10-3161-cv(L),

10-3310-cv(CON)

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff,

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,

Defendant-Appellant,

—v.—

MOBITV, INCORPORATION, f/k/a IDETIC, INCORPORATION,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF BROADCAST MUSIC, INC. AS *AMICUS CURIAE* URGING REVERSAL IN FAVOR OF APPELLANT AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

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CORPORATE DISCLOSURE STATEMENT OF BROADCAST MUSIC, INC.

Pursuant to Federal Rule of Appellate Procedure 26.1, Broadcast Music, Inc. states that Broadcast Music, Inc. has no parent corporation and that the only publicly held company that owns 10% or more of the stock of Broadcast Music, Inc. is Gannett Co., Inc., through an indirect, wholly owned subsidiary.

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NOS. 10-3161-cv(L), 10-3310-cv(CON)

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–v.–

MOBITV, INC., F/K/A IDETIC, INC.,

Applicant-Appellee.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF BROADCAST MUSIC, INC. AS *AMICUS CURIAE* URGING REVERSAL IN FAVOR OF APPELLANT AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

Broadcast Music, Inc. ("BMI") respectfully submits this *amicus curiae* brief[1] in support of the American Society of Composers, Authors, and Publishers ("ASCAP").

INTEREST OF THE AMICUS CURIAE

The digital communications revolution has given birth to many new outlets for music to be presented to the public, while at the same time imperiling or destroying others. In this time of radical transformation, the livelihoods of songwriters and composers, and their publishers, are jeopardized by forces that have nothing to do with their art and their talent for entertaining and enlightening the public. A computer hardware maker has the market power to decree that every song must sell for 99¢,[2] while outlaws profit from rampant infringement that pays the creators nothing at all.[3]

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[1] All parties have consented to the filing of this brief. No party's counsel has authored this brief in whole or in part. No party or its counsel has contributed money that was intended to fund preparation or submission this brief. No person—other than the *amicus curiae*—contributed money that was intended to fund preparation or submission of this brief.

[2] After protests by the music industry, iTunes eventually settled on three price points, 69¢, 99¢, and $1.29. *See* Yinka Adegoke, *Labels Bet Flexibility Boosts iTunes Sales*, REUTERS, April 6, 2009, http://www.reuters.com/article/idUSTRE53608420090407 (last visited Dec. 20, 2010).

[3] Despite the courts' efforts to enforce the law, 95% of all downloads worldwide were illegal as recently as 2008. IFPI, *Digital Music Report 2009: New*

(Footnote continued on next page)

In recent years, the four dominant national cellular telephone companies−AT&T Mobility, Sprint, T-Mobile and Verizon Wireless−have entered the entertainment business by selling "smartphones" to their customers with the functionality to play music also sold by the mobile carriers. It is estimated that by 2015, smartphones will be owned by more than 80% of the American public, up from just 17% in 2010.[4] This new outlet offers an opportunity to the makers of music, but it also represents a threat if these four dominant firms are able to sell music to the public, displacing older sources of portable music performances, without having to pay the songwriters and composers fair market value for it.

BMI is a music performing rights organization ("PRO") of comparable size to ASCAP, operating on a not-for-profit basis. Like ASCAP, its role is to license music performing rights to many classes of music users, including older media like radio and broadcast television, and new media such as internet webcasters and mobile carriers. BMI represents approximately 475,000 songwriters, composers,

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(Footnote continued from prior page)
Business Models for a Changing Environment, Jan. 2009, at 3, 5, 22, 29, available at http://www.ifpi.org/content/library/dmr2009.pdf (last visited Dec. 20, 2010).

[4] *See* David Goldman, *Your Smartphone Will Run Your Life*, CNNMoney.com, Oct. 19, 2010, http://money.cnn.com/2010/10/19/technology/smartphones/index.htm (last visited Dec. 20, 2010).

and publishers, and its repertoire comprises more than 6,500,000 works. BMI's affiliates depend on the BMI royalties as a major portion of their income as composers and songwriters. For many of BMI's writers, performing rights royalties−not royalties from the sale of recordings−are their largest source of income for their work.

BMI has reached performing rights agreements with numerous content aggregators and carriers in the mobile telephone industry, and is in the midst of negotiations with others. BMI has been attempting to reach agreement with appellee MobiTV for more than four years, without success.

