

16-3830-CV

IN THE
**United States Court of Appeals
for the Second Circuit**

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

BROADCAST MUSIC, INC.,
Defendant-Appellee.

On Appeal from the
United States District Court for the Southern District of New York
Case No. 1:64-cv-3787 (Hon. Louis L. Stanton)

REPLY BRIEF OF APPELLANT UNITED STATES OF AMERICA

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INTRODUCTION AND SUMMARY OF ARGUMENT

The plain language of the Decree¹ requires BMI to offer full-work licenses for the compositions in its “repertory” as defined by the Decree; that is, licenses that authorize users to immediately and legally perform repertory compositions. This reading is confirmed by the parties’ stated understanding of the Decree, the Decree’s context, and its purpose. Fractional licenses for repertory compositions do not satisfy this requirement. That is why BMI’s likening of a fractional license to a slice of pizza misses the point. You can eat a slice of pizza, but you cannot perform a fractional interest in a song. In pizza terms, the fractional license is closer to a cup of flour. And anyone who delivers only a cup of flour after agreeing to deliver a pizza plainly is in breach.

1. BMI agrees with the United States in part, conceding that it must license songs on a full-work basis when it can do so. This means that the district court’s decision cannot stand because it holds that the Decree *never* requires BMI to provide full-work licenses for the compositions in its repertory.

¹ Capitalized and abbreviated terms in this brief have the same meaning as set forth in the United States’ opening brief.

The parties' dispute on appeal is thus a narrow one: whether split-work compositions for which BMI cannot offer full-work licenses are in BMI's repertory. The plain language of the Decree answers this question in the negative by making clear that a license for "the right of public performance" is a full-work license. Article II(C) thus defines BMI's repertory as those compositions for which BMI has secured full-work licenses, and Article XIV(A) applies BMI's full-work licensing obligation to its entire repertory. BMI's concession confirms this reading. If, as the United States argues and BMI concedes, the Decree's requirement that BMI license "the right of public performance" obligates BMI to grant full-work licenses when it can, a license for "the right of public performance" must always mean a full-work license. Otherwise, a fractional license would satisfy BMI's obligation to license "the right of public performance," even if BMI had the ability to offer a full-work license.

Instead of acknowledging this logic, BMI argues that the Decree does not prohibit fractional licensing because it does not spell out that prohibition in "thou shalt not" terms. But this Court rejected just that argument in the partial-withdrawals case, *Pandora Media, Inc. v.*

ASCAP, 785 F.3d 73 (2d Cir. 2015), and the Court should reject it again here. Fractional licensing, which indisputably does not grant users the right to immediately and legally perform a song, is irreconcilable with the Decree's requirement that BMI license the right of public performance for all songs in its repertory.

BMI's textual arguments are similarly flawed. BMI abandons the sole textual argument it raised in its written submissions to the district court; namely, that the word "composition" includes partial interests in musical works. On appeal, BMI discusses only the meaning of "the right of public performance." It argues that the use of the definite article "the" in the phrase "the right of public performance" identifies not a single and complete right, but a particular type of right. BMI is correct in saying that the word "the" particularizes "the right of public performance," and that is one of the reasons why it was error for the district court to refuse to give any meaning to that phrase. BMI is wrong, however, that this proposition refutes the United States' argument that "the right of public performance" licensed under the Decree must be a right complete unto itself. The language used in

Articles II(C), XIV(A), and throughout the Decree establishes that the licenses BMI must offer under the Decree are full-work licenses.

BMI also leads its brief by attacking a position that the United States is not taking: that the Decree prohibits BMI from offering fractional licenses to users in any context. The United States' argument is that (1) BMI's repertory consists of those compositions, and only those compositions, for which it can provide full-work licenses, and (2) the Decree requires full-work licensing, and thus prohibits fractional licensing, of compositions in the repertory so defined. The relief sought by the United States is limited to "revers[ing] the district court's declaratory judgment that, *with respect to works in BMI's repertory*, the consent decree 'neither bars fractional licensing nor requires full-work licensing.'" U.S. Br. 5 (quoting JA12 (Op. 6)) (emphasis added); *see id.* at 51. The United States is not arguing that the Decree prohibits BMI from offering fractional licenses for works outside that repertory, separate from the blanket licenses covered by the Decree. This appeal presents a different question: whether BMI can offer fractional licenses under the collective-licensing regime regulated by the Decree. And the answer to that question is no.

2. BMI and the United States agree on a second point: the Court should not consider extrinsic evidence if it finds the Decree's language to be unambiguous. BMI goes too far, however, when it argues that, if the Court were to find the Decree ambiguous, there is no extrinsic evidence properly before it. Below, the United States provided evidence of the parties' intent, the Decree's context, and its purpose. By contrast, BMI promised to offer extrinsic evidence of trade usage in its written submissions, failed to do so, but nevertheless consented to the district court's deciding the case on the existing record. BMI's failure to introduce evidence when it had the opportunity does not preclude this Court from considering materials that are either in the record or are judicially noticeable.

