket license.

[31] Section II(S) of the AFJ2 sets out factors relevant to determining whether a group of users is similarly situated.

each and every music user within a group of similarly situated users would pay the same fee under a blanket or a per-program or per-segment license. Accordingly, the AFJ2 requires that the total license fee for a per-program or per-segment license approximate the fee for a blanket license for a *typical* user. The objective is to ensure that a substantial number of users within a similarly situated group will have an opportunity to substitute enough of their music licensing needs away from ASCAP to provide some competitive constraint on ASCAP's ability to exercise market power with respect to that group's license fees.[32]

Section VIII(C) is intended to ensure that ASCAP does not discourage music users from taking a per-program or per-segment license by imposing unnecessarily burdensome and costly reporting requirements on such users. It requires ASCAP to maintain an up-

[32] The extent to which the per-program and per-segment licenses in fact discipline ASCAP's market power with respect to any group of similarly situated users will depend not only on how many users in the group can realistically take advantage of such licenses, but also on how much of their music those users could switch to competitive alternatives. Most users will have no choice but to license at least some of their performances from ASCAP. For example, users cannot replace ASCAP music with BMI or SESAC music in pre-recorded programs, and there is little if any incentive for the individual rights holders to directly license such pre-recorded music for less than what ASCAP would charge under the blanket license. Because users that have per-program or per-segment licenses will have competitive alternatives for only a portion of their performances, only if a substantial number of users within a group find the per-program or per-segment license economical will those licenses significantly constrain ASCAP's market power.

to-date system for tracking music use related to the per-program and per-segment licenses,[33] and provides that ASCAP may require users under per-program and per-segment licenses to report information reasonably necessary for ASCAP to administer the licenses.

Section VIII(D) provides that the terms and requirements of any license, including the blanket license, be reasonable.

G. Section IX - Determination of Reasonable Fees

Section IX incorporates the so-called "rate court" provisions of the existing AFJ, which establish procedures for the Court to resolve fee disputes between ASCAP and music users. Rate court proceedings under the AFJ have been protracted and costly for music users, ASCAP, and the Court. Indeed, some proceedings have lasted a decade or longer, even though the purpose of the proceedings was to determine license fees to be charged during a five-year period. Because rate court proceedings are so costly, as a practical matter, they are unavailable to many individual music users. Section IX modifies the existing AFJ in several significant respects in an attempt to simplify and streamline rate court proceedings, thereby reducing their cost, hopefully making them available to more users, and

[33] Several technologies now exist that can electronically track music use by radio and television licensees. Such systems reduce or eliminate the need for users to physically monitor or report music use under per-program or per-segment licenses, as well as the need for ASCAP to verify the accuracy of users' reports.

increasing their effectiveness in regulating ASCAP's market power.

Section IX(A) sets out the procedures that ASCAP and music users must follow in order to seek the Court's intervention in a fee dispute. It differs from the procedures set forth in the existing AFJ in two respects. The AFJ requires ASCAP to respond to a user's written request for a license by advising the user of the fee it deems reasonable for the license. If the user and ASCAP are unable to agree upon a reasonable fee within 60 days, the user may apply to the Court to set a reasonable fee. Under the AFJ2, ASCAP may respond to a written request for a license *either* by advising the user of the fee that it deems reasonable or by requesting information that it reasonably requires in order to quote a reasonable fee. If the parties cannot agree upon a licence fee within sixty days of the user's request for a license, or sixty days after ASCAP's request for additional information, whichever its later, *either* the user or ASCAP may apply to the Court to determine a reasonable fee.

Section IX(B) provides that ASCAP has the burden of establishing the reasonableness of the fee that it seeks, as it does under the existing AFJ. However, the AFJ2 further provides that if a music user is seeking a per-segment license, the music user has the burden of proving that it meets the first two requirements of Section VII(A)(2) of the AFJ2: that its

performances can be tracked and monitored with reasonable accuracy, and that they can be attributed to segments commonly recognized within the industry for which license fees may be assessed. Information relevant to these issues is likely to be most readily available to the potential users of the per-segment licenses, such as Internet sites that may be using music in new and evolving ways.

Section IX(C) provides that license fees negotiated by ASCAP and music users during the first five years that ASCAP licenses users in an industry shall not be evidence of the reasonableness of any fees sought by ASCAP. ASCAP has frequently argued that the Court should infer that fees it had previously obtained in negotiations with users demonstrate the reasonableness of the fees it seeks in rate court proceedings. Usually, in the early days of an industry, music users are fragmented, inexperienced, lack the resources to invoke the rate court procedures, and are willing to acquiesce in fees requiring payment of a high percentage of their revenue because they have little if any revenue.[34] Although ASCAP's arguments have usually not been successful,[35] by pursuing them ASCAP has added to the complexity and costs of rate court proceedings.

