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March 17, 2020

Music Licensing: The ASCAP and BMI Consent Decrees

On June 5, 2019, the U.S. Department of Justice (DOJ) announced that it was opening a review of two consent decrees that play a critical role in the music industry. The decrees regulate the copyright licensing activities of the two largest U.S. performing rights organizations (PROs): the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI). DOJ is to consider whether or not to pursue modifications to, or termination of, the consent decrees. The U.S. District Court for the Southern District of New York (SDNY) would need to approve any proposed changes to the consent decrees.

PROs enable lyricists and composers (referred to collectively here as "songwriters") and music publishers to collect royalties when copyrighted musical works are performed publicly, that is, when music is played on the radio, through a streaming service, or in a nonprivate setting. As a result of antitrust lawsuits, however, ASCAP and BMI have long operated under consent decrees with DOJ, which constrain their activities. Changes to or termination of the consent decrees could significantly affect the amount of money that radio stations, orchestras, restaurants, cafes, clubs, and other businesses pay to perform musical works publicly, as well as the amount of money that songwriters and publishers receive for their works.

Copyright in Musical Works

Copyright attaches to a work upon its creation and fixation in some tangible medium of expression, such as in a score or a digital or analog recording. While copyright exists from the moment a person creates and fixes a work, copyright holders must register their works with the U.S. Copyright Office to bring a lawsuit for infringement. For works created today, copyright generally lasts until 70 years after the death of the work's author.

Two distinct types of copyrights applicable to music are available under the law. The copyright in a *musical work* covers the creativity of the music's composer and lyrics' writer. The copyright in a *sound recording* covers the work of the performers, producers, and engineers of a particular recording. For more information, see CRS Report R43984, *Money for Something: Music Licensing in the 21st Century*, by Dana A. Scherer.

Many songwriters work with music publishers and often assign their copyrights to them. In turn, the publishers pay songwriters an advance against future royalty collections and promote the songs. Under the law, copyright holders have exclusive rights to reproduce their work, distribute it, and perform it publicly. The public performance right prohibits others from streaming, broadcasting, or playing a musical work for public listening without the copyright holder's permission. Thus, any entity or venue seeking to perform musical works publicly generally needs to seek permission (i.e., a license) from songwriters and/or publishers, and typically pays them a fee (i.e., a royalty).

Performing Rights Organizations

Congress first gave songwriters the exclusive right to grant permission for and collect money from public performances in 1897. However, tracking each copyright holder and each public performance was challenging. To address such logistical difficulties, songwriters and publishers formed PROs and assigned PROs their public performance rights. The PROs, in turn, issue public performance licenses on behalf of their member songwriters and publishers. Licensees generally obtain a blanket license, which allows them to perform publicly any of the musical works in a PRO's catalog for a flat fee or a percentage of total revenues. After charging administrative fees, PROs split the public performance royalties they collect among members based on play frequency, among other factors.

SESAC and GMR. Two PROs active in the United States are SESAC (formerly the Society of European Stage Authors and Composers), founded in 1930, and Global Music Rights (GMR), founded in 2013. In part because they are not bound by consent decrees, SESAC and GMR differ from ASCAP and BMI in several ways. SESAC and GMR operate as for-profit corporations, and membership is by invitation only. SESAC administers other copyrights in addition to public performance licenses.

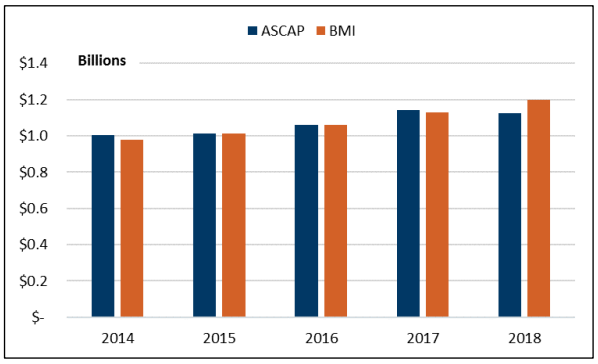
An organization representing broadcast radio stations, the Radio Music License Committee (RMLC), has asserted that SESAC and GMR have each violated antitrust laws. In 2012, RMLC sued SESAC, claiming that it charged rates disproportionate to the number of works it licenses. RMLC settled its lawsuit with SESAC in July 2015, and the parties agreed to binding arbitration in the event they could not agree to a royalty rate. In 2016, RMLC sued GMR, alleging that licensing its catalog of songs on an all-or-nothing basis was an abuse of market power. GMR countersued RMLC, alleging that RMLC was a buyer's cartel, and contending that its representation of virtually all commercial radio stations was anticompetitive. The lawsuits between GMR and RMLC are ongoing. A federal judge in California is overseeing these lawsuits.

