16-3830-cv

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

BRIEF OF TELEVISION MUSIC LICENSE COMMITTEE, LLC AS *AMICUS CURIAE* IN SUPPORT OF THE UNITED STATES OF AMERICA AND REVERSAL OF THE DISTRICT COURT

R. BRUCE RICH
BENJAMIN E. MARKS
WEIL, GOTSHAL & MANGES LLP
Attorneys for Amicus Curiae
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29 of the Federal Rules of Appellate Procedure, *Amicus Curiae* Television Music License Committee, LLC states that it is an incorporated, nonprofit membership association. It has no parent corporation and no stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF AMICUS

Amicus Curiae the Television Music License Committee, LLC ("Committee") is a non-profit organization funded by voluntary contributions from the television broadcasting industry that represents the collective interests of some 1,200 local commercial television stations in the United States in connection with certain music performance rights licensing matters.[1] The Committee has interacted extensively, over decades, with the two largest music performing rights organizations ("PROs"), the appellee here, Broadcast Music, Inc. ("BMI"), and the American Society of Composers, Authors and Publishers ("ASCAP"). The Committee has assisted local television broadcasters in their efforts to secure fair and reasonable music performance rights licenses through industry-wide negotiations (with the consent, and at the invitation, of these PROs), and it has funded antitrust and federal "rate court" and decree-construction litigations under those PROs' governing antitrust consent decrees (respectively, the "BMI Decree" and "ASCAP Decree") as circumstances have warranted. These decades-long efforts have had as their core objectives curbing BMI and ASCAP's market power

[1] Counsel for both the United States and BMI consented to the filing of this amicus brief. Pursuant to this Court's Rule 29.1(b), the Committee affirms that neither counsel for the appellant or appellee has authored this amicus brief in whole or in part; that neither appellant nor appellee, nor their respective counsel, contributed money intended to fund the preparation or submission of this brief; and that no individual or organization besides the Committee or its regularly contributing stations contributed funding for its preparation or submission.

and maximizing local stations' opportunities to benefit from competitive licensing of the copyrighted music they publicly perform.

From this extensive experience, the Committee has gained a unique perspective on matters directly relevant to the decree-interpretation issue presented on this appeal. This experience attests to:

- the inconsistency of BMI's current advocacy with more than 60 years of license arrangements with local television broadcasters featuring full, as opposed to fractional, rights licensing;
- the critical role the BMI Decree performs in constraining the inherent monopoly power enjoyed by BMI, whose repertory of licensed works is exclusive of that of any other PRO;
- the pattern of resistance both BMI and ASCAP have exhibited to opening the local television music performance market to competitive licensing, manifested by repeated, flagrant disregard of requirements imposed upon these PROs by their Decrees;
- how, in the Committee's estimation, the current, coordinated effort by BMI and ASCAP to limit license grants to users, including local television broadcasters, to such fractional rights in so-called "split" works as their licensors purportedly possess is part and parcel of this persistent effort to deprive local television broadcasters and other users of the benefits of competitive music licensing; and
- the destabilization of day-to-day local television broadcast operations that would occur if the district court's ruling were left to stand.

RELEVANT BACKGROUND

A. The Local Television Music Licensing Marketplace

When local television stations broadcast programming containing copyrighted music, they publicly perform such music and are responsible for securing the necessary rights to do so. *See* 17 U.S.C. § 106(4). Most of the programs involved are not produced by the stations themselves but, rather, consist of programs produced by third parties, who select and permanently incorporate the music into the programming.[2] Apart from the programming contracted to be broadcast by stations affiliated with networks such as NBC or CBS, the performing rights in which are acquired on the stations' behalf by the network, the bulk of the stations' remaining broadcast day consists of syndicated programming, popular examples of which are *Jeopardy*, *Seinfeld*, and *CSI*. For historically anomalous reasons, the producers and syndicators of such programming obtain and license to stations all of the copyright and other rights necessary to broadcast the programming (including those for creative inputs such as a script, choreography, acting, and directing), with the sole exception of the public performance rights to the copyrighted music therein.[3] As a result, the local stations are themselves

[2] Indeed, the stations are contractually prohibited from altering the music contained in such third-party produced programming.

[3] This is so despite the fact that the program producers are already negotiating with musical works rightsholders with respect to other copyright rights in this same

required to procure the necessary public performance rights to the music placed into the program by such third parties as a condition of broadcasting the syndicated programming that forms a staple of their broadcast day. Insofar as this imposition typically occurs *after* the music has already been irrevocably embedded in the programing, there is no meaningful opportunity for the stations to negotiate the fair market value of that music, let alone feasibly locate, identify, and conclude license arrangements with the myriad rights owners involved.[4]

These longstanding industry arrangements well-serve the economic interests of composers and music publishers affiliated with the PROs (as well as numerous program producers and syndicators with significant music publishing interests), but

---

music, most notably, a synchronization ("sync") right enabling the producer to incorporate the music into the soundtrack of the audiovisual work.