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[34] For example, today, these characteristics describe most Internet music users.

[35] *See, e.g., Buffalo Broadcasting Rate Proceeding*, *supra*, 1993 Tr. Cas. (CCH) ¶70,153 at 69,657.

Section IX(C) applies only to fees negotiated in the early years of an industry's dealings with ASCAP. However, nothing in the AFJ2 is intended to supercede this Court's decisions under the AFJ that rates negotiated in subsequent years should be considered relevant to the determination of reasonable fees only if there is reason to believe that they reflect competitive market conditions and remain appropriate for later time periods.[36]

Section IX(D) provides that, if ASCAP does not meet its burden of demonstrating that the fees it demanded are reasonable, the Court shall determine a reasonable fee based on all of the evidence.

Section IX(E) provides that the parties to a rate court proceeding must have the matter ready for trial 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. It further provides that no other delay shall be granted unless good cause is shown. As does the existing AFJ, this section also provides that once a user has requested a license from ASCAP, the user may perform works in the ASCAP repertory without payment of any fee except as ordered by the Court pursuant to Section IX(F) of the AFJ2.

Section IX(F) provides for the establishment of an interim

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[36] *Id.*

fee pending completion of negotiations or any rate court proceeding. It is similar to provisions in the existing AFJ, except that it adds a presumption that the fee fixed for the last existing license, if any, between the user and ASCAP, is the appropriate interim fee. As we discuss in connection with Section IX(D) above, this presumption is not intended to have any effect in the final determination of a reasonable fee for the user. Rather, this presumption is intended to further streamline rate court proceedings by reducing the number of issues that must be decided by the Court after discovery by the parties. Litigation over the appropriate level of interim fees has prolonged many rate court proceedings.

Section IX(G) provides that ASCAP must offer any fee established by the Court to all similarly situated music users who thereafter request such a license. Section IX(H) clarifies that nothing in Section IX prevents a music user from challenging the validity of any copyright of any work in the ASCAP repertory. Section IX(I) provides that the Department of Justice may participate in any rate court proceeding. None of these provisions makes any substantive changes to the existing AFJ.

H. Section X - Public Lists

Section X of AFJ2 requires ASCAP to make available to the public information about the compositions contained in its repertory, so that music users can more easily determine which

PRO administers rights to particular compositions and the identity of the ultimate rights holder for such compositions. This information enables users to make more informed licensing decisions and can facilitate substitution of music from one PRO for music from another or direct licensing from rights holders.

The existing AFJ also requires that ASCAP maintain a list of its repertory, but allows it to maintain the list at its offices "for inspection and copying." Although in recent years ASCAP has begun to make portions of the list available in electronic form, its official list consists of a massive paper card catalogue located in New York, so that it is not as a practical matter accessible to users, and users are often unable to determine whether and to what extent they actually use music in ASCAP's repertory.

Section X(A) requires ASCAP to respond to users' requests for information about whether a particular work is in the ASCAP repertory.

Section X(B) requires ASCAP to make its public list available for inspection at ASCAP offices, and to maintain an electronic list of all works in its repertory registered since January 1, 1991, or identified in its surveys of performed works since January 1, 1978. Copies of the electronic list must be made available in machine readable format, such as CD-ROM, and be updated semi-annually. In addition, the electronic list must be accessible on-line, and updated weekly.

Section X(C) provides that ASCAP must inform users how to gain access to the public list and public electronic list the first time that it makes a written offer of a license to a music user. This provision is intended to allow users from which ASCAP seeks a license to determine whether they in fact perform compositions in ASCAP's repertory and, if so, whether a per-program, per-segment or blanket license would be more economical.

Section X(D) prohibits ASCAP from initiating infringement actions relating to the performance of any work in the ASCAP repertory that is not, at the time of the alleged infringement, identified on the electronic public list.

I. Section XI - Membership

Section XI of the AFJ2 contains provisions governing ASCAP's relationship with its members. The AFJ2 substantially modifies provisions in the AFJ with respect to such relationships. In particular, it vacates in its entirety the 1960 Order governing distribution of revenues, voting rights, surveys of performances, and dispute resolution mechanisms for members. As discussed below, these provisions have proven costly and ineffective in preventing ASCAP from exercising market power.

Section XI(A) of the AFJ2 requires ASCAP to admit to membership any writer or publisher who meets certain minimal criteria. This provision is similar to a provision in the existing AFJ.