ASCAP and BMI. Songwriters formed ASCAP, the first U.S. PRO, in 1914. To strengthen their bargaining power vis-à-vis ASCAP, broadcasters in 1939 founded and financed a competing PRO, BMI. ASCAP and BMI now handle public performance rights for most musical works. Both are nonprofit organizations. Although publishers may affiliate with multiple PROs, each songwriter may affiliate

with only one. Thus, a song with more than one songwriter may appear in the catalogs of multiple PROs. For example, former Beatle Paul McCartney is an ASCAP member, while the estate of John Lennon, with whom McCartney wrote many songs jointly, is a GMR member. Whether the consent decrees require that the granting of public performance rights to such "split works" requires the approval of all parties concerned, not just of a single PRO, has been a matter of controversy.

Figure 1. Payments to ASCAP and BMI for Public Performance Licenses

(Figures in $ billions)



Source: ASCAP and BMI annual reports.

Notes: ASCAP and BMI collect royalties during their fiscal years (ending December 31 and June 30, respectively).

The ASCAP and BMI Consent Decrees

After their formation, both ASCAP and BMI offered only blanket licenses covering all songs in their respective catalogs. Thus, to license one song in ASCAP's or BMI's catalog, a user had to purchase a "blanket license" for the entire catalog. In addition, both PROs forbade members from entering into direct licensing agreements with music users.

Beginning in the 1930s, DOJ investigated and eventually sued ASCAP and BMI for anticompetitive business practices. DOJ alleged that the practice of offering only blanket licenses illegally conditioned the sale of one good on the purchase of another (a practice known as "tying"), and constituted price-fixing in violation of Section 1 of the Sherman Act (15 U.S.C. §1), which prohibits agreements that unreasonably restrict competition. In 1941, both ASCAP and BMI settled these cases, entering into consent decrees with DOJ. These consent decrees attempt to balance the efficiencies gained by PROs' collective licensing against promoting free and fair competition.

The ASCAP and BMI consent decrees are separate agreements, but share some basic features. First, they require that ASCAP and BMI obtain only the nonexclusive right to license musical performances; that is, songwriters retain the right to license their public performance rights individually. Second, ASCAP and BMI must grant a license to any applicant on terms equal to similarly situated licensees, and accept as a member any songwriter who meets minimum requirements. Under the consent decrees, ASCAP and BMI are subject to oversight by the SDNY, sometimes called the "rate court" in this context. If a potential licensee cannot reach an agreement with ASCAP and BMI on the appropriate royalty, it may petition the rate court to set a reasonable fee.

DOJ's Review of the Consent Decrees

DOJ has periodically reviewed the consent decrees since 1941. The parties last amended the ASCAP consent decree in 2001 and the BMI consent decree in 1994, in both cases with the approval of the rate court. In June 2014, DOJ announced that it would explore modifications to the consent decrees after ASCAP and BMI solicited a review. On August 4, 2016, DOJ completed its review and decided not to seek termination or modification of the consent decrees. However, at the conclusion of its review DOJ announced that, pursuant to its interpretation, the consent decrees required the two PROs to issue 100% licenses to all "split works" in their catalogs. If this interpretation had taken effect, either ASCAP or BMI could have granted rights to use a song, even if some of the songwriters or publishers who owned performance rights were members of another PRO. In September 2016, SDNY ruled that contrary to DOJ's interpretation, BMI's consent decree permits "fractional licensing," that is, requiring a user to obtain a license from each copyright owner. The U.S. Court of Appeals for the Second Circuit upheld that decision in December 2017.

The current review of the ASCAP and BMI consent decrees, which began in June 2019, seeks public comment on whether the consent decrees continue to serve the public interest; whether modifications to the consent decrees are needed to enhance competition or efficiency; whether termination of the consent decrees would serve the public interest; how a termination should proceed; and whether differences between the ASCAP and BMI consent decrees, or differences between ASCAP and BMI and the two PROs not subject to consent decrees, adversely affect competition. DOJ has received nearly 900 comments from the public on these issues; its review is ongoing.

PROs and the Music Modernization Act

The 2018 Orrin G. Hatch-Bob Goodlatte Music Modernization Act (MMA; P.L. 115-264) contains several provisions giving Congress greater oversight of DOJ with respect to its review of the consent decrees. First, the MMA requires DOJ to, upon request, brief any Member of the House and Senate Judiciary Committees regarding the status of any PRO consent decree review. Second, the MMA requires that DOJ, before seeking to terminate a consent decree, notify the Judiciary Committee chairpersons and ranking members. The notification must include a written report on DOJ's process, the public comments it received, and information regarding the impact of the proposed termination on the market for licensing public performances. The Senate Judiciary Committee report on the MMA expressed "concern that terminating the ASCAP and BMI decrees without a clear alternative framework in place would result in serious disruption in the marketplace, harming creators, copyright owners, licensees, and consumers."

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