Like ASCAP, BMI is governed by a government consent decree that includes a compulsory licensing regime, and a "rate court" in the Southern District of New York that determines "reasonable" fees intended to give BMI fair market value for the blanket license it offers music users−what a willing buyer would pay a willing seller for that license.[5] Pursuant to the compulsory license provision of the decree, MobiTV and numerous other content aggregators and carriers have been performing BMI music without−thus far−paying for it.

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[5] *See United States v. Broadcast Music, Inc.*, No. 64 Civ. 3787, 1966 U.S. Dist. LEXIS 10449, 1966 Trade Cas.(CCH) ¶ 71,941 (S.D.N.Y.1966), *modified*, No. 64 Civ. 3787, 1994 WL 901652, 1996-1 Trade Cas. (CCH) ¶ 71,378 (S.D.N.Y.1994) (the "BMI Consent Decree").

This Court and the ASCAP rate court have looked to license agreements negotiated by BMI as benchmarks for determining ASCAP "reasonable" fees.[6] It is also routine for music users negotiating with BMI to cite to rates agreed to with ASCAP or set by the ASCAP rate court as a benchmark for what they are willing to pay BMI.

The shockingly small license fee the District Court in this case has provided for the performances of ASCAP music by the major carriers, as well as MobiTV's other, smaller customers, represents a real danger to BMI's songwriters and composers, and their publishers−and hence to the musical life of this country. The flawed reasoning that led to this decision, notably the court's profound misunderstanding of this Court's *Music Choice* decisions under the BMI decree, is equally of concern to BMI, because the *Music Choice* principle has widespread application to many of BMI's customers.

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[6] *See United States. v. ASCAP (Application of Showtime/The Movie Channel, Inc.)*, No. 13-95 (WCC), 1989 WL 222654 at *23 (S.D.N.Y. Dec. 20, 1989), *aff'd sub nom. ASCAP v. Showtime / The Movie Channel, Inc.*, 912 F.2d 563, 571 (2d Cir. 1990); *United States v. ASCAP (Application of RealNetworks, Inc., and Yahoo! Inc.)*, No. 09-0539-cv(L), 2010 WL 3749292 at *13 (2d Cir. Sept. 28, 2010) ("*RealNetworks*").

ARGUMENT

I. THE DISTRICT COURT PAID ONLY LIP SERVICE TO *MUSIC CHOICE II* AND OVER-READ *MUSIC CHOICE IV.*

The logical underpinning of the District Court's decision was its mistaken understanding that *Music Choice II*[7] does not apply whenever music performances are sold in bundles with other programming elements, or when the party procuring the license does not deal directly with the public but does obtain a through-to-the-audience license that covers downstream outlets that do. That is the case most of the time. The District Court misread the footnotes in that case, and the decision in *Music Choice IV,*[8] to narrow the actual holding of *Music Choice II* to the point of irrelevance to the real world. Properly read, *Music Choice II*'s holding−that retail revenue is generally the true expression of fair market value−is equally applicable whether or not the licensee is purchasing a through-to-the-audience license and whether or not the license fee is calculated as a percentage of retail revenue.

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[7] *United States v. Broadcast Music, Inc. (Application of Music Choice)*, 316 F.3d 189 (2d Cir. 2003) ("*Music Choice II*").

[8] *United States v. Broadcast Music, Inc. (Application of Music Choice)*, 426 F.3d 91 (2d Cir. 2005) ("*Music Choice IV*").

A. *Music Choice II* Is the Law, and *Music Choice IV* Did Not Overrule or Narrow It.

1. What *Music Choice* Stands For.

As in the present case, *Music Choice* involved a music user that did not deal directly with the listening public, but that wanted a license that would cover not only its own public performances but also those of its downstream outlets that did deal with the end-users. As a matter of administrative convenience, BMI agreed with Music Choice that the license fee could be metered as a percentage of Music Choice's revenues rather than trying to monitor the downstream cable system operators' revenue. *See United States v. Broadcast Music, Inc. (Application of Music Choice)*, No. 64 Civ. 3787 (LLS), 2001 WL 829874, at *3 (S.D.N.Y. July 23, 2001) ("*Music Choice I*"). BMI argued that in fixing the appropriate rate, the court should take into account that the downstream cable system operators were keeping roughly half of retail revenue for themselves. *Id.* at *2 n.10, 4, 6; *see Music Choice II*, 316 F.3d at 192. In *Music Choice I*, the BMI rate court disagreed, determining that:

> the true value of the music is expressed at the earlier stage where it is incorporated into Music Choice's programs. The blanket license authorizes the use of the music, and should have no regard to whether the mechanics of delivery are cheaper or costlier. Thus, the idea that to recover the full value of the music, the blanket license rate should include a component based on the cable or satellite operators' revenues, is misconceived.

