16-3830-cv

IN THE
United States Court of Appeals
for the Second Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

BROADCAST MUSIC, INC.,
Defendant-Appellee.

On Appeal from the
United States District Court for the Southern District of New York
Case No. 1:64-cv-3787 (Hon. Louis L. Stanton)

BRIEF OF APPELLANT UNITED STATES OF AMERICA

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JURISDICTIONAL STATEMENT

The district court had jurisdiction over this action filed by the United States pursuant to 28 U.S.C. § 1345, having retained jurisdiction to implement a consent decree entered in 1966, Joint Appendix (JA) 18-21, and amended in 1994, JA22-24. The Court has jurisdiction over this appeal from a final Opinion and Declaratory Judgment of the District Court pursuant to 28 U.S.C. § 1291. The decision was entered on September 16, 2016, and the United States timely filed its notice of appeal on November 11, 2016.

INTRODUCTION

This appeal concerns a dispute between the United States and Defendant-Appellee Broadcast Music, Inc. (BMI) about the meaning of a longstanding antitrust consent decree governing BMI's aggregation and collective licensing of the right of public performance of copyrighted musical works. BMI obtains the public performance rights for works from songwriters and publishers, enforces those rights, and provides licenses of those rights to music users. BMI's "blanket license" enables music users—ranging from national broadcast networks to local businesses—to publicly perform millions of different songs without individual negotiations with each copyright owner, while also enabling, as a practical matter, the monitoring and policing of the public performance of the works.

These practical benefits, however, come with potential anticompetitive harms, including the elimination of competition between copyright holders over certain licensing. The consent decree at issue was designed to mitigate the anticompetitive effects, while preserving the unique benefits of the blanket license.

Among other things, the consent decree requires BMI to offer anyone, at a reasonable fee, "a license for the right of public performance of any, some or all of the compositions in [its] repertory," which the consent decree defines as "those compositions, the right of public performance of which defendant has or hereafter shall have the right to license or sublicense." JA26, 31-32 (Arts. II(C), XIV(A)). In the government's view, BMI's repertory includes every song, and only those songs, for which BMI has the right to license or sublicense on a "full-work" basis—meaning that it has the right to authorize a licensee to publicly perform the song without the need for additional licenses. And if BMI has the right to grant a full-work license for a song, the decree requires it to offer a full-work license for that song.

BMI now seeks to rewrite this requirement to include a special exception for "split works," which BMI defines as compositions with multiple owners, at least one of whom is not affiliated with BMI. BMI has the right to license some of these split works on a full-work basis, but it nonetheless asks the Court to create an exception for *all* split works. It seeks to provide "fractional licenses" for split works, which are licenses for only a fraction of the right of public performance based

on its affiliate's (or affiliates') percentage ownership of the copyrighted work.

There is no dispute that a fractional license for split works would *not* allow a user to publicly perform those compositions without first obtaining additional licenses from the unaffiliated co-owners, lest the user risk violating the co-owners' rights. BMI's special exception conflicts with the plain language of the decree that requires BMI to grant licenses for "the right of public performance of any, some or all of the compositions in defendant's repertory." JA31-32 (Art. XIV(A)).

Moreover, BMI's split-work exception cannot be squared with the intent of the parties to the consent decree. BMI has long represented to courts and licensees that its blanket license authorizes a user to publicly perform the works in its repertory, emphasizing immediate, unfettered, indemnified access to those works. Likewise, long before the present dispute, the government emphasized that immediate access to works, without the need to negotiate further licenses, was a key benefit of BMI's blanket license.

Nor is BMI's split-work exception consistent with the consent decree's purpose because it stands to diminish what the Supreme Court

has described as the core benefit justifying BMI's collective licensing despite its anticompetitive effects; namely, the blanket license's grant to users of "immediate use of covered compositions, without the delay of prior individual negotiations, and great flexibility in the choice of musical material." *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 22 (1979) (*BMI v. CBS*).

Accordingly, this Court should reverse the district court's declaratory judgment that, with respect to works in BMI's repertory, the consent decree "neither bars fractional licensing nor requires full-work licensing." JA12 (Op. 6).

STATEMENT OF THE ISSUE

Whether the consent decree requires full-work licensing of compositions within BMI's repertory and thus bars fractional licensing of the repertory's compositions.

STATEMENT OF THE CASE

This appeal arises from a letter that BMI filed with the district court seeking a "pre-motion conference" about a dispute with the government over the interpretation of the consent decree, as last amended in 1994, JA25-33 (BMI Decree or Decree). *See* JA55-62 (BMI

Aug. 4, 2016 Letter). After a further exchange of letters and a pre-motion conference, the district court (Stanton, D.J.) entered an Opinion and Declaratory Judgment rejecting the government's interpretation. *United States v. Broad. Music, Inc.*, 207 F. Supp. 3d 374 (S.D.N.Y. 2016) (reprinted in the Joint Appendix at JA7-12). The government seeks review of that decision.

1. a. BMI is a performing rights organization (PRO). PROs aggregate the rights of public performance of copyrighted musical works owned by their affiliates and collectively license those rights to music users. BMI and the American Society of Composers, Authors, and Publishers (ASCAP) are the two largest PROs in the United States. JA68 (Closing Statement 5). BMI claims to represent approximately 700,000 copyright owners with 10.5 million works. JA112 (BMI Resp. to ESPN Pet. ¶ 9). Its licensees range from broadcasting networks to individual radio and television stations, bars, restaurants, and fitness clubs. JA73-74 (Closing Statement 10-11); *United States v. Broad. Music, Inc. (Application of AEI)*, 275 F.3d 168, 171 (2d Cir. 2001) (*AEI*). Many of these users have no way to control or predict what music they will use. *BMI v. CBS*, 441 U.S. 1, 20 (1978). Users often seek a blanket

license, which gives them "the right to publicly perform any and all of the works in BMI's repertoire" as much as wanted without fear of infringing copyrights for those works. JA113 (BMI Resp. to ESPN Pet. ¶ 11). According to BMI, the benefits of the blanket license "include insurance against copyright infringement, relief from the need to separately identify each and every composition inserted into its programming, greatly reduced transaction costs, streamlined collection and payment of royalties, and immediate access to the more than 10.5 million works in BMI's repertoire." JA112 (*Id.* ¶ 8).

b. Because the blanket license provides, for a single fee, the right to play many separately owned works, it eliminates the competition that otherwise would exist among those works. On that basis, the United States separately sued BMI and ASCAP for antitrust violations. It alleged "that the blanket license . . . was an illegal restraint of trade and that arbitrary prices were being charged as the result of an illegal copyright pool." *BMI v. CBS*, 441 U.S. at 10; *see also AEI*, 275 F.3d at 171-72 (describing the United States' "antitrust suits against BMI and its main competitor, [ASCAP], for unlawfully monopolizing the licensing of performing rights").

