IN THE UNITED STATES DISTRCT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES v. ASCAP	**41 Civ. 1395**
UNITED STATES v. BMI	**64 Civ. 3787**

COMMENTS SUBMITTED BY DANIEL MARTIN BELLEMARE REGARDING THE UNITED STATES DEPARTMENT OF JUSTICE-ANTITRUST DIVISION REVIEW OF CONSENT DECREES IN THE ABOVE-CAPTIONED MATTERS.

INTRODUCTION

We welcome the opportunity provided by the United States Department of Justice - Antitrust Division to submit public comments on proposed modifications to the consent decrees in the above-captioned matters. The consent decrees impose terms and conditions on licensing of so-called "blanket licenses" for musical works protected by copyrights. Licensing of musical works takes place in a technological environment radically different from the one that existed when the consent decrees were entered, during the first half of the last century.

Most significantly, Internet has revolutionized licensing of musical works by reducing substantially individual transactional costs. Moreover, copyright owners enjoy effective remedies against copyright infringement under the contributory infringement doctrine, as the law was adapted to take account of unauthorized use of protected works on Internet. The above technological and legal developments undermine the justification for mandatory blanket licenses and, by implications, the rationale for using the rule of reason standard for analyzing their antitrust implications. These developments call for the application of the *per se* standard to mandatory blanket licenses.

COMMENTS

The United States Department of Justice - Antitrust Division ("Department of Justice") currently examines "the operation and effectiveness" of two final judgments — also known as consent decrees — entered by the United States District Court for the Southern District of New York: *United States v. ASCAP*, 41 Civ. 1395, *United States v. BMI*, 64 Civ. 3787 ("consent decrees"). On September 23, 2015 the Department of Justice invited a second round of public comments on the advisability to modify those consent decrees. The public notice lists specific issues on which the Department of Justice seeks comments. *Antitrust Consent Decree Review— ASCAP and BMI* (September 23, 2015).

The public notice enumerates relevant issues as to the contemporaneous effectiveness of the consent decrees. Nevertheless, we are of the view that one important question should be addressed in the course of the review process undertaken by the Department of Justice: Whether a mandatory blanket license — "take-it-or-leave-it" bundle comprising the totality of musical works in ASCAP or BMI *répertoires* — constitutes a *per se* violation of Section 1 of the *Sherman Act* (15 U.S.C. § 1) (2014) ("Section 1"). The answer to that question bears directly on the approach the Department of Justice should adopt toward the consent decrees.

Three considerations guide our analysis and comments. First, the Supreme Court decision in *Broadcast Music Inc. v. CBS*, 441 U.S. 1, (1979) (White, J.), holding in the pre-Internet era that the rule of reason standard governs the analysis of the antitrust implications of blanket licenses, under Section 1. Second, Internet, a revolutionary technology lowering substantially individual transactional costs. And finally, the contributory infringement doctrine announced in *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (Souter. J.), a "class-action-in-reverse" remedy so to

speak, providing effective protection against unauthorized third-party use.

I. THE RULE OF REASON STANDARD FOR BLANKET LICENSES ANNOUNCED IN *BROADCAST MUSIC v. CBS*.

Mandatory blanket licenses raise serious antitrust concerns under Section 1, as illustrated, *inter alia*, by two high profile civil antitrust actions: One filed by the Department of Justice as well as one filed by a private party. The Department of Justice filed and settled two antitrust cases against ASCAP and BMI; these settlements culminated in the consent decrees under review. Unable to negotiate directly with copyright owners non-blanket licenses tailored to its own needs, Columbia Broadcasting System, Inc. ("CBS.") filed a civil action challenging *inter alia* the legality of blanket licenses under sections 1 (restraint of trade) and 2 (monopolization) of the *Sherman Act*, 441 U.S. at 6 n.6, claiming, notably, that the practice violated Section 1 *per se*. 441 U.S. at 6.

The question presented to the Court was "whether the issuance by ASCAP and BMI to CBS of blanket licenses at fees negotiated by them is price fixing *per se* unlawful under the antitrust laws". 441 U.S. at 4.[1] The majority held in the pre-Internet era that the antitrust implications of blanket licenses should be reviewed under the rule of reason standard, not the *per se* rule. Basically, the majority rejected the *per se* standard, being of the view that to the extent a blanket license is a product different from its units, and combines a product (a cluster of musical works) and services (monitoring and enforcement of copyright infringement), 441 U.S. at 21-23, the practice is not a naked horizontal price restraint, 441 U.S. at 20 and 22 (citing *White Motors Co. v. United States*, 372 U.S. 253, 263, 83 S. Ct. 696, 702, 9 L. Ed. 2d 738 (1963). Blanket licenses gave "the licensees the

[1]As the dissent (Stevens, J.) pointed out: "It is the refusal to licence anything less than the entire repertoire — rather than the decision to offer blanket licenses themselves — that raises the serious antitrust question in this case". 441 U.S. at 28.

right to perform any and all of the compositions owned by the members or affiliates as often as the licensees desire for a stated term". 441 U.S. at 5. Moreover, "[f]ees for [such] blanket licenses [were] ordinarily a percentage of total revenues or a flat dollar amount, and [did] not directly depend on the amount of or type of music used". 441 U.S. at 5.