[4] This economically anomalous practice stands in contrast to the opportunity for fostering the competitive licensing of performance rights that could and would occur at the time of music selection were the program producers instead to negotiate directly with musical works rights owners to secure music performance rights on the stations' behalf. That is the moment when price competition over the music to be selected could occur. Indeed, this form of producer "source licensing" is precisely the manner in which theatrical motion picture music performance rights have been licensed for more than 65 years, as a result of private antitrust litigation subsequently incorporated into provisions of the ASCAP Decree. *See Alden-Rochelle Inc. v. ASCAP*, 80 F. Supp. 888, *amended by* 80 F. Supp. 900 (S.D.N.Y. 1948); *M Witmark & Sons v. Jensen*, 80 F. Supp. 843 (D. Minn. 1948); Second Amended Final Judgment, *United States v. ASCAP*, C.A. No. 41-1395, ¶ (IV)(E) (S.D.N.Y. June 11, 2001) ("ASCAP Decree").

disserve the interests of broadcasters in the competitive licensing of public performance rights. Their consequence has been to leave the Committee's constituent broadcasters for generations with no practical option but to enter into blanket license arrangements with BMI and ASCAP in order to secure these missing performance rights grants and thereby comply with copyright law. The resulting leverage afforded the PROs at the bargaining table is evident. As we next detail, historically, BMI and ASCAP have sought to maximize that leverage by seeking supra-competitive license fees from broadcasters while simultaneously resisting affording these licensees forms of license that would inject some degree of competition into the music licensing marketplace. Only the protections afforded by the Consent Decrees have restrained to a degree BMI's and ASCAP's otherwise unbridled exercise of their consequential market power.

B. The PROs' Persistent Efforts to Thwart the Protections Afforded Local Television Broadcasters by Their Consent Decrees

1. The Consent Decrees' Purpose to Rein in BMI's and ASCAP's Market Power.

The type of collective licensing in which BMI and ASCAP engage unquestionably implicates the exercise of significant market power with potential anticompetitive consequences, most notably by eliminating competition among composers and music publishers for performances of their works. *See ASCAP v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563, 570 (2d Cir. 1990) ("[I]n the

licensing of music rights, songs do not compete against each other on the basis of price."); *BMI v. CBS*, 441 U.S.1, 32-33 (1979) (Stevens, J., dissenting) ("[T]he blanket license does not present a new songwriter with any opportunity to try to break into the market by offering his product for sale at an unusually low price. The absence of that opportunity, however unlikely it may be, is characteristic of a cartelized rather than a competitive market.").

As the Government has recognized, these PROs "aggregate rights from copyright holders, license them on a non-exclusive basis to music users, and distribute the royalties to their members. These and other functions provide some efficiencies, but also give the PROs *significant market power*." *See, e.g.*, Brief for the United States as Amicus Curiae, *ASCAP v. THP Capstar Acquisition Corp.* (*In Re Application of THP Capstar Acquisition Corp.*), Case No. 11-127, 2011 WL 1836821, at *1 (2d Cir. May 6, 2011) (emphasis added). To be sure, while "individual composers do have some degree of market power as an ordinary function of product differentiation …, [t]he PROs' aggregation of composers' license rights increases that power exponentially." Brief for the United States at 24 n.15, *United States v. BMI* (*In Re Application of AEI Music Network, Inc.*,), Case No. 00-6123 (2d Cir. June 26, 2000).

The very *raison d'etre* of the BMI and ASCAP Decrees is to rein in those PROs' undoubted market power.[5] The BMI Decree, Final Judgment, *United States v. BMI*, No. 64-Civ-3787 (S.D.N.Y. Nov. 18, 1994), in similar fashion to ASCAP's, accomplishes this through a variety of mechanisms, including (of special relevance to television broadcasters):

- barring "gun to the head" licensing tactics and instead requiring BMI to issue licenses to users upon request, thereby averting threats of copyright infringement for the user's failure to accede to BMI's license fee demands. Art. VIII(B), JA29.

- actuating this protection through the transmittal by a user of a written application for "a license for *the right of public performance of any, some or all of the compositions in [BMI's] repertory*," Art. XIV(A), which confers upon such user "*the right to perform any compositions in [BMI's] repertory* pending the completion of any negotiations or [rate determination] proceedings" pursuant to the Decree. Art. XIV(B), JA32 (emphasis added).

- providing for a federal district court rate-setting mechanism, which may be invoked by either a licensee (or licensee group) or BMI in the event of a negotiating impasse. Art. XIV(A), JA32.

- prohibiting BMI from obtaining exclusive rights to license its affiliated copyright owners' works. Art. IV(A), JA26.

