16-3 830-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)

BRIEF FOR CONSUMER ACTION AND PUBLIC KNOWLEDGE IN SUPPORT OF PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

In accordance with Fed. R. App. P. 26.1, the undersigned certifies that Consumer Action is a nonprofit, non-stock corporation. It has no parent corporation and there is no corporation that has an ownership interest of any kind in it.

Public Knowledge has no parent corporation and no publicly held corporation holds 10% or more of its stock.

/S/ David A. Balto
Attorney for Amici Curiae

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INTEREST AND IDENTITY OF THE *Amici Curiae*[1][2]

Consumer Action is a national non-profit organization that has worked to advance consumer literacy and protect consumer rights in many areas for over forty years. The organization achieves its mission through several channels, from direct consumer education to issue-focused advocacy.

Public Knowledge is a non-profit organization that is dedicated to preserving the openness of the Internet and the public's access to knowledge, promoting creativity through balanced intellectual property rights, and upholding and protecting the rights of consumers to use innovative technology lawfully. Public Knowledge advocates on behalf of the public interest for a balanced patent system, particularly with respect to new and emerging technologies.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Consumers have benefitted greatly from the digital revolution in music. In the CD era, consumers were forced to buy entire albums even if they only wanted one or two songs. Digital music stores like iTunes opened the floodgates for consumer choice, allowing consumers to buy the whole album or any number of individual songs. Consumer choice only increased from there. Today, consumers

[1] No portion of this brief was authored by counsel for any party. No party or party's counsel contributed any money intended to fund the preparation of this brief; and no person, other than the *Amici* or their counsel, contributed any money intended to fund the preparation or submission of this brief.

[2] The parties have consented to the filing of this brief.

can buy music, listen to personalized "radio" services, or subscribe to "all-you-can-eat" streaming music services. Consumers now have music how they want it, when they want it, and where they want it. This consumer choice relies on powerful middlemen, like BMI, to connect music creators with music services to grant the necessary licenses. BMI sells blanket licenses for all songs in its repertory, which is price fixing in a literal sense,[3] and is subject to a consent decree with the Department of Justice ("DOJ") to prevent BMI from abusing its market power.

Professor C. Scott Hemphill outlined three ways in which a collective management organization, like Broadcast Music Inc. ("BMI"), can avoid running afoul of the antitrust laws. These organizations can either 1) "be set up in such a way that each right holder sets its own price;" 2) "set up a pricing scheme that mimics individual pricing;" or 3) "embed its collective pricing within the provision of a substantial consumer benefit."[4] BMI, like its fellow performance rights organization ("PROs") ASCAP, has chosen option three. This embeddedness "encourages a simultaneous consideration of the bitter and the sweet."[5] In the case of BMI, the Supreme Court has described the sweet as "unplanned, rapid, and

[3] *See* Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 US 1, 8-9 (1979).
[4] C. Scott Hemphill, *Symposium: Collective Management of Copyright: Solution or Sacrifice?*, 34 COLUM. J.L. & ARTS 645, 646-47 (2011).
[5] *Id.* at 647.

indemnified access to any and all of the repertory of compositions."[6] This tremendous benefit is what is at risk in this case.

The resolution of this case will likely have a substantial impact on the availability and price of music for consumers. If fractional licensing is permitted, then fractional rights holders will have the power to hold up the use of songs for any reason – including demanding higher fees. This not only creates new market power, it also enables market power to move out of the hands of PROs regulated by consent decrees and into the hands of powerful and unregulated music publishers. Additionally, some songs might not be able to be used for the simple reason that the music user, whether it's Spotify, Pandora, Apple, or Google, cannot find all the fractional rights holders in order to license 100% of the song. This greatly increases the search and transaction costs for music users that consumers rely on to provide them with music services. Fractional licensing creates the fundamental problem that no fractional rights holder can say yes, but any rights holder can say no, to the use of a song. Consumers can expect to see decreased choice and higher prices in a fractional licensing environment for the simple reason that it will become harder and more expensive for music services to license songs.

