

THE MUSIC RIGHTS FIGHT

Debates are escalating over how much media companies should pay to license music. And the stakes are enormous.

By JANET McHUGH



RECENTLY TOOK MY 21-YEAR-OLD SON (an aspiring lawyer) to see *To Kill a Mockingbird* on Broadway. We both had read the book in middle school. But I wanted him to understand a legal case – whether real or fictionalized – showcasing the idea that one man with good intentions and a keen legal mind could take on the system.

Such a lawyer can fight the good fight for the cause of justice, win or lose. That's why I became an attorney, and I wanted my son to have that same ideal.

The attraction of business law, with its ability to help me pay large tuition bills, has delayed my becoming the Atticus Finch of modern times. There still are opportunities, however, for individuals to work within

government and the courts (including the court of public opinion) to accomplish things that solve big problems and just make sense.

A case in point are the ongoing legal arguments against terminating the consent decrees that help curb the power of two performance rights organizations (PROs), ASCAP and BMI. That move is being contemplated by the U.S. Department of Justice (DOJ), and it has serious consequences for media companies.

Without regulation, ASCAP and BMI could charge whatever they want. Music users – who already pay well over \$1 billion dollars each to ASCAP and BMI – would be held hostage. They would either be forced to pay exorbitant fees or infringe on the copyright laws.

If the consent decrees are terminated it may lead to “the day the music dies” in your favorite TV programs or at your favorite bar. Those of us arguing in favor of maintaining the consent decrees are seeking fairness and order in what could become a very chaotic world of music-use licensing.

Since I wrote about this for *TFM* in the November/December 2018 issue (see “Discord Over Music Rights”), there have been some developments worth noting, not the least of which is the DOJ's decision to go ahead and begin a review of the consent decrees.

At press time, the Television Music License Committee (TVMLC) and many other music users affected by a possible termination or modification of the consent



decrees were expected to file comments responding to these questions. Comments were due by mid-August.

Before delving into recent actions, let's review why the decrees are so valuable.

DECYPHERING THE DECREES

The consent decrees specifically pertain to ASCAP and BMI, the two largest PROs in the United States. Their primary function is to pool the copyrights held by composer, songwriter and publisher members or affiliates.

BMI and ASCAP's repertoires are estimated to comprise almost 90% of all musical works in the U.S. This music is publicly performed in restaurants, bars, on TV, radio and on various music streaming services.

The decrees require the two PROs to issue licenses covering all works in their repertory upon request from music users. If the parties are unable to agree on an appropriate price for a license, the decrees provide for a "rate court" proceeding in front of a U.S. district judge. Neither decree contains a termination date.

The debates over rates charged by ASCAP and BMI are usually complicated, because the PROs bundle their music into a single license. Music users simply cannot pick and choose or realistically secure licenses for all of the works they play directly from songwriters and publishers.

Adding to the complexity, traditional TV programmers and streaming services like Netflix transmit content that already

has "music in the can." They don't control and oftentimes can't determine what music is actually being transmitted to consumers.

Because of the "take it or leave it" aspect of these licenses (with the "leave it" option likely resulting in potentially crippling copyright infringement lawsuits), ASCAP and BMI wield enormous market power.

Decades ago, the DOJ brought antitrust lawsuits against the PROs. These lawsuits were resolved with the imposition of consent decrees, which rein in ASCAP and BMI's enormous clout. The decrees were put in place, among other reasons, so that music users would not be subject to the full extent of ASCAP's and BMI's market power, thereby allowing for the negotiation of more reasonable license fees.

The decrees provide limited government oversight of the PROs, including the establishment of the "rate court" previously mentioned. Because of the decrees, PROs must give music users automatic licenses on request and freedom from copyright infringement concerns.

Only three years ago, the DOJ looked at several aspects of the consent decrees at the request of ASCAP and BMI. After exhaustive investigation, it concluded "the current system has well served music creators and music users for decades and should remain intact." The consent decrees continue to provide a check on potential anticompetitive behavior.

ENTER THE MIC COALITION

When Assistant Attorney General Makan Delrahim suggested in 2018 that the DOJ should review the ASCAP and BMI consent decrees again, the MIC Coalition stepped up to the plate. (MIC is pronounced "mike," as in microphone.) And it continued its efforts when the DOJ announced in June 2019 that it has once again opened a review of its ASCAP and BMI consent decrees.

The coalition had been formed due to a growing need: the world of music licensing is incredibly complicated and unnavigable without high-priced legal counsel and economists. It's non-transparent and subject to government requirements.