---

[5] *See* Memorandum in Aid of Construction of the Final Judgment at 3-4, *United States v. BMI*, 64 Civ. 3787 (LLS) (S.D.N.Y. June 4, 1999) ("The PROs' pooling and blanket licensing of copyrights creates antitrust concerns. Because both ASCAP and BMI have so many compositions in their repertories, most music users cannot avoid the need to take a license from each PRO. . . . As a result, the PROs have market power in setting fees for licenses."); Brief for the United States as Amicus Curiae, *In Re Application of THP Capstar Acquisiton Corp.*, 2011 WL 1836821, at *1 (noting Consent Decrees were the result of Government antitrust challenges designed "to cabin the exercise of [those PROs'] [market] power").

- conferring on broadcast users the entitlement to economically viable alternative forms of license beyond a fixed-fee blanket license.[6] For local television broadcasters these alternative licenses have taken the form of the Per-Program License and the Adjustable Fee Blanket License ("PPL" and "AFBL," respectively) (*see infra*).

2. BMI's and ASCAP's Efforts to Thwart the Decrees' Objectives.

Notwithstanding the brace of decretal requirements designed to pry open competitive licensing of music performing rights, BMI and ASCAP, throughout decades of regulation, have sought to limit, if not deny outright, users' ability to avail themselves of the Decrees' intended benefits. These PROs' dealings with local television broadcasters serve as prime examples.

The first meaningful user resort to the judicial rate court mechanism afforded under the Decrees was on the part of Showtime/The Movie Channel. Both at trial and on appeal to this Court, ASCAP attempted to neuter the monopoly-leavening role of the rate court, contending that the rate court's sole function was undiscerningly to apply to the applicant any license agreements ASCAP had been able to attain with assertedly comparable users. The district court, and subsequently this Court, set the record straight. In a finding affirmed by

[6] As the Antitrust Division has noted, this protection provides users with "important protections against supracompetitive pricing of the [PRO] blanket license . . . ." Memorandum of the United States in Response To Motion of BMI To Modify the 1966 Final Judgment Entered In This Matter at 10-12, *United States v. BMI*, 64 Civ. 3787 (S.D.N.Y. June 20, 1994); *see also Buffalo Broad. Co. v. ASCAP*, 744 F.2d 917, 925 (2d Cir. 1984) (noting the importance of license alternatives).

this Court, the district court concluded that ASCAP possesses significant market power, such that its otherwise arm's-length agreements with third-party licensees cannot be taken at face value as reflecting the reasonable fees that would be expected to emerge in a competitive music performance rights market. *United States v. ASCAP*, No. CIV. 13-95 (WCC), 1989 WL 222654, at *4 (S.D.N.Y. Oct. 12, 1989), *aff'd sub nom. ASCAP v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563 (2d Cir. 1990). This Court in turn noted the absence of price competition between and among PRO-affiliated composers to have their works performed and observed that the rate court is not simply a "placebo" intended to rubber stamp the "fees ASCAP ha[s] successfully obtained from other users." *Showtime/The Movie Channel, Inc.*, 912 F.2d at 570.

Thereafter, in the *Buffalo Broadcasting* rate proceeding, commenced by local television broadcasters, the level of ASCAP's historic fees to that industry were judicially determined to be supracompetitive and, accordingly, were massively reduced. *United States v. ASCAP*, No. CIV. 13-95 (WCC), 1993 WL 60687, at *86 (S.D.N.Y. Mar. 1, 1993) (hereinafter "*Buffalo Broadcasting*"), *aff'd in part, vacated in part*, 157 F.R.D. 173 (S.D.N.Y. 1994). The court further determined that the percentage-of-revenue rate structure that had historically been imposed upon local broadcasters bore virtually no relation to the value of the rights conveyed, and discontinued it. *Id.* at *33. As important, that ruling frontally

addressed ASCAP's (and by extension BMI's parallel) Decree-defiant determination to perpetuate their favored "all-or-nothing" blanket licenses as the sole form of license offered to local television broadcasters. Over preceding decades, BMI and ASCAP continuously fought to deny access to an economically meaningful alternative to a fixed-fee blanket license guaranteed by those PROs' Decrees: the per program license.[7] In language describing ASCAP's licensing posture that was, in the Committee's experience, equally apt as to BMI, the district court in *Buffalo Broadcasting* observed that "ASCAP's per-program proposal is designed to further its aim of keeping the per-program license technically available, but practically illusory for virtually all stations." *See, e.g.*, *Buffalo Broadcasting*, 1993 WL 60687, at *57. The Antitrust Division echoed this recognition, observing: "ASCAP has resisted offering a reasonable per-program license, forcing users desiring such a license to engage in protracted litigation, and often successfully dissuading users from attempting to take advantage of