The extrinsic evidence properly before the Court supports the conclusion that the parties intended the Decree to require full-work licensing. For example, BMI's licensing agreements purport to grant full-work licenses to BMI's users. And BMI has many times represented to courts that the blanket licenses required by the Decree confer benefits unique to full-work licensing. To the extent that the

Court finds the Decree's text ambiguous, that text should be interpreted in a manner consistent with this understanding.

3. The parties agree on yet a third point: policy arguments speculating about competitive consequences are not properly before this Court. Nonetheless, BMI's brief includes almost ten pages of policy arguments for which there is no factual record, claiming that the United States opened the door. The United States did no such thing, which is why BMI's policy arguments can cite only the United States' explanation of the well-documented historical context and purpose of the Decree, or those portions of the Statement that outline the United States' administrative review of fractional licensing.

BMI's assertions are wrong, in any event. Although BMI now claims that mandatory full-work licensing for repertory songs will cause massive disruption, it told the district court that the majority of its works would be unaffected. There is no support for BMI's claim that affected works will now be wholly excluded from licensing. And BMI's licensing agreements already purport to offer full-work licenses for repertory songs, so mandatory full-work licensing for those songs simply requires BMI to continue to do what it always has done. BMI's

claims that the requirement will chill artist collaboration or decrease competition are thus pure speculation, untethered to established facts.

ARGUMENT

A. BMI Fails To Overcome The United States' Plain-Text Reading Of The BMI Decree

1. Based on the concessions in BMI's brief, the parties' disagreement has narrowed on appeal. Below, BMI represented in its written submissions that it licensed only the shares of co-owned works that belong to the copyright holders affiliated with BMI. *See* U.S. Br. 38-39 (quoting BMI's letters to the district court). Even if its affiliate(s) granted BMI a full-work license for a split work, BMI claimed it could nonetheless license to users only the fractional interests owned by its affiliate(s), requiring users to secure additional licenses from non-affiliated co-owner(s) before they could perform the song lawfully.

Now, by contrast, BMI agrees "it must license, on a full-work basis, those works for which it can in fact do so." BMI Br. 26. This concession exposes the flaw in the district court's holding that the Decree *never* requires full-work licensing. *See* JA12 (Op. 6) ("The [BMI] Decree neither bars fractional licensing nor requires full-work

licensing.”). BMI has effectively confessed error, at least in part, but fails to appreciate the consequences of that confession for its argument that it may fractionally license some compositions under the Decree.

Article II(C) limits BMI’s repertory to those compositions for which BMI has the right to license “the right of public performance,” and Article XIV(A) requires BMI to offer licenses for “the right of public performance” for all compositions in its repertory. *See* JA26, 31-32. If the Decree were agnostic about fractional licensing, both fractional licenses and full-work licenses would qualify as licenses for “the right of public performance.” BMI thus could offer fractional licenses even for songs for which it had the right to offer full-work licenses. This is not the case, as BMI recognizes, though it never explains why. The reason is that a license “for the right of public performance” does not mean *either* a fractional *or* a full-work license; it means *only* a full-work license. Accordingly, the compositions in BMI’s repertory are limited to those for which BMI has the right to grant full-work licenses, and BMI must offer full-work licenses for all repertory compositions.

2. BMI claims that the Decree should not be interpreted to exclude fractionally licensed compositions from BMI’s repertory because

the Decree does not expressly and unambiguously prohibit their inclusion. BMI Br. 21-27 (citing, among other things, *United States v. Armour & Co.*, 402 U.S. 673 (1971)). But the Decree does just that when it requires BMI's licenses to confer on users the right to immediately and lawfully perform the compositions in BMI's repertory. See JA26, 29-32 (Arts. IV(A), VIII(B), IX(A)-(C), XIV(A)); U.S. Br. 26-30. This requirement is irreconcilable with fractional licensing, which would require users to enter individual negotiations and secure licenses from every co-owner of a song (or their representatives) before lawfully playing it. U.S. Br. 29-30.

