No. 00-6123

and consolidated cases Nos. 00-6125, 00-615

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant-Cross Appellee,

v.

BROADCAST MUSIC, INC.,
Defendant-Appellee-Cross Appellant,

In the Matter of the Application of

AEI MUSIC NETWORK, INC., et al.,
Applicants-Appellants-Cross Appellees,

For the Determination of Reasonable License Fees.

BRIEF FOR THE UNITED STATES

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CERTIFICATE OF COMPLIANCE PURSUANT TO F.R.A.P. 32

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In the Matter of the Application of

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Applicants-Appellants-Cross Appellees,

For the Determination of Reasonable License Fees.

BRIEF FOR THE UNITED STATES

PRELIMINARY STATEMENT

The decision below was by Judge Louis L. Stanton. It is not officially reported, but appears at 2000 WL 280034.

JURISDICTION

The district court has jurisdiction over the United States' antitrust suit pursuant to 15 U.S.C. 4 and 28 U.S.C. 1345. Pursuant to a 1994 amended consent decree between the United States and the defendant, it assumed jurisdiction to adjudicate certain disputes between the defendant and applicants for licenses from the defendant. Its Memorandum and Order granting in part and denying in part an Application by AEI Music Network et al. was entered on March 16, 2000. It granted a certificate under F.R. Civ. P. 54(b) with respect to the claims on which it ruled against the Applicants on March 21, and with respect to the claim on which it ruled against the defendant on April 10. The United States filed a timely Notice of Appeal on May 15, 2000. This Court has jurisdiction under 28 U.S.C. 1291.

ISSUES PRESENTED

1. Whether the rate court amendment to the BMI consent decree authorizes the district court to require BMI to offer licenses with characteristics not required by any other provision of the BMI consent decree.

2. Whether the license formats requested by the Applicants here involve the scope and coverage of the licenses rather than a change in rate structure.

DECREE PROVISION INVOLVED

Article XIV of the Consent Decree in *United States v. Broadcast Music, Inc.*, as added in 1994, 1996-1 Trade Cas. ¶71,378 (S.D.N.Y.) (JA A-41 - A-42),[1] provides in part that:

> (A) Subject to all provisions of the Final Judgment, defendant shall, within ninety (90) days of its receipt of a written application for a license for the right of public performance of any, some or all of the compositions in defendant's repertory, advise the applicant in writing of the fee which it deems reasonable for the license requested. If the parties are unable to agree upon a reasonable fee within sixty (60) days from the date when defendant advises the applicant of the fee which it deems reasonable, the applicant may forthwith apply to this Court for the determination of a reasonable fee ***. If the parties are unable to agree upon a reasonable fee within ninety (90) days from the date when defendant advises the applicant of the fee which it deems reasonable, then defendant may forthwith apply to this Court for the determination of a reasonable fee ***. Should defendant not establish that the fee requested by it is a reasonable one, then the Court shall determine a reasonable fee based upon all the evidence. ***

STATEMENT OF THE CASE

The United States brought an antitrust suit against the defendant Broadcast Music, Inc. ("BMI") in 1964 that was settled by a consent decree in 1966. *United States v. Broadcast Music, Inc.*, 1966 Trade Cas. ¶71,941 (S.D.N.Y.). In 1994, on

[1] "JA" refers to the Joint Appendix.

BMI's motion, a "rate court" provision was added as Article XIV of the Decree. It provides for the district court to adjudicate disputes between BMI and license applicants regarding the reasonableness of the fees BMI proposes for licenses requested by the applicants. *United States v. Broadcast Music, Inc.*, 1996-1 Trade Cas. ¶71,378 (S.D.N.Y. 1994) (the decree as modified (JA A-35) is hereinafter called the "BMI Decree").

In December 1998 BMI filed a motion for the court to set reasonable fees for AEI Music Network, Inc., Muzak LLC (hereinafter jointly "AEI"), and other background/foreground music service providers (the "Applicants") (JA A-44). After a conference with the court and an exchange of letters setting out the issues, AEI responded on June 4, 1999, with a Motion for Determination that Certain License Forms Are Within this Court's Rate Setting Authority Under Article XIV of the BMI Consent Decree (JA A-22). The court did not hold an evidentiary hearing, but, on the basis of written submissions, ruled on AEI's Motion, holding that the Decree did not entitle AEI to most of the license formats that it sought. Memorandum and Order (dated March 9, 2000) (JA A-715 - A-722). At the same time, it held that it could adjudicate the reasonableness of "per piece" licenses sought from BMI (JA A-722 - A-724).

The *Order* was entered on March 16, and in separate orders the court certified both rulings as final under Rule 54(b) (JA A-725 - A-727). AEI and Muzak have appealed the *Order* to the extent it denied their relief (JA A-728). BMI has cross-appealed with respect to the holding that the court can set fees for per piece licenses (JA A-733). The United States, which filed a brief supporting AEI in the district court, has also appealed (JA A-735).