[7] The intended function of that license is to enable local television broadcasters to inject some degree of price competition into the performing rights marketplace by calibrating PRO license fees to the actual presence of licensable music in discrete television programs. This pricing structure is designed to provide incentives to stations to reduce their PRO payments by clearing the music rights in given programs either in direct license transactions with BMI and ASCAP writers or music publishers or via producer source-licensing. The PROs' preferred all-or-nothing blanket licenses, in contrast, provided for no fee credits were a local station so to secure performance rights. In exercising such self-help, the station would end up paying twice for the same rights.

competitive alternatives to the blanket license." Memorandum of the United States in Support of the Joint Motion to Enter Second Amended Final Judgment, at 28, *United States v. ASCAP*, Civ. No. 41-1395 (WCC) (S.D.N.Y. Sept. 4, 2000). *Buffalo Broadcasting*'s enforcement of the ASCAP Decree's per program mandate (and by extension, the BMI Decree's) has enabled more than 450 local television stations to avail themselves of the per program license from either or both of ASCAP and BMI, thereby garnering tens of millions of dollars annually in license savings below the blanket license fees they would otherwise be paying.[8]

For its part, BMI—followed by ASCAP—resisted another competition-inducing license alternative required by its Decree, the AFBL, compelling first "background music" industry entities, and later, the Committee, to litigate though this Court users' entitlement to that option. The AFBL is a blanket license that affords the user access to BMI's full repertory of works but creates a fee-credit mechanism to account for BMI works which the user has directly licensed. As the Government has explained, the AFBL serves to enable a user "to pit rights holders against one another in direct licensing competition . . . [which] would make the

[8] In recognition of the competitive significance of the *Buffalo Broadcasting* ruling, the DOJ subsequently incorporated the core structural and pricing formulation of the per program license into the current ASCAP Consent Decree, thereby extending the benefits of that ruling to all manner of broadcast licensees. ASCAP Decree at ¶ VII.

music licensing market more similar to other competitive markets in our economy. . . . [T]his type of competition would put pressure on each rights holder to lower its prices for its directly licensed music, in turn putting downward pressure on and producing lower-priced competitive benchmarks for BMI's blanket licenses." Memorandum of the United States on Decree Construction Issues, at 3, *BMI v. DMX, Inc.*, 08 Civ. 216 (LLS) (S.D.N.Y. Apr. 13, 2010).

Even after the background music industry spent years in decree-interpretation litigation through this Court to secure an AFBL from BMI, BMI (as well as ASCAP, notwithstanding its parallel Decree language) fought its meaningful implementation in that industry (again appealed through this Court, *see*, *BMI v. DMX Inc.*, 683 F.3d 32 (2d Cir. 2012)). BMI next contested local television broadcasters' entitlement to an AFBL, notwithstanding the crystal clear language of this Court's *AEI* decision instructing that an AFBL is available to *all* users, only to be rebuffed by its rate court and by this Court on an attempted appeal. *WPIX, Inc. v. BMI*, No. 09 CIV. 10366 LLS, 2011 WL 1630996, at *4 (S.D.N.Y. Apr. 28, 2011) *appeal dismissed*, No. 11-2243 (2d Cir. Jan. 20, 2012), ECF No. 65.

As the balance of this memorandum elucidates, the issue presented to the Court on this appeal—whether BMI is required under its Decree to continue to offer users (including local television broadcasters) the right to publicly perform,

without limitation or legal risk, the entirety of the works placed in its repertory by their rights owners, or whether, instead, BMI is permitted to license solely the purported fractional ownership interests possessed by BMI affiliates in certain, albeit unidentified, numbers of such works—is the culmination of yet another campaign on the part of BMI—in league with ASCAP[9]—to flout its Decree obligations, to perpetuate monopoly conditions in the licensing of music performance rights to local television broadcasters and others, and to undermine its Decree's salutary antitrust purposes.

ARGUMENT

Consistent with the Government's conclusions, the express language of the BMI Decree, confirmed by BMI's own agreements with its affiliated rights owners and with its licensees, including local television broadcasters, requires BMI to grant the right to publicly perform any, some or all of the *compositions* in its repertory—irrespective of whether such compositions are owned solely by its affiliates or constitute "split works," one or more of whose joint copyright owners may be affiliated with a separate PRO or with no PRO at all.

[9] In response to the Government's Closing Statement giving rise to the instant dispute, BMI and ASCAP issued a joint press release stating their plan for BMI (but not ASCAP) to test the Government's interpretation before its rate court, while ASCAP pursued legislative remedies. Press Release, ASCAP and BMI Join Forces to Fight the Department of Justice's Interpretation of Their Consent Decrees (Aug. 4, 2016), JA106-07.

This recognition is consistent with both the efficiency rationale for permitting BMI to continue to operate in conformance with antitrust law and with copyright law. This longstanding mutual understanding between the rightsholder and user communities has served both well in minimizing licensing friction, infringement exposure, and undue cost to licensees, while assuring BMI and its affiliates generous compensation that has continually escalated, now to more than $1 billion annually.