The United States entered into consent decrees with both BMI and ASCAP in 1941. *See* JA13-17 (1941 BMI Decree); JA34-37 (1941 ASCAP Decree). Those decrees and their successors seek to mitigate the anticompetitive effects of the blanket license while preserving its benefits. *See* JA25-33 (BMI Decree); *United States v. Am. Soc'y of Composers, Authors & Publishers*, 2001-2 Trade Cas. (CCH) ¶ 73,474 (S.D.N.Y. June 11, 2001) (ASCAP Decree).[1]

The decrees prohibit BMI and ASCAP from acquiring exclusive licensing rights from their affiliates, leaving their affiliates free to license their works directly. JA26 (Art. IV(A)); ASCAP Decree § IV(A)-(B). They also prohibit BMI and ASCAP from discriminating among similarly situated licensees. JA28 (Art. VIII(A)); ASCAP Decree §§ IV(C), VIII(A).

As relevant here, the BMI Decree creates a compulsory licensing scheme. Specifically, the 1994 amendments to the Decree provide that anyone may apply to BMI for "a license for the right of public performance of any, some or all of the compositions in defendant's

[1] The current version of the ASCAP Decree is also available at https://www.justice.gov/atr/case-document/file/485966/download.

repertory." JA31-32 (Art. XIV(A)). The Decree defines "defendant's repertory" as "those compositions, the right of public performance of which defendant has or hereafter shall have the right to license or sublicense." JA26 (Art. II(C)). "Traditionally, . . . BMI's license of choice has been a 'blanket license,' a license that grants the licensee access to BMI's entire repertory in exchange for an annual fee." *AEI*, 275 F.3d at 172; *see id.* at 176 ("a request for a blanket license is simply a request for a license for performance rights to 'all of the compositions in [BMI's] repertory'"). Within ninety days of receipt of such an application, BMI must "advise the applicant in writing of the fee which it deems reasonable for the license requested." JA32 (Art. XIV(A)).

The 1994 amendments also provide for a rate court to resolve disputes over license fees, modeled on the rate-court provisions in the 1950 amendments to ASCAP's Decree. JA31-33 (Arts. XIII-XIV); *see* JA41-42 (1950 ASCAP Decree § IX); ASCAP Decree § IX. If BMI and the applicant "are unable to agree upon a reasonable fee," the applicant or BMI may apply to the U.S. District Court for the Southern District of New York "for the determination of a reasonable fee." JA32 (Art. XIV(A)). During such negotiation or litigation, "the applicant shall have

the right to use any, some or all of the compositions in defendant's repertory to which its application pertains," subject to an interim court-prescribed fee for such use and retroactive adjustment when a final fee is determined. *Id.* (Art. XIV(A)-(B)).

c. Under the terms of BMI's standard agreement with affiliated songwriters, the writers agree to register with BMI published works they have written, including those co-written with others. JA148 (BMI Writer Agreement §§ 1(b), 2(a)). The songwriters warrant that "no performing rights in such Work have been granted to or reserved by others except as specifically set forth therein in connection with Works heretofore written or co-written by you." *Id.* (§ 3). BMI affiliates grant BMI "[a]ll the rights that you own or acquire publicly to perform, and to license others to perform . . . any part or all of the Works," *id.* (§ 4(a)), and warrant that "the exercise of the rights granted by you herein will not constitute an infringement of copyright or violation of any other right of . . . any person," JA151 (§ 12(a)). The affiliates retain the right to grant non-exclusive direct licenses, but must notify BMI when they have done so. JA150 (§ 5(c)).

In return, BMI pays its affiliates based on "the then current performance rates generally paid by us to our affiliated writers for similar performances of similar compositions." *Id.* (§ 6(a)(i)). If a song is owned by more than one writer, BMI pays the affiliate "a pro rata share, determined on the basis of the number of co-writers, unless you shall have transmitted to us a copy of an agreement between you and your co-writers providing for a different division of payment." *Id.* (§ 6(a)(ii)).

Under the terms of BMI's blanket-license agreements with music users, BMI licenses users the right to perform all the works in its repertory. For example, under its Radio Station Blanket/Per Program License Agreement, "BMI grants LICENSEE a non-exclusive Through-to-the-Audience License to perform publicly in the U.S. Territory, by Radio Broadcasting and New Media Transmissions, non-dramatic performances of all musical works in the BMI Repertoire during the Term." JA131 (§ 3(A)). BMI also agrees to indemnify users "against all claims, demands, and suits that may be made or brought against them or any of them with respect to the performance under [this] License of any material licensed hereunder." JA135 (§ 8).

2. In 2014, the U.S. Department of Justice Antitrust Division—which has "the principal responsibility for enforcing the Sherman Act and administering the consent decrees," *BMI v. CBS*, 441 U.S. at 14—opened an investigation, at BMI's and ASCAP's request, into potential modifications of their consent decrees. JA65 (Closing Statement 2). The investigation revealed disagreement in the industry over PROs' licensing of "split works"; namely, whether the PROs must offer "full-work licenses" for split works in their repertories or whether they may offer only "fractional licenses" for those works. JA66 (*Id.* at 3).

Split works are works for which the right of public performance is owned by more than one party (e.g., a composer and a lyricist), and those co-owners are not all affiliated with the same PRO. According to BMI, split works represent only a minority of the compositions in its repertory. JA57 (BMI Aug. 4, 2016 Letter 3 n.3). Full-work licenses authorize the immediate public performance of works without any other permissions and without risk of infringement. Fractional licenses do not. They purport to license only a fraction of the right of public performance and thus do not authorize an actual public performance

until the licensee obtains additional licenses from any co-owners. JA71, 73 (Closing Statement 8, 10).

The Antitrust Division solicited public comments concerning industry's understanding of licensing under the decrees and whether the public interest would be served by fractional licensing. The Division received and reviewed 130 public comments and met with dozens of industry stakeholders. JA73 (*Id.* at 10); *see* ASCAP & BMI Consent Decree Review Public Comments 2015.[2] BMI, ASCAP, and other rights holders argued that each PRO is, or should be, permitted to include fractional licenses for split works in its blanket license. Users argued that the PROs have always offered full-work licenses and urged clarification of their duty to do so. *See* JA72 (Closing Statement 9) (summarizing comments). The Division gave careful consideration to these comments and issued a Closing Statement in August 2016, which set forth its reasons why it did not support amending the decrees to allow fractional licensing of split works. *See* JA64-85.