This Court has already considered and rejected an argument almost identical to BMI's in *Pandora Media, Inc. v. ASCAP*, 785 F.3d 73 (2d Cir. 2015) (*Pandora v. ASCAP*). In that case, ASCAP (as appellant) and BMI (as amicus) argued that their respective consent decrees should not be construed to prohibit partial withdrawals because there was no "express prohibition against partial grants or withdrawals" in the decrees. Br. for BMI as Amicus Curiae in Supp. of Resp't 19, *Pandora v. ASCAP*, No. 14-1158-cv, 2014 WL 3887401 (2d Cir. Aug. 4,

2014) (BMI *Pandora* Amicus Br.); *accord id.* at 13-15.² Both claimed that the decrees required only that BMI and ASCAP license whatever rights they had received from copyright holders, even if they had received only partial rights that did not authorize all users to perform all repertory compositions. BMI *Pandora* Amicus Br. 14-15; ASCAP *Pandora* Br. 33-35; *see also* BMI *Pandora* Mem. 17-18 (making same argument in BMI partial-withdrawals case). Like District Judges Stanton and Cote before it, this Court disagreed with ASCAP and BMI. The plain language of ASCAP’s Decree required ASCAP “to license its entire repertory to all eligible users,” and thus, it “unambiguously preclude[d] ASCAP from accepting . . . partial withdrawals.” *Pandora v. ASCAP*, 785 F.3d at 77.

Pandora’s reasoning applies here. BMI again argues that the Decree allows it to license only a subset of performance rights in repertory songs—this time, those corresponding to BMI’s affiliates’

² *See* Br. of Resp.-Appellant 30-33, *Pandora v. ASCAP*, No. 14-1158-cv (2d Cir. Aug. 4, 2014) (Dkt. No. 143) (ASCAP *Pandora* Br.); *see also* BMI Mem. of Law in Opp. to Pandora’s Mot. for Partial Summ. J. 14-15, No. 1:13-cv-4037-LLS, 2013 WL 7021820 (S.D.N.Y. Dec. 6, 2013) (BMI *Pandora* Mem.) (making same argument in BMI partial-withdrawals case).

fractional interests in their songs. *Compare* BMI Br. 21-36, *with* ASCAP *Pandora* Br. 29-40. But the plain language of the BMI Decree requires it to license the right of public performance. Thus for songs in BMI’s “repertory” as defined by the Decree, the Decree unambiguously precludes BMI from providing only a subset of performance rights. *See Pandora v. ASCAP*, 785 F.3d at 77.

3. BMI argues against the United States’ reading of the Decree, but never provides a cogent explanation for how fractional licensing is consistent with the Decree’s text. BMI offered only one such argument in its letters to the district court, when it claimed that the term “composition” “is commonly used in connection with music licensing to include fractional interests in musical works.” JA58 (BMI Aug. 4, 2016 Letter 4); *accord* JA166 (BMI Aug. 12, 2016 Letter 3). This argument was not based on any plain language, but on supposed trade usage and custom in the music industry, for which BMI offered no evidence. *See infra* p. 19. As the United States explained, the district court properly rejected BMI’s argument. *See* U.S. Br. 36 (quoting JA182 (Tr. 15)). BMI concedes this point by not contesting it, and effectively disavows

its prior argument by chiding the United States for discussing the meaning of “compositions” at all. *See* BMI Br. 25 n.21.

This leaves BMI with an argument about “the right of public performance” based almost exclusively on the meaning of the single word “the.” BMI contends that case law supports the view that the definite article “the” signals that the identified “right” has a specific, particularized meaning, but not the United States’ argument that the “right” referenced need be complete and unitary. *Id.* at 29-32.

The United States agrees with BMI that the definite article in the phrase “the right of public performance” signals that the phrase has a “specific meaning” under the Decree and distinguishes the right of public performance from other possible rights identified by the Copyright Act. *Id.* at 30 (quoting *United States v. Rybicki*, 354 F.3d 124, 137-38 (2d Cir. 2003)). BMI is incorrect, however, that its authorities conflict with the United States’ position. None uses “the” to indicate that the noun following “the” is merely a portion of something that must be combined with other things to form a complete whole. *See id.* at 29-30 & nn.24-25. BMI’s authorities are thus entirely consistent with the United States’ explanation that the definite article “connotes

the singularity” of the word modified. U.S. Br. 30 (quoting *Renz v. Grey Advert., Inc.*, 135 F.3d 217, 222 (2d Cir. 1997)).

In any event, the word “the” is just one of several textual signals that a license for “the right of public performance” requires a full-work license because that is the only type of license that confers the immediate right to perform a composition. The United States detailed the other provisions of the Decree that show this to be true. *See id.* at 26-30, 35-36. BMI recognizes that the Decree should be read as a whole, BMI Br. 26-27, but it fails to put that principle into practice. Instead it addresses those other provisions only in cursory footnotes.

BMI’s footnotes are unpersuasive. For example, BMI dismisses the portion of Article XIV(A) that confers on applicants an immediate right to use the compositions in BMI’s repertory while rate negotiations are ongoing using entirely circular logic: Article XIV(A) does not require full-work licensing because it was never intended to do so. *Id.* at 36 n.33. BMI also purports to distinguish Articles VIII(B) and IX(A) of the Decree from Articles II(C) and XIV(A), but it never contests the relevant point: that Articles VIII(B) and IX(A) plainly contemplate that BMI’s licenses confer on users the immediate right to play repertory songs,

and Articles II(C) and XIV(A) use the same language as those other provisions. *See id.* at 31 n.27.

