

ASCAP, BMI Unable to Persuade Justice Department to Support Consent Decree Modification

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The Department of Justice Antitrust Division earlier this week rejected efforts by performing rights organizations American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) and the two largest music publishers to relax the terms of antitrust consent decrees that govern the collective licensing of musical works for public performance. The modifications to the antitrust consent decrees “would disrupt the status quo, would not be consistent with the purposes of the consent decrees, and would not be in the interest of consumers,” the government concluded.

The performing rights organizations called for changes to the terms of the decrees, suggesting that the inability to accept partial grants of rights from its members might lead music publishers to withdraw from the organizations. It also was argued that the continued viability of collective licensing was at risk if the consent decrees were not modified to permit fractional licensing. Internet radio service Pandora and others suggested that the requested changes were part of an effort to increase prices for ASCAP and BMI blanket licenses for digital media users.

ASCAP and BMI have pledged to continue efforts to “push for consent decree reform.” BMI said it would take legal action, and ASCAP said it would pursue a

legislative fix.

The ASCAP consent decree (2001-2 Trade Cases ¶73,474) and the BMI consent decree (1996-1 Trade Cases ¶71,378) “seek to prevent the anticompetitive exercise of market power while preserving the transformative benefits of blanket licensing,” according to the Antitrust Division’s closing statement. The “blanket licenses” provide music users, such as bar owners, television and radio stations, and Internet music distributors, with access to millions of songs without resorting to individualized licensing determinations or negotiations, thereby enabling the users to publicly perform the musical works of the thousands of songwriters and music publishers who are members of the performing rights organizations.

In 2014, the Antitrust Division undertook its investigation of the consent decrees in response to requests from ASCAP and BMI that the government support proposed modifications. According to the Justice Department, the most significant of the proposed modifications was a proposal supported by ASCAP, BMI, and music publishers to allow music publishers to “partially withdraw” from ASCAP and BMI, thereby prohibiting the performing rights organizations from licensing the withdrawing publishers’ music to digital services such as Pandora or Spotify. In May 2015, the U.S. Court of Appeals in New York City held that the ASCAP consent decree precluded partial withdrawals of public performance licensing rights. The appellate court upheld a decision of the federal district court that oversees the continued operation of the decree.

The Antitrust Division has now concluded that the consent decrees require full-work licensing and that the decrees should not be modified to allow so-called fractional licensing. For the next year, where ASCAP and BMI proceed in good faith, the Antitrust Division will not take any enforcement action based on any purported fractional licensing by the performing rights organizations. However, ASCAP and BMI are expected to take the steps necessary to eliminate uncertainty, by obtaining from songwriter and publisher members the assurances that works can be offered on a full-work basis and by removing works from their licenses if they cannot be offered on a full-work basis.

“A full-work blanket license from ASCAP or BMI allows the music user to publicly perform, without risk of copyright infringement liability, all works in the licensing [performing rights organization]’s repertory,” Renata Hesse, Acting Assistant Attorney General in charge of the Antitrust Division, said in announcing the

investigation closure. However, the Antitrust Division has not “ruled out the possibility of pursuing modifications, including to allow for partial withdrawal, sometime down the road.”

Noting that “blanket license is a central component of the licensing framework established by the decrees, and is relied upon by songwriters and users alike for the effective functioning of performance rights licensing by ASCAP and BMI,” Hesse added that the closing statement was intended “to make clear what the consent decrees have always required so that any practices that have developed that are inconsistent with those requirements can be adjusted accordingly.”

Complying with full-work licensing requirements. In its closing statement, the Justice Department identified practices that industry participants might find useful in complying with the consent decrees’ full-work licensing requirements while maintaining most current licensing practices. Among the practices identified for both rightsholders and users are:

- continuing to allow co-owners of a song who are members of different performing rights organizations to have their songs included in one or more of the full-work licenses and be paid based on their fractional ownership;
- reminding ASCAP and BMI members that they made grants of rights to license all works of which a member is a partial or complete owner and warranted that there were no other agreements that would prevent such licensing;
- adjusting pricing for a user that seeks to stop obtaining licenses from multiple performing rights organizations and to rely on a single performing rights organization’s license to get access to songs that have multiple owners.

Legislative solution. The government has concluded that the ASCAP and BMI consent decrees continue to serve the purposes for which they were put in place in 1941 and, therefore, should remain in place. However, like the performing rights organizations, the government suggested that “a comprehensive legislative solution” might be a better approach. In light of “incongruity in the oversight over the licensing of performance rights and other copyrights in compositions and sound recordings,” the Justice Department suggested “a legislative solution that brings performance rights licensing under a similar regulatory umbrella as other

rights” and that “ensures a competitive marketplace and obviates the need for continued Division oversight” of the performing rights organizations. However, the Antitrust Division did not provide additional details for a legislative fix.

If Congress gets involved, this dispute is not likely to end any time soon. Moreover, the Justice Department does not have the final word on consent decree interpretation, and BMI has announced its intention to seek modification in court. Stay tuned.