



U.S. Department of Justice

Antitrust Division

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March 6, 2015

Ms. Catherine O'Hagan Wolfe
Clerk
United States Court of Appeals
for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square
New York, NY 10007

Re: Pandora Media, Inc. v. American Society of
Composers, Authors and Publishers,
2d Cir. Nos. 14-1158-cv(L), 14-1161, 14-1246

Dear Ms. Wolfe:

This letter is in response to the Court's request for the views of the U.S. Department of Justice in your letter of February 20, 2015. The Department appreciates this opportunity to state its view that the consent decree governing the licensing activities of the American Society of Composers, Authors and Publishers ("ASCAP") does not permit ASCAP to accept partial grants of public performance rights.

The U.S. Department of Justice, Antitrust Division, is responsible for monitoring and ensuring compliance with the Final Judgments in *United States v. ASCAP*, 41 Civ. 1395 (S.D.N.Y.), and *United States v. BMI*, 64 Civ.

3787 (S.D.N.Y.) (“Consent Decrees”). The Consent Decrees, originally entered in 1941, are the products of lawsuits brought by the United States against ASCAP and BMI under Section 1 of the Sherman Act, 15 U.S.C. § 1, to address competitive concerns arising from the market power each organization acquired through the aggregation of public performance rights held by their member songwriters and music publishers. Since their entry in 1941, the Department has periodically reviewed the operation and effectiveness of the Consent Decrees. Both Consent Decrees have been amended since their entry.

This appeal arises in part from the purported withdrawal by some publishers of their grant to ASCAP of the right to license their works to a subclass of entities, which they refer to as the “New Media.” One such entity, Petitioner-Appellee Pandora Media, Inc., has sought a determination that these “partial withdrawals” during the term of its interim license under consent decree do not affect the scope of the ASCAP repertory subject to that license. The district court concluded that the ASCAP Consent Decree, as amended in 2001 and known as the Second Amended Final Judgment or AFJ2, requires ASCAP to provide Pandora with a license to all of the works in its repertory. The Department agrees.

While AFJ2 has provisions that impose or allow carefully defined restrictions on licensing by ASCAP (sections IV(E) & (F)), the decree as it stands does not permit the type of partial withdrawals contemplated in this case. Under section VI of the decree, “ASCAP is hereby ordered and directed to grant to any music user making a written request therefor a non-exclusive license to perform all of the works in the ASCAP repertory,” defined in section II(C) as “those works the right of public performance of which ASCAP has or hereafter shall have the right to license at the relevant point in time.” “Work,” in turn, is defined as “any copyrighted musical composition.” Section II(U). The district court’s interpretation of this language is correct.

ASCAP’s argument focuses on the limitation to those works ASCAP “shall have the right to license,” as if the issue were a particular kind of right. ASCAP Br. 33. Not so. The kind of right, as set out in section II(C), is the “right of public performance.” The “right to license” qualification simply means that the copyright holder need not give ASCAP the right to license all the works in the holder’s catalogue; it can license different works through different performing rights organizations, or license some directly. As ASCAP ultimately concedes, therefore, it is arguing about whether it is “obligated to license the same repertory to all music users” (ASCAP Br. 36),

and the section VI mandate to license “all of the works in the ASCAP repertory” to “any music user” is conclusive on that point. Thus rights holders can specify what works ASCAP can license, but not the users to be licensed.

The Department has never suggested that it held a different view. ASCAP alludes in its main Brief to a meeting with the Department in March 2011 at which it purportedly raised the issue (Br. 15), but as it concedes in its Reply Brief (at 9 n. 1), the Department gave no “blessing” to the vague proposal it made at that meeting. Nor did the Department indicate that the AFJ2 permitted partial withdrawals (or grants) of performance rights.