4. The United States agrees with BMI that the Decree does not prohibit BMI from offering fractional licenses in all contexts. *See BMI Br.* 24-27. In particular, the Decree does not prohibit BMI from providing fractional licenses for songs that are outside the repertory, as defined by the Decree, and separate from the blanket license. Such licenses would be outside the auspices of the Decree and, thus, not subject to its requirements or its protections. For example, the rate court could not determine the reasonableness of rates for fractional licenses, nor for any per-program or blanket licenses that included fractional licenses. And if BMI engaged in collective licensing of fractional interests of songs outside the repertory, the United States would have to determine whether to investigate that conduct and, if so, determine whether such collective licensing violates the antitrust laws. But that issue is not presented here.³

³ Some passages in the Closing Statement suggested that BMI was prohibited from engaging in fractional licensing in all circumstances. *See, e.g., JA76* (Closing Statement 13) (stating that the Antitrust Division “has concluded that it would not be in the public interest to modify the ASCAP and BMI consent decrees to permit ASCAP and BMI

5. BMI echoes the district court’s concern that, under the United States’ view, BMI’s accidental licensing of invalid copyrights would be a Decree violation. BMI Br. 32. Of course, this possibility is not peculiar to full-work licensing. Even if the Decree authorized fractional licensing, BMI could still inadvertently license more than it actually had. BMI’s argument therefore adds nothing to the question of full-work licensing versus fractional licensing under the Decree.

BMI argues that the district court’s treatment of “the right of public performance” as “descriptive, not prescriptive” is the proper solution to avoid this situation. *Id.* at 33 (quoting JA12 (Op. 6)). To deprive the Decree of its plain meaning out of concern over hypothetical enforcement actions against inadvertent violations is to allow the

to offer fractional licenses”); JA82 (*id.* at 19) (suggesting that split works are “unlicensable by ASCAP or BMI”). Those passages did not adequately distinguish between (a) the proposition that the consent decree itself prohibits BMI from engaging in fractional licensing, and (b) the proposition that fractional licensing cannot occur under the *auspices* of the consent decree, so that (*inter alia*) the decree does not immunize fractional licensing from any constraints the antitrust laws would otherwise impose. To clarify, the position of the United States is that only the second proposition is correct. Accordingly, the United States has asked this Court to “reverse the district court’s declaratory judgment that, *with respect to works in BMI’s repertory*, the consent decree ‘neither bars fractional licensing nor requires full-work licensing.’” U.S. Br. 5 (emphasis added); *see id.* at 51.

smallest tail to wag the largest dog. And BMI's argument is wholly inconsistent with its acknowledgement that "it must license, on a full-work basis, those works for which it can in fact do so." *Id.* at 26; *see also* Mem. of Def. BMI in Supp. of Mot. to Modify Consent Decree, 1994 WL 16189513 (S.D.N.Y. June 27, 1994) (BMI 1994 Modification Mem.) (second paragraph in Argument § I.B) (recognizing that the 1994 amendments obligate BMI to provide users licenses on request, "eliminating BMI's copyright law-derived right to withhold access to its repertoire"). If the Decree creates an enforceable obligation on the part of BMI to provide full-work licenses in at least some contexts, the phrase "the right of public performance" cannot be merely descriptive.

Moreover, the phrase "the right of public performance" must have some discernible and prescribed meaning under the Decree because it defines the types of licenses regulated by the Decree. Only those licenses are subject to the jurisdiction of the rate court, and only those licenses are shielded from U.S. antitrust enforcement under the settlement that resulted in the Decree. Identifying the meaning of "the right of public performance" is, thus, necessary to give effect to the

Decree’s provisions—hardly the “absurd result[]” that BMI fears. *See* BMI Br. 32.

* * *

The unambiguous meaning of “the right of public performance” in the Decree is “the right to perform a musical composition.” *Buffalo Broad. Co. v. ASCAP*, 744 F.2d 917, 920 n.1 (2d Cir. 1984); *accord BMI v. Pandora Media, Inc.*, 140 F. Supp. 3d 267, 275 (S.D.N.Y. 2015) (“the right of public performance in a composition is the right to use the underlying musical composition itself”). BMI understands this. Before the district court, BMI asserted that “music users have obtained *the right to publicly perform* split works for which BMI can only license a fraction by obtaining licenses from the other domestic PROs and effectively aggregating the fractional interests into a full work license.” JA57 (BMI Aug. 4, 2016 Letter 3) (emphasis added). BMI’s prior statement makes clear what BMI well knows: a fractional license does not convey the right of public performance required by the plain language of the Decree. Only a full-work license does.