Music Choice I, 2001 WL 829874, at *6.

This Court vacated that decision, reasoning:

> It is true without doubt that to make the music available to its customers, the retail seller must incur expenses for various processes and services not provided by the owner of the music, such as the laying of cable, the establishment of satellite systems, etc. However, this is in no way incompatible with the proposition that retail revenues derived from the sale of the music fairly measure the value of the music. The customer pays the retail price because the customer wants the music, not because the customer wants to finance the laying of cable or the launching of satellites.

Music Choice II, 316 F.3d at 195. This Court so held even though the licensee was at the wholesale level of distribution and did not deal directly with the listening public, even though the license fee was going to be calculated as a percentage of wholesale, and even though the licensee was obtaining a through-to-the-audience license. The Court made clear that retail revenue was the true touchstone of fair market value for a through-to-the audience license, *see id.*, and in footnote 5 explained that this was true regardless of whether the fee was mathematically expressed as a percentage of wholesale or a percentage of retail:

> We do not mean to suggest that it would be inappropriate for the district court to estimate fair market value by first fixing on wholesale revenue and then making appropriate adjustments to that figure to approximate fair market value. Especially in a case such as this, where retail revenues attributable to the music are difficult to ascertain because of the bundled packages offered at retail, while wholesale revenues attributable to the music are easily determined, that may be a useful way to proceed. That, however, is very different from proposing that wholesale revenue, in itself, represents the fair market value of what is being sold.

Id. at 197 n.5.

Music Choice builds upon the Court's foundational holding in *Showtime* that the consent decrees' requirement of "reasonable" fees means that the rate court is to determine fair market value. *See Showtime* , 912 F.2d at 566, 569. It means that, at the end of the day, and regardless of whether the fee is expressed as a percentage of wholesale or a percentage of retail, the rate court is supposed to be searching for and "approximat[ing]" the retail value of the license−the value at the end of the distribution chain closest to the public. *See Music Choice II*, 316 F.3d at 195. And, as *Music Choice II* illustrates, this is true regardless of which entity in the chain of distribution is procuring the license for the others in the chain, because retail value is what "fair market value" means and what the "reasonable" fee should be.

Music Choice also provides instruction for those instances where the parties or the rate court decide to use a license fee formula that does not include the revenue of the music user that deals directly with the listening public (retail revenue) as the rate base. There was evidence in that case from a prior set of negotiations showing that retail revenue was about two times wholesale revenue. *See Music Choice II*, 316 F.3d at 192−93, 194; *Music Choice I*, 2001 WL 829874, at *3. This Court implicitly approved of this type of evidence as of the kind the rate court might look to in "approximating" retail value when the party before the court is an upstream provider of music. *Music Choice II*, 316 F.3d at 192−93, 195.

And this is illustrative of the more general point that the rate court is required to explore the economic relationships among the parties in the distribution chain, both as to the parties before the court and the parties to any benchmark agreement not involving those identical parties, to carry out its task of "approximating" retail fair market value:

> In choosing a benchmark and determining how it should be adjusted, a rate court must determine the degree of comparability of the negotiating parties to the parties contending in the rate proceeding, the comparability of the rights in question, and the similarity of the economic circumstances affecting the earlier negotiators and the current litigants, as well as the degree to which the assertedly analogous market under examination reflects an adequate degree of competition to justify reliance on agreements that it has spawned.

Music Choice IV, 426 F.3d at 95 (internal quotations and citations omitted). Indeed, the *Music Choice* principle is equally applicable if the fee is expressed as a flat dollar amount per year (as has been prevalent for broadcast television networks), a per subscriber fee (as has been true for cable systems' locally inserted programming), or any other way.

2. *Music Choice IV* Did Not Undermine *Music Choice II.*

It bears emphasis that *Music Choice IV* did not modify the holding of *Music Choice II* that the rate court's task is to approximate retail fair market value of the license being sold.