Section XI(B) imposes certain obligations on ASCAP with respect to the distribution of revenues to its members. It requires ASCAP to conduct an objective survey or census of performances of its members' works, and to distribute its revenues based primarily on performances of its members' works. It requires that ASCAP disclose to a member information sufficient for that member to understand how its payment was calculated.

Section XI(B) also provides that ASCAP may not restrict the ability of a member to withdraw from ASCAP at the end of any calendar year. In particular, ASCAP must distribute revenues to a withdrawing member for performances occurring through the last day of the member's membership in ASCAP, may not reduce the value it attributes to departing members' works, and may not prohibit the member from transferring compositions to another PRO because of pending license agreements between ASCAP and any users. This provision is intended to ensure that members can choose to switch to a competing PRO without suffering financial penalties.

Unlike the existing AFJ (pursuant to the 1960 Order), the AFJ2 does not require ASCAP to use any particular formula or rules in distributing its revenues. Nor does it require ASCAP to provide notice to or obtain the consent of the Department or the Court before making changes to its distribution formula and rules.

The restrictions and reporting requirements in the 1960

Order were intended to prevent ASCAP from exercising market power over members by discriminating against them in the distribution of revenues. At the time the 1960 Order was entered, most songwriters had no alternative to ASCAP in administering performance rights. Although BMI and SESAC existed, each collected less than 15 percent of performance rights licensing fees, and neither provided a strong alternative to ASCAP. Given the absence of competitive alternatives for rights holders, the 1960 Order was intended to prevent ASCAP from exercising market power by discriminating against its smaller members.

In practice, however, the 1960 order has been an ineffective way of constraining ASCAP. There are no practical standards under which the Department or the Court can determine whether changes that ASCAP makes to its formula and rules in fact reflect the relative values of different music and music uses to licensees. Indeed, ASCAP has made at over 30 changes to its formula and rules since the Order was entered. Although the Department has taken seriously its obligation to review those changes, it has been unable to identify any principled way to evaluate whether the changes are appropriate and therefore has almost never objected to the changes. The requirements of the 1960 Order thus impose costs on ASCAP (and consequently its members), on the Department, and on the Court, but provide little

if any protection to members.[37] Yet, ironically, when members do object to ASCAP's distribution practices, ASCAP frequently invokes the Department's review of its formula and rules as demonstrating that its distribution practices are fair and appropriate.

Moreover, the market for administering performance rights on behalf of writers and publishers has changed significantly since the 1960 Order was entered. BMI now has a market share roughly equivalent to ASCAP's and provides rights holders with a significant competitive alternative to ASCAP. SESAC, although still substantially smaller than the other two PROs, has been growing rapidly and has succeeded in attracting a number of well-known songwriters. Competition from BMI and SESAC is likely to be far more effective in disciplining ASCAP's distribution practices than regulation by the Department or the Court. If a member becomes dissatisfied with the way ASCAP distributes its revenue, it can move to one of the other PROs. The AFJ2 thus focuses on ensuring that ASCAP cannot impede its members' ability to move to a competing PRO.

Section XI(C) of the AFJ2 provides that the provisions of Section XI(B) shall be effective only upon entry of an order in

[37] Indeed, the 1960 Order may be impeding ASCAP's ability to compete with BMI and SESAC for members. BMI and SESAC are able to adjust their distribution practices quickly if necessary to attract or retain members, while ASCAP must go through the cumbersome and time-consuming process of submitting changes to the Department and the Court.

United States v. Broadcast Music Inc., that contain substantially identical provisions. In addition, until the provisions of Section XI(B)(3), which enable members to leave ASCAP for another PRO at the end of any calendar year without penalty, become effective, ASCAP is prohibited from entering into an agreement with a member with a term of longer than five years. Section XI(C) is intended to ensure that ASCAP is not put at a competitive disadvantage vis-a-vis its most significant PRO competitor, BMI.

The final judgment entered against BMI does not include restrictions on BMI's conduct analogous to those in Section XI(B) that limit the way BMI can distribute its revenues, or that prevent BMI from interfering with its members' ability to move to other PRO's. ASCAP was willing in principle to agree to the restrictions contained in Section XI(B) of the AFJ2, which are intended to promote competition among PROs to attract rights holders, but it was unwilling to agree to those provisions if their effect was to make it easy for rights holders to leave ASCAP for BMI, but not for BMI members to leave BMI for ASCAP. For that reason, the provisions in Section XI(B) will take effect only if BMI is subject to similar constraints.

IV. The Legal Standard Governing the Court's Public Interest Determination

This Court has jurisdiction to modify the existing judgments

against ASCAP pursuant to Section XVII of the AFJ, Section VI of the Foreign Decree, and Rule 60(b)(5) of the Federal Rules of Civil Procedure.