B. The Extrinsic Evidence Properly Before The Court Confirms That The Decree Requires Full-Work Licensing

Both parties agree that the Court should not consider extrinsic evidence if it finds the Decree to be unambiguous. U.S. Br. 22, 39; BMI Br. 33. The parties disagree, however, on what happens if this Court concludes that the Decree is ambiguous. BMI claims that “there is no extrinsic evidence of the parties’ intent” and therefore nothing for this Court to consider. BMI Br. 34. BMI is wrong. The government put extrinsic evidence of the parties’ intent in the record, even if BMI did not, and this Court may take this evidence into account if it finds the Decree is ambiguous. *See United States v. ITT Cont’l Baking Co.*, 420 U.S. 223, 238 (1975); *United States v. BMI (In re Applications of Muzak LLC & AEI Music Network, Inc.)*, 275 F.3d 168, 175 (2d Cir. 2001) (*AEI*). This evidence shows that the parties understood the Decree to require full-work licensing.

1. Before the district court, the United States offered evidence that BMI has long held itself out as offering full-work licenses: BMI purports to receive full-work licenses from its affiliates, *see, e.g.*, JA148 (BMI Writer Agreement §§ 3, 4(a)), and likewise purports to grant full-work licenses to its users, *see, e.g.*, JA131 (BMI Radio Station Blanket /

Per Program License Agreement § 3(A)). The United States showed that BMI has represented the same to courts. *See, e.g.*, JA112-13, 116-17 (BMI ESPN Resp. ¶¶ 8-9, 11, 23, 26). And the United States explained the historical purpose and context of the Decree by way of the Supreme Court’s discussion of that purpose and context in *BMI v. Columbia Broadcasting Systems, Inc.*, 441 U.S. 1 (1979) (*BMI v. CBS*). *See, e.g.*, JA88 (U.S. Aug. 9, 2016 Letter 3).

BMI, on the other hand, included only the United States’ Closing Statement with its initial submission. *See* JA63-85. BMI declared that it “intends to present evidence” about “trade practice and custom.” JA58 (BMI Aug. 4, 2016 Letter 4). But BMI never offered any such evidence, even after repeating its intention to do so at the pre-motion conference. JA178 (Tr. 11). BMI’s counsel nonetheless “accept[ed] the Court’s suggestion that we proceed on the basis of the submissions and argument already made,” without any qualification. JA185 (Tr. 18). BMI’s failure to offer extrinsic evidence before the district court does not preclude this Court from considering the evidence that the United States offered below or the judicially noticeable party statements from court filings. *See United States v. ASCAP (In re Applications of*

RealNetworks, Inc. & Yahoo! Inc.), 627 F.3d 64, 69 n.2 (2d Cir. 2010) (this Court may “take judicial notice” of “[p]ublic filings”); *see also, e.g.*, Fed. R. Evid. 801(d)(2) (opposing party’s statement is not hearsay).

Moreover, the only evidence BMI said it would offer—evidence of the supposed licensing practices of *others* in the industry—has no bearing on the supposed technical meaning of any words in the Decree or BMI’s licensing practices. BMI represents that it “has always licensed all public performance rights that it receives from its Affiliates.” BMI Br. 2 n.1. Although BMI qualifies this by saying it does so whether those rights are “full-work or fractional,” *id.*, BMI’s representations below showed that it was not aware of any affiliates that had reserved rights in songs by granting it less than full-work licenses, *see* U.S. Br. 42 (citing JA148 (BMI Writer Agreement § 3), JA165 (BMI Aug. 12, 2016 Letter 2 n.3)). BMI does not dispute this fact in its brief. It follows, then, that BMI has always offered only full-work licenses.

2. BMI attempts to explain away the United States’ evidence of the parties’ intent. *First*, BMI claims that, because the parties indisputably did not contemplate fractional licensing when they agreed

to any version of the Decree, all such evidence is irrelevant. *See* BMI Br. 34-35. Incorrect. The parties may not have contemplated how BMI's obligations would apply in all possible circumstances, but that does not change the basic requirements of the Decree. The Department of Justice, BMI, and ASCAP presumably did not contemplate the ubiquity of new media services like Pandora when they entered or last amended the BMI and ASCAP decrees, but two district judges and, for ASCAP, this Court, held that the decrees applied to the unforeseen technology just the same. In the ASCAP partial-withdrawals case, for example, Judge Cote expressly acknowledged that “[i]t is certainly imaginable that in 2001 DOJ and ASCAP simply did not contemplate” partial withdrawals, for new media services or anyone else, and therefore did not include a specific prohibition against such withdrawals in the ASCAP Decree. *In re Pandora Media, Inc.*, No. 1:12-cv-8035-DLC, 2013 WL 5211927, at *10 (S.D.N.Y. Sept. 17, 2013), *aff'd sub nom, Pandora Media, Inc. v. ASCAP*, 785 F.3d 73. But “such a failure is immaterial when the language of [the decree] so clearly forecloses” the practice. *Id. Contra BMI Pandora Amicus* Br. 17 (quoting same language and arguing Judge Cote was wrong).

