

16-3830-CV

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

BRIEF FOR DEFENDANT-APPELLEE
BROADCAST MUSIC, INC.

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FRAP 26.1 DISCLOSURE STATEMENT

Appellee Broadcast Music, Inc. ("BMI"), a private non-governmental corporate party, hereby certifies that TEGNA, Inc., which is publicly held, owns indirectly through a wholly-owned subsidiary more than 10% of BMI's stock. BMI has no publicly-held parent companies, affiliates, or subsidiaries, and there are no other publicly-held companies that own 10% or more of BMI's stock.

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GLOSSARY OF TERMS

Defined Term	Description
Affiliates	BMI's member songwriters, composers, and music publishers.
AFJ2	Second Amended Final Judgment entered in <i>United States v. Am. Soc'y of Composers, Authors & Publishers</i> , Civ. No. 41-cv-1395, 2001 WL 1589999 (S.D.N.Y. June 11, 2001)
ASCAP	American Society of Composers, Authors, and Publishers
BMI	Broadcast Music, Inc.
Br.	Brief of Appellant United States of America (Dkt. No. 49)
Consent Decree or Decree	Final Judgment entered in <i>United States v. Broad. Music, Inc.</i> , 1966 Trade Cas. (CCH) ¶ 74,941, 83,323 (S.D.N.Y. 1966) (JA18-21), <i>amended</i> , No. 64-cv-3787, 1994 U.S. Dist. LEXIS 21476, (S.D.N.Y. Nov. 18, 1994) (1996-1 Trade Cas. (CCH) ¶ 71,378) (JA25-33)
Closing Statement	Statement of the Department of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees, dated August 4, 2016 (JA64-85)
GMR	Global Music Rights
Opinion or Op.	Opinion & Declaratory Judgment, <i>United States v. Broad. Music, Inc.</i> , No. 64-cv-3787 (S.D.N.Y. Sept. 16, 2016) (Dkt. No. 100) (JA7-12)
PRO	Performing rights organization
SESAC	SESAC, Inc.

SUMMARY OF ARGUMENT

This appeal presents a single question: does BMI’s Consent Decree prohibit BMI from licensing a fractional interest in the public performance right to a musical work (commonly referred to as “fractional licensing”), when BMI does not control the entirety of the public performance right for that musical work? As demonstrated below, the answer to this question is no.

The Government disagrees, but its position is not supported by the Consent Decree. Under the Supreme Court’s decision in *United States v. Armour*, 402 U.S. 673 (1971), a party to a consent decree is enjoined only from engaging in those activities that are expressly and unambiguously prohibited within the four corners of the decree. *Id.* at 682. Any activity not expressly mandated or prohibited by the decree falls outside of its scope and is not regulated by that consent decree. The BMI Decree says nothing about fractional licensing.

Musical works can be licensed on a “full-work” basis or on a fractional basis. Under full-work licensing, a licensor—even one that created the work with a co-owner—grants performance rights to a licensee sufficient for it to publicly perform the work. By contrast, under fractional licensing, a licensor only licenses the percentage interest it owns, or receives from its affiliate in the case of a PRO, such that a licensee must obtain additional interests from all other co-owners before publicly performing the work.

Either approach is permissible under copyright law. Songwriters or composers who collaborate on a work can agree that each co-creator will retain ownership and control over their fractional interest, such that a music user cannot use the work without securing licenses from all co-owners. Alternatively, the co-owners can agree that each co-owner can license the full right in work. When co-owners who agree to restrict their rights join different PROs, each PRO can license only the fraction of the public performance right received from its respective member; neither can license the whole.

According to the Government, the choice that particular co-creators make regarding the manner in which their work can be licensed determines whether BMI can license the work under its Decree. Specifically, the Government contends that the Consent Decree requires all works to be licensed by BMI on a “full-work” basis. Therefore, if co-owners affiliated with different PROs agree that each PRO can offer a license only for the fractional interest in the public performance right received from its affiliate, BMI would be prohibited from licensing the work—including the fractional interest that it controls.¹ The Government refers to these

¹ BMI has always licensed all public performance rights that it receives from its Affiliates, whether full-work or fractional, and BMI intends to continue to do so. The Government is wrong in asserting that BMI seeks to license split works on a different basis than what it has been granted. Accordingly, this appeal implicates only that category of split works for which BMI controls a fraction of the right of public performance for the work without the ability to license the full public performance right.

works as “restricted split works,” and as a consequence of its position, they fall out of the BMI (and ASCAP) repertory, and become “stranded,” *i.e.*, unlicensable by BMI or ASCAP. The exclusion of such stranded works from the BMI repertory would result in a dramatic shift from the *status quo* in which, as the Government acknowledges, fractional interests in restricted works are currently included in the BMI and ASCAP blanket licenses, and licensees secure the necessary rights by obtaining licenses from the major PROs that “collectively cover[] all works.”² (Br. 15.)

The Government contends that this result is compelled by the language of the Decree. This is demonstrably incorrect. The BMI Consent Decree requires BMI to undertake certain actions (*e.g.*, license any, some or all of the compositions in its repertory to all music users upon request), and expressly bars BMI from taking certain other actions (*e.g.*, engaging in exclusive licensing or music publishing). The Decree does not address fractional licensing at all; it neither requires fractional licensing nor prohibits it.

² Historically, music users have always taken licenses from all PROs and paid each in accordance with the fractional interest each organization represents, no matter the nature of the grant. The challenges presented by a mandatory full-work licensing model, discussed *infra*, are not present in the current licensing environment.

The Government's argument is based on a logical fallacy.

The Government presses this Court to look beyond the plain text of the Decree and find an implied prohibition against fractional licensing. To support its position, the Government relies on a logical fallacy that proceeds as follows:

- Premise Number One: The repertory includes only works that BMI has the right to license on a full-work basis, and does not include works that BMI may license only on a fractional basis.³
- Premise Number Two: The Decree requires BMI to license all works in its repertory to all music users.⁴
- Faulty Conclusion: BMI is prohibited from licensing works which it can only license on a fractional basis.

If the Government were correct that works in which BMI has only a fractional interest of the performance right are not part of the repertory, such works would not fall within the requirement of Premise Number Two that BMI license all works in its repertory to all music users or, indeed, under any other provision of the Decree. The correct conclusion to be drawn from these two premises would be that the licensing of fractional interests are unregulated rather than prohibited. The licensing of such works would be neither prohibited nor required.

³ BMI disagrees with this premise (see Point II, below), but even accepting this premise, the Government's argument fails for the reasons outlined herein.

⁴ BMI agrees with this premise.

Defying the clear logic of its own premises, the Government concludes that because the fractional interests are not (in its view) part of the repertory, BMI is prohibited from offering fractional interests to music users. This conclusion is a complete *non-sequitur*. An obligation to license works in the BMI repertory does not translate into a prohibition against licensing fractional interests or any other legal right that falls out of the BMI repertory. Rather, as *Armour* dictates, the lack of an express prohibition on an activity means that activity is not prohibited by the Consent Decree.

Next, BMI submits that not only does the Government's ultimate conclusion fail, but its foundational premise that BMI is required to offer only full-work licenses is also wrong. The Government argues that "the right of public performance" can only be understood to mean a single, complete right. That is not so. The use of the definite article "the" in "the right of public performance" is used to describe the particular type of right that is being granted or licensed, not to connote that it is a complete right. That is, the Consent Decree regulates BMI's licensing of "the right of public performance," as distinct from other rights conferred by copyright, such as the right of reproduction, publication, and display. Read in this way—consistent with longstanding practice in the industry—BMI's repertory includes all works which BMI has been granted a public performance right to license, whether the rights granted to BMI are full or fractional.

A requirement to license all works in the BMI repertory does not constitute a prohibition on the licensing of fractional interests.

Whether the Consent Decree is or is not read to require the licensing of fractional interests as part of BMI's repertory, there is no basis in the Consent Decree to *prohibit* BMI from licensing fractional interests. A simple analogy demonstrates the point. Suppose a consent decree imposes an obligation on a pizzeria to sell pizzas to all customers, without specifying that the pizzeria may only sell "pizzas." Suppose further that the consent decree does not expressly address the sale of pizza slices, and the parties disagree as to whether the term "pizzas" includes pizza slices. Under either scenario, the pizzeria is permitted to sell pizza slices, in addition to whole pizzas. Either pizza slices are included in the definition of "pizzas" and the pizzeria is obligated to sell them under the decree, or they are not "pizzas" under the decree and are unregulated, meaning that the pizzeria can offer slices, but is not required to do so.