While it is true that the question of whether fractional licensing is permitted in the consent decrees has never clearly been addressed, that is because, until

[6] Broadcast Music, Inc., 441 US at 20 (1979).

recently, the market has been operating under a de facto full work licensing regime. All major rights holders licensed their works through PROs, and all major music users took licenses from the major (if not all) PROs. This meant that music users were able to be confident that they had full rights to all listed songs. Payment to PROs is based on their market share, and the allocation of payments to individual rights holders is managed by the PROs. To the music user, the world has looked like one of full work and not fractional licensing. Indeed, it appears that major court decisions and enforcement actions also presumed that ASCAP and BMI provided full work licensing. The district court's ruling disrupts this environment to the detriment of consumers.

We urge the Court to overturn the district court's ruling and restore the market to full work licensing by BMI, so that music users can rely on "unplanned, rapid, and indemnified access to any and all" of BMI's repertory of compositions when taking a blanket license from BMI.

ARGUMENT

I. An Examination of the History of Music Licensing Demonstrates the Necessity of the DOJ's Interpretation of the Consent Decrees

The legal landscape of music licensing was fundamentally impacted by two major events. The first was when the DOJ entered into consent decrees with the two major PROs, ASCAP and BMI, in 1941. These consent decrees settled claims for a variety of antitrust violations, and set up a regulatory regime to prevent the

abuse of market power. These consent decrees are the only permanent antitrust decrees issued that remain in effect, perhaps indicating the unique market realities of the music industry.[7] The history leading up to the consent decrees demonstrate why it is important for these consent decrees to remain in full force, while the treatment of BMI (and ASCAP) after the consent decrees demonstrate why changes to how the consent decrees function could throw the overall industry into dysfunction. The second event, the Supreme Court's ruling in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, is discussed in Section III below.

There were several notable instances of anticompetitive behavior before the consent decrees brought music composition licensing under the watchful eye of the judicial system. For example, in the 1900s publishers were using their power to attempt to pick winners and losers in the player piano business. Starting in 1902, publishers began to form exclusive licenses with player piano manufacturer Aeolian.[8] As professors Peter DiCola and Matthew Sag report, eventually "eighty-seven publishers, representing hundreds of thousands of works, licensed Aeolian."[9] While it is unclear if they ever achieved a position of market dominance, it was enough to raise antitrust concerns from President Theodore Roosevelt and

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[7] See D. Gervais, *"The Landscape of Collective Management"*, (2011) 24:4 COLUM. J.L. & ARTS 423.
[8] Richard J. Spelts, *Comment, Battle Over the Compulsory License: Mechanical Recording of Music*, 36 U. COLO. L. REV. 501, 503-04 (1964).
[9] Peter DiCola & Matthew Sag, *An Information-Gathering Approach to Copyright Policy*, 34 CARDOZA L. REV. 173, 199 (2012).

Congress.[10] Conversations of copyright reform began, and after the Supreme Court decision in *White-Smith Music Publishing Co. v. Apollo Co.*,[11] Congress passed compromise legislation that extended copyright protection to mechanical reproductions but created a compulsory license available to all piano roll companies.[12] The threat of publishers picking winners and losers exists to this day, especially in the streaming industry.[13]

Professors DiCola and Sag remarked that the first PRO, ASCAP, "has existed under the shadow of the threat of antitrust investigation and enforcement for almost all of its existence."[14] The FTC and DOJ began investigating ASCAP for antitrust violations not too long after it was first incorporated in 1914.[15] However, it was ASCAP's actions in radio that ultimately led to the founding of BMI and the consent decrees.

ASCAP used its power to engage in several anticompetitive actions against radio broadcasters. Chief among them were two provisions introduced in 1932: 1) ASCAP demanded a blanket license "regardless of the percentage of music that

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[10] *Id.*
[11] 209 US 1 (1908). Finding piano rolls did not infringe composers' copyrights.
[12] Dicaro & Sag, *supra* note 7 at 200. Compulsory mechanical licensing still exists today, and is how cover songs are licensed.
[13] *See* Steve Knopper, *How Apple Music, Tidal Exclusives Are Reshaping Music Industry*, ROLLING STONE (Oct. 5, 2016), http://www.rollingstone.com/music/news/inside-the-war-over-album-exclusives-w443385.
[14] Dicaro & Sag, *supra* note 7 at 204.
[15] *Id.* at 203-04.