Arguments about unforeseen circumstances do not justify reinterpreting the plain language of a consent decree. *See Armour*, 402 U.S. at 681. If anything, they address whether modification of a consent decree is appropriate. *Id.* Because modification is not an issue before this Court on appeal, BMI's arguments about unforeseen circumstances are misplaced.

Second, BMI describes as "strained" the United States' explanation that fractional payments may coexist with full-work licenses. *See BMI Br. 35 & n.32.* But BMI's own statements prove that the United States' explanation is correct. As BMI now concedes, it is required to, and does, offer full-work licenses for songs when it can, including for split works that are held as tenancies-in-common. *See id.* at 2 n.1, 26. At the same time, BMI makes fractional payments to its affiliates for those songs, based on their proportional ownership interests. *See JA150 (BMI Writer Agreement § 6(a)(ii)); U.S. Br. 42-45 (citing, among other things, AEI, 275 F.3d 168).* This proves that BMI has provided, and does provide, fractional payments to its affiliates, even when it licenses their songs on a full-work basis.

3. BMI also suggests that any party statements that are not contemporaneous with the 1994 amendments to the Decree, which added Articles II(C) and XIV(A), are not relevant. *See* BMI Br. 34-36. This argument does not help BMI because its 1994 statements also demonstrate that BMI understood the Decree to require full-work licensing. When BMI asked the district court to modify the Decree, BMI described its historical licensing practices in a manner that is consistent only with full-work licensing. BMI explained that its blanket licenses “facilitate[] the licensing of performing rights to millions of compositions for many thousands of music users without the delay and expense of individual negotiations” and “provide unfettered, indemnified, and instantaneous access to millions of compositions for one fee.” BMI 1994 Modification Mem. (last paragraph in “BMI’s Business” section of Statement of Facts; citing *BMI v. CBS*, 441 U.S. at 22). These benefits do not extend to fractional licenses, which provide only fettered, potentially not fully indemnified, and not-instantaneous access to songs, the performance of which would require multiple fees. BMI is forced to concede as much on appeal. *See* BMI Br. 40.

BMI is also wrong about the relevance of the parties' prior statements. Its specific challenge to the pre-1994 statements is based on the supposed fact that the Decree's 1994 amendments incorporated changes to copyright law enacted through the Copyright Act of 1976. According to BMI, that is when the law first allowed fractional licensing. *See id.* at 35 & n.31. To accept BMI's argument, however, the Court would have to find that this greater flexibility to license songs on a fractional basis was incorporated into the 1994 Decree amendments. This argument is directly contrary to the one BMI pressed when it sought modification of the Decree in 1994, representing that "the modification requested will serve to *further constrain* BMI's licensing *practices.*" BMI 1994 Modification Mem. (first paragraph under Argument § I.A; emphasis in original). The United States relied on this interpretation when it consented to BMI's proposal, as did the district court when it adopted the modification. BMI should not now be heard to make a contradictory argument because it would allow BMI to "play[] fast and loose with the courts," as well as the United States, its counterparty to the Decree. *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (some quotation marks omitted).

In any event, nothing in the BMI Decree suggests that the meaning of terms such as “composition,” “public performance,” or “the right of public performance” changed in 1994. Variations of these terms have existed since the 1941 and 1966 versions of the Decree, in almost every substantive provision of the Decree. *See, e.g.*, JA14-16 (1941 BMI Decree Arts. II-III); JA18-21 (1966 BMI Decree Arts. IV-X); U.S. Br. 26-30. The 1994 amendments used these same terms in Articles II(C) and XIV(A). *See* JA22-24 (1994 BMI Order) (describing 1994 amendments to 1966 BMI Decree). Even when the 1976 Copyright Act shifted from the term “musical compositions” to “musical works,” the BMI Decree retained the “compositions” language of the 1909 Copyright Act. *Compare* 17 U.S.C. § 102(a)(2), *with* Copyright Act of 1909, ch. 320, § 5(e), Pub. L. No. 60-439, 35 Stat. 1075, 1076 (repealed 1976).

In the context of both statutory construction and contract construction, courts have long applied the “standard principle . . . that identical words and phrases within the same statute should normally be given the same meaning.” *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007); *see Bank of New York Mellon Tr. Co. v. Morgan Stanley Mortg. Capital, Inc.*, 821 F.3d 297, 306-07 (2d Cir.

2016) (applying same principle to contracts); *Maryland Cas. Co. v. W.R. Grace & Co.*, 128 F.3d 794, 799 (2d Cir. 1997), *as amended* (Nov. 18, 1997) (same). “Where sections of a statute have been amended but certain provisions have been left unchanged, [the Court] must generally assume that the legislature intended to leave the untouched provisions’ original meaning intact.” *Am. Cas. Co. of Reading v. Nordic Leasing, Inc.*, 42 F.3d 725, 732 n.7 (2d Cir. 1994).