STATEMENT OF FACTS

1. The American Society of Composers, Authors and Publishers ("ASCAP"), founded in 1914, and Broadcast Music, Inc., founded in 1939, are the two largest performing rights organizations ("PROs") in the country. Their function is to grant licenses to music users, collect license fees from them, and distribute the royalties among affiliated copyright holders. They also enforce the copyright laws against persons who engage in the public performance of affiliates' music without a license. The government sued ASCAP and BMI separately in 1941 for monopolizing the licensing of performing rights. Although the then-fledgling BMI was much smaller than ASCAP, it had been established by a consortium of radio broadcasters to gain bargaining leverage in negotiations with ASCAP, and the government alleged that it was seeking to monopolize licensing to radio broadcasters. Both suits were settled

by consent decrees.[2] In 1950, the ASCAP consent decree was amended to establish what has become known as a "rate court," *i.e.*, a provision allowing the district court to set rates for licenses when ASCAP and the applicants could not agree on them. See *United States v. ASCAP*, 1950-51 Trade Cas. ¶62,595 at 63,754 (S.D.N.Y. 1950). The government brought a second suit against BMI in 1964, and entered into a new consent decree in 1966, but with no rate court provision. *United States v. Broadcast Music, Inc.*, 1966 Trade Cas. ¶71,941 (S.D.N.Y.).[3]

BMI itself asked for a rate court provision in 1994, modeled after the one in the ASCAP decree.[4] According to BMI's Memorandum in support of that Motion, the provision would have two functions: (i) to compel BMI to grant licenses upon request by "eliminating BMI's copyright law-derived right to withhold access to its repertoire should it be unable to agree on the terms of its license with any music

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[2] *United States v. ASCAP*, 1940-43 Trade Cas. ¶56,104 (S.D.N.Y. 1941); *United States v. Broadcast Music, Inc.*, 1940-43 Trade Cas. ¶56,096 (E.D. Wisc. 1941).

[3] The 1966 consent decree incorporated the 1941 decree with some modifications, and the 1941 decree was vacated.

[4] The only differences in the text of the provisions are that BMI's allows BMI as well as the applicant to move for fee determinations, and it explicitly authorizes the court to fix a reasonable fee "based upon all the evidence" when BMI fails to meet its burden of showing that the fee it originally requested was reasonable. Article XIV(A).

user willing to apply for a license," and (ii) "to substitute a rate court mechanism for BMI's right to withhold access to its repertoire" (JA A-410). These functions were intended to serve the interests of both itself and its user-customers. They allow applicants to use BMI's music while negotiations and court proceedings are pending, subject to the court's determination of an interim fee and retroactive adjustment when a final decree is entered. Thus, BMI argued, the provision would not only give users the protection of judicial review of BMI's rates, but would also allow BMI and its affiliates a steady stream of royalties while negotiations continue, and relieve both sides of the costs of antitrust and abuse of copyright litigation that had regularly arisen in the course of past fee negotiations (JA A-382 - A-383).

In light of that litigation history and the support of the music users, the government supported the amendment to the decree, but with the caveat that its consent "does not reflect our intention that judicial rate setting should become a substitute for competitive rate setting" (JA A-432). It noted in particular the existing decree provisions "to assure that music users have competitive alternatives to the blanket license, including direct and per-program licensing, and source licensing for prerecorded programming" (JA A-432 - A-433). The new provision was added as Article XIV of the Decree. *United States v. Broadcast Music, Inc.*, 1996-1 Trade Cas. ¶71,378 (S.D.N.Y. 1994).

2. The primary form of license issued by ASCAP and BMI (and the one they prefer) is the blanket license for all of the works in their repertories at a fee that is not based on music use.[5] Background music providers, the applicants involved here, have received blanket licenses with fees based on a per premise basis, dependent on the type of service at each premise.[6] The last regular contracts between BMI and the Applicants expired in 1993, but were extended on an interim basis until 1997, subject to retroactive adjustment to January 1, 1994 (JA A-50). BMI terminated those agreements effective July 3, 1997.

On receiving BMI's notice of termination, the Applicants filed applications pursuant to Article XIV of the BMI Decree (JA A-51 - A-52), which allows them to continue using BMI music while negotiations and court proceedings continue, subject to interim fees set by the court and retroactive adjustment when final fees

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[5] For example, broadcasters' fees are a percentage of advertising revenues, and concert fees are based on concert revenues. Fees for some other types of users, such as hotels and bars, are based on the establishment's total entertainment expenses. See *BMI v. Moor-Law, Inc.*, 527 F.Supp. 758, 760-61 (D. Del. 1981), aff'd mem., 691 F.2d 490 (3d Cir. 1982). Some classes of user, such as broadcasters, negotiate their rates with ASCAP and BMI through trade associations organized for that purpose. See *United States v. ASCAP (Capital Cities/ABC)*, 157 F.R.D. 173, 180 (S.D.N.Y. 1994) ("*Capital Cities/ABC II*") ("All-Industry Committee" negotiated for local broadcasters); *United States v. ASCAP (Salem Media)*, 981 F.Supp. 199, 208-09 & n. 11 (S.D.N.Y. 1997) (discussing representativeness of committee).

[6] See JA A-55. The Applicants negotiate collectively with BMI (JA A-50).

are determined. AEI and Muzak requested BMI to quote "blanket license, per program license, and per channel license fees such that Muzak and/or AEI will be required to pay BMI solely with respect to such musical programming and individual channels delivered to their subscribers as actually contain BMI music." (JA A-95). BMI responded with a set of fixed fee blanket license quotes (JA A-98), and queries regarding the nature of the programs and channels contemplated (JA A-100). Finally, with negotiations stalemated and the Applicants continuing to pay at the 1993 level, BMI filed a motion under the rate court provisions of the Decree on December 8, 1998, seeking a prescription for the period January 1994 to December 1999 (JA A-50, A-52). That Motion is still pending. AEI and Muzak then notified BMI of their desire for "reasonable per piece licenses *** with respect to those musical compositions, as embodied in one or more programming channels delivered to identifiable subscribers to be specified to BMI, for which other licensing arrangements have not been made" (JA A-102).