came from ASCAP;" and 2) ASCAP demanded information from radio stations on what songs were played but supplied no information in returned on what songs were in ASCAP's catalog.[16] The DOJ filed its first formal complaint in 1934, expressing concern with "the flat fee, the behavior of ASCAP agents, collusion with publishers to raise mechanical royalties well above the statutory rate, restricted access to radio, and higher prices to local advertisers."[17] However, the investigation soon fizzled, in part due to the departure of Warner Bros. from ASCAP, which meant that ASCAP did not have monopoly power.[18] (Warner later returned to ASCAP.)

The continuing dispute between ASCAP and radio broadcasters led to the creation of a broadcaster-founded rival in BMI.[19] However, this new PRO also engaged in anticompetitive activities, and the DOJ announced criminal proceedings against both ASCAP and BMI in December of 1940.[20] These proceedings led to the consent decrees the two PROs are under today.

II. Since the Consent Decrees, Antitrust Enforcement Decisions Have Been Made Under the Assumption That BMI Follows the Default Rule of Copyright Licensing

[16] *Id.* at 205-206. This tactic of keeping music users in the dark over owned songs to gain leverage would be repeated almost a century later. *See In re* Pandora Media, Inc., 6 F. Supp. 3d 317, 344-45 (S.D.N.Y. 2014).
[17] *Id.* at 206.
[18] *Id.*
[19] *Id.*
[20] *Id.* at 207.

After the consent decrees, the music industry settled into a practice where music publishers collected composition rights and licensed them through PROs to music users. This meant that virtually all music licensing was protected under the consent decrees, once they were licensed through the PROs. Publishers generally could not exercise market power to raise rates to supracompetitive levels, because music users could always turn to the rate courts, provided by the consent decrees, to request a fair rate from the PROs.

The antitrust enforcement agencies appear to have taken the protection of the consent decrees into consideration when reviewing publisher mergers. A good example is the Sony/EMI merger of 2012, which created the world's largest music publisher. The Federal Trade Commission voted 5-0 to close its investigation of Sony/EMI, and the deal was allowed to proceed without comment or remedy.[21] Things did not go as smoothly in the E.U., which required Sony to divest several catalogues before approving the merger.[22] A chief concern for the E.U. was the control shares of the merging companies, which was relevant because fractional licensing is common in the E.U. These control shares take account of fractional

[21] Press Release, *FTC Closes Its Investigation Into Sony/ATV Music Publishing's Proposed Acquisition of EMI Music Publishing*, FTC (June 29, 2012), https://www.ftc.gov/news-events/press-releases/2012/06/ftc-closes-its-investigation-sonyatv-music-publishings-proposed.

[22] Press Release, *Commission approves Sony and Mubadala's takeover of EMI's music publishing business, subject to conditions*, European Commission (Apr. 19, 2012), http://europa.eu/rapid/press-release_IP-12-387_en.htm.

shares on an equal basis as full publishing rights. As the E.U. explained, "the bargaining power of a publisher is the same if that publisher holds 100% in nine songs or a 25% interest in the same amount of songs."[23] The E.U. had the same concerns in the Universal/BMG Music Publishing merger five years prior.[24] Measuring market power through control shares showed far higher market shares, and those showed competitive concerns that would not have been apparent if measuring through other means.

U.S. antitrust enforcers simply did not have the same concerns as the E.U. during these mergers, presumably because the U.S. licensing market operated as if the PROs offered full work licenses to the songs in these publishers' catalogues. Music users, like streaming services, would not be subjected to greater market power due to the merger as long as they could still license song rights through the PROs. If the U.S. starts down the road towards fractional licensing, that may mean that past merger enforcement decisions were wrong. If BMI is allowed to fractionally license, then a publisher that withdraws and begins to license outside

[23] Case No. COMP/M.6459– Sony/ Mubadala/ EMI Music Publishing, Commission Decision of 19 April 2012, pg. 41 (citations omitted), *available at* http://ec.europa.eu/competition/mergers/cases/decisions/m6459_20120419_20212_2499936_EN.pdf.