Pursuant to this basic interpretive principle, and contrary to BMI’s argument, the fact that the parties used the same terms in the 1994 amendments without expressly altering the terms’ definitions indicates that the parties meant the terms to have the meanings they have always had. It follows, therefore, that evidence of the parties’ pre-1994 understanding of the Decree is relevant to show the meaning of the same language added in 1994. And this evidence shows that the parties have historically understood that BMI offers full-work licenses under the Decree. Only those types of licenses “can offer to music users a single license which covers all the works of all [BMI’s] affiliates.” *Br. for Pet’rs 7, BMI v. CBS*, Nos. 77-1578, 77-1583, 1978 WL 207040 (S. Ct. Nov. 17, 1978).

Evidence of the parties' understanding of the Decree after the 1994 amendments is also relevant because it confirms that the parties understood the 1994 amendments did not change the nature of the licenses BMI is required to offer under the Decree. BMI has repeatedly told courts, including this Court, that its blanket licenses offer "immediate access to music from virtually any source without advance negotiation and indemnification against claims of copyright infringement" and "provide what 'most users want': 'unplanned, rapid, and indemnified access to any and all of the repertory of compositions.'" [Corrected] Br. for Pet'r-Appellant 39, *BMI v. DMX Inc.*, No. 10-3429-cv (2d Cir. Jan. 5, 2011) (Dkt. No. 61) (quoting *BMI v. CBS*, 441 U.S. at 20). That is what distinguishes blanket licenses from direct licenses, negotiations for which cost time and money. "With a blanket license, this expense is incurred only once[.]" *Id.* at 38.

In short, the available extrinsic evidence shows that the parties intended, and have long understood, the Decree to require BMI to offer full-work licenses for repertory songs.

C. BMI's Policy Arguments Are Improper And Wrong

1. To resolve this appeal, the Court may consider the plain text of the Decree and, if the Decree is ambiguous, extrinsic evidence of the parties' intent. Both parties agree that policy arguments speculating about the competitive consequences of fractional licensing have no place in the Court's analysis of the meaning of the Decree. *See* BMI Br. 41.

BMI, however, accuses the United States of opening the door to such arguments in its brief. *See id.* at 41-42. BMI broadly cites the United States' discussion of courts' and the parties' historical justifications for the Decree. *See id.* at 42 & n.34 (quoting U.S. Br. 45, 46, 48). In that discussion, the United States recognized that fractional licenses can impose informational and potential copyright-liability burdens on users that are inconsistent with the parties' intent and understanding of the Decree. *See id.* (citing U.S. Br. 48). To the extent the United States' historical assessment of potential burdens on users qualifies as "policy," it is based on common sense that BMI never bothers to dispute. Indeed, BMI falls silent when it comes to the United States' observation that BMI does not offer *any* comprehensive, reliable

means for its users to identify which of its licensed songs are split works, or the co-owners of those songs. *See* U.S. Br. 47-48.

Rather than engaging with those entirely proper arguments, BMI speculates about how full-work licensing would affect the market and musical collaboration, based on unproven (and disputed) allegations. *See* BMI Br. 42-51. These are not responses to the United States. Every citation to the United States' brief in BMI's substantive policy discussion references portions of the United States' Statement that outlined the history of its administrative review of fractional licensing—and not a single page of the United States' actual argument. *See id.* at 43, 49 (citing U.S. Br. 14, 15, 18, 19-20). BMI's attempt to back-door policy arguments is improper.

2. BMI is also wrong. To begin, BMI's contention that the government's interpretation of the Decree would cause widespread harm in the market, *id.* at 42-49, is speculative at best, and contrary to BMI's prior representations at worst. BMI has already represented that “[t]he majority of works in BMI's repertoire are works created by a single writer or composer or co-written by two or more creators who are all affiliates of BMI” and therefore “would not be affected by a full work

licensing requirement.” JA57 (BMI Aug. 4, 2016 Letter 3 n.3).

Moreover, BMI acknowledged below that it did not discover that co-owners supposedly “often” restricted licensing between them until the government’s investigation in 2016. *See* JA165 (BMI Aug. 12, 2016 Letter 2 n.3). BMI’s concern for widespread market disruption is thus newfound. It is based on an allegation that requiring BMI to offer full-work licensing for its repertory songs would either require new negotiations with and among “thousands of rights holders globally,” BMI Br. 44, or eliminate many works from BMI’s repertory, rendering those so-called “stranded” works “wholly excluded from licensing,” *id.* at 43.