The Division began with a discussion of the background legal principles governing jointly owned compositions. Many musical works

[2] https://www.justice.gov/atr/ASCAP-BMI-comments-2015.

have multiple authors. Under copyright law, the default rule for joint works in the United States is that co-owners own the copyright as tenants-in-common. JA71 (Closing Statement 8); *Davis v. Blige*, 505 F.3d 90, 98 (2d Cir. 2007). Each co-owner has the right to grant non-exclusive licenses to publicly perform the entire work without the consent of other co-owners, subject only to a duty to account to her co-owner(s) for any profits derived therefrom. JA71 (Closing Statement 8). As a result, ordinarily, if the copyright for a single musical composition were co-owned by two joint authors, one could grant a full-work license to BMI even if the other were affiliated with ASCAP or no PRO at all. BMI could then include these "unrestricted split works" in its repertory and license them on a full-work basis. *See* JA81-82, 84 (*Id.* at 18-19, 21).

Sometimes each co-owner of a split work is restricted from granting licenses without the agreement of the other co-owner(s) because they have contracted around the default rule or for other reasons. For these "restricted split works," no co-owner can unilaterally confer a full-work license on her PRO. *See* JA71 (*Id.* at 8).

The Division next placed the Decree's treatment of split works in context. Historically, the question whether fractional licenses were permitted by the decrees was never raised because the vast majority of music users obtained blanket licenses from BMI, ASCAP, and the third largest PRO, SESAC, and paid those PROs based on fractional market shares. In this way, music users secured blanket licenses that collectively covered all works, and rights owners received payment for their works from their own PROs without having to worry about accounting to any co-owners. JA72, 74 (*Id.* at 9, 11); JA93-94 (BMI June 18, 2015 Mem. 3-4).

The circumstances have changed over the years, the Division explained. Additional PROs have come into existence. JA68-69 (Closing Statement 5-6). And some publishers are not joining any PRO, are considering withdrawing from PROs, or have attempted partial withdrawals. JA71-72 (*Id.* at 8-9); JA94 (BMI June 18, 2015 Mem. 4); *see Pandora Media, Inc. v. Am. Soc'y of Composers, Authors & Publishers*, 785 F.3d 73, 76 (2d Cir. 2015) (*Pandora v. ASCAP*). As a result, unless the works in a PRO's repertory are licensed on a full-work basis, blanket licenses may not give users all the permissions they need

to perform the repertory's split works. And the users have no notice of what licenses are missing, or from whom, because BMI does not provide that information for the songs listed in its repertory. *See* JA78 (Closing Statement 15); Comments of Comput. & Commc'ns Indus. Ass'n 4 (Nov. 20, 2015)[3]; Comments of Music Licensees 8-9 & n.4 (Nov. 20, 2015)[4]; Comments of Music Choice 6-7 (Nov. 20, 2015)[5]; Comments of WineAmerica 1 (Nov. 20, 2015).[6]

The Division determined that "recent events, including the Division's review, have made it necessary to confront the question" of whether the BMI and ASCAP decrees allow fractional licensing. JA72 (Closing Statement 9). The Division concluded that "the plain text of the decrees cannot be squared with an interpretation that allows fractional licensing"; rather, "the consent decrees require ASCAP's and BMI's licenses to provide users with the ability to publicly perform, without risk of infringement liability, any of the songs in the respective

[3] https://www.justice.gov/atr/public/ascapbmi2015/ascapbmi16.pdf.
[4] https://www.justice.gov/atr/public/ascapbmi2015/ascapbmi19.pdf.
[5] https://www.justice.gov/atr/public/ascapbmi2015/ascapbmi28.pdf.
[6] https://www.justice.gov/atr/public/ascapbmi2015/ascapbmi13.pdf.

PRO's repertory." JA74 (*Id.* at 11). And "ASCAP's and BMI's licenses have for decades purported to do exactly that." *Id.*

Moreover, the Division explained, "only full-work licensing achieves the benefits that underlie the courts' descriptions and understandings of ASCAP's and BMI's licenses." JA75 (*Id.* at 12). These blanket licenses "allow[] the licensee immediate use of covered compositions, without the delay of prior individual negotiations, and great flexibility in the choice of musical material." *Id.* (quoting *BMI v. CBS*, 441 U.S. at 21-22). But if the blanket licenses incorporated fractional licenses for split works, the licenses "would *not* avoid the delay of additional negotiations, because users would need to clear rights from additional owners of fractional interests in songs before performing the works in the ASCAP and BMI repertories." *Id.*

The Division also found that modifying the decrees to allow fractional licensing would not be in the public interest. Modification "would undermine the traditional role of the ASCAP and BMI licenses in providing protection from unintended copyright infringement liability and immediate access to the works in the organizations' repertories, which the Division and the courts have viewed as key procompetitive

benefits of the PROs preserved by the consent decrees." JA76 (*Id.* at 13). Such a change would "impair the functioning of the market for public performance licensing" by undermining the reliability of the PROs' licenses as guarantees against copyright infringement, particularly given the lack of information on the ownership of rights. JA76-78 (*Id.* at 13-15). The change would also create an incentive for the owners of fractional rights to hold out for disproportionate payments for them. JA78-79 (*Id.* at 15-16).

The Division next addressed several of the arguments raised in support of interpreting or amending the decrees to allow fractional licensing. The PROs, songwriters, and publishers claimed that adopting the government's interpretation of the decrees would force the PROs to drop from their blanket licenses split works for which they could not secure full-work authorization. And they argued that this might leave some split works (particularly those with foreign owners) unlicenseable by any PRO. But, the Division recognized, songwriters and publishers have within their power the ability to agree to confer full-work licenses on PROs. JA79, 81-83 (*Id.* at 16, 18-20). The

Division found the benefits of full-work licensing outweighed its potential costs. JA79 (*Id.* at 16).

The PROs and songwriters also claimed that full-work licensing would make it difficult for songwriters to be paid by the PRO of their choice. But the Division found that co-owners of a split work have historically had, and can continue to have, the ability to agree that their works will be licensed by the PROs on a full-work basis, and that each co-owner, in turn, will be paid by their own PRO based on their fractional interest. JA81-82 (*Id.* at 18-19). The Division offered guidance on how songwriters and PROs could preserve these benefits and invited stakeholders to develop additional solutions. *Id.*

In sum, the Division concluded that decrees require BMI and ASCAP to offer full-work licenses for all compositions in their respective repertories, and that BMI's and ASCAP's repertories include "only those songs they can license on . . . a [full-work] basis." JA75-76 (*Id.* at 12-13). Because BMI and ASCAP can license unrestricted split works on a full-work basis, unrestricted split works are part of their repertories and the PROs must offer full-work licenses for them. *Id.* But to the extent BMI and ASCAP do not have the right to license restricted split works on a

full-work basis, those restricted split works are not within the PROs' repertories. *Id.* Recognizing that there were an undetermined number of restricted split works for which the co-owners' contracts might prevent the immediate grant of full-work licenses by any one PRO, and that it would take time to sort them out, the Division stated that it would not take any enforcement action related to fractional licensing for one year. JA80-81 (*Id.* at 17-18).