The same is true here. Works in which BMI represents and can license only a fraction of the public performance right are either included in its repertory (thereby obligating BMI to license them to all users), or they are excluded from the repertory and are not regulated by the Consent Decree. Either way, BMI is free to license such fractional interests and is certainly not prohibited from doing so. The fact that the Decree requires that works be licensed on a full-work basis when such rights have been granted to BMI does not expressly or by implication require BMI

to offer only those works capable of being licensed on such a basis. Having met the obligation to offer full-work licenses when its grants permit it to, BMI is not prohibited from offering, additionally, fractional interests in the performance right in other works. On the contrary, consistent with this Court's holding in *Pandora*,⁵ BMI is looking to offer, as it always has, rights of public performance it has been granted by its Affiliates, whether full or fractional, to all music users.

The parties to the Decree had the opportunity to, but never addressed fractional licensing.

The suggestion advanced by the Government—that the inclusion of fractional interests in the blanket license would be contrary to the intent of the parties—is pure fiction. The provisions cited by the Government in support of its position that the Consent Decree was created to preserve “the transformative benefits of blanket licensing, including the ‘immediate use’ of the works,” were only added to the Decree in 1994. As the Government acknowledges, the parties did not consider (or address) the licensing of co-owned works—whether on a fractional or full-work basis—at that time, even though the practice of licensing fractional interests was already prevalent in the industry.

Significantly, it was BMI that moved to modify the Decree in 1994. The Government did not join the motion. The amendments had nothing to do with

⁵ *Pandora Media, Inc. v. Am. Soc’y of Composers, Authors & Publishers* (“*Pandora*”), 785 F.3d 73 (2d Cir. 2015).

fractional licensing; they were intended only “to establish a judicial mechanism for adjudicating disputed fees for the licensing of music performing rights.”⁶ It is precisely the Government’s result-oriented reinterpretation of consent decrees that the Supreme Court cautioned against in *Armour*. 402 U.S. at 682 (“[T]he scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it.”).

This Court need not consider the competitive effects of mandating full-work licensing.

Lacking any textual support for its position, the Government argues at length that full-work licensing should be required (and fractional licensing prohibited) because “only full-work licensing can yield the substantial procompetitive benefits associated with the blanket license that distinguishes ASCAP’s and BMI’s activities from other agreements among competitors that present serious issues under antitrust laws” (JA66 (Closing Statement 3)). Such arguments are not properly before this Court. The District Court issued a ruling based on the plain language of the Decree; the record contains no evidence on the impact of the Government’s proposed interpretation of the Consent Decree. To the extent the Government presses a policy position, it must seek modification of the Decree and

⁶ Mem. of U.S. in Resp. to Mot. of Broadcast Music, Inc. to Modify the 1966 Final J. Entered in This Matter at 1, *United States v. Broad. Music, Inc.*, 64 Civ. 3787, 1994 WL 16189511 (S.D.N.Y. June 20, 1994) (“U.S. Response to 1994 Amendments”).

develop a factual record in the lower court. The Government has not done so and, based on the procedural posture of this case, there is only one question for the Court to resolve: whether the Consent Decree contains an express prohibition on fractional licensing. The answer to that is plainly no. The District Court's decision should be affirmed.

Mandating full-work licensing would be anti-competitive.

Nevertheless, and only because the Government raises policy arguments, BMI notes that, if policy issues were properly before this Court, it expects that the weight of the evidence would demonstrate that the Government's proposed interpretation of the Decree is anticompetitive. The immediate consequence of prohibiting fractional licensing (as the Government concedes) would be to shrink BMI's repertory of licensable works (JA76 (Closing Statement 13)), which could result in some songs being unlicensable by BMI (and ASCAP). Furthermore, if, as the Government hypothesizes, the market ultimately adjusts and keeps such works in BMI by granting BMI the full public performance right even when its Affiliate only owns a fraction of the right, the result would be that music users would choose to license works through the regulated PROs rather than via free-market alternatives. Under the Government's interpretation of the Decree, and if, as it projects, copyright owners ensure that BMI receives the full performance right in any restricted split work, the impact on free-market negotiations could be

significant. The resulting loss of licensing alternatives for music creators and users at the expense of competition would be antithetical to antitrust law and policy. In addition, a full-work licensing mandate could chill collaboration among songwriters that has long been critical to musical creativity.

STATEMENT OF THE ISSUE

Was the District Court correct in ruling that the Consent Decree does not prohibit BMI from offering licenses for fractional interests in the public performance right for musical works when BMI has no legal ability to offer a full-work license for such musical works?

STATEMENT OF THE CASE

I. PERFORMING RIGHTS ORGANIZATIONS AND THE REGULATION OF COLLECTIVE LICENSING.

Founded in 1939, BMI is a music PRO that operates on a not-for-profit basis. BMI obtains the non-exclusive right to license the public performance rights in musical compositions from its Affiliates. BMI's repertory currently consists of 12 million musical works from the catalogs of approximately 750,000 Affiliates and covers the entire range of musical genres.⁷

The BMI Consent Decree (as amended) is an injunction that expressly regulates certain of BMI's business activities; it reflects the terms of a heavily-negotiated settlement struck between the Government and BMI. The Consent

⁷ <https://www.bmi.com/about>.

Decree was ordered in 1966.⁸ (JA18-21 (1966 BMI Consent Decree).) It was subsequently amended, at the initiation of BMI, in 1994. (JA22-24 (Order Modifying the 1966 BMI Consent Decree).) Neither at the time of its entry nor at the time of its amendment did either party to the Consent Decree include any provision to address the licensing of fractional interests in musical works.

BMI's chief competitor, ASCAP, is subject to its own consent decree. Although virtually all songwriters and composers are affiliated with a PRO, co-writers or co-composers are often affiliated with different PROs, resulting in "split works." Interests in split works are most commonly divided between BMI and ASCAP. Together with SESAC, a PRO that is not subject to a consent decree, BMI and ASCAP historically have, through their three repertories, licensed the domestic public performance rights in nearly every copyrighted musical composition.

To secure all of the necessary public performance rights, "the vast majority of music users obtain a license from ASCAP, BMI, and SESAC." (JA72 (Closing Statement at 9).) With these three licenses, music users historically have had access to nearly all musical works including split works and may have needed to combine fractional interests from the PROs that together provided them with a full-work license. (*Id.* ("users have held licenses that collectively cover all works");

⁸ A prior consent decree was entered in 1941 but was superseded by the 1966 Decree.

Br. 15).) PRO licenses were priced based on the fractional interests licensed, and “rights owners received payment for their works from their own PROs without having to worry about accounting to any co-owners.” (Br. 15; JA81-2 (Closing Statement at 18-19).)

In 2013, a new PRO—GMR—entered the market for the licensing of performances of musical works. Like SESAC, GMR is not subject to a consent decree. In the past several years, certain songwriters formerly affiliated with BMI or ASCAP have terminated their relationship with the regulated PROs and joined GMR. (Br. of Industry Participants as *Amici Curiae* in Support of the United States of Am. 15 (“Industry Br.”).) By leaving the regulated PROs those songwriters, composers, and/or music publishers believe they retain greater control of their public performance rights, in particular the ability to license their works at a free-market, negotiated rate, when not subject to the automatic licensing and rate court provisions of the BMI or ASCAP consent decrees. *Cf. Broad. Music, Inc. v. Pandora Media, Inc.* (“*BMI v. Pandora*”), 140 F. Supp. 3d 267, 288 (S.D.N.Y. 2015) (“Once the rate negotiations were freed from the overhanging control of the rate courts, the free-market licenses” entered into between Pandora and music publishers “reflect[ed] sharply increased rates.”).