In *Music Choice IV*, this Court only remanded for the purpose of having the BMI rate court clarify how it came to its decision in *Music Choice III*[9] to adopt the benchmark it had previously rejected in *Music Choice I.* The Court was concerned that the lower court had "over-read[]" *Music Choice II* as *requiring* the adoption of BMI's proposed benchmark, whereas the Court had only intended to say that it was *permitted*. *See Music Choice IV*, 426 F.3d at 96−97. The Court directed that, on remand, the rate court could determine fair market value based on any appropriate benchmark, including BMI's tendered agreement where the upstream licensee had paid a fee expressed as a percentage of its own (wholesale) revenue. *Id.* at 98−99. It called on the rate court to compare the "particular features of the business models" of the music user in the benchmark agreement to the one before the court, and suggested that the rate court might also "wish to consider the market conditions at the time" the benchmark deal was made. *Id.* at 98. In no way did *Music Choice IV* cut back *Music Choice II*'s imperative that the rate court seek to approximate the "retail value of the music rights themselves." *Id.* To the contrary, it reaffirmed that retail price is "generally a good marker for fair market value" and

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[9] *United States v. Broadcast Music, Inc. (Application of Music Choice)*, No. 64 Civ. 3787(LLS), 2004 WL 1171249 (S.D.N.Y. May 26, 2004) ("*Music Choice III*").

should be used "absent some valid reason for using a different measure." *Id.* at 97 (internal citations and quotations omitted).

B. The District Court Mistakenly Rejected the Evidence of Retail Value, as Indicated by Retail Revenue, as Irrelevant.

The central holding of *Music Choice II* is that,

> *absent some valid reason for using a different measure*, what retail customers pay to receive the product or service in question (in this case, the recorded music) seems to us to be an excellent indicator of its fair market value. While *in some instances* there *may* be reason to approximate fair market value on the basis of something other than the prices paid by consumers, in the absence of factors suggesting a different measure the price willing buyers and sellers agree upon in arm's-length transactions appears to be the best measure.

Music Choice II, 316 F.3d at 195 (emphasis added)(footnote omitted). By contrast, the Court warned,

> the price a retailer pays to purchase goods from a wholesaler will vary based on factors that arise from the business structure of the industry or entity-factors that have no bearing on the fair market value of what is being sold.

Id. at 196.

The District Court in the present case minimized the force of *Music Choice II*'s actual holding and, instead, allowed the possibility of exceptions to swallow the rule. The court appeared to act as if retail revenue is irrelevant *whenever* music performing rights are bundled with other entertainment elements or transmission services.

1. Despite some of its rhetoric, the district court acted as if retail revenue is irrelevant whenever music performing rights are bundled with other programming elements or services.

At the outset of its discussion, the District Court correctly noted that this Court had only authorized the use of wholesale revenue as the rate base "in the appropriate case," and cited the Court's warning that even when a wholesale rate base is employed to calculate the fee, that "'is very different from proposing that wholesale revenue, in itself represents the fair market value of what is being sold.'" (SPA 65 (*quoting Music Choice II*, 316 F.3d at 197 n.5).)[10]

When it came to evaluate ASCAP's proposal and contrast it with MobiTV's, however, the District Court took a wholly different approach. It acted as if the very fact that music is bundled with other programming elements, or that consumers are offered a variety of different services through their mobile phone subscription plans, meant that retail revenues were simply irrelevant to its decision. (*See, e.g.*, *id.* at 91−92, 94−96.)

Thus, once it found that ASCAP's proposal was unreasonable, the District Court focused exclusively on MobiTV's proposed rate base, which was based on MobiTV's acquisition cost for the non-music elements of its programming. It gave no further consideration to the evidence of the value of the music to the

[10] "SPA" refers to the Special Appendix filed by ASCAP on December 15, 2010.

subscribing public as expressed in their payments to the mobile carriers, or indeed, the carriers' payments to MobiTV. (*See id.* at 90−97.) Indeed, the reader cannot fail to detect the hostility with which the District Court met ASCAP's efforts to place before the court the retail revenue being earned through the use of ASCAP's music, calling it "gargantuan," "extraordinarily large," "enormous," and "vastly inflated," as if its sheer size paradoxically made it irrelevant. (*See id.* at 71, 77−78, 89.) The District Court thereby failed to heed this Court's teaching that retail value is always the goal regardless of the rate base used to calculate the fee.

2. Music performing rights are always bundled in consumer entertainment services, but this does not mean that retail revenue is irrelevant or always unsuitable as a benchmark.

By their very nature, music performing rights are never sold by themselves to the listening public. At a minimum, the rights to a song have to be combined with a musician's rendition of the song in a particular live performance and the technological means of recording it. And, often, the musical performance is then combined with visual elements in a movie or television program. Beyond that, music and other entertainment are often offered to the public in "channels" of programming, and subscriptions are sold to one or more channels that are distributed by cable, satellite, or (now) mobile telephony.