The MIC Coalition is composed of a

group of associations whose members transmit licensed music over the nation's airwaves, through the Internet and in stores, hotels, restaurants, bars and taverns throughout the country.

In addition to the TVMLC, the coalition's members include the National Association of Broadcasters, American Beverage Licensees, American Hotel and Lodging Association, National Restaurant Association, Radio Music License Committee, National Retail Federation, National Association of Theatre Owners, Consumer Technology Association and Wine America.

It is committed to a rational, sustainable and transparent system that will drive the future of music and ensure that consumers have continued access to music across a variety of platforms, venues and services.

The coalition realized that the potential modification or termination of the consent decrees with no replacement framework would have a serious impact on music users and the fees they pay to all PROs. With that in mind, it has been educating the public and Congress about the negative impacts of either possible outcome.

As the MIC continues its work on that

front, the TVMLC has been exploring whether it should be working to secure fair and reasonable license fees with newer PROs, including Global Music Rights (GMR) and Pro Music.

CLEARING THE AIR

While the DOJ gears up for its examination of the decrees, the U.S. Congress is reviewing copyright laws that govern music licensing. The MIC Coalition is hopeful that it will advance reform legislation achieving a healthy balance in the new music economy.

This includes the creation of a modern music copyright database to finally provide a transparent, accurate and fully searchable record of music ownership and licensing information available to everyone. In the words of Atticus Finch: "Best way to clear the air is to have it all out in the open."

Readily available ownership information

is critical to facilitate more efficient licensing and accuracy in payment. Composers cannot be paid if users and distributors do not know who owns what or who should be paid.

As it now stands, music users like TV and radio stations do not know precisely what they're licensing from each PRO. It's not clear who owns a given piece of music and which PRO each copyright owner is affiliated with.

There have been various attempts to create such a database within the U.S. Copyright Office or as an independent initiative. For example, the MIC Coalition supports proposed

legislation known as the Transparency in Music Licensing and Ownership Act.

The legislation focuses exclusively on the creation of a database of musical works (as opposed to also including sound recordings, which was previously addressed by Congress in the Music Modernization Act passed last year).

TVMLC and the MIC Coalition are committed to working with the music producing community, all performing rights organizations and all music licensees to create a fair and transparent system that prevents anti-competitive practices. Both organizations want to achieve fair compensation to composers and publishers and reasonable, competitive-market-based rates for consumers.

In order to achieve this, the consent decrees either must stay in place or be replaced with an alternative framework including a comprehensive data base for musical works.

As Harper Lee wrote in *Go Set a Watchman*, the sequel to her novel, *To Kill a Mockingbird*: "I guess it's like an airplane: they're the drag and we're the thrust, together we make the thing fly. Too much of us and we're nose-heavy, too much of them and we're tail-heavy — it's a matter of balance."

With the songwriting, publishing, government and music-using community working together, I think we can make this fly.

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ARGUMENTS PRO AND CON

THE CURRENT DEPARTMENT OF JUSTICE (DOJ) REVIEW OF THE DECREES IS ITS second in five years. Its purpose is to determine whether the decrees should be maintained in their current form, modified or terminated.

In explaining his decision, Makan Delrahim, assistant attorney general for the DOJ's antitrust division, noted: "The ASCAP and BMI decrees have been in existence in some form for over 75 years and have effectively regulated how musicians are compensated for the public performance of their musical creations."

He went on to say: "There have been many changes in the music industry during this time, and the needs of music creators and music users have continued to evolve. It is important for the division to reassess periodically whether these decrees continue to serve the American consumer and whether they should be changed to achieve greater efficiency and enhance competition in light of innovations in the industry."

As part of its public comment process, the DOJ wants to know, among other things, whether the consent decrees continue to serve important competitive purposes. The Television Music License Committee and the MIC Coalition feel strongly that the answer is "yes."

As Elizabeth Frazee, executive director of the MIC Coalition, explains: "The ASCAP and BMI consent decrees were originally established to guard against anticompetitive behavior, and we have seen no evidence that they have outlived their intended purpose. If anything, they are more critical than ever in an increasingly complex and diverse licensing environment which, without measures that ensure an orderly market, is ripe for abuse."

Frazee added: "Modifying the existing decrees for the sake of change, alone, will not lead to the advent of a new and improved licensing regime that yields greater competition or adequately protects consumer interests."

The consent decrees were created because the system of licensing performance rights was not working. There was no competitive marketplace. Nothing has changed. ASCAP and BMI still control 90% of the performance rights in musical works.

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