II. THE LICENSING OF CO-CREATED WORKS.

A. Collaboration Among Songwriters Is Common.

It has long been a common practice in the music industry for songwriters to collaborate in the creation of songs.⁹ Well-known examples of songwriter collaboration include: Gerry Goffin and Carole King (*e.g.*, “Will You Love Me Tomorrow”); John Lennon and Paul McCartney (*e.g.*, “Yesterday”); and Mick Jagger and Keith Richards (*e.g.*, “(I Can’t Get No) Satisfaction”). “[F]or the year 2014, 93 of the top 100 charting songs had more than one writer.”¹⁰ In late 2015, “every song in the Top 10 on Billboard’s Pop, Country, Christian, and R&B/Hip-Hop charts was the result of collaboration” between or among songwriters. (Comments of BMI Songwriters, Composers, and Publishers at 1.)¹¹ Collaboration increases the quantity and diversity of creative output.¹²

⁹ See, *e.g.*, U.S. Copyright Office (the “Copyright Office”), *Views of the United States Copyright Office Concerning PRO Licensing of Jointly Owned Works* (the “USCO Views”) at 8-9. The Copyright Office was designated by Congress “[a]ll administrative functions and duties under” the 1976 Copyright Act (the “Copyright Act”). 17 U.S.C. § 701(a). Specifically, the Register of Copyrights “shall perform the following functions,” among others: (i) “[a]dvice Congress on national and international issues relating to copyright”; (ii) “[p]rovide information and assistance to Federal departments and agencies and the Judiciary on national and international issues relating to copyright”; and (iii) “[c]onduct studies and programs regarding copyright.” *Id.* § 701(b)(1), (2), (4). In furtherance of those duties, and at the request of a House Committee, on January 29, 2016, the Copyright Office issued the USCO Views.

¹⁰ USCO Views at 12 (citing Ed Christman, *The Dept. of Justice Said to Be Considering a Baffling New Rule Change for Song Licensing*, *Billboard* (July 30,

Music creators do not choose their creative partners based on PRO affiliation. Accordingly, co-writers or co-composers are often affiliated with different PROs, resulting in “split works.” Interests in split works are most commonly divided between BMI and ASCAP. Were the Government’s position adopted, songwriters who wished to control the licensing of their interests in performance rights might be forced to choose their collaborators based on PRO affiliation rather than creative chemistry.

B. BMI Affiliates May Only Be Able to Grant a Fractional Interest in the Public Performance Right to BMI.

Songwriting partners can each separately own the underlying copyright in the song they have created. 17 U.S.C. § 201(d). Although the Copyright Act contains default rules that treat all co-owners as tenants-in-common such that any co-owner can grant non-exclusive licenses to the right of public performance in the full work,¹³ parties are allowed to contract around those default rules.¹⁴

2015) (<http://www.billboard.com/articles/business/6649208/the-dept-of-justice-said-to-be-considering-a-baffling-new-rule-change-for>)).

¹¹ <https://www.justice.gov/atr/public/ascapbmi2015/ascapbmi38.pdf>.

¹² *Id.* at 2 (“Without the freedom to collaborate and choose representation, the profession of songwriting is in jeopardy, as is the music that touches all of our lives.”).

¹³ *Davis v. Blige*, 505 F.3d 90, 98 (2d Cir. 2007) (joint authors of a work “are to ‘be treated generally as tenants in common, with each co[-]owner having an independent right to use or license the use of a work, subject to a duty of accounting to the other co[-]owners for any profits.’”) (citing H.R. Rep. No. 94-1476, at 121 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5736).

In practice, songwriters and composers often do. (USCO Views at 9-10.) As the Copyright Office recently explained, “[t]he co-authors of jointly created musical works often enter into agreements that define the percentages of copyright ownership of each co-author and provide that each will retain control over his or her ‘share’ of the work.” (*Id.* at 9 (citations omitted).) Some co-writers “might stipulate that each contributor ‘shall administer and exploit only [his or her] respective ownership share’ of the work.” (*Id.*) Others agree that the consent of each co-owner is required in every instance in which a license is granted. *See* 1 Nimmer on Copyright § 6.10 [C].

BMI and ASCAP also license foreign musical works through reciprocal agreements with non-domestic PROs. In this way, domestic music users can seamlessly secure the rights to foreign works through BMI (or ASCAP), and foreign songwriters and publishers can collect royalties for the performance of their works in the United States. Notably, the tenancy-in-common default rule for jointly-created works has no application in many foreign countries, where separate ownership and alienation of interests in performance rights is the norm. (USCO Views at 18 (BMI’s agreements with foreign PROs are “predicated on a system of fractional licensing.”).) In many instances, a foreign PRO may only be capable of

¹⁴ *Corbello v. DeVito*, 832 F. Supp. 2d 1231, 1244 (D. Nev. 2011) (“Joint owners may agree by contract that none of them shall independently license a work”); 1 Nimmer on Copyright § 6.09 (co-owners of copyrights are free to contract out of the default rule and divide up their interests as they see fit).

granting BMI the right to license one co-owner's fractional interest in the public performance right. Under the Government's view of the Decree, BMI would be barred from licensing such works, which it has always licensed, placing the burden on music users to identify and license them directly.

C. Fractional Ownership and Licensing of Copyrights Other than the Performance Right is Common in the Industry.

In addition to the right of public performance, songwriters, composers and music publishers also own the mechanical right and the synchronization right in covered works. For jointly-created works, ownership of those rights is commonly divided, and routinely licensed on a fractional basis. (*See, e.g.*, USCO Views at 3 (collecting sources); *see also* Industry Br. 23, n.7 (“co-owners of works commonly license a different right—synchronization (or “synch”) rights . . . on an individual-song basis under terms requiring all co-owners to consent before the licensee may use the work.”).)

III. THE PRESENT DISPUTE.

A. The Government Review of the Consent Decree.

In 2014, after a period of informal discussions regarding modernizing the Decree initiated by the PROs, the Government commenced a review of the “operation and effectiveness” of the Consent Decree and AFJ2, and solicited

public comments.¹⁵ On September 21, 2015, the Government solicited a second round of public comments, this time concerning the fractional licensing of musical compositions.¹⁶ Specifically, the Government sought comment on whether BMI had historically offered music users a fractional or full-work license.

The Government received over 130 public comments from stakeholders across the music industry in response to its second solicitation. The vast majority of public comments were submitted by interested parties in the music-creating community—including one comment signed by nearly 13,000 BMI-affiliated songwriters, composers, and publishers of all genres of music¹⁷—and revealed a broad agreement among copyright holders and licensors that the industry had always licensed on a fractional basis and any required change to that longstanding practice would have a negative impact on the marketplace.¹⁸

¹⁵ Antitrust Division Review of ASCAP and BMI Consent Decrees 2014, <https://www.justice.gov/atr/ascap-bmi-decree-review>.

¹⁶ Antitrust Division Requests Comments on PRO Licensing of Jointly Owned Works, <https://www.justice.gov/atr/antitrust-consent-decree-review-ascap-and-bmi-2015>.

¹⁷ *See* Comments of BMI Songwriters, Composers, and Publishers, <https://www.justice.gov/atr/public/ascapbmi2015/ascapbmi38.pdf>.

¹⁸ *See, e.g.*, Comments by the National Music Publishers' Association at 1-2, <https://www.justice.gov/atr/public/ascapbmi2015/ascapbmi22.pdf>); Comments of Songwriters of North America at 1, <https://www.justice.gov/atr/public/ascapbmi2015/ascapbmi81.pdf>.

Some music users claimed, however, “that PROs had always offered licenses to perform all works in their repertoires . . . and urged [decree] modifications to confirm their view.” (JA72 (Closing Statement at 9).) Facing the rise of the unregulated GMR, these music users, in an effort to avoid or minimize their free-market negotiations with unregulated entities, urged the Government to interpret the PRO decrees in a manner that would force more performance rights licensing into the regulated PROs and away from direct licensing or licensing with BMI’s unregulated competitors.¹⁹ Thus, despite their longstanding characterization of BMI and ASCAP as monopolist organizations, music users were seeking to drive more interests to be licensed through these organizations—which is the result the Government expects based on its interpretation of the Decree—thereby increasing the scope of regulated rights at the expense of other unregulated, free-market alternatives.

B. The Government Issues the Closing Statement Claiming that BMI is Not in Compliance with its Consent Decree and Offers a One-Year Grace Period to Allow BMI to Achieve Compliance.

This appeal stems from the publication on August 4, 2016 of the Government’s Closing Statement, concluding its evaluation of the Consent Decree

¹⁹ Notably, music users took the position that all “split works” are licensed by BMI on a full-work basis, including “restricted split works” where BMI is without the legal right to license them on such a basis. (Comments of Media Licensees 9-13, <https://www.justice.gov/atr/public/ascapbmi2015/ascapbmi19.pdf>.) Recognizing that such a position is legally unsupportable, the Government adopted a rule that would instead have “restricted split works” fall out of the repertory.

and AFJ2. In the Closing Statement, the Government pronounced that “the consent decrees must be read as requiring full-work licensing” and, accordingly, “ASCAP and BMI can include in their repertoires only those songs they can license on such a basis.” (JA75 (Closing Statement at 12).)