The mere fact that music performing rights are always part of a bundle when consumed by the public does not mean that they have no retail value or that the

rate court is not supposed to find their retail value in assessing a license fee. As *Music Choice II* instructs, the contributions of other elements generally are acknowledged by determining the *rate* to be applied against the retail rate base. *See Music Choice II*, 316 F.3d at 196. After all, no one asks for a 100% royalty. If the royalty being requested is 2.5% of retail revenue, that itself is acknowledgement that 97.5% of the retail price is being paid for other elements of the entertainment service.

We recognize that the District Court found undue complexities in several sub-parts of ASCAP's efforts to derive a rate to apply against its proposed retail rate base (*see* SPA 71−75, 88−89), but a fair reading of the District Court's decision is that the very idea of asking for a fee calculated from the revenue derived at retail was unreasonable because of the bundled nature of the product purchased by consumers. For instance, the court stated that, "[b]ecause ASCAP chose a vastly inflated [retail] revenue base it faced the Herculean task of contracting that base through a series of calculations." (*Id.* at 89.) This reflexive rejection of the retail revenue evidence was error.

3. In practice, BMI's experience suggests that retail revenue is a "good marker" for licensing in the mobile entertainment space.

In practice, BMI has found that there is nothing special about the mobile telephone industry that makes it unusually difficult to negotiate license agreements

in which the conversation focuses on retail revenue. When it has dealt with mobile carriers and *à la carte* offerings of music, such as ringback tones, BMI has made deals expressly calculated as a percentage of retail revenue. In at least one case when it has negotiated with a carrier concerning a bundled offering, the carrier provided information on the ratio of data minutes in which music was transmitted relative to all minutes of data transmission, and the parties wound up negotiating a flat sum deal with that information in hand. In negotiating with would-be licensees that do not deal with the public at retail, the music users have been able to supply information about the retail revenue splits they have with the carriers and revenue flows in the chain of distribution.

One of the reasons the District Court gave for choosing a wholesale rate base was the unavailability of good data from the carriers. (SPA 76−78.) Thus, the court criticized ASCAP's rate proposal for its dependence on slender data supplied by Sprint about relative usage of its network for transmission of audiovisual programming compared to other uses. (*Id.* at 77−80.) We suggest that the difficulty ASCAP apparently experienced in obtaining this information was because it was not in the carriers' interest to have their data spread before the court in easily digestible form.

In BMI's experience, the mobile carriers have the ability to create detailed data about how their networks are used. (Just look at any mobile phone bill to

confirm this.) Given that those same carriers are actually the primary beneficiaries of the MobiTV license, the court should not have been so accepting of the argument that retail data is just not available. This stands in strong contrast with the situation in the cable industry at the time of the *Music Choice* trial, when it apparently was true that the cable system operators had no way of determining which channels their subscribers were tuning in to. It seems particularly unfair that the District Court tolerated the mobile carriers' failure to come forward with the data they had in light of the fact that they were at that same exact time before the ASCAP rate court for their other, non-MobiTV music performances.

II. UNDER *MUSIC CHOICE II*, THE DISTRICT COURT SHOULD HAVE LOOKED FAR MORE CRITICALLY AT MOBITV'S PROPOSED WHOLESALE LICENSE RATE.

Under *Music Choice II,* the rate court may use a wholesale rate base in setting a percentage-of-revenue license fee, if it first correctly determined that the retail rate base proposed by ASCAP could not be used because of information limitations such as bundling of products and access to retail revenue data. *See Music Choice II*, 316 F.3d at 195, 195 n.2, 197 n.5. Likewise, it was open to the rate court, in a case where there was no useful benchmark involving the same parties, or the same industry, to choose a benchmark agreement from a different industry. *See Music Choice IV*, 426 F.3d at 98 n.8 (stating that the district court was permitted to consider internet licenses as long as the district court includes

retail value of the music in its valuation of the music rights). Yet, as this Court has made clear, the greater the distance from the ideal of a retail benchmark involving the same parties and the same industry, the greater the need for searching economic analysis to compare the products, pricing, industry structure, and other differences, and to adjust accordingly. *See RealNetworks*, 2010 WL 3749292 at *12; *Broadcast Music, Inc. v. Weigel Broad. Co.*, 340 Fed. App'x 726, 727 (2d. Cir. 2009); *Music Choice IV*, 426 F.3d at 95. And specifically when a percentage-of-wholesale benchmark is employed, this Court has explicitly warned of the obstacles that must be overcome in extrapolating from one agreement to another. *See Music Choice II*, 316 F.3d at 196 & n.4.