In contrast, an interpretation of the BMI Decree favoring BMI and its major music publisher affiliates' present advocacy would significantly disrupt the licensing status quo and, in the process, invite severely anticompetitive consequences for licensees including local television broadcasters, who would be deprived of the very benefits of rapid, indemnified access to BMI's repertory of works that undergird the U.S. Supreme Court's extension of an antitrust lease-on-life to BMI (and ASCAP). Instead, local broadcasters would be at constant risk of performing a musical work that had not been *fully* authorized by each and every owner of a fractional interest in that work. The practical outcome of such a change to the BMI Decree would be widespread commercial disruption for licensees unable to locate and contract with all necessary rightsholders. No PRO, licensee, copyright administration database or system, or court decision has heretofore *ever*

so much as contemplated such a circumstance, let alone sought to provide for an orderly music license system in its wake.

While the destabilizing effects of a dramatic change in practice allowing BMI to license solely fractional ownership rights in the musical works it licenses are welcomed by a narrow segment of those marketplace participants who would gain "hold-up" power in relation to users of copyrighted music and thereby be able artificially to raise market prices, there is no sound basis, on the face of the BMI Decree, as supported by its underlying antitrust purposes and interested parties' longstanding course of conduct construing it, for affording such relief.

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

A. The Plain Language of the BMI Decree, Supported by the Underlying Rationale of the Governing Language, Requires Full Works Licensing.

With virtually no discernible supporting rationale, and without benefit of full briefing, the District Court concluded that the BMI Decree "neither bars fractional licensing nor requires full-work licensing." Order at 6, JA12. On its *de novo* review, this Court should reject that conclusion as unsupported by either the plain language of the Decree or the antitrust considerations that gave rise to it. *See generally United States v. ITT Cont'l Baking Co.,* 420 U.S. 223, 238 (1975) (consent decrees are to be "construed for enforcement purposes basically as a

contract"; in discerning the "four corners" of a consent decree, it is proper for the court to rely on, among other things, "the circumstances surrounding the formation" of the decree."). Whatever later-developed policy arguments or claimed changes of circumstance may be said to warrant second-guessing that original bargain between the parties, "the instrument must be construed as it is written, and not as it might have been written." *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971).[10]

Applied here, BMI has historically licensed exclusively on a blanket basis rights to publicly perform the musical works in its repertory. *BMI v. DMX Inc.*, 683 F.3d 32, 36 (2d Cir. 2012). The BMI Decree straightforwardly defines "[BMI's] repertory" to "mean *those compositions*, the right of public performance of which [BMI] has or hereafter shall have the right to license or sublicense" (BMI Decree Art. II(C), JA26) (emphasis added). The obligation to license "compositions" carries forward into Article XIV of the Decree, which was added by consensual modification of the BMI Decree in 1994. Article XIV brings BMI's

[10] Were this case presented in the posture of a proposed modification of the BMI Decree, which it is not, BMI would have borne the heavy burden of proving over the Government's objection that "a significant change in circumstances warrants revision of the decree" to permit fractional licensing. *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992). *Cf. United States v. Eastman Kodak*, 63 F.3d 95, 101 (2d. Cir. 1995) (a defendant seeking to terminate a consent decree over the government's objection must demonstrate that "the basic purposes of the consent decrees—the elimination of monopoly and unduly restrictive practices—have been achieved").

licensing practices in line with those of ASCAP by requiring BMI to license all applicants who write BMI requesting "a license for the right of public performance of any, some or all of *the compositions* in [BMI]'s repertory." BMI Decree Art. XIV(A), JA31-32 (emphasis added). In turn, "[w]hen an applicant has the right to perform *any compositions* in [BMI's] repertory," either the applicant or BMI retains the right to invoke the authority of the district court supervising the BMI Decree (a) to set an interim fee pending final determination of a reasonable fee for use of BMI's repertory (BMI Decree Art. XIV(B), JA32), and/or (b) to set such a reasonable final fee (BMI Decree Art. XIV(A), JA32).

Beyond the statement, appearing in the Conclusion to its brief Opinion, that the above-quoted language from Article II(C) of the BMI Decree "is descriptive, not prescriptive," Order at 6, JA12, the district court failed to parse the governing language, let alone explain its rationale for interpreting that language, as "neither bar[ring] fractional licensing nor requir[ing] full-work licensing." *Id.* Its apparent focus instead on the meaning of "the right of public performance," which is not in dispute, and upon the irrelevant issue of "the value or validity of copyrights of compositions in BMI's repertory," *id.* at 4, JA10, led the district court to erroneous legal conclusions.