Two factors weighed heavily in favor of adopting the rule of reason standard: (i) Judicial oversight through the consent decrees in the above-captioned matters; and, (ii) the Copyright Act's statutory framework. On the one hand, the consent decrees imposed "no practical impediments [to] direct dealing by the televison networks", 441 U.S. at 12.[2] On the other hand, licensing of musical compositions, a statutorily created market, existed "at all only because of the copyright laws", 441 U.S. at 18; the law created "a market in which individual composers [were] inherently unable to compete fully effectively", 441 U.S. at 23.

Pre-Internet, blanket licenses could be justified on efficiency grounds, such as centralized monitoring and enforcement over copyright infringement, and avoiding "thousands of needless individual negotiations". 441 U.S. at 20. Arguably, a case could be made that "[a] middleman with a blanket license was an obvious necessity if the thousand of individual negotiations, a virtual impossibility, were to be avoided". 441 U.S. at 20. The majority declined to examine the legality of blanket licenses under the rule of reason standard, judging the issue was not before the court. 441 U.S. at 24.

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[2]However, as Stevens, J. pointed out in his dissent: "A per-program license also covers the entire ASCAP repertoire; it is therefore simply a miniblanket license". 441 U.S. at 27 n.8.

Although the Court agreed unanimously that the rule of reason standard governed, Stevens J. (dissenting) found that blanket licenses violated Section 1 under the governing standard[3], finding that "ASCAP and BMI [had] steadfastly adhered to the policy of only offering overall blanket or per-program license, notwithstanding requests for more limited authorizations". 441 U.S. at 27. This practice affected competition in two ways: (i) First, through price discrimination ; and, (ii) by erecting entry barriers.

The price discrimination finding stemmed from the formula used for assessing royalties, one based on licensees' advertising revenues, which eliminated competition on the merits for the products offered by copyright owners. 441 U.S. at 30-31. Also, ASCAP and BMI "blanket all-or-nothing blanket license"[4], 441 U.S. at 26, restrained direct dealings between users and individual copyright owners for licenses on a "per-composition or per-use basis", 441 U.S. at 33, thereby increasing significantly transactional costs, which in turn erected entry barriers. 441 U.S. at 36-37.

As a result of ASCAP and BMI market power, "there [was] no price competition between separate musical compositions", 441 U.S. at 32, and, by implications, between copyright owners. The absence of price competition between copyright owners increased "the rewards of the established composers at the expense of those less well known". 441 U.S. at 32. All this contributed to prevent a sustainable competitive market. ("In sum, the record demonstrates that the market at issue here is one that could be highly competitive, but is not competitive at all"). 441 U.S. at 33.

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[3]See also *National Collegiate Athletic Assn. v. Board of Regents of Uni. of Okla.*, 468 U.S. 85 (1984) (Stevens, J.) (Restrictions imposed by collegiate association on number of football games televised by each members violate Section 1, under rule of reason analysis. The Court declared the *per se* standard inapplicable to the restraint under review, as only a league wide agreement could preserve "the integrity of the product") (internal quotation marks omitted) (ibid at 102).

[4]Previously we used the expressions "mandatory" and "take-it-or-leave-it". These expressions refer to "all-or-nothing blanket licenses".

In the final analysis, two consent decrees supervise blanket licenses issued by ASCAP and BMI. Furthermore, the rule of reason standard governs the analysis under Section 1 *stare decisis.* Moreover, at least once, blanket licenses failed to pass muster under Section 1, under a rule of reason analysis. The review process initiated by the Department of Justice provides an opportunity to address a fundamental issue respecting the consent decrees, namely, whether the rule of reason standard is still appropriate for assessing the antitrust implications of "all-or-nothing" blanket licenses.

II. "ALL-OR-NOTHING" BLANKET LICENSES ISSUED BY ASCAP AND BMI CONTRAVENE *SHERMAN ACT* SECTION 1 *PER SE*.

The majority in *Broadcast Music* warned that "changes brought by new technology or new marketing techniques might ... undercut the justification for [blanket license]". 441 U.S. at 21 n. 34. Only the Supreme Court can overrule *Broadcast Music*. *State Oil Company v. Khan*, 552 U.S. 3, 20 (1997); so, unquestionably, *Broadcast Music* is still the law, a precedent that should be reconsidered "with the utmost caution". Ibid. Yet, Sherman Act's holdings "called into serious question" may be reconsidered. Ibid at 21. Two new developments call into question the appropriateness of the rule of reason standard for reviewing the legality of blanket licenses, under Section 1: Internet and the law respecting contributory infringement.