The District Court in this case employed a wholesale rate base, but failed to perform any economic analysis to determine the adjustments needed to find fair market value.

A. The Principle of Derived Demand Does Not Trump *Music Choice II.*

Ultimately, the District Court relied on the economic principle of derived demand to find that rates paid by cable networks for cable distribution could be used and applied against revenues at the cable network level to calculate the retail value of the ASCAP licenses. (*See* SPA 94−96.) The erroneous effect was to assume away the very task given it by *Music Choice II* and *Music Choice IV*: to

determine how a wholesale rate base can be used, with the correct license rate, to approximate retail fair market value.

The District Court's analysis was uncannily similar to the erroneous−and reversed−reasoning of the BMI rate court in *Music Choice I*. According to both courts, everything you need to know to set the fair market value of a through-to-the-audience license can be discerned by looking at revenues at the wholesale level.

The BMI rate court put it this way:

> the true value of the music is *expressed* at the earlier stage where it is incorporated into Music Choice's programs. . . . Thus, the idea that to recover the full value of the music, the blanket license rate should include a component based on the cable or satellite operators' revenues, is misconceived.

Music Choice I, 2001 WL 82974 at *6 (emphasis added).

In the decision below, the ASCAP rate court, nine years later, and in the face of *Music Choice II*, came to the same faulty conclusion:

> The economic concept of derived demand explains why the 'value,' . . . of a downstream performance is *reflected* in the wholesale prices of the musical content. . . . [T]he value of the public performance of the music at the retail level is indeed *captured* at the wholesale level.

(SPA 94 (emphasis added).)

While it is surely correct that wholesale revenue has *some* relationship to retail value, it is simply not correct to say that in every case they have the *same* relationship, and the ratio that prevails in one industry will not necessarily prevail

in all industries. As *Music Choice* makes clear, the District Court was required, if it chose to use a wholesale benchmark derived from another industry, to consider the different structures of the different industries and firms and make adjustments as necessary. *See Music Choice II*, 316 F.3d at 196 & n.4; *Music Choice IV*, 426 F.3d at 96. Here the District Court, based on its (mis)understanding of derived demand, simply assumed that what was true for cable television would be equally true for mobile, notwithstanding their many relevant differences.

It is in the nature of entertainment products that the same content is distributed in a variety of forms at completely different price levels. For instance, paperback and hardcover versions of the same book have different price points. Movies are distributed in a series of "windows" ranging from first-run theatrical releases (at $10.00 or more per ticket), through pay-per-view cable (at $4.95 per view), premium cable (at $9.95 or more per month for a schedule of movies and made-for-television material), basic cable ($44.99 per month or more for a basket of dozens of channels), and advertiser-supported broadcast television (free to viewers over the air). None of this sort of analysis figures into the District Court decision.

B. The Mobile Industry Has Been Using Entertainment Offerings to Gain Penetration, Not to Maximize Revenues.

One of the important ways the economics of the mobile industry today differs from cable is that the mobile carriers remain primarily in the business of

selling bandwidth, "data plans" that authorize consumers to send and receive telephone calls and text messaging. As the District Court found,

> Mobi markets itself to the wireless carriers as a way to increase the number of consumers that subscribe to unlimited data plans and to increase purchases of more expensive handsets to play Mobi content. It portrays itself as a synergistic partner to the wireless carriers, helping drive demand for data packages that are lucrative to the carriers.

(SPA 29−30.)

In contrast, the cable system operators have customers who mostly do business with them to watch television, the cable operators' relationship with those customers is mature, and the cable operators' goal is to maximize revenues and profits from their television business. If anything, the cable operators have exactly the opposite strategy than the mobile carriers: they are trying to use low prices for add-on telephone and internet service to maintain their customer base and increase revenue from already existing television customers.[11]

Similarly, the cable networks would have completely different incentives in selling to the mobile industry when it is just getting off the ground and considered

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[11] *See* Linda Moss, *Expanding the Brand: With its $29.95 Mantra of Success, Cablevision Eyes New Services*, MULTICHANNEL NEWS, Issue 40, Sept. 25, 2005, available at http://www.multichannel.com/article/87523-Expanding_the_Brand.php (last visited Dec. 20, 2010).

additive to existing distribution for their programming than when it becomes competitive with their existing business of selling to the cable system operators.[12]

Using a wholesale revenue base intended to substitute for retail value in the cable industry as a benchmark for the mobile industry, without looking at the margins and strategies in the different industries, was just blind guessing. The District Court's result was way off the mark.