As BMI acknowledged below, however, the number of works that would require such negotiations is “unknowable.” JA57 (BMI Aug. 4, 2016 Letter 3). And BMI’s claim that so-called stranded works would be rendered unlicensable is unsupported. BMI never explains why co-owners of restricted split works who want their works included in BMI’s repertory would not be able to solve this problem. Nor does BMI explain why “stranded” works would be “wholly excluded from licensing,” even by copyright holders or their representatives.

BMI also contends that a full-work licensing requirement will change the distribution of royalties in a way that will “chill” creative collaborations between members of different PROs, BMI Br. 46, but it has given no reason to believe that any such change will occur. On its face, the standard BMI user license is already a full-work license. JA131 (BMI Radio Station Blanket/Per Program License Agreement § 3.A) (“BMI grants LICENSEE a non-exclusive Through-to-the-Audience License to perform publicly in the U.S. Territory, by Radio Broadcasting and New Media Transmissions, non-dramatic performances of all musical works in the BMI Repertoire during the Term.”). At the same time, BMI makes fractional payments to its members; that is, it agrees to pay a member his or her pro rata share of the royalties for multi-writer works. *See* JA150 (BMI Writer Agreement § 6(a)(ii)). But that agreement with the member about payment is independent from the type of license granted to the user. The Decree’s requirement to grant full-work licenses is thus entirely consistent with BMI’s existing practice of fractional payments, BMI Br. 44-46, and does not by itself affect the distribution of royalties among its affiliates or the members of other PROs for fully licensed works.

Finally, BMI contends that the government's interpretation is anticompetitive because it would reduce the number of license providers. *Id.* at 46-48. Requiring a user to obtain multiple licenses for the same composition, however, is not pro-competitive. Competition exists when two products are reasonable substitutes for each other, and the buyer can choose one or the other based on price and quality. If a radio station wants to play a co-owned song, on the other hand, the co-owners' respective fractional interests can no more be substituted for each other than a left shoe and a right shoe.

Citing *Columbia Broadcasting System, Inc. v. ASCAP*, 620 F.2d 930 (2d Cir. 1980), the *BMI v. CBS* case on remand, BMI suggests that the direct licensing that the court found to mitigate the anticompetitive effects of the blanket license there is equivalent to the access to other PROs it claims that fractional licenses would allow here. BMI Br. 47. But while direct licensing adds competition, fractional licensing does not. Fractional licenses from others for the same works are complements to, not competitive substitutes for, those offered by BMI. In any event, history shows that some users will pursue direct licenses for songs even when blanket licenses for those songs are also available.

See, e.g., In re THP Capstar Acquisition Corp., 756 F. Supp. 2d 516, 528 (S.D.N.Y. 2010), *aff'd sub nom. BMI v. DMX Inc.*, 683 F.3d 32 (2d Cir. 2012).⁴

BMI's comparison to the market for mechanical rights and synchronization rights, BMI Br. 50-51, is likewise flawed. Entities seeking mechanical and synchronization rights are not already tied to a given composition. A film maker, for example, usually needs only a few songs and can shop among the millions of available songs, or even commission original music. As the Court noted in *BMI v. CBS*, however, that is not a practical option for most users of public performance rights, who need "unplanned, rapid, and indemnified access to any and all of the repertory of compositions." 441 U.S. at 20. The ability of the blanket license to provide that benefit was a large part of the justification for treating the PROs' collective rate making under the rule of reason rather than as per se unlawful.

⁴ ASCAP claims the *Capstar* case "acknowledged the existence of fractional licensing under the ASCAP decree." Br. of ASCAP as Amicus Curiae in Supp. of Def.-Appellee 18 n.6. In fact, the court stated just the opposite. It quoted *AEI*, 275 F.3d at 171, to explain that the applicant, DMX, was making "a request not for a new type of license, but for a blanket license with a different fee basis." *In re THP Capstar Acquisition Corp.*, 756 F. Supp. 2d at 540.

3. According to BMI and its amici, full-work licensing imposes substantial transaction costs and logistical difficulties because many songs are now the product of collaboration among multiple writers. This change in the music industry is not a problem created by the Decree, however. And arguments about changed circumstances go to the propriety of modification of the Decree; they are not grounds for reinterpretation. *See Armour*, 402 U.S. at 681. As BMI recognizes, such arguments require a factual record that does not exist and are not properly before this Court. BMI Br. 42, 51.

CONCLUSION

For these reasons, the Court should reverse the decision of the district court and hold that the BMI Decree requires BMI to provide users full-work licenses for the compositions in its repertory.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), I certify that this Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), as modified by Circuit Rule 32.1(a)(4), because this Brief contains 6,824 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(f).

I further certify that this Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the Brief has been prepared in New Century Schoolbook, 14-point font, using Microsoft Office Word 2013.

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CERTIFICATE OF SERVICE

I certify that on August 31, 2017, I caused the foregoing to be filed through this Court's CM/ECF filer system, which will serve a notice of electronic filing on all registered users, including counsel for Appellee.

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