3. On August 4, the day the Division issued its Closing Statement, BMI (but not ASCAP) sent the district court that oversees the BMI Decree a letter seeking permission to move for a declaratory order. BMI sought a determination that the Decree "does not require 100% licensing" or, in the alternative, a modification of the Decree to allow the licensing of fractional shares owned by its affiliates. JA56 (BMI Aug. 4, 2016 Letter 2). The Division responded that the Decree required BMI to grant licenses that would allow immediate public performance of "compositions" in BMI's repertory, not licenses of fractional interests that would require the user to track down and secure licenses from the holders of the additional fractional interests

before publicly performing the compositions. JA87-88 (DOJ Aug. 9, 2016 Letter 2-3).

On September 16, the district court held the pre-motion conference BMI requested. Rather than granting BMI leave to file its requested motion, the court ruled on the merits of BMI's proposal, issuing an Opinion and Declaratory Judgment on the same day, without making any factual findings. In the court's view, whether a license was full or fractional was a matter of the "validity, scope and limits of the right to perform compositions" that are outside the scope of the Decree and left to other laws to resolve. JA10-11 (Op. 4-5). Thus, "[i]f a fractionally-licensed composition is disqualified from inclusion in BMI's repertory it is not for violation of any provision of the Consent Decree." JA9 (*Id.* at 3). The court issued a declaratory judgment, which provides in full:

> The phrase in Art. II (C) of the Consent Decree defining BMI's repertory as "those compositions the right of public performances of which [BMI] has . . . the right to license or sublicense" is descriptive, not prescriptive. The "right of public performance" is left undefined as to scope or form, to be determined by processes outside the Consent Decree. The Consent Decree neither bars fractional licensing nor requires full-work licensing.

JA12 (*Id.* at 6).

STANDARD OF REVIEW

A district court's interpretation of a consent decree is reviewed *de novo* and its factual findings for clear error. *Broad. Music, Inc. v. DMX, Inc.*, 683 F.3d 32, 43 (2d Cir. 2012) (*BMI v. DMX*); *see also Pandora v. ASCAP*, 785 F.3d 73, 77 (2d Cir. 2015). A consent decree is construed as a contract and "deference is to be paid to the plain meaning of the language of a decree and the normal usage of the terms selected." *Berger v. Heckler*, 771 F.2d 1556, 1568 (2d Cir. 1985). If, and only if, the language is ambiguous, "a court may consider . . . extrinsic evidence to determine the parties' intent, including the purpose of the provision and the overall context of the decree." *BMI v. DMX*, 683 F.3d at 43.

SUMMARY OF ARGUMENT

For decades, BMI offered music users a blanket license for the public performance of the millions of works in its repertory. It has done so subject to a consent decree designed to mitigate the anticompetitive effects of its collective licensing, while preserving the unique benefits of the blanket license, which allows the licensee "immediate use of covered compositions, without the delay of prior individual negotiations and

great flexibility in the choice of musical materials." *BMI v. CBS*, 441 U.S. 1, 22 (1979).

This appeal concerns the meaning of two provisions of the BMI Decree, as amended. Article XIV(A) requires BMI to offer a license for the right of public performance of the compositions in its repertory: upon "receipt of a written application from an applicant for a license for the right of public performance of any, some or all of the compositions in defendant's repertory," BMI must "advise the applicant in writing of the fee which it deems reasonable for the license requested." JA31-32. Article II(C) defines BMI's "repertory" as "those compositions, the right of public performance of which defendant has or hereafter shall have the right to license or sublicense." JA26. Taken together, these provisions require BMI to offer music users full-work licenses for the compositions in its repertory because only a full-work license gives the user the right to publicly perform those compositions without the need for additional licenses.

BMI now claims that with respect to split works, which it defines to include all compositions with multiple owners that are not all affiliates of BMI, the BMI Decree does not mandate a blanket license

that provides users with the right to publicly perform compositions. Rather, BMI takes the position that the Decree allows it to provide "fractional licenses" for split works, meaning licenses for only a fraction of the right of public performance based on its own affiliates' ownership. Everyone agrees that such licenses do not allow users to publicly perform those compositions without first obtaining additional licenses.

The district court made no factual findings, but concluded that fractional licensing is permitted by the Decree. This was error. The plain language of the BMI Decree requires full-work licensing of compositions in BMI's repertory, not licenses contingent on securing additional licenses. Evidence of the parties' intent and understanding and the Decree's purpose confirm that reading.

1. The Decree requires BMI to offer "a license for the right of public performance of any, some or all of the compositions" in its repertory. JA31-32 (Art. XIV(A)). This requirement is unambiguous: BMI must authorize users to publicly perform those compositions. Only a full-work license satisfies that requirement. The district court declined to give the term "right of public performance" any particular meaning, finding it merely "descriptive, not prescriptive." JA12 (Op. 6).

But the term has an established meaning in the Decree and unambiguously refers to the ability to publicly perform a composition. BMI would rewrite the Decree to allow it to offer licenses for "partial interests in musical works." That argument is foreclosed by the plain meaning of "composition." And accepting it would render the Decree's requirement nonsensical—one cannot publicly perform a partial interest in a composition.

2. Both BMI and the United States have understood and intended the Decree to require full-work licensing. As BMI admitted below, it did not contemplate fractional licensing when the BMI Decree was last amended. Its licensing agreement purports to grant the licensee the right to publicly perform "non-dramatic performances of all musical works in the BMI Repertoire." JA131 (§ 3(A)). And BMI has consistently and publicly represented that its blanket license is a full-work license.

Contrary to its public representations, BMI now argues that it has always practiced fractional licensing under the Decree, as evidenced by its practice of paying co-owners a fraction of the royalties for a song according to their interest. But fractional payment practice has long co-

existed with full-work licensing. Nothing about fractional payments indicates or necessitates fractional licensing. And, in any event, that BMI makes fractional payments cannot alter the language of the Decree, which requires full-work licensing.

3. Lastly, the United States settled its antitrust claims against BMI in part because the blanket license allows licensees "immediate use of covered compositions," *BMI v. CBS*, 441 U.S. at 22. This Decree reflects that settlement. If BMI were to include in its blanket license fractional interests in songs, it would no longer provide immediate, indemnified access to all works in its repertory. Users would have to secure additional rights before performing those works—a difficult task because there is no reliable database of ownership interests. This result would undercut the utility of the blanket license and alter the bargain the United States and BMI struck.