The Government reasoned that the obligation on BMI (and ASCAP) in the Consent Decree “to offer users the ability to perform all ‘compositions’ in its repertory,” “cannot be squared with an interpretation that allows fractional licensing.” (JA74 (*id.* at 11).) Going beyond the Consent Decree’s language, the Government also argued that “only full-work licensing achieves the benefits that underlie the . . . descriptions and understandings of ASCAP’s and BMI’s licenses” supposedly recognized in two judicial decisions—*CBS*²⁰ and *Pandora*. (JA75 (Closing Statement at 12).)

The Government recognized that its announcement of a ban on fractional licensing would “require adjustment by some market participants.” (JA80 (*id.* at 17).) Accordingly, the Government volunteered to refrain from taking any enforcement action for one year to “facilitate the adjustment and ease the transition.” (*Id.*) In so noting, the Government recognized that some copyright owners that owned fractional interests in musical works would need to renegotiate

²⁰ *Broad. Music, Inc. v. Colum. Broad. Sys., Inc.* (“*CBS*”), 441 U.S. 1 (1979).

existing agreements with their co-owners to come into compliance with the Government's reading of the Decree. (*Id.* at 19.)

IV. THE DECISION BELOW.

On August 4, 2016, immediately following the Government's public release of its Closing Statement, BMI sought permission from the District Court to move for, among other relief, "a declaration that the Consent Decree does not require 100% licensing[.]" (JA56.) BMI and the Government filed written submissions with the District Court setting forth their respective positions on the obligations (or lack thereof) in the Consent Decree. Neither party submitted any evidence regarding the effect of a prohibition on fractional licensing, or a full-work licensing obligation, on the market for public performance rights. Oral argument was held. At the court conference, both parties agreed that the plain meaning of the Decree could be decided on the existing record without further submissions. (JA183-185 (Sept. 16, 2016 Hr'g Tr. at 16:21-18:4).)

On September 16, 2016, the District Court issued its Opinion and Declaratory Judgment. The District Court concluded that "[n]othing in the Consent Decree gives support to the [Government's] views. If 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 (Op. 3).)

The District Court issued the following declaratory judgment:

The phrase in Art. II(C) of the Consent Decree defining BMI's repertory as "those compositions, the right of public performance 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 (Op. at 6) (emphasis added).)

STANDARD OF REVIEW

"A district court's interpretation of a consent decree is . . . subject to *de novo* review." *Pandora*, 785 F.3d at 77.

ARGUMENT

I. THE CONSENT DECREE DOES NOT PROHIBIT BMI FROM LICENSING FRACTIONAL INTERESTS IN PUBLIC PERFORMANCE RIGHTS.

A. Under the Government's Interpretation of "Repertory," Works in Which BMI Holds Only a Fractional Interest in the Public Performance Right Are Excluded from the BMI Repertory and Are Not Regulated by the Consent Decree.

Under *Armour* and its progeny, where a consent decree is silent as to whether an activity is prohibited, that activity is permitted. 402 U.S. at 682. In *Armour*, the Supreme Court established a strict construction rule for interpreting consent decrees. Consent decrees, which reflect carefully-negotiated settlements, and carry severe penalties for breach, including contempt, must be interpreted strictly according to their terms. *See, e.g., United States v. Am. Soc'y of*

Composers, Authors & Publishers (Application of Shenandoah Valley Broadcasting, Inc.), 331 F.2d 117 (2d Cir. 1964) (“It is important to the obtaining of consent decrees, on which the effective enforcement of the antitrust laws depends in no small degree, that defendants who sign them should know these will not be stretched beyond their terms.”) (citing *Hughes v. United States*, 342 U.S. 353, 357 (1952)); *United States v. Atlantic Ref. Co.*, 360 U.S. 19, 23 (1959). A court may not rewrite a decree to include additional obligations or prohibitions to which the parties did not agree.

The Government argued in *Armour* that the consent decree provision prohibiting Armour from engaging in a particular business should be read to prohibit Armour’s majority stockholder from engaging in that same business. *Armour*, 402 U.S. at 675. After reviewing the language of the *Armour* decree, the Court concluded that it contained no language prohibiting Armour’s majority stockowner from engaging in the alleged forbidden business. *Id.* at 679 (“If the parties had agreed to such a prohibition, they could have chosen language that would have established the sort of prohibition that the Government now seeks.”). The Court rejected the Government’s invitation to read the words of the consent decree flexibly to adjust them to meet its purported intentions. “[C]onfronted with the Government’s argument that to allow [the majority owner] to [engage in the

forbidden business] would allow the same kind of anticompetitive evils that the [original] suit was brought to prevent,” the Court responded as follows:

This argument . . . might be a persuasive argument for modifying the original decree, after full litigation, on a claim that unforeseen circumstances now made additional relief desirable to prevent the evils aimed at by the original complaint. Here, however, where we deal with the construction of an existing consent decree, such an argument is out of place.

Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus the decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. ***For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it. . . . [A]nd the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation.***

Id. at 680-82.

Following *Armour*, this Court has consistently held that courts cannot impose obligations or prohibitions upon parties to a consent decree that are not contained within the four corners of the decree. *See, e.g., Perez v. Danbury Hosp.*, 347 F.3d 419, 424-25 (2d Cir. 2003) (declining to hold defendant in contempt

where “[t]he district court failed to identify a specific command in the Decree that defendants violated” and “[t]he district court’s analysis trenches upon the well-established principle that the language of a consent decree must dictate what a party is required to do and what it must refrain from doing”); *Tourangeau v. Uniroyal, Inc.*, 101 F.3d 300, 307 (2d Cir. 1996) (courts may not “impose obligations . . . that are not unambiguously mandated by the decree itself”); *King v. Allied Vision, Ltd.*, 65 F.3d 1051, 1060 (2d Cir. 1995) (no obligation to take certain action where the decree “contains a number of detailed provisions, [but did] not specifically require” such action); *Berger v. Heckler*, 771 F.2d 1556, 1568 (2d Cir. 1985) (consent decrees must be read in accordance with their “explicit language;” courts cannot “expand or contract the agreement of the parties as set forth in the consent decree”); *see also United States v. Am. Soc’y of Composers, Authors & Publishers (Application of Muzak, LLC)*, 309 F. Supp. 2d 566, 577 (S.D.N.Y. 2004) (“[T]his Court may not require ASCAP to grant applicants a license structured in such a manner that its scope or coverage is not contemplated by the plain language of the [ASCAP Decree].”), *as clarified*, 323 F. Supp. 2d 588 (S.D.N.Y. 2004).

Unable to identify any express language that prohibits fractional licensing, the Government resorts to faulty logic in an effort to achieve the policy result that it seeks. First, the Government contends that the definition of BMI’s “repertory”

in the Article II(C) of the Decree includes only works BMI can license on a full-work basis (the merits of which we address *infra* § I.B.). (Br. 26-38.) Next, the Government contends that Article XIV(A) of the Decree requires BMI to provide a license, upon request, for all works in its “repertory.” (*Id.*) From these two propositions, the Government makes an unsupportable logical leap: it contends that because the Consent Decree requires BMI to offer licenses for all works in its “repertory,” and because fractional interests are not in the BMI repertory, BMI is prohibited from offering licenses for fractional interests where BMI cannot license such interests on a full-work basis. (*Id.* 38.)²¹

There is no basis for the Government’s conclusion. The purported express requirement in the Decree that BMI license works in its repertory on a full-work basis, without any indication that this is the *only* basis on which BMI may license, does not create an unwritten implied prohibition on licensing fractional interests which are, by the Government’s logic, excluded from the BMI repertory. *See, e.g., Armour*, 402 U.S. at 681-82; *Muzak*, 309 F. Supp. 2d at 577. A requirement to do X does not, without more, constitute a prohibition on doing Y, unless Y is the precise converse of X. Licensing fractional interests—where BMI has no ability to

²¹ The Government’s and *amici curiae*’s focus on “works” or “compositions” rather than the underlying public performance rights in those works is mistaken. (*See, e.g.,* Br. 47; Industry Br. 11.) BMI licenses to music users the interests in the right of public performance it has been granted by its Affiliates—a right that can be, and often is, subdivided. (*See* USCO Views at 3.) BMI adopts the Government’s use of “works” only to demonstrate the flaw in its logic.

license the whole—is not contrary to a requirement that BMI license on a full-work basis when it is able to; it is additive. BMI offers all of the interests it represents, both full-work and fractional.