BMI's legal obligation to license public performances to the "compositions" in its repertory is unambiguous. Its ordinary meaning connotes "[t]he combining

of distinct parts or elements to form a whole"—as in "a work of music, literature, or art . . . ." *American Heritage Dictionary of the English Language* (3d ed. 1992). The logic of BMI's fractional license position requires a tortured reading of plain English and accepted usage of the term to construe "compositions" as meaning something less than entire musical works, *i.e.*, solely *portions* of musical works. Nothing in the text of the BMI Decree supports such a construction. Articles II(C) and XIV could have been written to require BMI to license "*those rights in* compositions in it repertory it has been granted authority to license," or "those *portions of* compositions, the right of public performance of which [BMI] has or hereafter shall have the right to license or sublicense" or the like. But no such language exists, and BMI is not free to conduct its business as if it did.

A full-works licensing requirement also is fully consistent with the "circumstances surrounding the formation" of the BMI Decree as it has been periodically modified over time. *ITT Cont'l Baking*, 420 U.S. at 238. The Government sued BMI on antitrust grounds challenging, *inter alia*, its "all or nothing" blanket license. *BMI v. CBS*, 441 U.S. at 10-12 & n.20. As the Supreme Court stated, BMI "plainly involve[s] concerted action in a large and active line of commerce." *Id.* at 10. The decretal provisions resolving that antirust challenge and subsequent revisions that may have averted similar challenges codify BMI's operation as a licensing collective whose "product" is a repertory of musical

compositions which users are entitled to access and publicly perform in return for prescribed procedures assuring both the users and BMI reasonable (*i.e.*, market competitive) terms of license. Indeed, as the Supreme Court recognized, the core rationale for insulating BMI's (and ASCAP's) licensing practices from *per se* condemnation under the Sherman Act is their ability to afford users instantaneous, indemnified access to a large body of musical compositions without need for costly transactions with countless individual rights owners. *Id.* at 19-20. In allowing BMI and ASCAP to continue to offer blanket licenses on a case-by-case basis under the antitrust laws, the Supreme Court credited the PROs' arguments that blanket licenses were "designed to 'increase economic efficiency and render markets more, rather than less, competitive.'" *Id.* at 20.

To construe the BMI Decree as, instead, affording users such as local television broadcasters only *partial* access to an unknowable number of works in BMI's repertory, as requiring users, at great expense, to locate the copyright owners of the remaining portions of such works, and as limiting indemnification from infringement—a key protection broadcasters require—solely to such unknown and undisclosed works from within BMI's repertory as to which BMI claims to have full license authority, would fundamentally undercut the core antitrust bargain BMI struck with the Government and undermine the rationale for its continued lawful operation under the antitrust laws.

Accordingly, the plain language of the BMI Decree requires full-works licensing consistent with the very purpose of the antitrust enforcement action brought and resolved by the Government against BMI.

B. BMI's Agreements with Its Affiliated Writers and Music Publishers, Its License Agreements With Local Television Broadcasters, and Its Court Pronouncements All Confirm the Plain Reading of the BMI Decree to Require Full Works Licensing.

The import of the plain language of the BMI Decree is reinforced by the scope of license authority BMI has obtained from its affiliates, by the rights grants contained in user agreements with, among others, local television broadcasters, and by BMI's representations to the courts over many decades.

1. Affiliation Agreements. BMI's affiliation agreements with its writers—the composers of the works contained in BMI's repertory—have unequivocally granted BMI the rights to license the non-dramatic public performance of any works *any portion of which* are owned by that affiliate. The operative language of BMI's form writer agreement thus conveys to BMI the right to license public performances of "*all* musical compositions . . . composed *by you alone or with one or more co-writers.*" BMI, Writer Agreement, at ¶ 1(b)(ii), JA148 (emphasis added). As Appellant United States' brief points out (at 42), BMI was never, prior to the submission of public comments to the Government during its investigation, aware of any reservations of rights by its affiliates that would detract from this broad grant of license authority.

2. Licenses with Local Television Broadcasters. Throughout more than 60 years of licensing with BMI, local television stations have *always* secured unfettered, indemnified rights to publicly perform *each work* in the BMI repertory without reservation or limitation. BMI has *never* conditioned performances of BMI-repertory works upon the broadcaster securing rights from other potential owners of interests in any of the licensed works or declined to indemnify the broadcasters against infringement claims arising out of their performances of any and all BMI-repertory works.

The license grant language effectuating this understanding has been straightforward. The current blanket and per-program licenses provide:

> BMI hereby grants to LICENSEE, for the term hereof, a non-exclusive license to perform publicly all musical works the right to grant public performing right licenses of which BMI may during the term hereof control….