ARGUMENT

A. The Plain Language of the Decree Requires Full-Work Licensing of Compositions in BMI's Repertory

1. The Decree requires BMI to convey in its licenses a particular right for compositions in its repertory: "the right of public performance." The obligation to license the right of public performance

means what it says: BMI must authorize a user to publicly perform the compositions for which the user requests a license. JA74 (Closing Statement 11). Only a full-work license does this.

a. The plain language of Articles II(C) and XIV(A) compels this reading. BMI must offer any applicant, upon request, "a license for the public performance of any, some or all of the compositions in [its] repertory," which is made up of "those compositions, the right of public performance of which [BMI] has or hereafter shall have the right to license or sublicense." JA26, 31-32 (Arts. II(C), XIV(A)). The only plausible interpretation of this language is that, under the BMI Decree, "the right of public performance" means the immediate right to actually perform the work.

For instance, when a rate dispute is filed in the district court, "the applicant shall have the right to use any, some or all of the compositions in defendant's repertory to which its application pertains." JA32 (Art. XIV(A)). That the licensee applicant has "the right to use" the song during the negotiations confirms that the applicant will have the "right to use" the song after the negotiations are completed, at the agreed-upon rate. Indeed, it would be nonsensical for the Decree to

provide a user the right to use a song during ongoing negotiations over a licensing agreement if, after that licensing agreement is finalized, that same user would not have the right to play the song. The license must give users the immediate ability to publicly perform the songs in BMI's repertory.

This interpretation is also compelled by the established, historical meaning of "the right of public performance" under the Decree. For example, Article VIII(B)—a version of which has existed in the Decree since 1941, and the current version of which has existed since 1966—requires BMI to offer a license that grants a certain class of broadcasters "the rights publicly to perform [BMI's] repertory by broadcasting on either a per program or a per programming period basis." JA29; *accord* JA20 (1966 Decree Art. VIII(B)); *see* JA15 (1941 Decree Art. II(3)(i)) (describing licenses setting "the payment of a stipulated amount for each program in which musical compositions licensed by [BMI] shall be performed"). The language of this provision plainly contemplates that BMI's license gives broadcasters the ability to actually broadcast the licensed songs.

And Article IX(A)—a version of which has also been in the Decree since 1941, and in its current form in relevant part since 1966—requires BMI, upon request, to grant network broadcasters a "single license" that "shall permit the simultaneous broadcasting of" "the public performance of any musical composition or compositions" "by all stations on the network which shall broadcast such performance." JA29 (Art. IX(A)); *accord* JA20 (1966 BMI Decree Art. IX(A)); *see* JA15 (1941 BMI Decree Art. II(4)). Again, this provision requires BMI to grant a single license that authorizes a network to broadcast the public performance of works in the repertory.

The parties to the BMI Decree were drafting against this backdrop when they added Articles II(C) and XIV(A) in 1994. By describing the subject of the 1994 provisions as licenses for "public performance" rights, the parties' incorporated the meaning of those words already established by the BMI Decree. As with the provisions existing since 1941 and 1966, Articles II(C) and XIV(A) require licenses that do exactly what they say they do—authorize the public performance of music—rather than providing only fractional licenses that must be combined with licenses from other sources before a user may perform

the music. Indeed, this is the only reading that is consistent with the rate court provisions in ASCAP's decree, on which the BMI Decree's 1994 amendments were modeled. *See* Br. of BMI in Supp. of Modification, *United States v. BMI*, No. 1:64-cv-3787, 1994 WL 16189513 (S.D.N.Y. June 27, 1994); *see also id.* n.5 (citing the 1950 ASCAP Decree attached as an exhibit to BMI's modification request). The "right of public performance" means "the right to perform a copyrighted musical composition publicly for profit in a non-dramatic manner." JA38 (1950 ASCAP Decree § 2(B)).

This interpretation of Articles II(C) and XIV(A) is further underscored by the fact that both provisions require the described licenses to confer "the" right of public performance. JA26 (Art. II(C)); JA31-32 (Art. XIV(A)). The definite article "the" indicates that the Decree refers to a singular right that is complete in and of itself. As this Court has explained, "[p]lacing the article 'the' in front of a word connotes the singularity of the word modified. . . . In contrast, the use of the indefinite article 'a' implies that the modified noun is but one of several of that kind." *Renz v. Grey Advert., Inc.*, 135 F.3d 217, 222 (2d Cir. 1997); *see also, e.g.*, *Rumsfeld v. Padilla*, 542 U.S. 426, 434 (2004)

("use of the definite article . . . indicates that there is generally only one"); *Am. Bus Ass'n v. Slater*, 231 F.3d 1, 4-5 (D.C. Cir. 2000) ("the definite article 'the' particularizes the subject which it precedes" and "is a word of limitation as opposed to the indefinite or generalizing force of 'a' or 'an'" (citation omitted)). The type of license that confers the singular right to perform music is a full-work license. Fractional licenses do not confer *the* right of public performance—something that BMI has not disputed.

Moreover, if fractional licenses were included in BMI's repertory, the rights granted by BMI in its blanket license would vary from song to song, sometimes providing the unconditional right to play a song, while other times providing some rights that must be combined with other rights before playing a song. This result is irreconcilable with the Decree's requirement that BMI license *the* right of public performance.

b. Despite the plain text of the Decree, the district court held that the phrase "the right of public performance" is "descriptive, not prescriptive" and "left undefined." JA12 (Op. 6). Thus, the court concluded that the Decree "neither bars fractional licensing nor requires full-work licensing." *Id.* Because the Decree "contains no provision

regarding the source, extent, or nature of" "the right of public performance," the court would not give the phrase any particular meaning. JA10 (Op. 4).

That is not how construction of consent decrees works. Courts do not limit their review to expressly defined terms. The phrase "the right of public performance" in Articles II(C) and XIV(A) must be given a prescribed scope and form to make sense of those provisions. If terms are used but not defined, "deference is to be paid to the plain meaning of the language of a decree and the normal usage of the terms selected." *Berger*, 771 F.2d at 1568. And if that plain meaning is unambiguous, "the scope of a consent decree must be discerned within its four corners." *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971). As explained above, the plain meaning of "the right of public performance" of a composition unambiguously refers to a full-work license for that is what is needed to publicly perform the composition lawfully.