The clearest signal that the District Court was straying off the path was that its trajectory led it to a determination that a significant amount of the music in MobiTV's programming had a fair market value of $0, and the composers of that music deserved nothing for their efforts. (*See* SPA 105−108.) Remember, this was not a fair use determination, or a determination that the music was not actually publicly performed, had no audience, or anything of that sort. Rather, it was the result of the court's systematic−but systematically wrong−reliance on MobiTV's acquisition costs as the license rate base. (*See id.* at 90−97.)

Of course, various sellers in the chain of distribution may, for their own commercial reasons, decide to give away their products for free−as loss leaders to

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[12] *See* Tim Arango, *Time Warner Views Netflix as a Fading Star*, N.Y. TIMES, Dec. 13, 2010, at B1 (describing how cable networks' pricing for Internet distribution of their programming might rise by a factor of 1,000% once Internet viewing begins to be perceived as competitive with viewing through cable systems).

sell other products, for good will, or to let new customers sample their service. (*See, e.g.*, SPA 105−06.) That does not mean that their products have no value; it means that the seller has decided to forgo short-term revenue in hopes of capturing greater revenue at a later date. But no one asked the ASCAP composers and songwriters whether they wanted to participate in that strategy. Under the ASCAP decree, those composers and songwriters were forced to provide a compulsory license, and in return are entitled to be paid fair market value today, which the rate court was supposed to determine. *See* ASCAP Consent Decree Articles V, IX.[13] If the court's proposed rate base did not provide that compensation, it was required to choose another rate base, or make an adjustment. Even if nothing else had alerted the District Court to the reality that sellers were not seeking to maximize revenue, that should have led the court−charged with the responsibility to consider "all the evidence"−to reconsider its choice of MobiTV's acquisition costs as its rate base.

III. THE DISTRICT COURT SHOULD NOT HAVE PERMITTED MOBITV TO NARROW OR BROADEN THE SCOPE OF THE COMPULSORY LICENSE IT HAD REQUESTED AT OR NEAR TRIAL.

BMI is not in a position to judge whether ASCAP was prejudiced in its ability to put on its case at trial by the vague and shifting scope of the license for

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[13] *United States v. ASCAP*, No. 41-1395 (WCC), 2001-2 Trade Cases ¶ 73,474, 2001 WL 1589999 (S.D.N.Y. June 11, 2001) (the "ASCAP Consent Decree").

which MobiTV applied, and the timing of the District Court's trial and post-trial rulings as to the scope of the license and the revenues to include in the rate base for the license. On the face of the decision, however, BMI is concerned about two aspects of the way the rate court process was allowed to work: First, the inchoate license application from MobiTV to ASCAP that began the process. And second, the apparent mismatch between the protection from infringement the District Court gave MobiTV and the rate base employed by the court to set the license fee. The District Court's handling of these issues suggests fundamental unfairness in the rate court process.

A. The Rate Court Process Requires an Applicant to State With Reasonable Specificity the Medium and Property for Which it Wants a License, so that the PRO Can Propose a Reasonable Fee.

The ASCAP Consent Decree, like BMI's, provides a three-step process before a music user or the PRO may commence a proceeding in the rate court to set license fees. First, the prospective music user must apply in writing to ASCAP for the license. Next, ASCAP must respond with a proposal for the fee it deems reasonable for the license requested. And third, the decree provides for a mandatory negotiating period that must elapse before the parties may proceed to court. *See* ASCAP Consent Decree Article IX(A); BMI Consent Decree Article XIV(A).

To make this process work, the prospective music user must tell the PRO how it intends to perform the music. For a multimedia conglomerate like, for instance, the Walt Disney Company, the applicant would have to specify whether it is seeking a license for its amusement parks, a sports-oriented cable network like ESPN, or a broadcast network like ABC. For a start-up enterprise, the music user should say, for instance, if it plans to play music at a bowling alley, on a website, or as the new owner of a radio station. Beyond this, as appropriate, the PRO might reasonably require information from a license applicant about its business model and its intended usage of music (*e.g.* is a cable network advertiser-supported and sold as part of a bundle, or is it a "premium" channel sold *à la carte*; is a radio station for profit or not-for-profit; does a website transmit audiovisual material or audio only).