[24] Case No COMP/M.4404 - Universal/BMG Music Publishing, Commission Decision of 22 May 2007, pg. 66, *available at* http://ec.europa.eu/competition/mergers/cases/decisions/m4404_20070522_20600_en.pdf.

of BMI could have far more market power than intended, and would simultaneously not be subjected to the consent decrees.

The lack of merger enforcement against publishers in the U.S. is significant considering the current state of consolidation in the music publishing industry. Professor Kristelia Garcia noted that

> the three major music publishers today are the result of extensive consolidation among many smaller publishing companies. Universal resulted from a merger between PolyGram, MCA, Rondor, BMG, and Zomba. EMI Music Publishing (EMI, acquired by Sony in 2012) began in 1984 as a combination of Ardmoor, Beechwood, Keith Prowse, and Central Songs, followed by the addition of Screen Gems and Colgms, SBK, CBS and Jobette. Warner began in 1929 with its acquisition of Chappell-Harms. Sony – currently the nation's largest publisher – got its start in 1989 when the company purchased CBS (then known as Tree), and then scored a coup with the purchase of Michael Jackson's ATV catalog.[25]

The music publishing business, as measured by share of total revenue, is dominated by three companies: Sony/ATV (27%), Universal Music Publishing (19.8%), and Warner/Chappell (12%) hold a combined three-firm market share of 60%.[26]

The unchecked consolidation in the publishing industry presents yet another reason why the district court decision should be reversed. If BMI is permitted to

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[25] Kristelia A. Garcia, *Facilitating Competition by Remedial Regulation*, 31 BERKELEY TECH. L.J. 183, 189 (2016)

[26] *WMG makes recorded-music market share gains, while indies extend publishing lead*, MUSIC & COPYRIGHT BLOG (May 12, 2017), *available at* https://musicandcopyright.wordpress.com/tag/market-share/.

engage in fractional licensing, then there is a significant risk that a major publisher will exercise significant market power by withdrawing their repertories and negotiating separately. Under a full work licensing regime, the incentive for these publishers to withdraw is much lower, because music users can still acquire the rights to the publishers' fractionally owned songs through the PROs.

If BMI is allowed to fractionally license, then publishers would have the incentive and ability to withdraw and use their market power to raise rates to much higher levels. This is especially problematic since a consolidated industry such as the publishing industry is prone to collusion, tacit or otherwise, as seen during Sony and Universal Music Publishing Group's ("UMPG") attempts to partially withdraw their rights from PROs in 2012. In the litigation that followed, Judge Denise Cote commented on the high degree of coordination among competitors in obtaining the high rates from Pandora.[27] Judge Cote stated that "Sony and UMPG justified their withdrawal of new media rights from ASCAP by promising to create higher benchmarks for a Pandora-ASCAP license and purposefully set out to do just that."[28] Judge Cote also commented on how Sony and UMPG interfered with Pandora's negotiations with ASCAP and how "Sony made sure that UMPG learned of all of the critical terms of the Sony-Pandora license."[29] Judge Cote noted

[27] *In re* Pandora Media, Inc., 6 F. Supp. 3d at 357-58.
[28] *Id.* at 357.
[29] *Id.*

that "ASCAP, Sony, and UMPG did not act as if they were competitors with each other in their negotiations with Pandora. Because their interests were aligned against Pandora, and they coordinated their activities with respect to Pandora, the very considerable market power that each of them holds individually was magnified."[30]

III. Without Full Work Licensing, BMI Should Not Be Given Special Consideration Under the Antitrust Laws

In 1948, seven years after the consent decrees were made, a district court found that "[a]lmost every part of the ASCAP structure, almost all of ASCAP's activities in licensing motion picture theatres, involve a violation of the anti-trust laws."[31] While the consent decrees marked the end of the PROs facing government antitrust challenge, they were still open to private challenge. Indeed, the plaintiff in the above case was successful in winning an injunction against ASCAP for violations of antitrust laws.