Where, as here, the United States tentatively has consented to a proposed modification or termination of a judgment in a government antitrust case, the issue before the Court is whether modification or termination "is in the public interest." *See United States v. Western Elec. Co.,* 993 F.2d 1572, 1576 (D.C. Cir. 1993); *United States v. Western Elec. Co.*, 900 F.2d 283, 305 (D.C. Cir. 1990), *cert. denied*, 498 U.S. 911 (1990); *United States v. Loew's, Inc.*, 783 F. Supp. 211 (S.D.N.Y. 1992); *United States v. Columbia Artists Management, Inc.*, 662 F. Supp. 865, 869-70 (S.D.N.Y. 1987), *citing United States v. Swift & Co.*, 1975-1 Tr. Cas. (CCH) ¶ 60,201, at 65,702-03, 65,706 (N.D. Ill. 1975).

This is the same standard that a District Court applies in reviewing an initial consent judgment in a government antitrust case. *See* 15 U.S.C. § 16(e); *Western Elec. Co.*, 900 F.2d at 295; *United States v. AT&T*, 552 F. Supp. 131, 147 n.67 (D.D.C. 1982), *aff'd sub nom Maryland v. United States*, 406 U.S. 1001 (1983).

The Supreme Court has held that where the words "public interest" appear in federal statutes designed to regulate public sector behavior, they "take meaning from the purposes of the regulatory legislation." *NAACP v. FPC*, 425 U.S. 662, 669 (1976);

see also System Fed'n No. 91 v. Wright, 364 U.S. 642, 651 (1961). The purpose of the antitrust laws, the legislation involved here, is to protect competition. *United States v. Penn-Olin Chem. Co.,* 378 U.S. 158, 170 (1964) (antitrust laws reflect "a national policy enunciated by the Congress to preserve and promote a free competitive economy"). Thus, the relevant question before the Court is whether entry of the AFJ2 would advance the public interest in "free and unfettered competition as the rule of trade." *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958); *see also Western Elec. Co.*, 900 F.2d at 308; *United States v. American Cyanamid*, 719 F.2d 558, 565 (2d Cir. 1983), *cert. denied*, 405 U.S. 1101 (1984); *United States v. Loew's, Inc.*, 783 F. Supp. at 213.

It has long been recognized that the government has broad discretion in settling antitrust litigation on terms that will serve the public interest in competition. *See Sam Fox Pub'g Co. v. United States*, 366 U.S. 683, 689 (1961). The Court's role in determining whether the initial entry of a consent decree is in the public interest, absent a showing of abuse of discretion by the government, or a failure to discharge its duty, is to determine whether the government's explanation is reasoned, and not to substitute its own opinion. *United States v. Mid-America Dairymen, Inc.*, 1977-1 Tr. Cas.(CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977); *see also United States v. Bechtel Corp.,* 648 F.2d 660,

666 (9th Cir. 1981), *cert. denied*, 454 U.S. 1083 (1981), *quoting United States v. National Broad. Co.*, 449 F. Supp. 1127, 1143 (C.D. Cal. 1978). The government may reach any of a range of settlements that are consistent with the public interest. *See, e.g., Western Elec.,* 900 F.2d at 307-09; *Bechtel,* 648 F.2d at 665-66; *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975). The Court's role is to conduct a limited review to "insur[e] that the government has not breached its duty to the public in consenting to the decree," through malfeasance or by acting irrationally. *Bechtel*, 648 F.2d at 666.

The standard is the same when the government consents to the modification of an antitrust judgment. *Swift & Co.*, 1975-1 Tr. Cas.(CCH) ¶ 60,201, at 65,702-03. Where the Department of Justice has offered a reasoned and reasonable explanation of why the modification advances the public interest in free and unfettered competition, and there is no showing of abuse of discretion or corruption affecting the government's recommendation, the Court should accept the Department's conclusion concerning the appropriateness of the modification.

Conclusion

For the reasons set forth above, the United States has tentatively concluded, subject to review of any public comments, that the public interest would be served by entry of the AFJ2 in place of the AFJ and the Foreign Decree. The United States may

revoke its consent at any time prior to the entry of the AFJ2 if its conclusions change.

Respectfully submitted,

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September 4, 2000

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing Memorandum of the United States in Support of the Joint Motion to Enter Second Amended Final Judgment on Defendant American Society of Composers, Authors and Publishers by hand delivering a copy to Philip Zane, Morgan, Lewis & Bockius, LLP, 1800 M Street, N.W., Washington, D.C. 20036.

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