Indeed, the district court has previously given effect to the Decree's plain meaning. In *Broadcast Music, Inc. v. Pandora Media, Inc.*, publishers sought to partially withdraw from BMI and have their works excluded from BMI's blanket licenses to new media services, such

as Pandora. No. 1:13-cv-4037-LLS, 2013 WL 6697788, at *1 (S.D.N.Y. Dec. 19, 2013). The district court rightly explained, "when an applicant requests a license for 'any, some or all of the compositions in defendant's repertory,' BMI must grant a license for performance of the requested compositions, which may range from 'any' (a 'per piece' license) to 'all' (a blanket license)." *Id.* at *3. If a publisher purports to withdraw subsets of rights in works, BMI cannot "license . . . performance of the requested compositions." *Id.* Accordingly, "the affected compositions are no longer eligible for membership in BMI's repertory," and thus BMI "cannot include them in a blanket license." *Id.* at *4.

In contrast here, the district court disagreed that "fractionally-licensed composition[s are] disqualified from inclusion in BMI's repertory," reasoning that the Decree "does not address the possibilities that BMI might license performances of a composition without sufficient legal right to do so." JA9, 10 (Op. 3, 4). In fact, Article XIV(D) of the Decree, which the court quotes, allows a user in a rate dispute to attack "the validity of the copyright of any of the compositions in defendant's repertory" *in the rate-court proceedings*.

JA10 (Op. 4) (quoting JA33 (Art. XIV(D)). More importantly, the district court's apparent concern is not presented here. The court feared that, if the Decree requires BMI to grant the complete right of public performance for every song in its repertory, then any time BMI granted a license "without sufficient legal right to do so, or under a worthless or invalid copyright," JA10 (Op. 4), it would violate the Decree. But that is not the government's argument. Rather, the Decree's plain text does not authorize BMI to knowingly provide users with incomplete, non-functional rights to split works—even those that it has authority to license on a full-work basis—without even identifying for users whose compositions are in that category.

2. BMI never grappled with the plain language of the Decree below. Instead, it promised to offer evidence of the trade meanings of terms in the Decree that supposedly would support its view that the Decree allowed fractional licensing. *See* JA58 (Aug. 4, 2016 Letter 4). Specifically, BMI claimed that "the term 'composition' is commonly used in connection with music licensing to include fractional interests in musical works." *Id.* BMI never explains how its understanding of "composition" makes any sense in light of the plain meaning of "the

right of public performance." Nor does its argument comport with the plain meaning of "composition."

The ordinary meaning of "composition" is "the formation of a whole esp[ecially] by different things being put together" or, more specifically, an "intellectual creation," such as "a written piece of music." *Webster's Third International Dictionary of the English Language* 466 (1993); *accord American Heritage Dictionary of the English Language* 387 (3d ed. 1992) ("[t]he combining of distinct parts or elements to form a whole"; "[a] work of music, literature, or art, or its structure or organization"); *Random House Dictionary of the English Language* 420 (2d ed. 1987) (*Random House Dictionary*) ("a piece of music"; "the organization or grouping of the different parts of a work of art so as to achieve a unified whole"). And in ordinary speech, a musical "composition" is a song.

BMI argued to the district court that the term "composition" in the Decree should be construed to "include partial interests in musical works." JA58 (BMI Aug. 4, 2016 Letter 4); JA166 (BMI Aug. 12, 2016 Letter 3). But the Decree does not speak in terms of portions of, or partial rights in, musical compositions. When the Decree references a

composition, it means the composition as a "unified whole," *Random House Dictionary* 420, and the collective rights and interests therein. *See* JA74-75 (Closing Statement 11-12). Thus, BMI seeks not to construe the term "composition" as much as rewrite the Decree to insert the words "composition or any partial interests in that composition" every time the word "composition" appears. Such after-the-fact redrafting is not allowed. "A defendant who has obtained the benefits of a consent decree—not the least of which is the termination of the litigation—cannot then be permitted to ignore such affirmative obligations as were imposed by the decree." *Berger*, 771 F.2d at 1568. The district court rightly rejected BMI's argument, noting instead that "[a] composition is a piece of music. A performance is the performance of that piece of music." JA182 (Tr. 15).

This Court came to almost the exact same conclusion in *Pandora v. ASCAP*, when it held that the word "works" in the definition of ASCAP's repertory does *not* include subsets of "rights in musical works." 785 F.3d 73, 77 (2d. Cir. 2015); *see* ASCAP Decree § II(C) (defining "ASCAP repertory" to mean "those works the right of public performance of which ASCAP has or hereafter shall have the right to

license at the relevant point in time"). There, the district court (Judge Cote) considered a partial-withdrawal question under the ASCAP Decree similar to the one resolved by Judge Stanton under the BMI Decree. *See In re Pandora Media, Inc.*, No. 1:12-cv-8035-DLC, 2013 WL 5211927, at *5 (S.D.N.Y. Sept. 17, 2013). ASCAP sought to exclude from its blanket license a particular subset of public performance rights, arguing that its repertory "refers only to the rights in musical works that ASCAP has been granted by its members as of a particular moment in time." *Id.* The district court disagreed, concluding that "the meaning of 'works' in [the decree] is not ambiguous," but refers to a "copyrighted musical composition" as a whole, not "a gerrymandered parcel of 'rights.'" *Id.* at *5, *6; *see also id.* at *6 (distinguishing between "compositions" and "rights in compositions"). This Court affirmed: the "plain language of the decree" forecloses any reading "that it speaks in terms of the right to license the particular subset of public performance rights being sought by a specific music user." *Pandora v. ASCAP*, 785 F.3d at 77. BMI's argument thus falters under the weight of precedent.

3. In sum, the plain language of the Decree is unambiguous. BMI's repertory includes those songs for which BMI has "the right to license or sublicense" "the right of public performance." JA26 (Art. II(C)). And BMI is required to offer users, upon request, a blanket license that provides them with the right to publicly perform those compositions. JA31-32 (Art. XIV(A)). The district court's decision to the contrary was erroneous.

* * *

The consequence of the Decree's plain language is that if, for any reason, a BMI affiliate is unable to grant BMI the full performance right in a particular composition, that composition is not included in BMI's repertory and cannot be licensed under the Decree. Many split works fall outside of this category: the co-owners are treated as tenants-in-common, and thus, while a BMI affiliate may own only a fraction of the copyright, she can provide BMI with a non-exclusive, full-work license. But BMI cannot, as it argued below, license "only the shares of a co-owned work that belong to its affiliates." JA55 (BMI Aug. 4 Letter at 1 n.1); *see* JA165 (BMI Aug. 12 Letter at 2 n.3) ("[A]lthough co-owners generally *own* compositions as tenants-in-common, the

industry has *licensed* those co-owners' interests on a fractional basis.") (emphasis in original). The Decree requires BMI to license those compositions on a full-work basis.