The second major event in music licensing happened in 1979, when the Supreme Court found that the licensing activities of BMI should be judged under the rule of reason rather than as *per se* illegal, in *Broadcast Music, Inc. v.*

[30] *Id.* at 357-58.
[31] Alden-Rochelle, Inc. v. ASCAP, 80 F. Supp. 888, 893 (S.D.N.Y. 1948).

Columbia Broadcasting System, Inc.[32] This ruling substantially raised the bar for bringing successful claims against the PROs.

The Supreme Court found that the blanket license was necessary to create a new and valuable product that was desired by the market and beneficial to music users.[33] *Broadcast Music* showed that the Supreme Court was unwilling to rigidly apply antitrust laws to strike down behavior that benefits consumers and competition. After essentially admitting that the blanket license is literally price fixing, the court states "[t]he Court of Appeals' literal approach does not alone establish that this particular practice is . . . 'plainly anticompetitive' and very likely without 'redeeming virtue.' Literalness is overly simplistic and often overbroad."[34]

However, a complete reading of the *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc*. decision makes it obvious that the Supreme Court assumed that BMI was providing full work licenses. Virtually every defense of the blanket license by the Supreme Court relies on a full work license in order to provide the explained benefit. The Supreme Court describes the blanket licenses as "allow[ing] the licensee immediate use of covered compositions, without the delay of prior individual negotiations, and great flexibility in the choice of musical material" which provides "unplanned, rapid, and indemnified access" to the works

[32] Broadcast Music, Inc., 441 US at 24 (1979).
[33] *Id.* at 21-23.
[34] *Id.* at 8-9.

in ASCAP and BMI's catalogues.[35] The DOJ significantly relied on this decision in its closing statement as a reason why the DOJ determined that the consent decrees do not permit fractional licensing.[36]

BMI would no longer provide the benefits described in the Supreme Court's decision if fractional licensing is allowed by BMI. Instead of being a one-stop shop for music users, BMI becomes just one stop of many. This is not the different product described by the Supreme Court, it's just a large bundle of rights offered at a blanket rate. There is no "immediate use," "great flexibility," or "unplanned, rapid, and indemnified access" if BMI is permitted to give fractional licenses. Music users will still have to seek out the remaining rights, and remove works they don't have the full rights to, or face significant damages from being sued for copyright infringement.

Allowing BMI to engage in fractional licensing will likely lead to a return of significant antitrust scrutiny of PRO actions. Since the consent decree was meant to end antitrust litigation, by allowing BMI to continue to provide benefits to the market while restricting its ability to abuse its power, it seems unlikely that the consent decree would intend to allow fractional licensing, which would erase these

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[35] *Id.* at 20, 22.

[36] *Statement of the Department of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees* at 7 (Aug. 4, 2016), *available at* https://www.justice.gov/atr/file/882101/download [hereinafter "Closing Statement"].

benefits. Indeed, the DOJ states in its brief that the United States elected to settle its antitrust claims against BMI because of the unique benefit of allowing "the licensee immediate use of covered compositions, without the delay of prior individual negotiations."[37] The United States even urged the Supreme Court not to treat the blanket license as *per se* illegal price fixing because of these unique benefits BMI provides.[38] As professor C. Scott Hemphill states, BMI avoids running afoul of the antitrust laws by mixing the bitter with the sweet.[39] Without the sweet (market and consumer benefits), the bitter makes out an antitrust case.

IV. Fractional Licensing Would End Long-standing Industry Practice to the Detriment of Consumers, Leading to Higher Prices and Decreased Choice

In its closing statement, the DOJ found that BMI does "currently and must continue to offer full-work licenses" in order to preserve "the significant licensing and payment benefits that the PROs have provided music creators and music users for decades."[40] The DOJ found the need to preserve the status quo,[41] and that is why it closed its extensive two-year investigation without modifying the consent decrees. The DOJ states that "[a]lthough stakeholders on all sides have raised some