Finally, after preliminary proceedings with the court to define the issues, Applicants AEI and Muzak LLC filed a Motion on June 4, 1999, for a determination that certain license forms are within the court's rate setting authority under Article XIV (JA A-22). The court decided the motion on the basis of the parties' briefs and written evidentiary submissions.

As described by the district court, the Applicants were seeking four separate forms of licenses (JA A-709 - A-710):

> (1) a blanket license with the fees subject to reduction if the Applicant obtains a direct license to particular BMI titles; (2) a blanket license with the fee based only on those of the Applicant's programs which actually use BMI licensed music (a "per program blanket license"); (3) a blanket license with the fee based only on those of the Applicant's channels which actually use BMI licensed music (a "per channel blanket license"); and (4) a declaration that BMI's per piece license fees are subject to this court's rate-setting authority.

The court ruled against the Applicants on all but the last point. It rejected their argument that the issue was simply one of rate setting for a traditional blanket license, saying that "the rate is not the only thing changed in such a license; it would also alter the legal rights of the parties" (JA A-715). In particular, it noted that "[t]he change from a license offering unlimited choice upon payment of a fixed fee to one offering unlimited choice with payment depending on usage, or upon rights obtained from third parties, is a change in the rights of the licensor and licensee, not merely a change in price," and would deprive BMI of "the predictability of its flat fee income." *Ibid.*

It also rejected Applicants' argument that BMI must issue any reasonable type of license on request under the rate court provision. The provision allows a prospective licensee to apply for a license for "any, some or all of the compositions

in defendant's repertory," and requires BMI to quote a fee "for the license requested." The court noted, however, that the court of appeals had construed the same language in the ASCAP Decree as limited to fees for types of licenses required elsewhere by the Decree, and it thought the language should be given the same construction in the BMI Decree (JA A-716 - A-718).

Going through the various license types the Applicants sought, the court found that BMI's provision of a blanket license with a "'carve out' based on music clearances" to television broadcasters did not require it to offer the same type of license to members of a different industry (JA A-719 - A-720).[7] It also found that the Decree did not specifically require BMI to offer "per channel" licenses, but held that the Applicants' allegation of discrimination was not ripe, because BMI said that it was willing to provide such licenses so long as the Applicants could meet adequate reporting requirements (JA A-720 - A-721).[8] The Applicants were not

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[7] Under Article VIII(A) of the Decree, BMI may not discriminate in rates or terms among "similarly situated" licensees, but persons in different industries may not be "similarly situated" (JA A-38).

[8] BMI provided per channel licenses to Minnesota Mining and Manufacturing Corp. ("3M") until 3M left the background music business in 1998. The others argued that refusal to offer them such a license constituted discrimination in violation of Article VIII(A) (Applicants' Mem. in Support of Motion for Determination that Certain License Forms Are Within This Court's Rate Setting Authority 10-11 (filed June 4, 1999)). Without addressing the discrimination issue, BMI said that it

(continued...)

entitled to "per program" licenses, because the Decree specifically provided that BMI was required to offer such licenses only to broadcasters (JA A-721 - A-722). On the other hand, the court held that the provision in the Decree requiring the copyright proprietor's consent to BMI licensing of specific compositions did not deprive the court of jurisdiction over BMI's prices for such works, but reserved judgment on whether the proprietor could then refuse to consent to a license at a price set by the court (JA A-723 - A-724).

SUMMARY OF ARGUMENT

1. A consent decree is to be construed like a contract, in accordance with its plain language if unambiguous, and in light of surrounding circumstances if the text is ambiguous. In this case, both the plain language and the surrounding circumstances show that the district court erred.

Article XIV of the BMI Decree allows an applicant to request a license for "any, some or all of the compositions in defendant's repertory," and BMI must "advise the applicant in writing of the fee which it deems reasonable for the license requested." As this Court found with respect to the same language in the ASCAP

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[8] (...continued)
was willing to offer them a license similar to 3M's if it is practical to do so (Mem. of BMI Concerning Consent Decree Construction 45-47 (filed June 4, 1999)).

Decree in *United States v. ASCAP (Shenandoah Valley Broadcasting, Inc.)*, 331 F.2d 117, 121 (2d Cir.), cert. denied, 377 U.S. 997 (1964), a literal reading "would indeed require [the defendant] to quote a fee for any type of license requested," and that is the proper construction of the language under the BMI Decree. The district court refused to accept that construction because this Court interpreted the rate court provision of the ASCAP Decree more narrowly, as limited to the types of licenses required elsewhere in the Decree. But the ASCAP Decree is different from the BMI Decree in crucial respects; most importantly, by contrast to the ASCAP Decree, no other provision of the BMI Decree requires that BMI grant blanket licenses. Therefore, applying the *Shenandoah* holding that the rate court provision is limited to enforcement of other licensing requirements would make the BMI rate court provision a nullity, since most licenses granted by BMI are blanket licenses.

A literal reading of the BMI text is consistent with the circumstances surrounding the adoption of the BMI rate court provision. When it proposed the provision, BMI did not say that it intended to incorporate the *Shenandoah* interpretation of the ASCAP Decree, nor is such reading required by BMI's stated purposes. On the contrary, it conceded that there was no other provision in the Decree requiring it to grant blanket licenses, and that one function of the provision is to restrain its exercise of market power. Moreover, BMI has significant market

power, and the alternative of direct licensing rather than blanket licenses is the primary commercial constraint on the exercise of that power. Reading the Decree in accordance with the plain meaning of its language would provide a means to lower the cost and risk of pursuing that alternative, and thus make it a more effective constraint on BMI's market power.