B. The Parties' Intent Confirms That the Decree Requires Full-Work Licensing of Compositions in BMI's Repertory

The plain language of the Decree resolves this appeal in the government's favor. But if this Court instead concludes the Decree's language is ambiguous, the Court "may consider . . . extrinsic evidence to determine the parties' intent." *BMI v. DMX*, 683 F.3d at 43. BMI's public statements and practice provide key extrinsic evidence confirming that the parties intended the Decree to provide for full-work licensing of compositions in BMI's repertory.

1. BMI itself admitted below that "the parties never contemplated fractional interests back in 1994 when section 14 was added." JA180 (Tr. 13); *see also* Br. of BMI in Supp. of Modification, *United States v. Broad. Music, Inc.*, No. 1:64-cv-3787, 1994 WL 16189513 (S.D.N.Y. June 27, 1994) (describing the benefit of "blanket licenses" as providing "unfettered, indemnified, and instantaneous access to millions of compositions for one fee"). And both before and after the 1994

amendments, BMI publicly represented that its blanket license was a full-work license.

For example, in 1978, BMI told the Supreme Court that its license "authorizes the user to perform any work in the BMI repertory, without advance notice to either BMI or the copyright owner." Br. for Pet'rs, *BMI v. CBS*, Nos. 77-1578, 77-1583, 1978 WL 207040, at *7 (S. Ct. Nov. 17, 1978). More recently in a 2006 copyright infringement suit, BMI claimed to grant "the right to publicly perform any of the works in BMI's repertoire by means of 'blanket license agreements.'" Pl.'s Mem. in Supp. of Summ. J., *Broad. Music, Inc. v. Miller Assocs.*, No. 2:04-cv-1711, 2006 WL 825397, at *3 (W.D. Pa. Feb. 23, 2006). And just months before telling the district court that it was engaged in fractional licensing, BMI told the court that its blanket license provides "immediate access to the more than 10.5 million works in BMI's repertoire." JA112 (BMI Resp. to ESPN Pet. ¶ 8); *see also* JA113 (*id.* ¶ 11) ("Through BMI, licensees obtain the right to publicly perform any and all of the works in BMI's repertoire.").

BMI's public promises are confirmed by the terms of its license agreements. For example, BMI's Radio Station Blanket/Per Program

License Agreement grants the licensee "a non-exclusive Through-to-the-Audience License to perform publicly in the U.S. Territory, by Radio Broadcasting and New Media Transmissions, non-dramatic performances of all musical works in the BMI Repertoire during the Term." JA131 (§ 3(A)). This can be reasonably read to mean only that BMI grants a full-work license because the license permits the radio station to perform the works by broadcasting them and one cannot "perform," let alone broadcast, a fractional interest in a composition.

Moreover, BMI's Writer Agreement confirms that BMI's regular practice is to secure full-work licenses from its affiliates. Affiliates grant BMI a license for "[a]ll music compositions (including the musical segments and individual compositions written for a dramatic or dramatico-musical work) composed by you alone or with one or more co-writers during the Period [of BMI affiliation]." JA148 (§ 1(b)(i)); *see id.* (§ 4(a)). And they further warrant that "the exercise of the rights granted by you herein will not constitute an infringement of copyright or violation of any other right of, or unfair competition with, any person, firm or corporation." JA151 (*id.* § 12(a)).

Although the Agreement allows for affiliates to "specifically set forth" whether performing rights in a work "have been granted to or reserved by others," JA148 (*id.* § 3), BMI has represented that it was not aware of any affiliates that had identified reserved rights, JA165 (BMI Aug. 12, 2016 Letter 2 n.3) (BMI learned only "through public comments submitted in response to the DOJ's request for comments on the issue and the Copyright Office report, [that] co-owners often depart from the default rule"). By BMI's own admission, writers historically have granted BMI full-work licenses.

2. Contrary to the representations it makes to its affiliates, users, and the courts, BMI now argues that it has always practiced fractional licensing under the Decree, pointing to the industry practice of "pricing, collecting, and distributing fees and royalties for split works on a fractional basis." JA57 (BMI Aug. 4, 2016 Letter 3). This reasoning makes an unwarranted leap in logic.

That BMI counts the fractional interests of its affiliates in seeking license fees has no weight as evidence of fractional licensing. On that point, this Court's holding in *AEI*—that payments need not be co-extensive with licensing—is instructive. 275 F.3d 168 (2d Cir. 2001).

In *AEI*, certain "background music services"—Muzak and AEI—directly licensed certain publishers' catalogues of songs and then requested a blanket license from BMI, but with a "carve-out" from the fee for payments already made to those publishers under the direct licenses. *Id.* at 173. BMI refused, arguing that such an arrangement did not constitute a blanket license and so it was free to refuse the requested license. This Court disagreed. The applicants plainly requested a blanket license, which this Court equated to "'a license for the right of public performance of . . . all of the compositions in defendant's repertory,'" *id.* at 175. AEI and Muzak requested a "carve-out" not from the license, but just from the fee: "The requested license would differ from the traditional blanket license only in its fee structure." *Id.* at 177. Accordingly, BMI was required to negotiate over a reasonable fee for a blanket license that took account of payments already made under direct licenses. *Id.*

BMI also points to its practice of paying co-owners a fraction of the royalties for a song according to their fractional interest in the song. JA57 (BMI Aug. 4, 2016 Letter 3). In fact, BMI makes fractional payments for works that even it claims are licensed on a full-work basis.

For example, BMI licenses compositions with multiple co-owners all of whom are BMI members, on a full-work basis. Nevertheless, it pays its members individually according to their pro rata share of the copyright ownership. JA150 (Writer Agreement § 6(a)(ii)). Pro rata payments when writers are members of different PROs are simply an extension of this practice. BMI admits it never contemplated fractional licensing when the Decree was last amended in 1994. The practice of fractional payments existed long before that. ASCAP and BMI have allowed cross-registration of works since "about 1972." Donald S. Passman, *All You Need to Know about the Music Business* 236 (Simon & Schuster, 4th ed. 2000). Under this cross-registration, each society pays its own members for their share of a given song, just as if they were all members of the same PRO. Al Kohn & Bob Kohn, *Kohn on Music Licensing* 1259 (Aspen Publishers, 4th ed. 2009).