The Government mistakenly characterizes BMI’s position—that it may license fractional interests—as seeking an “exception” (Br. 3-4) to the supposed full-work licensing requirement. BMI is not looking for any exception to a requirement that it must license, on a full-work basis, those works for which it can in fact do so. BMI wishes to continue to offer music users the full set of public performance rights that it receives, whether those rights allow for performance of a work or whether the fractional interests in the rights need to be combined with additional interests controlled by other PROs or copyright owners before they can be publicly performed. BMI should be permitted to continue to offer these additional fractional interests along with any full-work rights that it can license.

A holistic review of the Consent Decree and its structure further supports BMI’s position. *All. to End Repression v. City of Chicago*, 742 F.2d 1007, 1011 (7th Cir. 1984) (en banc) (Posner, J.) (“Like any document, a consent decree must be read as a whole.”) (citations omitted). The Decree is an injunction that includes a handful of affirmative obligations,²² and over a dozen prohibitions,²³ none of

²² BMI must (i) continue to pay royalties to terminated affiliates on account of performances licensed by BMI and provide royalty statements to affiliates (JA26, 28 (Consent Decree §§ V(C), VII(A))), (ii) include an arbitration provision in its

which address fractional licensing in any way. All other aspects of BMI's business—including how BMI collects and distributes royalties to its Affiliates, tracks performances, enforces Affiliates' copyrights, or the additional types of licenses BMI may offer to music users—are left unregulated by the Consent Decree. BMI is free to engage in any other licensing activities (indeed, any other business activities) except where the Consent Decree contains an express prohibition.

B. Under BMI's Interpretation of "Repertory," Works in Which BMI Holds Only a Fractional Interest in the Public Performance Right Are Included in the BMI Repertory and BMI is Obligated to License Them.

The Government's claim that the Consent Decree prohibits licensing fractional interests is premised on its reading of "repertory" to include only compositions where BMI has the right to license the full work and exclude any works in which BMI controls only a fractional interest. That premise is wrong.

affiliation agreements (JA28 (*id.* § VII(C))), (iii) offer a per program license to broadcasters (JA29 (*id.* § VIII(B))), and (iv) quote a reasonable rate and provide a license for any, some or all of the works in BMI's repertory (JA31-32 (*id.* § XIV(A))).

²³ For example, BMI is prohibited from (i) precluding its Affiliates from entering into direct licenses with music users (JA26 (Consent Decree § IV(A))), (ii) publishing or recording music (*id.* § IV(B)), (iii) distributing sheet music (*id.*), (iv) refusing to affiliate with a songwriter or publisher (JA26 (*id.* § V(A))), (v) binding an Affiliate for more than five years (JA27 (*id.* § V(B))), or (vi) discriminating "in rates or terms between licensees similarly situated" (JA28 (*id.* § VIII)).

Article XIV, the Decree’s compulsory licensing provision, reads, in pertinent part, that BMI shall, upon application, offer “a license for the right of public performance of any, some, or all of the compositions in defendant’s repertory.” (JA29 (Consent Decree § XIV).) Article II(C) defines “[BMI’s] repertory,” in pertinent part, as “those compositions, the right of public performance of which [BMI] has or hereafter shall have the right to license or sublicense.” (JA23 (*id.* § II(C).) The Government urges that “[t]he *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.” (Br. 27 (emphasis added).)

Not only is the Government’s reading of the term “repertory” not the only plausible interpretation, it is wrong. First, contrary to the Government’s contention, the use of the definite article “the” in “the right of public performance” does not signify a singular, full right; rather, it particularizes and distinguishes the public performance right from other copyrights like the right of reproduction or publication, *see infra* Section 1. Second, even assuming *arguendo* that the Government’s reading were plausible, it is purely by chance because, as the Government concedes, neither the Government nor BMI contemplated or intended to address fractional licensing in the 1994 amendments, *see infra* Section 2.

Finally, BMI's reading of the Decree, and not the Government's, is most consistent with this Court's decision in *Pandora*, *see infra* Section 3.

1. The Plain Language of the Consent Decree Does Not Require Fractional Interests in the Public Performance Right to Be Excluded from BMI's Repertory.

The Government urges that the use of the definite article “the” in “the right of public performance” can only be read to mean that “the right” is “a *singular* right that is complete in and of itself” and thus must mean “the immediate right to actually perform.” (Br. 27, 30-31 (emphasis added).) This is pure nonsense. The definite article in “the right of public performance,” as used in the Decree, simply connotes the particular right, from among the bundle of copyrights, addressed in the Decree, *i.e.*, *the right of public performance*, as opposed to *the right of reproduction, adaptation, publication, or display*, 17 U.S.C. § 106—and not that the right must be singular and complete.

Dictionary definitions of “the” uniformly define it as connoting particularity.²⁴ Courts have used this meaning in other contexts. For example,

²⁴ Merriam-Webster Dictionary Online, www.merriam-webster.com (last visited Aug. 17, 2017) (“The” defined as a definite article “used as a function word to indicate that a following noun or noun equivalent is *a unique or a particular member of its class*.”) (emphasis added); Oxford English Dictionary Online, www.oed.com (last visited Aug. 17, 2017) (defining “the” as a word that marks “an object as before mentioned or already known, or contextually *particularized*”) (emphasis added); *see also Am. Bus Ass’n v. Slater*, 231 F.3d 1, 5 (D.C. Cir. 2000) (“In construing statute, definite article “the” *particularizes* the subject which it precedes and is [a] word of limitation as opposed to indefinite or generalizing force

interpreting the phrase “the intangible right of honest services” in a federal criminal fraud statute, this Court held:

The definite article “the” suggests that “intangible right of honest services” had a specific meaning to Congress when it enacted the statute—Congress was recriminalizing mail- and wire-fraud schemes to deprive others of *that* “intangible right of honest services,” which had been protected before *McNally*, not *all* intangible rights of honest services whatever they might be thought to be.

United States v. Rybicki, 354 F.3d 124, 137-38 (2d Cir. 2003) (emphasis in original), *cited with approval by Skilling v. United States*, 561 U.S. 358, 404-05 (2010); *see also* Hon. John Paul Stevens, *The Freedom of Speech*, 102 Yale L.J. 1293, 1296 (1993) (“I emphasize the word ‘the’ as used in the term ‘the freedom of speech’ because the definite article suggests that the draftsmen intended to immunize *a previously identified category or subset* of speech.”) (emphasis added).²⁵ So too, here, “the” particularizes “the right” that BMI must license: “the

“a” or “an.””) (citing Black’s Law Dictionary 1477 (6th ed. 1990) (emphasis added).

²⁵ The Government’s cases also support BMI’s reading. *Rumsfeld v. Padilla*, 542 U.S. 426, 427, 434 (2004) (interpreting “*the person* who has custody over [a prisoner]” in a habeas statute to be referring to one *type* of person (not *one* person)—“the warden of the facility where the prisoner is being held”) (emphasis added); *Renz v. Grey Advert., Inc.*, 135 F.3d 217, 222 (2d Cir. 1997) (a jury instruction that included the phrase “age was the real reason” was improper because “[t]he most plausible meaning of the entire phrase is that the modified noun (here ‘reason’) is *the only or principal one of its kind*”) (emphasis added); *Am. Bus.*, 231 F.3d at 4-5 (The use of the phrase “remedies and procedures” made clear that Congress understood the at-issue statute’s remedies to be “*exclusive*.” Indeed, it is a rule of law well established that the definite article ‘the’

right of public performance”—a specific type of right—and not other copyrights.²⁶ Each of the provisions cited by the Government makes perfect sense read through that lens.²⁷ Nothing in the provisions cited compels reading “the” to mean only a single, complete, unitary right.

Had the parties wished to limit the scope of the repertory to include only works for which BMI could grant a full right of public performance, they could have included the scope of the particularized right in the definition. Specifically, the parties could have defined the BMI repertory in Article II(C) to mean “[**only**] those compositions, the [**full**] right of public performance of which [BMI] has or

particularizes the subject which it precedes.”) (emphasis added) (alteration, citation, and internal quotations marks omitted).

²⁶ The definition of “right of public performance” in AFJ1 (the operative ASCAP decree when BMI’s Consent Decree was drafted)—from which the Government selectively quotes (Br. 30)—also makes clear that the ASCAP definition (which was not imported into BMI’s Decree) speaks of “the right of public performance,” as opposed to other copyrights. It defines “right of public performance” to mean “the right to perform a copyrighted musical composition publicly for profit in a non-dramatic manner, *sometimes referred to as ‘small performing right.’*” (JA-38 (emphasis added).) In other words, the “small” public performance right as opposed to the “grand” right (the right necessary to cover dramatic musical performances) or any other copyright.