2. Even if the *Shenandoah* interpretation were applicable to the BMI Decree, the district court misapplied it here. Under *United States v. ASCAP (Metromedia, Inc.)*, 341 F.2d 1003, 1009 (2d Cir.), cert. denied, 382 U.S. 877 (1965), the decision in *Shenandoah* deprives the rate court only of jurisdiction to consider applications for licenses of different scope or coverage. The licenses sought by the Applicants here are forms of blanket licenses that differ from more ordinary blanket licenses only in the means of calculating the fees. There is nothing in the language of the BMI Decree that guarantees BMI a fixed fee for its blanket licenses, and the district court's reasoning in holding that it does is insupportable. The Decree gives it jurisdiction to consider whether a variable fee formula is reasonable.

ARGUMENT

The issue of consent decree interpretation is a matter of law subject to *de novo* review by this Court. *E.g.*, *EEOC v. New York Times Co.*, 196 F.3d 72, 77 (2d Cir. 1999); *Berger v. Heckler*, 771 F.2d 1556, 1568 (2d Cir. 1985).

I. THE BMI DECREE SHOULD BE CONSTRUED IN ACCORDANCE WITH ITS LANGUAGE AS REQUIRING BMI TO QUOTE A FEE FOR THE LICENSE FORMAT REQUESTED BY THE APPLICANTS

1. The basic rule of construing a consent decree is to treat it as a contract. *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 238 (1975). To the extent a decree is unambiguous, it should be construed in accord with its plain language. Since consent decrees normally embody compromises, and do not themselves have a purposes independent of the parties' own, generally opposing, purposes, "the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it." *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971). In cases where the decree is ambiguous, however, "reliance on certain aids to construction is proper, as with any other contract," and those aids include "the circumstances surrounding the formation of the consent order." *ITT Continental* at 238.[9] While the court should not uncritically attribute the purpose of the statute to be enforced to the decree, *id.* at 236-37, the government's intent to enforce the statute is certainly part of the

[9] The Court in *ITT Continental* distinguished *Armour* as a case where "the construction of the consent decree urged by the Government was inconsistent with the express terms of the consent decree it was seeking to enforce." 420 U.S. at 233. See *Armour* at 678-80.

"overall context of the judgment" that may be taken into account. See *United States v. American Cyanamid Co.*, 719 F.2d 558, 564 (2d Cir. 1983), cert. denied, 465 U.S. 1101 (1984), citing *United States v. Motor Vehicle Mfrs. Ass'n*, 643 F.2d 644, 650 (9th Cir. 1981).[10] The court may likewise look to the contemporary court filings of the parties; since they were available to each other, their uncontradicted representations would provide some evidence of their mutual understanding. Cf. *United States v. Western Elec. Co. (Pacific Telesis Group*), 894 F.2d 1387, 1392 (D.C. Cir. 1990).

2. In the government's view, the district court's construction of the BMI Decree is erroneous both within the four corners of the Decree, and when viewed in light of its circumstances. Under Article XIV(A), "[s]ubject to all provisions of the Final Judgment, defendant shall, within ninety (90) days of its receipt of a written application for a license for the right of public performance of any, some or all of the compositions in defendant's repertory, advise the applicant in writing of the fee

[10] At the very least, since the court's authority to enter a decree derives from the underlying statute, *System Federation No. 91, Ry. Employees' Dept. v. Wright*, 364 U.S. 642, 651 (1961), the decree should not be interpreted in a way "inconsistent with the statutory framework under which the action was brought." *Motor Vehicle Mfrs. Ass'n*, 643 F.2d at 651. That is particularly so since the district court accepted public comments and specifically found Article XIV to be "in the public interest." *United States v. BMI*, 1996-1 Trade Cas. at 76,891.

which it deems reasonable for the license requested." As this Court construed the same language in *United States v. ASCAP (Shenandoah Valley Broadcasting, Inc.)*, 331 F.2d 117, 121 (2d Cir.), cert. denied, 377 U.S. 997 (1964), a literal reading allows an applicant to seek a license for "any, some or all of the compositions in [defendant's] repertory," and requiring the defendant to quote a fee "for the license requested," "would indeed require [the defendant] to quote a fee for any type of license requested." We submit that is precisely the meaning of the BMI Decree.

The district court rejected that result here because it was rejected in *Shenandoah*, but such an application of *Shenandoah* ignores the vital principle of the decision−that such language must be construed in light of the overall context of the particular decree.

The ASCAP Decree and the BMI Decree are significantly different for purposes of this case. The rate court provision in the ASCAP Decree (Section IX) is immediately preceded by four other provisions (Sections V-VIII) addressing the types of licenses that ASCAP must grant. *United States v. ASCAP*, 1950-51 Trade Cas. at 63,752-54. Section V requires through-to-the-viewer (or listener) licenses for certain users groups: section V(A) for broadcast networks and "wired music services" (such as "Muzak"), section V(B) for independent producers of broadcast shows, and Section (V)(C) for movie producers. Section VI address licenses for

users generally, including a requirement that ASCAP grant any applicant a license "to perform all of the compositions in the ASCAP repertory" or, with the consent of the copyright owner, a per piece license. Section VII requires it to grant per program licenses to broadcast stations that want them. Section VIII requires ASCAP to set fees in a way that gives users a "genuine choice" among the licenses available to them. In that context, the *Shenandoah* court construed the rate court provision "as relating to requests for licenses which some other portion of the Judgment required ASCAP to grant." 331 F.2d at 122. The applicants in that case were broadcasters seeking a form of license that would effectively force independent producers to clear the performing rights for their music at the source. Since section VII, which deals with broadcasters' licenses, gives them no right to demand such a license, and section V(B), which deals with producers, specifically leaves such licensing at their option, the court simply refused to infer more. *Id.* at 122-24.