These grant clauses are reinforced by indemnification language holding harmless each licensee against all claims that may be made against them "with respect to the performance under this Agreement of any works in the BMI repertoire that are licensed hereunder…."[11]

Had BMI, as it for the first time now contends, historically licensed only fractional ownership rights to users such as local television broadcasters, surely the

[11] *Amicus* is prepared to provide the Court with copies of the referenced agreements should it desire to review them.

above grant (and tracking indemnification) language would not have been used to convey such limited grant. BMI quite easily could have stipulated instead to be granting a license to "*such portions of* the musical works the right to grant public performance right licenses of which BMI may during the term control," or the like. It did no such thing.

The local television licenses confirm BMI's historic full-works license grants in yet another way. The BMI per-program license requires the licensee to pay prescribed fees based principally upon revenues associated with programs that contain one or more BMI musical compositions *that are not otherwise licensed* (a "Program Fee"). Among the categories of programs whose revenues are excludable in calculating the Program Fee are those "whose only uses of music from BMI's repertoire" consist of "Otherwise Licensed Split Works." An Otherwise Licensed Split Work is defined as:

> a musical work: (1) the copyright in which is owned by two or more individuals or entities, or as to which two or more individuals or entities have the right to collect performing rights royalties, at least one of which is an affiliate of BMI and at least one of which is not an affiliate of BMI, and (2) for which LICENSEE has a valid license to perform publicly the composition … either from another U.S. performing rights organization or from a copyright owner or its licensee who is not an affiliate of BMI.

Plainly stated, these provisions reflect BMI's recognition that a local television station can secure full works license authority from another PRO or rights holder which owns or represents solely a partial interest in a work that is also

represented (through a different writer) in BMI's repertory, *and that there is no payment obligation whatsoever to BMI in relation to such works.* This is simply the mirror circumstance to that in which BMI has been empowered by its affiliates to license entire works of which they are only partial owners.

The governing per program license language has been in place since the 1990s and, to the Committee's knowledge, has never given rise to a challenge by the owner of a fractional interest in a split work to the authority of one or the other of BMI or ASCAP to license the full work or to the ability of a station licensee to broadcast that work without seeking additional license authority.

3. BMI's Prior Judicial Acknowledgment of the Mandated Scope of Its License Grants. BMI's current professions that it never has offered unfettered access to all the works in its repertory flies in the face of decades of contrary assertions, among others, before the Supreme Court and this Court. Indeed, BMI went to great lengths when the antitrust legality of its blanket licensing practices was first challenged to emphasize the very opposite: that a license from BMI uniquely provided users with rapid, indemnified access to the millions of works in its repertory. In briefing before the Supreme Court in *BMI v CBS*, 441 U.S. 1 (1979), BMI touted its blanket license as: "authoriz[ing] the user to perform any work in the BMI repertory, without advance notice to either BMI or the copyright owner, any number of times during the term of the license," Brief of Petitioners

BMI, *BMI v. CBS*, Case No. 7701578, 1978 WL 207040, at *7 (U.S. Nov. 17, 1978); providing users with "unlimited flexibility in planning programs, because any music it chooses is 'automatically' covered by the blanket license," *id.* at *11; and enabling users "to perform spontaneously a broad range of music without fear of infringement." *Id.* at *24. This briefing before the highest court in the land was unaccompanied by any caveats cautioning that the foregoing sweeping, assertedly procompetitive advantages of these PRO offerings were properly construed as excluding potentially millions of musical compositions which are jointly owned by individuals or entities belonging to different licensing organizations. As earlier discussed, the Supreme Court relied upon these representations in declining to condemn BMI's and ASCAP's blanket licensing practices as *per se* unlawful under the Sherman Act.

BMI has since repeatedly reaffirmed these tenets of its licensing, including before this Court, with assurances of comprehensive protection against copyright infringement, such as that "the blanket license is a unique product: 'not a series of individual licenses, but a right to play any music in the BMI library immediately and without additional payment . . . .'" Brief and Special Appendix for Petitioner-Appellant BMI, *BMI v. DMX*, No. 10-3429-cv, 2010 WL 5558379, at *38 (2d Cir. Dec. 29, 2010); *see also* Gov't Br. at 40.

C. BMI's Sought-After Interpretation is Antithetical to Copyright Law.

BMI and its supporting rightsholders are certain to argue that to require BMI to issue full-works license authority would be antithetical to norms of copyright law. Nothing could be farther from the truth. We are dealing here with works of joint authorship under copyright law, that is, works with several contributors that combine into an indivisible whole. *See generally* 17 U.S.C. § 201. With respect to rights to exploit such joint works, it is firmly established that any single contributor may issue a license, as in the present circumstance, to publicly perform the entire work, without permission from its co-owners, subject only to an accounting obligation for the royalties earned. 1 David Nimmer, Nimmer on Copyright, § 6.10[A][1][b], LexisNexis; *Weissmann v. Freeman*, 868 F.2d 1313, 1318 (2d Cir.1989) ("An action for infringement between joint owners will not lie because an individual cannot infringe his own copyright."). While it may be possible for co-owners of a joint work to agree between themselves to a different understanding that departs from this default rule of copyright law, they may not use BMI as a tool for doing so. The BMI Decree unambiguously requires BMI to license entire musical works, a requirement implemented by the earlier-cited language of BMI's affiliation agreements. Were it otherwise, BMI would stand naked of the very protective antitrust garb in which it has cloaked itself: its ability to "authorize the user to perform any work in the BMI repertory" "without fear of infringement."