²⁷ Likewise, Article VIII(B) of the Decree, cited by the Government (Br. 28), highlights that “the” refers to a particular category, or set, of rights. It states that BMI must “license the rights publicly to perform its repertory” to broadcasters on a per program or per programming period basis. (JA29.) The use of the definite article combined with the plural, “rights,” proves that “the” is about specificity, not singularity. The same is true with the use of “the public performance” in Article IX(A), relied on by the Government (Br. 29). It is short-hand for “the right of public performance.” It would make no sense if Article IX(A) read “Defendant shall not license a public performance”

hereafter shall have the right to license or sublicense.” They did not, thus leaving open the possibility that BMI include in its repertory works for which it can license the full right of public performance as well as works for which it holds only a fraction of the right of public performance.

In addition to not being compelled by the language of the Decree, the Government’s reading of the definition of repertory, to include only works for which BMI can grant an immediate right to perform, leads to absurd results. As the lower court explained, if the Government were correct that BMI could only include in its repertory those works for which it can grant an “immediate right to actually perform the work,” BMI would be in violation of its Decree any time it licensed a work without sufficient legal right to do so, or under a worthless or invalid copyright. (JA11 (Op. 5).) Although the Government tries to sidestep this issue, arguing that the licensing of invalid or worthless copyrights is not at issue in this case (Br. 34), it does not dispute that the logic of its argument—that BMI can only license works for which it can grant the immediate right to perform—also compels the conclusion that licensing invalid or worthless copyrights also would be a violation of the Consent Decree.²⁸

²⁸ To avoid this concern, the Government reads still more unwritten prohibitions and obligations into the Decree, concluding that “the plain text does not authorize BMI to *knowingly provide* users with *incomplete, non-functional rights* to split works . . . *without even identifying for users whose compositions are in that*

The lower court’s reading of “the right of public performance” to be “descriptive, not prescriptive,” JA12 (Op. 6), properly avoids this problem. As the District Court explained, “[q]uestions of the validity, scope and limits of the right to perform compositions are left to the congruent and competing interests in the music copyright market, and to copyright, property and other laws to continue to resolve and enforce.” (JA10-11 (Op. 4-5).)

2. Extrinsic Evidence Does Not Support the Government’s Interpretation.

As demonstrated above, the Decree cannot reasonably be read to prohibit fractional licensing. Without ambiguity in the Consent Decree’s terms, extrinsic evidence should not be considered. *See, e.g., Armour*, 402 U.S. at 681-82; *Muzak*, 309 F. Supp. 2d at 577. As the cases cited by the Government demonstrate (Br. 45-46), only when faced with ambiguous language (unlike the language at issue here or in *Armour*) may courts look to the intent of the parties and the context in which the parties were operating at the time the decree was entered.²⁹

category.” (Br. 34 (emphasis added).) There is no basis for this assertion in the Decree.

²⁹ *See United States v. ITT Cont’l Baking Co.*, 420 U.S. 223, 239 (1975) (adopting an expansive definition of the term “acquiring” based in part on “the circumstances surrounding the order and the context in which the parties were operating”); *King*, 65 F.3d at 1059 (“Where, as here, a term of a consent decree is ambiguous, a court may consider extrinsic evidence to ascertain the parties’ intent, including the circumstances surrounding the formation of the decree.”). *Broad. Music, Inc. v. DMX, Inc.*, 683 F.3d 32, 43 (2d Cir. 2012), from which the Government quotes (Br. 45), relies exclusively on this Court’s decision in *United States v. Broad.*

In any event, there is no extrinsic evidence of the parties' intent here, as neither the Government nor BMI intended to address fractional licensing in the Decree.³⁰ The history of the 1994 amendments—which added the only provisions on which the Government bases its argument—confirms that they had nothing to do with fractional licensing. The 1994 amendments were pressed by BMI in an effort to quell the spate of time-consuming, expensive, and consistently unsuccessful private antitrust litigation brought by music users with which BMI could not agree on a reasonable license fee. BMI moved the District Court—with the tentative consent of the Government—to modify the Consent Decree to include a compulsory licensing and rate setting provision, namely, Article XIV, and the corresponding definition of BMI's "Repertory" in Article II(C). (U.S. Response to 1994 Amendments at 1.)

Music, Inc. (Application of AET), 275 F.3d 168, 175 (2d Cir. 2001), where this Court held that, when the language of a consent decree is ambiguous, the parties' intent should be ascertained from "the circumstances surrounding the formation of the Decree." *Id.* (citing *King*, 65 F.3d at 1059).

³⁰ The Government relies on representations made by BMI in connection with the *CBS* case in 1978 and the terms of its industry-wide commercial broadcast radio license and affiliation agreements as evidence of BMI's intent. (Br. 39-41.) None of this "evidence" speaks to the parties' intention at the time of entry or amendment of the Decree, much less addresses full or fractional licensing. It is also entirely beside the point. The question on appeal is not what rights BMI has or has not received or granted under relevant contracts, it is about what rights BMI is obligated to license or prohibited from licensing under the terms of the Consent Decree.

The 1994 amendments had nothing to do with fractional licensing. Indeed, the Government does not contest that the parties did not consider adding any discussion of fractional licensing to the Decree at the time of the 1994 amendments. (*See, e.g.*, Br. 25 (BMI “did not contemplate fractional licensing when the BMI Decree was last amended.”).)³¹ The Consent Decree cannot now be read to prohibit it. As the D.C. Circuit court in *United States v. Western Electric Co.*, 797 F.2d 1082 (D.C. Cir. 1986) explained, “[h]ad they considered it, they might have proscribed it The questions before the court, however, is whether we may now read such a proscription into the decree. Under *Armour* and *ITT Continental Baking*, it is clear that we may not.” 797 F.2d at 1091.

Moreover, the fractional division of copyright ownership, including the right of public performance, and the fractional licensing of those interests, was codified after the 1976 amendment of the Copyright Act. By 1994, the practice was commonplace. (*See, e.g.*, Br. 44 (“The practice of fractional payments existed long before [1994].”).)³² Thus, the context in which the parties were operating at the

³¹ The 1966 Decree did not address fractional licensing and, despite the enactment of the 1976 Copyright Act, the Government never sought to amend the Decree to include an express reference permitting or prohibiting fractional licensing.

³² The Government’s strained attempts to explain the co-existence of fractional *payments* and full-work *licensing* (Br. 44-45) raise a distinction without a difference. As the Government concedes, music users have long paid BMI only for the *pro rata* share of BMI’s interest in the right of public performance. (Br. 44.) If the Government wanted BMI to license the full work to (and only receive full payment from) those users, it could have specified so in 1994.

time of the amendments (*see ITT Cont'l Baking*, 420 U.S. at 239) included fractional licensing. The Decree was amended at a time when fractional licensing existed and could have been addressed but it was not. If anything, the failure to address the issue evidences an intent not to regulate it.³³

3. BMI's Interpretation of the Consent Decree is Consistent with the Lower Court's and this Court's *Pandora* Decisions.

The Government wrongly relies on this Court's *Pandora* decision to support its position. (Br. 36-37, 48-49.) At issue in the *Pandora* cases was whether ASCAP and BMI could hold in their repertoires works that they were authorized to license to some, but not all, music users, as a result of the partial withdrawal of rights by certain music publishers. This Court affirmed the "district court's determination that the plain language of [AFJ2] unambiguously precludes ASCAP from accepting partial withdrawals," reasoning that, "ASCAP is required to license its entire repertoire to all eligible users." *Pandora*, 785 F.3d at 75, 77. The focus

³³ The Government relies on the last sentence of Article XIV(A) of the Decree, which grants music users "the right to use any, some or all of the compositions in defendant's repertoire to which its application pertains" during the pendency of a rate dispute, to mean that the blanket license must "give users the immediate ability to publicly perform the songs." (Br. 27-28 (citing JA32).) That sentence cannot be read to imply only full-work licensing because, as discussed above, fractional licensing was never intended to be addressed in the Decree. Even accepting the Government's logic, the provision would not reach fractional interests because the Government contends fractional interests are definitionally outside of the repertoire. To the extent that "repertoire" includes fractional interests (as BMI contends), the only sensible reading of the provision is that BMI will grant users whatever rights (including fractional rights) that BMI possesses.

of the Court was on the potential disparate treatment of certain music users in contravention of the obligation in AFJ2, similar to that in the BMI Consent Decree, that ASCAP offer a license for any, some or all of the work in its repertory to any music user. (AFJ2 § IX(A).)