By contrast, the "licenses which some other provision of the Judgment requires" BMI to grant are significantly more limited than their ASCAP counterparts. *United States v. BMI*, 1966 Trade Cas. at 83,326-27 (JA A-38 - A-40). Article VIII(A) prohibits discrimination generally, and VIII(B) provides for per program licenses for broadcasters. Articles IX(A) and (B) incorporate some of the

provisions of sections V(A) and (B) of the ASCAP Decree requiring the defendant to offer through-to-the-audience licenses to network and independent producers. Article IX(C) tracks the second sentence of section VI of the ASCAP Decree in requiring the defendant to grant per piece licenses. Unlike the ASCAP Decree, however, the BMI Decree does not require through-to-the-viewer/listener licenses for wired music services or for movie producers, and likewise omits the first sentence of ASCAP section VI, which would require blanket licenses. In fact, no provision within the "four corners" the BMI Decree (except Article XIV(A)) could colorably be construed to require BMI to grant blanket licenses. Nor is there any reason to imply such a requirement; legal compulsion would have been superfluous so long as BMI could name its price. Thus, to construe Article XIV(A) as the district court did, as serving "only to establish the machinery for requesting and determining reasonable fees for those licenses which are mandated elsewhere in the Decree" (JA A-717), makes nonsense of the provision, since it excludes the primary form of license that BMI grants.

The district court recognized the omission of compulsory blanket licensing from the other provisions of the Decree, and tried to evade its implications by finding that everyone understood that blanket licenses would be available and covered by Article XIV (JA A-713, A-717 - A-719 & n. 9). It does not, however,

explain the origin of that understanding. The only possible textual source in the BMI Decree is the plain language of Article XIV(A), which requires BMI to respond with a fee quotation to whatever license an applicant requests.[11] The alternative, to create out of thin air some other requirement for BMI to grant blanket licenses, has no support in the rules of consent decree interpretation.

3. Our reading of the text is entirely consistent with the circumstances surrounding the adoption of the BMI Decree and its rate court provision.

As noted above, the BMI rate court provision was initiated by BMI itself. It gave two reasons for doing so. First, under pressure from its users, it sought to provide an "orderly rate-setting procedure" as "a more efficient way to deal with negotiation breakdowns" than the termination of licenses and antitrust and copyright litigation (JA A-382). Second, on its own behalf, it wished to establish greater

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[11] The Court in *Shenandoah*, based on a concession by the applicant there, thought that a literal interpretation of the ASCAP Decree would not be practical because it would require ASCAP "to grant every kind of license which the ingenuity or whim of hundreds of television station owners could devise." 331 F.2d at 122. That is doubtful, since most purely whimsical license formats would probably not be economically viable. On the other hand, to the extent nontraditional formats are viable and economical, there is no obvious reason why BMI should not quote a reasonable fee for them. Moreover, Article XIV adequately protects BMI in other ways. It gives BMI the initiative in proposing a fee, *United States v. ASCAP (Metromedia, Inc.)*, 341 F.2d 1003, 1009 (2d Cir.), cert. denied, 382 U.S. 877 (1965), and does not authorize the court to prescribe a new one unless BMI fails to show that the fee it quoted is reasonable.

competitive parity between itself and ASCAP, whose rate court provision "assured a steady stream of revenue while continuing to negotiate with music users" (JA A-382 - A-383, A-392). The rate court provision would do this "by eliminating BMI's copyright law-derived right to withhold access to its repertoire should it be unable to agree to the terms of its licenses," and "substitut[ing] a rate court mechanism" (JA A-410). Obviously, under BMI's own rationale there was no provision in the Decree prior to the amendment that would stop BMI from "withhold[ing] access to its repertoire," and, indeed, none was needed, since it could charge whatever the market would bear for such access. If Article XIV is to carry out BMI's stated goals, it must establish the duty to license as well as the mechanism for the regulation of rates.

Two other salient points also appear in BMI's memorandum supporting the amendment. First, it recognized the court's duty to consider the public interest in the proposed amendment in light of the procompetitive policies of the antitrust laws, the goal of the BMI Decree to restrain "whatever market power BMI allegedly derived from its accumulation of a massive number of copyright rights in a single entity," and the desirability of maintaining the alternative of direct licensing as a

competitive restraint on BMI (JA A-409 - A-412).[12] Second, despite multiple references to ASCAP, BMI did not express an intention to import into its provision all outstanding precedent under the ASCAP Decree. Instead, it included a provision barring the assignment of any BMI rate court issue to any judge or magistrate that handled ASCAP matters[13] in order "to establish a rate court for BMI that is in every respect independent from the rate proceedings for ASCAP" (JA A-415).

