

Music Licenses: Rhyme or Reason for Antitrust?



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The Sherman Antitrust Act

15 U. S. C. §§ 1 and 2

- Enacted in 1890 to prohibit practices by “trusts” to stifle competition
- Prohibits any unreasonable agreement in restraint of trade
- Prohibits monopolization or attempt to monopolize by anticompetitive means
- Enacted for the protection of “competition, not competitors”
- Aims to bring more choices of better quality goods to consumers at lower prices

Performing Rights Organizations

- The American Society of Composers, Authors and Publishers (ASCAP) was organized in 1914
- Today ASCAP represents over 370,000 composers, songwriters and music publishers
- BMI is a competing organization organized in 1939 to “provide competition” to the “existing performing right organization”
- ASCAP and BMI primarily operate by offering “blanket licenses” to all the music in their respective repertory

Performing Rights Organizations (Cont'd)

- A blanket license gives the licensee the right to publicly perform any and all of the compositions in the repertory for a stated term
- Licensees of ASCAP and BMI include television stations or cable channels, radio stations, restaurants, airlines, clubs etc.
- Today BMI and ASCAP compete with each other in recruiting members and attracting licensees

United States v. ASCAP

- Competition between performing rights organizations didn't always thrive
- In 1941 the DOJ brought suit against ASCAP and BMI alleging violations of the Sherman Act
- The DOJ claimed that the blanket license was an illegal restraint of trade and that the prices charged for these licenses were not competitive
- The cases were settled by consent decrees. The consent decrees imposed significant conditions on ASCAP and BMI licensing practices

The Consent Decree (ASCAP)

- The consent decree is periodically amended to keep up with changing times and technology
- The current decree is available on ASCAP's website

Key Terms include:

- Member may grant only non-exclusive rights to ASCAP and retain the right to individually license their works
- ASCAP must grant non-exclusive license to licensee either for a period of time or on a per program basis
- ASCAP cannot insist on a blanket license
- ASCAP must offer a genuine economic choice between a blanket license and a per program license
- If a putative licensee and ASCAP disagree on fees, the putative licensee may request the district court (SDNY) to determine a reasonable fee, with ASCAP having the burden of proving reasonableness

The Consent Decree (BMI)

- Not as rigid as the consent decree with ASCAP
- District court may not be able to hear complaints regarding unreasonable fees
- Members not required to give non-exclusive licenses

CBS v. BMI, 441 U.S. 1 (1979)

- Key antitrust case
- CBS brought suit against ASCAP and BMI alleging that blanket licenses are a restraint of trade and should be struck down “per se” as illegal price fixing
- District court found that blanket license not “per se” illegal because individual licenses could also be obtained
- Court of Appeal reversed district court found the blanket license to be illegal price fixing

CBS v. BMI, 441 U.S. 1 (1979) (Cont'd)

- “[A] consent judgment, even one entered at the behest of the Antitrust Division, does not immunize the defendant from liability for actions, including those contemplated by the decree, that violate the rights of nonparties.” *Id.* at 13.
- “Although the copyright laws confer no rights on copyright owners to fix prices among themselves or otherwise to violate the antitrust laws, we would not expect that any market arrangements reasonably necessary to effectuate the rights that are granted would be deemed a per se violation of the Sherman Act.” *Id.* at 19.

CBS v. BMI, 441 U.S. 1 (1979) (Cont'd)

- The blanket license, as we see it, is not a naked restraint of trade with no purpose except stifling of competition, but rather accompanies the integration of sales, monitoring and enforcement against unauthorized copyright use." *Id.* at 20.
- "Here, the whole is truly greater than the sum of its parts; it is, to some extent, a different product." *Id.* at 21-22.
- "[T]o the extent the blanket license is a different product, ASCAP is not really a joint sales agency offering the individual goods of many sellers, but is a separate seller offering its blanket license, of which the individual compositions are raw material." *Id.* at 22.

Consent Decree Today

- Continues to be enforced by the district court
- Putative licensees can petition court for setting a reasonable fee
- *See, e.g., Int'l show car Ass'n v. ASCAP*, 806 F.Supp. 1308 (E.D. Mich. 1992) (transferring case to SDNY)

Hot Topics Re the Consent Decree

- Is a digital download a performance?
- In 1995 Congress enacted the Digital Performance Rights in Sound Recordings Act (DPRSRA)
- The DPRSRA created the term “digital phonorecord delivery” (“DPD”) and defined the term as a “digital phonorecord delivery” is each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein.

Hot Topics Re the Consent Decree Cont'd

- SDNY reviewed applications regarding reasonable fees for online services based upon its authority under the consent decree
- The parties cross-moved for partial summary judgment on the issue of whether the downloading of a digital music file embodying a particular song constituted a "public performance" of that song within the meaning the Copyright Act
- The court rejected ASCAP's arguments and held that the transmission of a performance, and not simply the transmission of data, is required to implicate the performance rights granted under the Copyright Act

Music Licenses and Antitrust Today

- Meredith Corp. v. SESAC, (SDNY 2009)
- SESAC is also a performing rights organization.
- SESAC was founded in 1930 to primarily serve European authors not adequately represented in the U.S.
- Touts itself as SESAC “the fastest growing and most technologically adept of the nation’s performing rights companies”
- Class action complaint filed in SDNY by various television stations alleging antitrust violations by SESAC
- SESAC has never been subject to a consent decree
- Complaint alleges that SESAC’s blanket licenses and its refusal to offer per program licenses violate the antitrust laws

Other Hot Topics

- Pending Legislation

Regarding royalties payable to performers as well as songwriters. Satellite radio and cable channels pay these royalties but currently AM and FM radio channels do not.

H.R. 848 (Senate Bill 379) "The Performance Rights Act" (1) grant performers of sound recordings equal rights to compensation from terrestrial broadcasters; (2) establish a flat annual fee in lieu of payment of royalties for individual terrestrial broadcast stations with gross revenues of less than \$1.25 million and for noncommercial, public broadcast stations; (3) grant an exemption from royalty payments for broadcasts of religious services and for incidental uses of musical sound recordings; and (4) grant terrestrial broadcast stations that make limited feature uses of sound recordings a per program license option

Hot Topics (Cont'd)

- ASCAP goes after bars and pubs
 - ASCAP filed suit against Connolly's pub in NYC naming Bruce Springsteen as plaintiff. Suit sought royalties for music performed by cover bands.
 - Springsteen issued statement seeking to have his name removed from the lawsuit.
<http://www.shorefire.com/index.php?a=pressrelease&o=3650>
 - Bars claim that they can't afford the licenses and will do without the live cover music
 - ASCAP's position is that public performance is a right of the artist for which royalties are properly paid
 - Some states have enacted legislation to provide some protection to bars and pubs. See, e.g., Colo. Rev. Stat. 6-13-101, et seq.

What Your Clients Need to Consider

- For songwriters and publishers – what are the pros and cons of joining a performing rights organization?
- For putative licensees – what to look for in license deals offered by the performing rights organizations
- When can any of these agreements (either between the rights holder and the PRO or the licensee and PRO) violate the antitrust laws?
- Can the rights holder or licensee seek recourse under the antitrust laws?