[37] DOJ Brief at 51 (citations omitted).
[38] Br. of the United States as Amicus Curiae, BMI v. CBS, Nos. 77-1578, 77-1583, 1978 WL 223155, at *18 (S. Ct. Nov. 27, 1978).
[39] C. Scott Hemphill, *supra* note 2 at 647.
[40] Closing Statement at 3-4.
[41] The DOJ, in Section III of their brief, explain how BMI has historically been granted and offered full work licenses.

concerns with the status quo, the Division's investigation confirmed that the current system has well served music creators and music users for decades and should remain intact."[42]

This status quo is important. The PROs currently under consent decree, BMI and ASCAP, serve a vital role in minimizing transaction and search costs involved in licensing music. To be clear, it is already difficult for music users to license the music needed to begin operations. The U.S. Copyright Office found that launching a marketable digital music service "requires roughly eighteen months of effort, with some entities never able to successfully negotiate the licenses needed to launch their services."[43] The Copyright Office found that one of the key problems for music licensors was the lack of an "authoritative list of rights holders and the recordings/works they represent."[44] BMI, like ASCAP, makes music licensing easier by offering a blanket license for performing rights of all the songs in its repertoire. If BMI is allowed to fractionally license, music users would have far more work to do to assemble the licenses for a marketable digital music service.

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[42] *Id.*at 3.
[43] *Copyright and the Music Marketplace* at 58-59, U.S. Copyright Office (2015), https://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf (citations omitted).
[44] *Id.* at 59 (citations Omitted).

Without BMI offering full work licenses, the music industry will suffer what law professor Michael Heller described as the tragedy of the anticommons.[45] The tragedy of the anticommons generally describes what happens when people who each own the rights to the same or complementary goods either can't or won't work together to set a total price that is attractive to buyers. In music licensing, the problem is twofold. First, in a fractional licensing world any fractional owner, no matter how little rights they own, can hold up the use of a song for any reason. Second, it can be very difficult for those who want to license songs and artists or others who have song rights to find each other.

Congress set out to avoid the tragedy of the anticommons, and to encourage the use of artistic works, by stating that full work licensing is the default rule under the Copyright Act. What this means is, unless changed by contract, each copyright co-owner has the right to license 100% of a work and simultaneously has a responsibility to pay the other co-owners their share of any money received. The music industry has also largely avoided the tragedy of the anticommons by giving "unplanned, rapid, and indemnified access" to music users through PROs. Fractional licensing defeats this and reintroduces the tragedy of the anticommons.

[45] Michael Heller, *The Wealth of the Commons: A World Beyond Market & State*, WEALTHOFTHECOMMONS.ORG, http://wealthofthecommons.org/essay/tragedy-anticommons.

Fractional licensing gives each fractional owner tremendous power. This can have the unfortunate side effect of giving publishers the incentive and ability to withdraw rights from BMI and exercise this power, discussed in Section II above. It can also create "holdup" problems like those that have been plaguing patent licensing. Patent holdup occurs when a company invests heavily in a product without knowing they are missing key patent rights.[46] This gives the holder of those missing patent rights extraordinary leverage in negotiations, because the holder can seek an injunction preventing the sale of the entire product. This leverage often leads to royalty rates based on the value of the avoided harm, rather than the actual value of the technology.[47] The leverage is much the same in music, where unintentional infringement can lead to enormous statutory damages. This leverage is compounded by the lack of an authoritative list of song ownership, and by the market power derived from consolidation in the publishing industry. A publisher can force a music user to take a license simply from having a huge catalogue of unidentified works that could put music users in significant jeopardy if they unintentionally played. This type of leverage was used by publishers against Pandora.[48]

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[46] *See* Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEXAS L. REV. 1991 (2007).
[47] *Id.*
[48] *In re* Pandora Media, Inc., 6 F. Supp. 3d at 344.

Fractional licensing also introduces significant new costs for music users in the form of transaction costs and risk. Under the lower court's ruling, music users, like Internet streaming services, can no longer guarantee that they have all the rights to any particular song in BMI's catalogue by taking blanket licenses from BMI. If the ruling is allowed to stand, music users will be additionally tasked with tracking down all the co-owners to every song they wish to play, and making a licensing offer to each of them. This is no easy task, because there is no centralized database or record of who owns what and in what amount. It can be very difficult to determine the owners of a particular song, and even private databases can have trouble keeping up with a living market where copyright ownership changes hands.