The United States supported the amendment because it also viewed the provision as promoting the public interest in competition as defined by the antitrust laws (JA A-428 - A-429). It reasoned that "empowering the Court to resolve licensing disputes when negotiations between BMI and music users break down is sound enforcement policy," and noted the role of a rate court "as an effective

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[12] BMI disparaged the merits of the government's case that gave rise to the 1966 consent judgment, Memorandum of BMI Concerning Consent Decree Construction 13-17 (filed June 4, 1999), but neither the strength nor the weakness of the case is relevant since a consent decree was entered. Both sides waived the right to a trial. What is important is that BMI does not contest the intent of the 1966 judgment to restrain the exercise of its market power, or the absence of any reference to blanket licenses outside of Article XIV. *Id.* at 17. Moreover, when the ellipses in its quotations are filled in, two district court cases it cited as finding a duty under other parts of the Decree to offer blanket licenses say instead that the Decree requires it to offer other forms of licenses in addition to the blanket license that it prefers. Compare *ibid.* with *Columbia Broadcasting System Inc. v. ASCAP*, 400 F.Supp. 737, 744 (S.D.N.Y. 1977); *Moor-Law*, 527 F.Supp. at 760.

[13] Amendment to Article XIII of the BMI Decree, 1996-1 Trade Cas. at 76,892-93. See JA A-41.

restraint on potential abuse of market power" (JA A-431). It emphasized, however, that it did not intend "that judicial rate setting should become a substitute for competitive rate setting" (JA A-432), and discussed the existing provisions in the Decree designed to make direct licensing an effective competitive alternative for users (JA A-432-34).

Although Article XIV is obviously modeled on section IX of the ASCAP Decree, and both BMI and the government contemplated the application of Article XIV to blanket licenses (JA A-384, A-434), neither party mentioned the then thirty-year-old *Shenandoah* decision in its submission to the court on the amendment, and there is no indication that either thought of the issue the court addressed in that case. Indeed, given the plain inapplicability of the *Shenandoah* holding to the BMI Decree, it is an issue that BMI would have had to address specifically if it wanted *Shenandoah* to apply, and the government would then have had the opportunity to address the issue as well, and might not have consented to the amendment. Certainly, BMI, as the proponent of the change and the party that drafted the language, should not be given the benefit of any ambiguity that might have misled the government. As matters stand, there is no basis for assuming a meeting of the minds that would warrant an interpretation different from the ordinary meaning of the language used in the specific context of the BMI Decree as a whole–and in that

context the only language giving users a right to a blanket license is in Article XIV(A) itself. If Article XIV(A) is to function as the parties explicitly agreed with respect to blanket licenses, therefore, the *Shenandoah* interpretation of the ASCAP Decree cannot be imported into the BMI Decree.

4. As noted above, BMI and the government agreed at the time the rate court provision was entered that it was to be a constraint on BMI's market power, and the government plainly communicated to BMI and the court that the provision was to supplement, not supplant, competitive pricing. That BMI has market power, the ability to exercise some control over price,[14] is plain. *ASCAP v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563, 570 (2d Cir. 1990) ("*Showtime*").

The reason for such market power is also plain. Even individual songs can have some market power,[15] and BMI has aggregated the right to license millions of songs on behalf of thousands of composers and dozens of publishers, aggregating their market power in the process. Moreover, while there is free entry into the

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[14] IIA P. AREEDA, H. HOVENKAMP & J. SOLOW, ANTITRUST LAW ¶402b2, at 3-4 (1995) ("AREEDA").

[15] As this Court has noted, "in the licensing of music rights, songs do not compete against each other on the basis of price." *Showtime* at 570. Even if the situation is not quite that absolute, individual composers do have some degree of market power as an ordinary function of product differentiation. Cf. AREEDA ¶409. The PROs' aggregation of the composers' license rights increases that power exponentially.

business of song writing, entry into the business of being a performing rights organization is rare. ASCAP was the only such organization from 1914 until 1939, when BMI was formed by large customers who felt they were being overcharged (JA A-254 - A-257), and those two have remained dominant in the 60 years since then.[16] Finally, BMI does not compete with ASCAP in the sense that users will purchase licenses from one or the other; since their repertories are different, most bulk users take licenses from both. *BMI v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 5 (1979) ("*CBS*"); *Moor-Law*, 527 F.Supp. at 764. Their relationship vis-a-vis users may be more accurately described as co-monopolists in the sale of blanket licenses.[17]

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[16] Courts have found economies of scale that could limit entry in the monitoring and bulk licensing functions with respect to some classes of users. *CBS*, 441 U.S. at 20-21; *Moor-Law*, 527 F.Supp. at 762-63. Moreover, it is in the interest of copyright holders, all other things being equal, to be members of a PRO that has market power because it can demand higher fees for their works. These considerations reinforce the historical evidence that there is unlikely to be sufficient entry to significantly reduce the market power of the PROs.

[17] The existence of market power is wholly consistent with the fact that ASCAP and BMI have been found not to violate the antitrust laws in their sale of blanket licenses in various cases. *CBS*, 441 U.S. at 24 (blanket license not per se violation); *Columbia Broadcasting System, Inc. v. ASCAP*, 620 F.2d 930 (2d Cir. 1980) (on remand, no violation under rule of reason), cert. denied, 450 U.S. 970 (1981); *Buffalo Broadcasting Co. v. ASCAP*, 744 F.2d 917, 925-33 (2d Cir. 1985), cert. denied, 469 U.S. 1211 (1985) ("*Buffalo Broadcasting II*"). Market power is only one element of an antitrust violation, and those findings were based on the

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While the rate court places a constraint on the exercise of BMI's market power, it is plainly not the equivalent of a true competitive constraint. Ratemaking in this context has no cost-based element, like utility rates, but rests on the "fair market value" of the licenses, which in turn is "the price that a willing seller would agree to in an arms-length transaction." See *Salem Media*, 981 F.Supp. at 210; *Moor-Law* at 764. But that can only be estimated by extrapolation from negotiated transactions, such as prior licenses negotiated between similar parties, *i.e.*, between the PROs and industry organizations that have countervailing bargaining power. *Salem Media, supra.* That is hardly a reliable context for finding "competitive" rate levels. See, *e.g.*, AREEDA ¶412c. As the ASCAP rate court remarked, "[t]o postulate what prices would prevail were [the market for blanket licenses] 'competitive' is perplexing in theory, impractical in practice, and dubious in outcome ***." *Capital Cities/ABC I*, 831 F.Supp. at 144.