As the Government has recognized, individual copyright owners are free to decide not to license their works in such fashion; they simply may not do so through an affiliation with BMI.[12]

D. BMI's Sought-After Interpretation is Antithetical to the Goals of the BMI Decree and Would Unduly Disrupt the Operations of Local Television Broadcasters.

Allowing BMI, at the urging of its largest rightsholders, to afford users such as local television broadcasters solely partial rights in potentially millions of copyrighted "split" works would vitiate the very procompetitive justification for BMI's existence: affording users instantaneous, unfettered, indemnified access to all works in its repertory without need to engage in additional licensing transactions. That longstanding assurance and the commercial operations of users built upon such expectation would be instantly disrupted, supplanted by a licensing market in which users would lack certainty as the ability to perform, without need for further license, even a single work in BMI's repertory. There is no way for a local television broadcaster to know which of the millions of works in BMI's repertory are wholly owned by a BMI affiliate; which are split works all of whose

[12] *See* Statement of the Department of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees, at 19 (Aug. 4, 2016), JA82. In its letter submission before the district court, BMI avoided frontally acknowledging the limited number of copyrighted works that likely are the subject of such departures from prevailing copyright practice, stating merely (and undoubtedly understatedly) that the "majority" of works licensed by BMI do not implicate such practice. Dkt. No. 87 (hereinafter "BMI Letter") at 3, JA57.

joint owners are BMI affiliates; which constitute split works, the licensing authority to perform reposes in the BMI affiliate; or which are split works one or more of whose co-owners are unaffiliated with BMI and, by agreement with the remaining co-owners, claim to have retained separate rights to authorize their performance. Tellingly, BMI itself has no clue as to these answers. *See* BMI Letter at 6, JA60 (acknowledging that "it will be very difficult" for BMI "to identify and locate all co-owners of a split work."). It is ludicrous to expect that a local television broadcaster—or any other user—would be in any better position.

Whereas certain music copyright owners stand to benefit from such a sea change in license practice, that gain would directly undermine the antitrust underpinnings of the BMI Decree. BMI's monopoly power would not be mitigated, as users still would require licenses from BMI to secure those portions of split works it purported to be authorized to license, while at the same time being deprived of the procompetitive benefits of dealing with BMI in the first instance. In turn, potentially numerous individual copyright owners with ownership interests in split works would have an incentive to go it alone, in terms of performance rights licensing—effectively becoming mini-monopolies with hold-up power over televised and other uses of works in which they owned an interest.

For local television broadcasters, the transactions costs and disruption to commercial operations that would result from such a regime cannot be overstated.

Facing the prospect of potentially punitive copyright infringement penalties for inadvertently performing musical works for which less than complete rights had been acquired, local broadcasters would face the Scylla of scaling back their use of copyrighted music or the Charybdis of engaging in costly, time consuming, and likely ultimately futile efforts to identify and negotiate the rights held by every co-owner of split works contained in their programming. Neither choice is realistic.

The scale of this commercial disruption cannot be overstated. As noted, the preponderance of programming broadcast by local television stations that is dependent on BMI licenses is produced by third parties and sold in the syndication marketplace. Stations have no role in selecting that music, and are contractually barred from altering it. Thus implicated are countless copyrighted musical works over whose performance the stations have no control. To simply proceed with airing such programming without legal assurance as to the licensed status of the music and corresponding indemnification protection would subject the local stations to potentially ruinous copyright infringement exposure.

No sound antitrust policy would be furthered by such profound marketplace disruption. The requirements placed upon BMI by its Decree to license fully the works in its repertory soundly protects local broadcasters from being placed in such an untenable posture.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's decision and hold that the BMI Decree requires BMI to afford its licensees the right to publicly perform in their entirety any and all works contained in BMI's licensing repertory.

Respectfully submitted.

/s/ R. Bruce Rich

May 25, 2017

R. Bruce Rich
Benjamin E. Marks
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
Telephone: (212) 310-8000
Facsimile: (212) 310-8007
Attorneys for Television Music License Committee, LLC

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) because this Brief contains 6,967 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 Times New Roman, 14-point font, using Microsoft Office Word 2013.

/s/ R. Bruce Rich
Attorney for Television Music License Committee, LLC

CERTIFICATE OF SERVICE

I certify that on May 25, 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 Appellant and Appellee.

/s/ R. Bruce Rich
Attorney for Television Music License Committee, LLC