Without this information, the PRO is not in a position to quote a reasonable fee, and is not able to carry out its duty to avoid discriminating between licensees that are "similarly situated." *See* ASCAP Consent Decree Article IX(G); BMI Consent Decree Article VIII(A); *Broadcast Music, Inc. v. Weigel Broad. Co.*, 488 F. Supp. 2d 411, 415 (S.D.N.Y. 2007), *aff'd*, 340 Fed. App'x 726 (2d Cir. 2009). This Court and the rate courts have invariably set license rates that distinguish among music users on the basis of the intensity and character of their music usage, their business model, and the industry in which they compete. *See, e.g.*,

RealNetworks, 2010 WL 3749292 at *12; *Music Choice IV*, 426 F.3d at 98 n.8; *Broadcast Music, Inc. v. Weigel Broad. Co.*, 488 F. Supp. 2d at 414, 418; *United States v. ASCAP (Application of Showtime/The Movie Channel, Inc.)*, 1989 WL 222654 at *6−25. It follows that the PRO must have this sort of information if it is to make an appropriate fee quote, and if there is any realistic chance that the parties might reach agreement without resorting to the rate court.[14]

In addition, the compulsory license aspect of the rate court process requires some reasonable specificity about the music uses intended to be licensed. The ASCAP and BMI decrees provide that an applicant is prospectively licensed automatically from the time it submits its license request to the PRO. *See* ASCAP Consent Decree Article IX(E) - (F); BMI Consent Decree Article XIV(A). Without reasonable specificity there is no way to know whether a particular performance was or was not licensed−until and unless the PRO identifies the music user's performance or type of performances, brings the music user to court, and asks the court to determine a fee for that particular type of performance. Up until

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[14] On December 13, 2010, BMI commenced a proceeding under the BMI Consent Decree for an order directing an Internet company, AOL, to specify the particular websites, platforms, and services for which it sought a compulsory license. AOL had provided BMI with two lists of sites it wanted to have covered, but asserted that its license application also included any other use for which it might need a license. *See* Petition, ¶¶ 10−14, *Broadcast Music, Inc. v AOL, Inc.*, No. 10-cv-9300-UA, Docket #1 (S.D.N.Y filed Dec. 13, 2010).

that point, the music user can deny any liability for license fees or insist that some third party will or should obtain the license−without itself running any risk of infringement liability if it is mistaken. The compulsory license provisions were not intended to shift this risk of legal uncertainty to the PRO from the music users.

B. The District Court Should Not Have Permitted MobiTV to Have it Both Ways: Immunity From Infringement, Without Paying for the Performances.

In this case, following a practice that a large number of music users have passed around among them through counsel and a common vendor (MRI), MobiTV sent ASCAP a completely open-ended request for a license "'only to the extent required.'" (SPA 46 & n.39.) At or shortly before trial, MobiTV took advantage of its vague, place-holder license request in a number of important ways. For one, it sought to exclude from the rate base revenue from programming "sourced" by the carriers, even though it conceded that it would be liable for copyright infringement if those carriers were not themselves licensed due to its role in actually "performing" the music to the carriers' customers. (*Id.* at 69 & n.46.) It also sought to exclude performances as to which unspecified third party content suppliers upstream from MobiTV had obtained licenses. (*Id.* at 104−05.)

The District Court not only tolerated this game of fast-and-loose, it actively supported it by excluding from the rate base revenues from programming performed by MobiTV but "sourced" by the carriers. (*Id.* at 69−70.) There is no

indication in the decision that those performances for which the revenue was excluded from the rate base have been paid for by the carriers, or any guarantee that they will be paid for by the carriers.

The net result of the District Court's endorsement of the shifting coverage of MobiTV's license was that MobiTV got the benefit of immunity from any infringement risk, while only paying for a discrete portion of the performances for which it would have been liable under the Copyright Act. Once it applied for license and conceded it had liability under the Act, it should have been required to pay for all uses that would be infringements if they were not licensed.

CONCLUSION

The District Court's decision should be reversed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(d) and 32(a)(7)(C) and Circuit Rule 32.1(a), I hereby certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 6,568 words, excluding the parts of the brief exempted by Fed. R. App. P. and 32(a)(7)(B)(iii).

I also hereby 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

Executed: New York, New York
December 22, 2010

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