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[17] (...continued)
absence of other elements. *Showtime*, 912 F.2d at 569-71. Moreover, the theory that blanket licenses are a different and superior product, *CBS*, 441 U.S. at 21-22; *Buffalo Broadcasting II*, at 934 (Winter, J., concurring), would confirm the PROs' market power rather than negate it. See *United States v. ASCAP (Capital Cities/ABC)*, 831 F.Supp. 137, 144 (S.D.N.Y. 1993) ("*Capital Cities/ABC I*"). Finally, in some markets it may be the cost of disentangling historical practices, rather than the inherent efficiencies of the blanket license, that give the blanket license its market power. See, *e.g.*, *Shenandoah*, 331 F.2d at 123 (broadcasters' complaint that producers were taking free ride on broadcasters' blanket licenses).

Under these circumstances, the most effective market-based constraint on BMI pricing is the availability of direct licensing, since it places an outside limit on the price that BMI can charge for the blanket license. The traditional all-or-nothing character of blanket license pricing, however, artificially raises the cost of that alternative, and has thus played a role in maintaining PROs' market power, for it means that a user cannot directly license some works and then go to BMI or ASCAP for the remainder of its needs without paying twice for the directly licensed works. The alternative of directly licensing all the works used is still a largely untested route[18] and likely to require a substantial investment. Both the ASCAP and BMI Decrees addressed this issue in a limited way by requiring the PROs to allow through-to-the-viewer licensing for networks and other producers of recorded shows, and program licenses for broadcasters, but those alternatives have had limited utility.[19]

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[18] While this Court in *CBS Remand* found that CBS had not proven the unavailability of direct licenses, it also pointed out "the difficulty of determining what the market for performance rights will look like if CBS elects to forgo the blanket license." 620 F.2d at 939.

[19] The networks take through-to-the-viewer licenses, but independent producers do not. See *Shenandoah*, 331 F.2d at 123.

Per program fees became viable for many stations, over ASCAP's strenuous objections, because the ASCAP rate court imposed maximum percentage spreads

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The practical issue here, therefore, is to what extent the BMI Decree provides a means for reducing the cost and the risk of direct licensing as an alternative to monopolistic blanket licenses. What the Applicants are seeking is simply a flexible way of addressing the problem, and the Decree should be read in accordance with its plain language to give it to them.

II. EVEN IF THE BMI RATE COURT IS LIMITED TO SPECIFIED LICENSE FORMATS, IT HAS JURISDICTION TO CONSIDER THE RATE FORMULAS PROPOSED BY THE APPLICANTS HERE

Even if the *Shenandoah* construction were applicable to the BMI Decree, the district court's decision was wrong. That is plain from this Court's holding in *Metromedia*, 341 F.2d at 1008-09, that *Shenandoah* goes to the scope or coverage of the licenses, not to the rate formula, the ASCAP rate court can require.

In *Metromedia* a broadcaster had sought blanket license rates based on gross receipts rather than net receipts, which the court described as a "markedly different method for computing royalties than was provided in previous ASCAP blanket

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[19] (...continued)
between blanket and per program rates in *United States v. ASCAP (Buffalo Broadcasting Co.)*, 1993-1 Trade Cas. ¶70,153, at 69,683, 69,692-94 (S.D.N.Y. 1993) (Magistrate Dolinger) ("*Buffalo Broadcasting I*"), aff'd, *United States v. ASCAP (Capital Cities/ABC)*, 157 F.R.D. 173, 202-03 (S.D.N.Y. 1994). See *Salem Media*, 981 F.Supp. at 216-18. Such a formula, however, provides little incentive to lower blanket license fees.

licenses." 341 F.2d at 1006 & n. 2. The Court also recognized that the Decree "gives ASCAP the initiative in proposing the entire formula." *Id.* at 1009. Nevertheless, distinguishing the demand in *Shenandoah* for "a license whose scope or coverage differs from that contemplated by the decree,"[20] the Court held the dispute within the jurisdiction of the rate court, and said that the application should have gone to the court as a rate issue.[21] *Id.* at 1008-09. Similarly, the Applicants in this case are seeking licenses for BMI's entire repertory, with fees computed per channel (which BMI itself characterizes as a blanket license that it will grant on

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[20] *Shenandoah* arose from the fact that independent producers, unlike networks, do not exercise their right to secure through-to-the-viewer licenses under section V of the ASCAP Decree, forcing the broadcasters to pay for coverage under their licenses. 331 F.2d at 122-23. The broadcasters wanted to force the producers to secure such licenses by excluding their shows from the broadcasters' licenses. Section VII of the Decree, however, specifically addressed broadcasters' licenses and required no such exclusion, so the court refused to infer the right to it from any other provision. *Id.* at 122-24 & n. 5. Thus, the immediate focus of the case was on the scope of the licenses sought, rather than the fees.