Songwriters prefer fractional payments as a fair and efficient way to distribute royalty payments. During the Antitrust Division's investigation, many BMI affiliates praised the practice, particularly because it enabled them to be paid by BMI, with whom they had established a relationship of trust. Those affiliates expressed anxiety

that BMI would be forced to abandon fractional payments, forcing them to rely on other sources to account for their interests.[7] But nothing about the efficiency of fractional payments is threatened or compromised by full-work licensing, and the Division explained in its Closing Statement how BMI and ASCAP could provide full-work licenses and continue to pay their affiliates on a fractional basis. JA81-85 (Closing Statement 18-22). BMI has argued that such steps should not be necessary, but has not questioned their workability. Nor could it, because fractional payments have long co-existed with full-work licensing. And nothing in the practice of fractional payments alters the language of the BMI Decree (or ASCAP Decree), which requires full-work licensing of the compositions in BMI's repertory.

C. The Purpose and Context of the Decree Confirm It Requires Full-Work Licensing of Compositions in BMI's Repertory

If the Court decides the Decree's language is ambiguous, it may also examine "the purpose of the provision and the overall context of the decree" to help determine the parties' intent. *BMI v. DMX*, 683 F.3d at

[7] *See* Songwriter Comments, drafted and forwarded by BMI, Nov. 20, 2015. https://www.justice.gov/atr/public/ascapbmi2015/ascapbmi38.pdf.

43; *see also United States v. Microsoft Corp.* 147 F.3d 935, 946 (D.C. Cir. 1998) (A court may rely on "'the circumstances surrounding the formation of the consent order'" when discerning the parties' intent.) (quoting *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 238 (1975)). Where, as here, the consent decree emerged from antitrust claims, the Court should "keep procompetitive goals in mind in the interpretive task." *Microsoft*, 147 F.3d at 946. The relevant purpose and context of the BMI Decree counsel in favor of the government's interpretation; that is, the Decree requires full-work licensing of compositions in BMI's repertory because such licensing mitigates the anticompetitive harm inherent in collective licensing.

1. The BMI Decree settled antitrust challenges to BMI's blanket licensing practice, whereby "composers and publishing houses . . . joined together into an organization that sets its price for the blanket license it sells." *BMI v. CBS*, 441 U.S. at 8. Unlike naked restraints of trade, however, the blanket license addresses a practical problem in this industry. Music users want "unplanned, rapid and indemnified access to any and all of the repertory of compositions," copyright holders want a reliable method of collecting royalties, and individual negotiations

between all the users and owners prior to use would be impractical. *Id.* at 20. The blanket license "allows the licensee immediate use of covered compositions, without the delay of prior individual negotiations," which is a "unique characteristic" of great benefit to users. *Id.* at 22. And it was this same uniquely beneficial characteristic that led the United States to settle its antitrust claims against BMI and, instead, enter into the consent decree that, as amended, governs BMI's blanket license today.

If BMI could engage in fractional licensing of works in its repertory, the blanket license would no longer provide immediate, indemnified access to all works in its repertory. Rather, with respect to split works, users would have the burden of obtaining additional rights before performing those works, undercutting the utility of the blanket license. JA76-77 (Closing Statement 13-14).

That burden would be substantial even if the users were fully informed about the ownership of fractionally licensed works. But there is no reliable database of ownership available to users. JA78 (*id.* at 15). The owner or owners of a musical work, of course, are best positioned to know whether they have entered a contractual relationship that would

prevent them from granting BMI the ability to provide a full-work license. Likewise, BMI is best positioned to secure assurances from its members that the co-owners have not restricted the rights being granted. But the district court's order places on the music user the task of both determining what, if any, additional rights must be obtained before playing any given song and obtaining those rights. The music user is in the worst position to accomplish that task. And to the extent they cannot, concern about copyright liability could lead some users to stop playing music. JA77-78 (*id.* at 14-15).

2. BMI contends that, because copyright law allows for the divided ownership of copyrights, the term "composition" in the Decree should be read to include divided or partial interests in copyrights. JA58 (BMI Aug. 4, 2016 Letter 4). But full-work licensing under the BMI Decree does not conflict with anything in copyright law, nor does it affect the rights of copyright holders to freely sell or divide their interests. The Decree applies only to BMI. It imposes limits on BMI to guard against anticompetitive abuses that could arise from competitors' combining to sell collectively their competing copyrights. As this Court recognized in *United States v. Apple, Inc.,* 791 F.3d 290, 337 (2d Cir.

2015), *cert. denied*, 136 S. Ct. 1376 (2016), "as a practical matter, injunctions often alter the options available to other parties." But those practical consequences cannot alter an injunction's plain language or its intended purpose.

This Court rejected a similar argument concerning the ASCAP Decree. Music publishers sought to partially withdraw from ASCAP and negotiate separately with online users. Because the ASCAP decree required ASCAP "to license its entire repertory to all eligible users, publishers may not license works to ASCAP for licensing to some eligible users but not others." *Pandora v. ASCAP*, 785 F.3d at 77. This Court explained:

> This outcome does not conflict with publishers' exclusive rights under the Copyright Act. Individual copyright holders remain free to choose whether to license their works through ASCAP. They thus remain free to license—or to refuse to license—public performance rights to whomever they choose. Regardless of whether publishers choose to utilize ASCAP's services, however, ASCAP is still required to operate within the confines of the consent decree.

Id. at 78.

Lastly, BMI claims that its Decree was never intended to prohibit fractional licensing and "should not be reinterpreted to suit the policy views of the DOJ at a subsequent point in time." JA167 (BMI Aug.12,

2016 Letter 4). But nearly 40 years ago, and long before the 1994 amendments to the Decree, the United States urged the Supreme Court not to treat BMI's blanket license as *per se* illegal price fixing because the blanket license offered users unique benefits, including "immediate access to works as soon as they are written" and "flexibility in making last-minute programming decisions, because all music in the repertory is automatically covered by the license." Br. of the United States as Amicus Curiae, *BMI v. CBS*, Nos. 77-1578, 77-1583, 1978 WL 223155, at *18 (S. Ct. Nov. 27, 1978). The United States went on to explain that without the blanket license, "users of music would need to enter into a separate license for each song" and that in many cases, "the costs of finding the copyright owner and negotiating a license would exceed the value, to the user, of any particular piece of music." *Id.* at *20-*21.

The United States did not bargain for a consent decree that placed such a burden on users, but that is precisely the burden BMI now seeks to impose. Nothing in the text, history, or purpose of the Decree supports such a change.

CONCLUSION

For these reasons, the Court should reverse the decision of the district court and hold that the BMI Decree requires BMI to provide users full-work licenses to the compositions in its repertory.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), I certify that this Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this Brief contains 9,711 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(f).

I further 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 the Brief has been prepared in New Century Schoolbook, 14-point font, using Microsoft Office Word 2013.

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CERTIFICATE OF SERVICE

I certify that on May 18, 2017, I caused the foregoing to be filed through this Court's CM/ECF filer system, which will serve a notice of electronic filing on all registered users, including counsel for Appellee.

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