Fractional licensing was not implicated by the partial withdrawals at issue in *Pandora*. In any event, the inclusion of fractional interests in BMI's repertory is completely consistent with the Decree requirements emanating from the holding in *Pandora*, as BMI would continue to offer fractional interests to all users.

Critically, this Court's decision in *Pandora* was predicated on a determination that the conduct in question was expressly regulated by AFJ2's terms. *Pandora*, 785 F.3d at 77 (holding that ASCAP's proposed reading of AFJ2 "is foreclosed by the plain language of the decree, rendering [its] interpretation unreasonable as a matter of law"). In that context, this Court determined that AFJ2 does not speak "in terms of the right to license the particular subset of public performance rights being sought by a specific user," but rather "ASCAP is required to license its entire repertory to all eligible users" and publishers can license their works through ASCAP "on a take-it-or-leave-it basis." *Id.* This Court, however, did *not* (i) determine whether ASCAP's "repertory" includes or excludes fractional interests, or (ii) consider the term "right of public performance," much less analyze its meaning under the terms of *BMI's* Consent Decree.

When the Government made this identical argument to Judge Stanton in the context of BMI's Consent Decree, Judge Stanton explained that in *BMI v. Pandora*, much like this Court's decision in *Pandora*, the District Court was confronted with "explicitly regulated" conduct—the Consent Decree requires BMI to offer its entire repertory to all comers, and Affiliates therefore cannot require BMI to exclude their compositions from BMI's license to some music users but not others. (JA11 (Op. at 5).) Distinguishing the present dispute, Judge Stanton explained, that "[t]he Consent Decree contains no analogous provision concerning the values of fractional versus full-work licensing." (*Id.*) Indeed, the parties to the Consent Decree stipulated that it does not "extend to problems such as those involved in determining the value or validity of copyrights of compositions in BMI's repertory." (JA10 (*id.* at 4).)

In sum, to the extent this Court's holding and reasoning in *Pandora* are relevant at all, they are consistent with BMI's reading of the Consent Decree. Under BMI's reading, BMI "is required to license its entire repertory," including every right of public performance it has been granted—a full or fractional interest—"to all eligible users." *Pandora*, 785 F.3d at 77.

C. The Supreme Court's Decision in *CBS* is Not Relevant to the Issue Before the Court.

The Government also seeks to support its reading of the Consent Decree by reference to the Supreme Court's Decision in *CBS*. (JA75 (Closing Statement at

12.) That decision sheds no light on the meaning of Articles II(C) and XIV(A) of the Consent Decree. The interpretation of the Consent Decree was not at issue in *CBS*, which was decided 15 years before the 1994 amendments on which the Government relies for its supposed prohibition on fractional licensing. The case had nothing to do with fractional licensing, which was not discussed by the parties or the Court.

In *CBS*, the Court held only that the issuance of blanket licenses is not *per se* unlawful and instead, “when attacked” under the antitrust laws, the blanket license “should be subjected to a more discriminating examination under the rule of reason.” *CBS*, 441 U.S. at 24. In reaching that determination, the Supreme Court described the many benefits of the blanket license, including its facilitation of “immediate use of covered compositions, without the delay of prior individual negotiations.” *Id.* at 22. The Government claims that this benefit—one of several identified by the Supreme Court—supports its construction of the Consent Decree because “only full-work licensing” achieves it. (JA75 (Closing Statement at 12); *see also* Br. 17.) However, the Supreme Court did not purport to interpret the Consent Decree, much less the policy implications of the provision that the Government relies on in this appeal—Section XIV. Nor did the Supreme Court address co-owned works; the 1976 Copyright Act, which codified the divisibility

of ownership in copyrights, did not become effective until after the record in the *CBS* proceedings had closed.

The Government presents the world as binary: either the BMI blanket license provides music users with the immediate right to perform all compositions in the repertory, and satisfies the benefit identified in *CBS*, or it does not. The reality is more complex. Regardless of whether works for which BMI holds only a fraction of the public performance right are included in the repertory or not, the BMI blanket license, consistent with the Government's reading of the Decree, provides "immediate use of covered compositions, without the delay of prior individual negotiations" (Br. 5 (citing *CBS*, 441 U.S. at 22)), for millions of compositions which it licenses on a full-work basis. With respect to the fractional interests, while the BMI blanket license may not provide the immediate right to perform those works, it would still avoid the need and associated costs for music users to enter into separate licenses for each of the interests represented by BMI. Limiting the need for individual license negotiations was one of the benefits of the blanket license identified by the Government itself in *CBS*. (Br. at 50 (citing Br. of the United States as Amicus Curiae, *Broad. Music, Inc. v. Colum. Broad. Sys., Inc.*, Nos. 77-1578, 1978 WL 223155, at *20-*21 (S. Ct. Nov. 27, 1978)).)

To the extent some music users would find themselves without the ability to use so-called restricted split works without also securing additional rights, that

would be the case whether or not fractional interests were included in BMI's repertory. Including fractional interests in the BMI (and ASCAP) blanket license mitigates this problem for music users by aggregating these fractional interests and significantly reducing, if not eliminating, the number of negotiations required with individual rights holders. The value of the BMI blanket license is made all the richer for music users by the inclusion of such additional, fractional interests.

II. POLICY ARGUMENTS ARE NOT PROPERLY BEFORE THIS COURT, BUT IF THEY WERE, BMI EXPECTS THAT THE EVIDENCE WOULD SUPPORT FRACTIONAL LICENSING.

A. This Court Should Not Consider the Government's Policy Arguments.

As demonstrated above in Section I, there is no express prohibition in the Decree on the licensing of fractional interests. Accordingly, the Court need not, and should not, entertain the Government's policy arguments—and its attendant reliance on inapposite case law. Indeed, it would be inappropriate for the Court to do so. *Armour*, 402 U.S. at 681-83.

The District Court correctly ruled based on the express terms of the Consent Decree. No evidence was introduced in the proceedings below and, as the Government acknowledges, “[t]he district court made no factual findings.” (Br. 24). As a result, the record on appeal is devoid of any economic or other evidence about the likely effect of prohibiting fractional licensing on the market. The Government's arguments about the consequences of potential interpretations or

changes to the Consent Decree are entirely speculative.³⁴ Thus, the sweeping statement that full-work licensing “mitigate[s] the anticompetitive harm inherent in collective licensing” (Br. 46) is conclusory (and, as discussed *infra*, incorrect). To the extent that the economic effect of the Government’s construction were relevant to interpreting the Decree, factual findings would have to be made by a trial court.

BMI nonetheless feels compelled to counter the unfounded policy arguments advanced by the Government and the *amici curiae* supporting the Government.

B. The Government’s Market-Based Arguments Are Counter to Established Antitrust Principles and Policy.

The Government’s interpretation of the Decree would: (i) reduce the number of compositions available to be licensed by regulated PROs; (ii) increase transaction costs; (iii) deter collaboration and innovation in the creation of new musical works; and (iv) undermine direct licensing, a core protection (and requirement) of the Consent Decree.

The Government claims that “only full-work licensing can yield the substantial procompetitive benefits associated with blanket licenses[.]” (JA66 (Closing Statement at 3).) In fact, a full record likely would show that the

³⁴ See, e.g., Br. 45 (claiming that “nothing about the efficiency of fractional payments is threatened or compromised by full-work licensing”); *id.* 48 (claiming that “[c]oncern about copyright liability” in a fractional licensing regime “could lead some users to stop playing music.”). Both statements rely solely on reference to unsupported conclusions contained in the Closing Statement, not economic analysis or documentary evidence.

Government's proclaimed full-work mandate harms consumers and risks reducing competition in the market for public performance rights licenses in a number of ways.

1. Prohibiting Fractional Licensing Could Harm Market Participants and Result in a Less Competitive Market.

First, the Government concedes that by precluding BMI (and ASCAP) from licensing fractional interests, some works (including many foreign works) previously licensable by PROs could become “stranded” and thus un-licensable by any regulated PRO. (Br. 14, 19-20.) That change could have a significant impact on consumers' access to music. As noted by the Copyright Office, “many of the most sought-after and valuable songs” could be “wholly excluded from licensing.” (See USCO Views at 29.) The “great flexibility in the choice of music material” provided to music users through the blanket license (*CBS*, 441 U.S. at 22), therefore, could be greatly diminished by a full-work mandate.

