OPINION: DOJ Got It Right On ASCAP, BMI Consent Decrees

Law360, New York (August 8, 2016, 11:30 AM ET) --
On Aug. 4, theU.S. Department of Justice issued a statement closing its two-year review of the ASCAP and BMI consent decrees, deciding not to further change music licensing rules that have protected competition in the music industry since 1941. These consent decrees established the rules by which performing rights organizations (PROs), middlemen between music copyright owners and music users, that administer blanket licenses that have competitive dangers but create many benefits to the music licensing industry.[1]

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Blanket licenses are aggregate licenses to perform musical works covering millions of songs by thousands of artists. These licenses offer all the songs in the PRO's repertoire, regardless of their popularity. This practice prevents songs from competing with each other, which would typically lower the average price of music. Blanket licenses also create economies of scale and easy access to song licenses in an industry that is incredibly complex and has opaque ownership information. It would be extremely difficult, if not impossible for music users — from bars to online music companies — to put together the licenses they need in order to avoid the risk of costly copyright infringement without a blanket license from PROs. ASCAP and BMI themselves take weeks or months to properly distribute fees to artists after a song is played, and even then do so imperfectly.[2]

The consent decrees establish rules of the road to ensure that these benefits are balanced against the power that comes from a few companies controlling rights to a majority of music in the cannon. Under these rules, ASCAP and BMI can match song owners seeking to profit with the many businesses that want to purchase song licenses without risking anti-competitive prices or practices. It is this value and the protections of the consent decrees that influenced the Supreme Court to decide that these blanket licenses were not per se illegal under the antitrust laws.[3]

The consent decrees are a good deal for music creators, owners and users. While the DOJ has significantly amended the consent decrees as necessary, the changes proposed by the PROs and music publishers were unnecessary at best, and at worst would cause significant harm to the market.

Take the proposed change to allow fractional licensing. The decision by the DOJ not to allow the PROs to license incomplete rights to a song may be the most controversial and most misunderstood portion of the announcement. A copyright for a single song can have many owners. Congress intended for co-owners of a copyright to be treated generally as tenants in common, with each co-owner having an independent right to use or license the use of a work, subject to a duty of accounting to the other co-owners for any profits.[4]

This is how licensing at ASCAP and BMI generally works today. BMI's license states: "BMI grants you a non-exclusive license to publicly perform at the Licensed Premises all of the musical works of which BMI controls the rights to grant public performances during the terms."[5] ASCAP's similarly says "ASCAP licenses to music users, on a nonexclusive basis, the right to publicly perform, non-dramatically, all of the works in the ASCAP Repertory."[6] Continuing this practice will surely not lead to the sky falling.

However, allowing fractional licensing, which essentially forces music users to assemble 100 percent interests of songs from multiple owners, would negate the very purpose of PROs. It would also undo most of the benefits the Supreme Court found outweighed competitive harms inBroadcast Music Inc. v. Columbia Broadcasting System Inc.,[7] and cause a parade of bad effects to spill out into the music industry.

For starters, there would have to be a carefully crafted and meticulously updated database detailing which works are owned in what shares by who in order for music users to operate within a fractional licensing environment. This database would have to be regularly updated to account for transfers of copyright ownership. No such database exists and it would be impossible for music users or a third party to create one because all the necessary information is held by thousands of music copyright owners.

Music owners do not seem motivated to create such a database, because a lack of information works in their favor at the negotiating table. Information has already been used as a significant bargaining chip in negotiations. In the rate hearing case In re Pandora

Media Inc., Judge Denise Cote found that lack of information compelled Pandora to enter into agreements with Sony and UMPG, and therefore made poor benchmarks.[8] Fractional licensing will only make this worse.

Without this database, which would be extremely costly and presently does not exist, confusion about copyright infringement would essentially destroy the music playing business. Music users would live in constant fear of infringement, which come with up to $150,000 in damages each time it occurs.[9] Radio stations in particular would be crushed. Radio stations would only be able to play music they are absolutely certain they license 100 percent of, severely limiting their catalogue. Consumers would be listening to the same songs on repeat while new artists would have trouble getting on the air until the stations could thoroughly vet their licenses to avoid infringement.

And while much has been made of theoretical problems this decision could spell for co-authors of music, a world with fractional licensing would likely leave music writers worse off. Any partial owner could prevent a song from being played for any reason. This means that artists that want their song widely played could be blocked by any co-author, or anybody that co-author transferred their interest to, for any reason. Artists would have to trust that collaborators won't sink their chance at popularity. This is why Congress specifically crafted the default rule to encourage public enjoyment of works, rather than private hoarding and bickering.

Finally, fractional licensing would completely defeat the larger policy goal to prevent the rise of music monopolies that would dictate prices. Ownership of a fraction of a song means absolute control over the entire song in a fractional licensing world. This would create new monopolies that could exploit their power to raise prices and limit the number of music services that can successfully operate in the business. In the European Union, an investigation conducted during the Sony/ATV and EMI merger found that while a combined Sony/ATV and EMI would only hold 20-30 percent and 30-40 percent revenue-based market shares in Ireland and the U.K. respectively, they would control 60-70 percent and 50-60 percent of song licenses respectively.[10] Fractional licensing would completely destroy the balance of power in the music industry if just one publisher left the PROs and used their monopoly power to terrorize the industry.

Fractional licensing would not be good for the U.S. music industry. The Justice Department made the right decision when it chose not to change the consent decrees for ASCAP and

BMI.

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[1] See Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979).

[2] Statement of the Department of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees at 14 (Aug. 4, 2016),https://www.justice.gov/atr/file/882101/download.

[3] Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979).

[4] House Report No. 94-1476, available athttps://en.wikisource.org/wiki/Copyright_Law_Revision_(House_Report_No._94-1476).

[5] BMI Music License for Eating & Drinking Establishments, available athttp://www.bmi.com/forms/licensing/gl/ede.pdf

[6] Compendium of ASCAP Rules and Regulations, and Policies Supplemental to the Articles of Association, Effective December 2009, at Section 2.1

[7] 441 U.S. 1 (1979).

[8] In re Pandora Media, Inc., 6 F. Supp. 3d 317, 360-62 (S.D.N.Y. 2014).

[9] 17 U.S.C. § 504(c)(2).

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