If BMI is permitted to engage in fractional licensing, it would also create tremendous error risk for music users. Copyright law has statutory damages that can amount to $150,000 per infringement.[49] Internet music services play millions of songs, making managing the rights of their catalogue difficult and the error costs high in a fractional licensing world. During the piracy battles of the late 2000s, the recording industry won heavy fines in several high-profile cases against file sharers. This included a $222,000 fine against Jammie Thomas-Rasset for sharing 24 songs, and a $675,000 fine against Joel Tenenbaum for sharing 30 songs — imagine the potential liability for an Internet streaming service that plays tens of

[49] *See* 17 U.S.C. § 504(c)(2).

millions of songs. Music users already face substantial error risks, as seen in a lawsuit filed against Spotify in 2015 for $150 million.[50] During that controversy, Spotify explained to Billboard that

> We are committed to paying songwriters and publishers every penny. . . . Unfortunately, especially in the United States, the data necessary to confirm the appropriate rightsholders is often missing, wrong, or incomplete. When rightsholders are not immediately clear, we set aside the royalties we owe until we are able to confirm their identities. We are working closely with the National Music Publishers Association to find the best way to correctly pay the royalties we have set aside and we are investing in the resources and technical expertise to build a comprehensive publishing administration system to solve this problem for good.[51]

If the status quo is defeated, and BMI is permitted to begin fractional licensing, then these transaction costs and risks will be even higher, and consumers could expect to see prices rise.

Another problem is that music streaming services will become risk averse when it comes to playing any particular song, meaning if they cannot guarantee they have 100% of the rights, then they just won't play it. This ultimately harms consumers because it will reduce the range of music they have access to through music services. This reduction in music availability will harm consumers and artists alike, and will also limit the range of new music that consumers are exposed

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[50] Ed Christman, *Spotify Hit With $150 Million Class Action Over Unpaid Royalties*, BILLBOARD (Dec. 29, 2015), http://www.billboard.com/articles/business/6828092/spotify-class-action-royalties-david-lowery-cracker-150-million.

[51] *Id.*

to. Policies that structurally limit the amount of music consumers have access to are perverse, and could work in such a way as to deprive consumers of culturally important genres of music. An example of this would be if music streaming services found that it was not financially feasible to clear the rights for Hispanic or country music, and simply eliminated those categories from their service entirely.

V. BMI's Special Function in the Market Justifies Holding it to the Default Rule of Full Work Licensing

BMI, like ASCAP, is fundamentally different than other individuals and entities that hold or license copyright rights. This is clear by the nature and treatment of these PROs. Both are historically large collective management organizations on which music users rely to license musical compositions. Both license "must have" products in the music industry for any music user to compete. Both are under the only indefinite consent decree still ongoing, and both have been governed under consent decrees longer than any other entity – over 50 years longer than the next longest consent decree (AT&T). Both have faced significant antitrust challenges over their lifetimes.

BMI's special function in the market justifies requiring it to license the full work, which is the default rule under the Copyright Act. Requiring BMI to engage in full work licensing does not weaken copyright ownership, as other copyright holders are free to engage in fractional licensing through contract. As the Second Circuit has stated (in regards to a different issue in the closing of the consent

decrees): "[t]his outcome does not conflict with publishers' exclusive rights under the Copyright Act. . . . however, ASCAP is still required to operate within the confines of the consent decree."[52]

BMI is an organization with market power governed by a consent decree, and it is not only reasonable but also prudent that it be barred from engaging in fractional licensing, to safeguard the benefits that justify its existence.

CONCLUSION

We ask the court to reverse the district court's ruling and reinstate the DOJ's finding that the consent decree requires BMI to license full works.

Date: May 25, 2017

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[52] Pandora v. ASCAP, 785 F.3d 73, 78 (2d Cir. 2015).

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 5,121 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: May 25, 2017

By: /s/David A. Balto
David A. Balto
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on May 25, 2017.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

By: /s/David A. Balto
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Attorney for Amici Curiae