

## Antitrust Alert

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### DOJ Revisits Music Royalty Consent Decrees

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From cassette tapes to CDs to Pandora and Spotify, innovations in the music field over the past two decades have drastically changed how people access music. Songwriters, however, are paid according to a system that has been in place since 1941 and unchanged since 2001.

The Department of Justice (DOJ) is now considering changing that. The agency announced yesterday that it will review the consent decrees governing the nation's largest performance rights organizations (PROs) — the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI). The consent decrees were originally entered into in 1941, based on the DOJ's concerns over the market power wielded by ASCAP and BMI, which collect and redistribute licensing fees for more than 90% of music in the United States for their member songwriters and music publishers. The consent agreements currently require ASCAP and BMI to license their performance rights to any party who wants them and mandate rate-setting by federal judges in New York federal courts if the PROs and the parties are unable to decide on a rate.

ASCAP and BMI, as well as individual songwriters and publishing companies, have long lobbied for changes to the consent decrees, arguing that the current system fails to take into account innovations that have significantly changed the field, such as digital music played on streaming services such as Pandora, and claiming that the system under-compensates their members for these rights.

In any piece of recorded music, there are two copyrights — the sound recording copyright (the recording of a song by an artist, which is usually held by the record label), and the right to the musical work (the words and music to a song, usually held by a publishing company or songwriter). Unlike license fees collected by ASCAP and BMI, which are subject to antitrust rate-setting, the digital royalties for the public performance of sound recordings by non-interactive services (like satellite or internet radio) are set by the Copyright Royalty Board, and distributed by a collective called SoundExchange. Because the two are distinct copyrights, song publishers receive significantly lower digital royalties for their compositions than the record companies do for sound recordings.

Pandora has battled both ASCAP and BMI in court over the last several years over rate-setting issues. Pandora has also sued to block a move by publishers to pull only their digital rights from ASCAP and BMI (to get higher rates by directly licensing with the services) while keeping their overall catalogs with the PROs. Courts, however, have held that that a publisher is "all in or all out" and a publisher may not, for example, withdraw only music meant for webcasts from ASCAP; it would have to remove all its songs — including those broadcast on AM/FM radio or performed in venues.

The DOJ has solicited public comments during a 60-day public comment period and expressed particular interest in whether, among other issues, (1) the decrees should be changed to permit partial or limited grants of licensing rights to ASCAP and BMI, (2) the consent decrees are still necessary to protect competition, and (3) the rate-setting procedure should be changed. Comments are due August 6, 2014.

Feel free to contact one of the attorneys listed above for further information on this issue or to discuss participation in the comment proceeding. We would be pleased to assist you with any concerns you may have.

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