[21] In *Metromedia* the broadcaster had moved to hold BMI in contempt of the government's decree for refusing to offer the rate structure it wanted, and the court held that it had no standing to do so. 341 F.2d at 1007-08. The discussion in the text is from its alternative holding that even if Metromedia had standing, ASCAP had not violated the decree. *Id.* at 1005, 1008-09.

Metromedia's exegesis of *Shenandoah* is particularly authoritative because Judges Friendly and Smith sat on both panels. Judge Friendly wrote the *Shenandoah* opinion and Judge Smith the *Metromedia* opinion.

certain conditions[22]) or per program (which this Court has described as "simply another form of blanket license"[23]), or with a discount for directly licensed works. These may be "markedly different methods for computing royalties," but *Metromedia* clearly places them within the rate court's jurisdiction to consider.

Rather than apply *Metromedia*–indeed, without even mentioning the case–the district court held that the Applicants were not entitled to such licenses because they "alter the legal rights of the parties" and are not "traditional blanket licenses" (JA A-715). It explained:

> In addition to access to all of BMI's repertory of music (regardless of which titles the licensee chooses to play) for one flat fixed fee, the licensee would also gain the additional right to use some of the repertory for nothing, if he obtains a direct license for it elsewhere. BMI would lose the predictability of its flat fee income, for every similar licensee would have the same right. The change from a license offering unlimited choice upon payment of a fixed fee to one offering unlimited choice with payment depending on usage, or upon rights obtained from third parties, is a change in the rights of the licensor and licensee, not merely a change in price.[8] Such a change would stretch the concept of rate-setting too far, in violation of the principle that "It is important to the obtaining of consent decrees, on which the effective enforcement of the antitrust laws depends in no small degree, that

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[22] Memorandum of BMI Concerning Consent Decree Construction 45-46 (filed June 4, 1999).

[23] *Columbia Broadcasting System, Inc. v. ASCAP*, 562 F.2d 130, 133-34 (2d Cir. 1977), rev'd on other grounds *sub nom. BMI v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979). Accord, *Capital Cities/ABC II*, 157 F.R.D. at 178 (program license is a "mini-blanket license").

> defendants who sign them should know these will not be stretched beyond their terms." *United States v. ASCAP*, (Application of Shenandoah Valley), 331 F.2d 117, 123-24 (2d Cir. 1964).
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> [8] Some actual changes in the conduct of BMI's business under such a regime are indicated in *BMI v. Moor-Law, Inc.*, 527 F.Supp. 758, 769-70 (D. Del. 1981).

That reasoning, however, is insupportable. The court cites no precedent for its "legal rights" criterion. The Applicants certainly would not receive "the additional right to use some of the repertory for nothing;" they would simply be paying the copyright holder directly, rather than through BMI. See *Buffalo Broadcasting I*, 1993-1 Trade Cas. at 69,692. The loss of "predictability of [BMI's] flat fee income" is nothing more than the normal operation of a competitive market, and there is nothing in the Decree that is intended to protect BMI from competition. Cf. *Salem Media*, 981 F.2d at 203 (rejecting ASCAP objection to per program license that "renders ASCAP's income dependent on actual use of ASCAP music"). Nor is there anything on the face of Applicants' proposal equivalent to the usage-based rates demanded in the *Moor-Law* case that the court cites.[24]

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[24] *Moor-Law* was a copyright infringement action in which the defendant filed an antitrust counterclaim. The defendant sought a retrospective usage-based license that would give it the right to play any composition in the BMI repertory, but fees would be based on the amount of BMI music actually used, measured by a complicated sampling system. 527 F. Supp. at 769-70. As the court noted in that (continued...)

In short, Article XIV of the BMI Decree gives BMI the right to a reasonable fee, but there is nothing in it that gives BMI an absolute right to a fee fixed without regard to the actual usage of BMI music. The only relevant language in the Decree is that an applicant has a right to ask for a license for "any, some or all of the compositions in defendant's repertory," that BMI is to "advise the applicant in writing of the fee which it deems reasonable for the license requested," and that "[s]hould the defendant not establish that the fee requested by it is a reasonable one, then the Court shall determine a reasonable fee based on all the evidence." Neither the court nor BMI has pointed to any other language in the Decree that may have a bearing on the issue here. It may be, at the end of the day, that BMI can prove that a particular fixed fee is a reasonable one for the licenses requested by the Applicants

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[24] (...continued)
case, such a rate structure would not compensate for the benefit of guaranteed immediate access to all the works in the repertory, while it would impose substantial implementation and monitoring costs. In this case, by contrast, the Applicants' proposal relies on a prior carve-out of directly licensed compositions, and no rate has yet been proposed, so speculation on the reasonableness of any particular rate structure is premature.

here, but the district court's holding has foreclosed even a hearing on that issue.[25] The text of the Decree provides no support for that holding.

CONCLUSION

The decision of the district court should be reversed.

Respectfully submitted.

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[25] As Article XIV(A) is structured, the rate court must first decide whether BMI's proposed fees are reasonable, and only if they are not does it need to consider the applicant's proposal. It is not bound to adopt either BMI's or the applicants' proposals, but is to set a fee "based upon all the evidence." See, *e.g.*, *Buffalo Broadcasting I*, 1993-1 Trade Cas. at 69,682-94. It may also set the fee to cover any additional BMI administrative expenses. *Id.* at 69,694-95.

CERTIFICATE OF SERVICE

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