

Appeals Court Rejects DOJ Expansive Interpretation of Music Consent Decree

IN SHORT

The Background: Since 1941, performing rights organizations ("PROs"), which pool the copyrights held by a work's composer, songwriter, and publisher and collectively license those rights to music users, have been subject to consent decrees.

The Proposed Change: In 2014, two of the largest PROs asked the Department of Justice ("DOJ") to modify their consent decrees to allow music publishers to partially withdraw from the PROs, which would have prevented the PROs from licensing the withdrawing publishers' music to digital services. Following an investigation, DOJ declined to modify the PROs' consent decrees, and declared that the PROs' blanket licenses are full-work licenses as opposed to fractional licenses.

The Decision: One PRO, Broadcast Music, Inc., petitioned a federal district court, asking the court to declare that its consent decree does not require full-work licensing. The court found that nothing in BMI's consent decree prohibits fractional licensing. The Second Circuit recently affirmed that decision, rejecting DOJ's regulatory use of the decree that went beyond the plain text of the order.

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A federal court of appeals has rejected the efforts of the Obama Antitrust Division to expand the scope of a decades-old consent decree that governs licensing of musical works for public performance. This dispute highlights the limitations of industry regulation through consent decrees, which is a theme that has been forcefully advanced by the new leadership at the Antitrust Division in the Trump Administration.

Background

Two copyrights cover any piece of recorded music, the sound recording and the composition. Record labels typically own the sound recording, while songwriters, composers, and publishers hold the rights for the composition. Anyone who wants to publicly perform a musical work must obtain a license. Performing rights organizations ("PROs") pool the copyrights held by a work's composer, songwriter, and publisher and collectively license those rights to music users, such as radio stations and performance venues. PROs offer a "blanket" license to give music users immediate access to millions of songs without having to negotiate individual licenses for each work.



The consent decrees have been modified several times, but they are still in effect today, nearly 80 years later.



The two largest PROs are the American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI"). ASCAP and BMI are subject to consent decrees that settled antitrust lawsuits brought in 1941 by the Department of Justice ("DOJ"). The consent decrees have been modified several times, but they are still in effect today, nearly 80 years later. (A consent decree is the court order that memorializes the settlement agreement under which a company commits to take certain actions to resolve a government antitrust enforcement action.)

In 2014, ASCAP and BMI proposed to the Antitrust Division modification of the consent decrees, to allow publishers to "partially withdraw" from the PROs. Under a partial withdrawal system, a publisher would be able to partially withdraw its rights from a PRO and thereby prohibit the PRO from licensing the withdrawing publishers' music to digital services. DOJ initiated an investigation to determine if it would join ASCAP and BMI in proposing this modification to the federal court that has jurisdiction over the consent decrees.

The DOJ investigation stumbled into a related question: If no single PRO controls all the copyrights to a musical work, does a license from a PRO that has some of the copyrights allow the licensee to publicly perform that work, or must the user obtain licenses from all PROs holding copyrights to multi-owner works? If the consent decree were interpreted to require a full-work license, then a user could contract with only one PRO to have access to the full-work. But if fractional licenses are permitted, then the user must license each fractional piece of the work. In this dispute, music users claimed that PROs always offered full licenses to perform all works in their repertoires, whereas music rightsholders claimed that PROs were not entitled to offer full licenses to perform fractionally owned works.

DOJ concluded that its consent decrees require ASCAP and BMI to offer full-work licenses. This issue eventually overshadowed the original question of partial withdrawal. As DOJ explained, "the lack of industry consensus as whether the PROs offer full-work licenses creates too much uncertainty to properly evaluate the competitive impact of allowing partial withdrawal." Ultimately, DOJ declined to answer the

question of "partial withdrawal." In August 2016, DOJ issued a closing statement that did not modify the consent decrees, and stated its position that the PROs' blanket licenses are full-work licenses as opposed to fractional licenses.

BMI immediately petitioned a federal district court to declare that its consent decree does not require full -work licensing. The judge held that "the Consent Decree neither bars fractional licensing nor requires full-work licensing." DOJ appealed this decision to the Second Circuit, which affirmed the decision.

Modernization of Consent Decrees

The Trump DOJ has announced a policy to avoid regulatory consent decrees and a plan to review old antitrust consent decrees, with a view to seeking to end those that are no longer useful. DOJ's top antitrust official said this would include decrees in the entertainment and music industries." (Legislation has been introduced in Congress to revise the music copyright system, although this Music Modernization Act would retain court oversight of ASCAP and BMI.)

The courts' rejection of the Obama DOJ's goal-oriented interpretation of these consent decrees closely aligns with the views of the new Administration that antitrust consent decrees are not good regulatory tools and should be limited in time. It should be expected that today's DOJ decision-makers will limit its use of decrees that involve regulatory or conduct commitments by companies, whether in the context of antitrust challenges to mergers (as discussed [elsewhere](#)) or other business conduct.

THREE KEY TAKEAWAYS

1. Under the Obama Administration, DOJ sought to use the PROs' consent decrees to expand regulation, but the Trump DOJ has been more skeptical of regulation through consent decrees.
2. Going forward, DOJ is expected to use consent decrees only on a limited basis. DOJ leaders have considered whether consent decrees provide less effective regulation than the market or copyright law would provide.
3. Legislation known as the Music Modernization Act has been introduced in Congress to update the music copyright system, although the legislation would continue court oversight of ASCAP and BMI.

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