Lastly, I note that the Department is currently undertaking a review to examine the operation and effectiveness of the Consent Decrees and is exploring whether the Consent Decrees should be modified and, if so, what modifications would be appropriate. See “Antitrust Consent Decree Review” (attached, and also available at <http://www.justice.gov/atr/cases/ascap-bmi-decree-review.html>). On June 4, 2014, it solicited public comments, due by August 6, 2014, on several issues, including: “Should the Consent Decrees be modified to allow rights holders to permit ASCAP or BMI to license their performance rights to some music users but not others,” and “If such partial or limited grants of licensing rights to ASCAP and BMI are allowed, should

there be limits on how such grants are structured.” *Id.* The Department received 237 written comments in response to that solicitation. Some commenters have expressed concern about the potential effects of permitting partial grants of performance rights, or of permitting such grants without appropriate safeguards in place. Their concerns include the potential that permitting partial grants of rights could lead to information asymmetries that disadvantage music users, and the potential that publishers, having removed from ASCAP their works as to certain users, will coordinate to increase the prices they charge those music users for licenses of performance rights. Since the comments are still being reviewed and the investigation is not yet complete, it would be premature to announce any conclusions, and it would be improper to infer from the fact of the investigation that the Department would consider an unconditional right to partial withdrawal to be permitted by the AFJ2 or to be pro-competitive.

Respectfully submitted,

/s/
Renata B. Hesse
Acting Assistant Attorney General

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Antitrust Consent Decree Review

American Society of Composers, Authors and Publishers/Broadcast Music, Inc.

Related documents:

- [ASCAP - Second Amended Final Judgment \[AFJ2\] \(June 11, 2001\)](#)
- [BMI - \[Amended\] Final Judgment \(November 18, 1994\)](#)

Related page:

- [ASCAP and BMI Consent Decree Review Public Comments](#)

Antitrust Division Opens Review of ASCAP and BMI Consent Decrees

The U.S. Department of Justice, Antitrust Division, is responsible for overseeing the enforcement of the Final Judgments in *United States v. ASCAP*, 41 Civ. 1395 (S.D.N.Y.), and *United States v. BMI*, 64 Civ. 3787 (S.D.N.Y.) ("Consent Decrees"). The Consent Decrees, originally entered in 1941, are the products of lawsuits brought by the United States against ASCAP and BMI under Section 1 of the Sherman Act, 15 U.S.C. § 1, to address competitive concerns arising from the market power each organization acquired through the aggregation of public performance rights held by their member songwriters and music publishers. Since their entry in 1941, the Department has periodically reviewed the operation and effectiveness of the Consent Decrees. Both Consent Decrees have been amended since their entry. The ASCAP Consent Decree was last amended in 2001 and the BMI Consent Decree was last amended in 1994.

The Antitrust Division currently is undertaking a review to examine the operation and effectiveness of the Consent Decrees. The Department understands that ASCAP, BMI and some other firms in the music industry believe that the Consent Decrees need to be modified to account for changes in how music is delivered to and experienced by listeners. The Department's review will explore whether the Consent Decrees should be modified and, if so, what modifications would be appropriate.

Public Comments Are Solicited

As part of its review, the Department invites interested persons, including songwriters and composers, publishers, licensees, and service providers, to provide the Division with information or comments relevant to whether the Consent Decrees continue to protect competition. While Performance Rights Organizations, such as ASCAP and BMI, monitor for unlicensed uses, enforce copyrights against unlicensed users, and administer copyright royalties, the Department is most interested in comments on competitive concerns that arise from the joint licensing of music by Performance Rights Organizations and the remediation of those concerns.

In particular, the Department requests that the public comment on the following issues:

- Do the Consent Decrees continue to serve important competitive purposes today? Why or why not? Are there provisions that are no longer necessary to protect competition? Are there provisions that are ineffective in protecting competition?
- What, if any, modifications to the Consent Decrees would enhance competition and efficiency?
- Do differences between the two Consent Decrees adversely affect competition?
- How easy or difficult is it to acquire in a useful format the contents of ASCAP's or BMI's repertory? How, if at all, does the current degree of repertory transparency impact competition? Are modifications of the transparency requirements in the Consent Decrees warranted, and if so, why?
- Should the Consent Decrees be modified to allow rights holders to permit ASCAP or BMI to license their performance rights to some music users but not others? If such partial or limited grants of licensing rights to ASCAP and BMI are allowed, should there be limits on how such grants are structured?
- Should the rate-making function currently performed by the rate court be changed to a system of mandatory

arbitration? What procedures should be considered to expedite resolution of fee disputes? When should the payment of interim fees begin and how should they be set?

- Should the Consent Decrees be modified to permit rights holders to grant ASCAP and BMI rights in addition to “rights of public performance”?

All comments should be submitted by electronic mail to ASCAP-BMI-decree-review@usdoj.gov by August 6, 2014 and will be posted in their entirety for public review at [this web address](#). Information that parties wish to keep confidential should not be included in their comments. Comments may also be sent, preferably by courier or overnight service, to

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