Internet undermines the rationale for applying a rule of reason analysis to blanket licenses. Transactional cost-savings stemming from this " new technology", 441 U.S. at 21 n. 34, supply a competition-enhancing tool, by reducing individual transactional costs, to the point where "thousands of negotiations" are not "a virtual impossibility", 441 U.S. at 20, but a real possibility. Musical works are available mostly on-line, thus easily negotiable on a "per-composition or per-use basis". There is no room for an argument that copyright owners are unable to compete in an open

market at this stage of technological development in modern society.

For decades, "courts have had considerable experience", *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 887 (2007) (Kennedy, J.), with blanket licenses — oversight of two consent decrees; litigation up to the Supreme Court. The core antitrust issue presented "is the refusal to license less than the entire repertoire", 441 U.S. at 28. To the extent Internet strips most efficiencies found to have existed by the majority in *Broadcast Music*, all that remains is a plain " naked restraint of trade with no purpose except stifling of competition" (internal quotation marks and brackets omitted) 441 U.S. at 20 citing *White Motors Co. v. United States*, 372 U.S. 253, 263, 83 S.Ct. 696, 702, 9 L.Ed. 2d 738 (1963).

ASCAP and BMI are radically different from other forms of joint ventures. *American Needle, Inc. v. National Football League*, 560 U.S. 183 (2010) (exclusive authority to grant trade mark licenses conferred on professional sport league by team members). *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006) (price fixing agreement between joint-owners of subsidiary). Neither *Dagher* nor *American Needle* governs the antitrust analysis of blanket licenses, a naked horizontal price agreement among competitors. For the reasons stated above, the horizontal price restraint carried by ASCAP and BMI is in no way ancillary to a legitimate venture. *Dagher*, 547 U.S. at 7.

The issuance of "all-or-nothing" blanket licenses amounts also to a group boycott. *Northwest Stationers v. Pacific Stationery*, 472 U.S. 284, 294 (1985) (citations omitted) ("boycott often cut off access to a supply, facility, or market necessary to enable the boycotted firm to compete ...and frequently the boycotting firms possessed a dominant position in the relevant market"). ASCAP and BMI practice is similar to the one found *per se* illegal in *FTC v. Superior Court Trial Lawyers A*ssn., 493 U.S. 411, 428 (1990) (group boycott intended to force an increase in legal fees for representing

indigent facing criminal charges, "a plain violation of antitrust laws").

The same conclusion ensues under a "quick-look analysis", an "abbreviated" rule of reason inquiry. *California Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999) (Souter, J.) ("quick-look analysis carries the day when the great likelihood of anticompetitive effects can easily be ascertained") citing *National Collegiate Athletic Assn. v. Board of Regents of Uni. of Okla*., 468 U.S. 85 (1984; *National Soc. of Professional Engineers v. United States*, 435 U.S. 679 (1978); *Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. 447 (1986). By any standard, pooling innumerable musical works owned by individual copyright owners within two entities which collectively exert market power and issue "all-or-nothing" blanket licenses, constitutes an unreasonable restraint of trade.

Developments in the area of copyright law further undermines the justification for the restraint. The doctrine of contributory infringement provides effective protection, as courts may grant injunctive relief against a limited number of defendants to enjoin copyright infringement engaged in by millions of third-party infringers. See *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919 (2005) (Souter, J.). ("[O]ne who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties").

The rule of liability for third-party infringement announced in *Grokster* was a response to technological innovations, and concomitant increased potential for infringement, in an environment where copyrighted works become instantly available. ("The argument for imposing indirect liability in this case is, however, a powerful one, given the number of infringing downloads that occur everyday using StreamCast's and Grokster's software"). 545 U.S. at 929.

For instance, Metro-Goldwyn-Mayer and a group of entities representing copyright owners' interests successfully invoked the doctrine of contributory infringement to enjoin the distribution of a peer-to-peer software developed and made available on Internet by Grokster to facilitate copyright infringement by millions of Internet users, thereby avoiding the necessity to intiate individual lawsuits. See also *Broadcast Music, Inc. v. Meadowlake, Ltd.* 754 F.3d 353 (6th Cir. 2014); *Pictures Industries, Inc. v. FungFung*, 710 F.3d 1020 (9th Cir. 2013); *Viacom Int'l Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012).

CONCLUSION

A competitive market for the issuance of licenses for copyrighted musical works is rendered possible by Internet. All barriers to the realization of a competitive market should be removed, primarily the practice of issuing only "all-or-nothing" blanket licenses. Internet provides copyright owners with the means to deal directly with users, and provide "per composition" and "per-use" licenses. On the other hand, joint monitoring and enforcement by copyright owners poses no antitrust issue; should ASCAP and BMI engage solely in monitoring and enforcement, "it could hardly be said that member copyright owners would be in violation of the antitrust laws by not having a common agent issue per-use licenses". 441 U.S. at 18 n.28. We respectfully submit that the consent decrees should be modified accordingly.

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