Mandating the removal of popular compositions from PROs' repertoires also would harm music creators and music users, and would be antithetical to the goals of antitrust law. Activities that have “the effect of reducing . . . consumer preference . . . and output [are] not consistent with [the] fundamental goal of antitrust law.” *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 107 (1984). “Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit.” *Id.* at 107-08

(citation omitted). In the same vein, “[t]he slowing of innovation cannot be squared with the objectives of antitrust law.” *New York v. Microsoft Corp.*, 224 F. Supp. 2d 76, 187 (D.D.C. 2002).

Second, the Government’s proposed solution to the problem of stranded works oversimplifies the efforts that would be necessary to change an entire industry’s relationships and operations. It therefore is likely to cause a significant increase in transaction costs associated with licensing those works, and may not solve the stranded works problem. As the Government acknowledged, copyright owners of split works would need to renegotiate contractual arrangements for millions of works globally. (*See* JA81-82 (Closing Statement at 18-19).) Music users who aggregate multiple rights for co-created works would be required to identify stranded works and then find and negotiate with thousands of rights holders globally. (*See, e.g.*, USCO Views at 29 (observing that “[i]t would be no small task to renegotiate and document the countless relationships of the current and legacy writers who would be affected.”).)

These increased costs also would be imposed on the PROs and would increase the cost of the blanket license. As the Government acknowledges, PROs have always “charged fees based roughly on their respective market share accounting for partial interests in the songs in their repertoires.” (JA74 (Closing

Statement at 11).³⁵ Neither the BMI nor the ASCAP rate court has ever set a rate accounting for royalties to be paid to the other PRO's affiliates on account of their interests in split works.³⁶ Among other things, BMI and ASCAP would be required to develop and maintain systems necessary to collect and distribute royalties for songwriters, composers, and publishers affiliated with other PROs or engaged in direct licensing.³⁷ The Copyright Office has raised concerns that “[t]he administrative burdens and costs of [a full-work] system on ASCAP and BMI could be overwhelming.” (USCO Views at 29.) The Government grossly oversimplifies the burdens that would be imposed on songwriters, composers, music publishers and PROs around the globe to restructure hundreds of thousands of contractual arrangements established over decades, to comply with a full-work

³⁵ *See also* USCO Views at 17 (“Consistent with their membership agreements and distribution practices, ASCAP and BMI negotiate with and collect from users only the percentage of royalties representing the aggregate shares of works in their respective repertoires, not 100 percent of all works or some works.”) (citations omitted).

³⁶ It is undisputed that music users have historically paid PROs “based on fractional market shares.” (JA72 (Closing Statement at 9); *see also* JA82 (Closing Statement at 19) (referring to the licensing of split works through each co-owner’s chosen PRO and the receipt of payments from that PRO as “consistent with historical practice”).)

³⁷ *See* Comments of BMI Songwriters, Composers, and Publishers, <https://www.justice.gov/atr/public/ascapbmi2015/ascapbmi38.pdf>. (noting that, under the Government’s interpretation of the Decree, Affiliates would “[s]omehow . . . have to monitor what we are being paid by a PRO we have no relationship with, figure out whether they have missed nay of our performances, understand how and when they will pay us . . . and so on.”).

licensing requirement. Indeed, there is no evidence, beyond the Government's say-so, that the contemplated transition is even possible.

Third, a fractional licensing prohibition could chill the collaboration and innovation that has long been, and continues to be, a hallmark of the music creation process.³⁸ Collaboration increases creative output. A full-work mandate, however, could alter that calculus. For example, a BMI-affiliated songwriter may be reluctant to collaborate with an ASCAP-affiliated songwriter if doing so “could jeopardize a songwriter’s ability to collect full royalty payments in a timely manner,” “result in increased cost for distribution of royalties,” or require “violation of agreements that have been previously entered into between co-writers outlining ownership splits and exploitation rights.”³⁹ The potential impact of such a behavioral shift on musical output could be substantial, although it is unknowable on the record before this Court. To the extent such an impact would exist, it would fundamentally alter the collaborative creative process—a process that has always been driven by craft and chemistry, not dictated by contractual affiliation.

Finally, the Government’s construction of the Consent Decree would decrease competition in the market for public performance rights licenses by

³⁸ *See, e.g.*, USCO Views at 8-9.

³⁹ Comments of Bart Herbison, Executive Director, Nashville Songwriters Association International at 3, <https://www.justice.gov/atr/public/ascapbmi2015/ascapbmi129.pdf>.

reducing access to competitive alternatives to the regulated PROs, and potentially disincentivize music users from licensing interests in co-owned works directly through individual rights owners or through unregulated PROs.

Access to direct licensing has long been recognized by courts, and the Government, as a significant pro-competitive constraint under the Decree.⁴⁰ In fact, on remand from the Supreme Court, this Court upheld the legality of the blanket license under the rule of reason, not because it allowed “immediate use of covered compositions” but because direct licensing was available as an alternative to the blanket license. *See Colum. Broad. Sys., Inc. v. Am. Soc’y of Composers, Authors & Publishers* (“*CBS v. ASCAP*”), 620 F.2d 930, 935 (2d Cir. 1980).

A full-work licensing mandate could reduce licensing alternatives because music users could well avoid licensing from other sources by entering into blanket licenses with the regulated PROs and obtaining all of the rights necessary to perform a composition, even if co-owners of that composition are not affiliated

⁴⁰ *See, e.g., CBS*, 441 U.S. at 24 (noting that “the substantial restraints placed on [BMI and] ASCAP and [their] members by the consent decree must not be ignored” when considering music users’ access to alternative forms of licensing); *Meredith Corp. v. SESAC LLC*, 1 F. Supp. 3d 180, 212 (S.D.N.Y. 2014) (recognizing that direct licensing offers “a key avenue of competition with [SESAC’s] blanket license”); U.S. Response to 1994 Amendments at 11 (“[T]he government’s tentative consent to the establishment of a ‘rate court’ mechanism does not reflect our intention that judicial rate setting should become a substitute for competitive rate setting. The Judgment already contains important provisions to assure that music users have competitive alternatives to the blanket license, including direct . . . licensing . . .”).

with a regulated PRO. Put differently, requiring regulated PROs to engage in full-work licensing could result in the licensing of nearly all co-owned works through the regulated PROs' repertoires. That would leave co-owners who have chosen to license directly, or through an unregulated PRO, with nothing of value to license. By requiring BMI to license the interests in the public performance right represented by GMR, for example, music users might no longer have a need to obtain a license from GMR for works co-owned by BMI Affiliates.

So why would the Government promote an interpretation of the Consent Decree that reduces output, innovation, competition, and market efficiency? Again, without a record, it is difficult to know. It appears, however, that the Government, prodded by music users (many of whom have appeared as *amici curiae*), came to believe (incorrectly) that full-work licensing was good policy. In reality, the Government's policy sacrifices the interests of creators of musical works to the purported benefit of licensees who, preferring to license from PROs subject to rate regulation, would shield themselves from having to engage in negotiations for such rights with unregulated PROs that are free to license performance rights at free-market rates.

2. The Government's Concerns About "Hold Up" Power Are Specious.

The Government posits that allowing fractional licensing to continue will create "hold up risks" for music users because they will need to obtain additional

licenses from unregulated PROs or individual copyright holders. (Br. 18 (citing JA78-79).) Although fractional licensing has been the norm for decades with the Government's acquiescence, the Government contends that it has recently become a concern because "[a]dditional PROs have come into existence" and "some publishers are not joining any PRO, are considering withdrawing from PROs, or have attempted partial withdrawals." (Br. 15.)

It is difficult to see how the entry of new PROs and competition from direct licensing alternatives could give rise to an antitrust concern.⁴¹ Even if there were a genuine concern about "hold up" risk, it clearly would be unrelated to the Consent Decree or BMI's licensing practices. The Consent Decree requires BMI to license its repertory, on reasonable terms, to all applicants. BMI wants only to continue to license all of the rights that it has always licensed, including fractional interests. It is the Government, not BMI, whose position requires market participants to alter decades of licensing behavior and, in the process, to reduce the basket of rights conveyed to music users with the blanket license by eliminating fractional interests.

⁴¹ Indeed, in holding that the blanket licenses is not *per se* unlawful under the antitrust laws, the Supreme Court expressly contemplated the role that new, smaller PROs had in the market for public performance rights licenses. *CBS*, 441 U.S. at 22 ("[E]ven small-performing rights societies that have occasionally arisen to compete with ASCAP and BMI have offered blanket licenses.").

In any event, the Government’s “hold up” concern is misplaced. What the Government and *amici curiae* describe pejoratively as “hold up” is simply the Congressionally-mandated exclusive right of copyright holders, as this Court has recognized, to be “free to license—or to refuse to license—public performance rights to whomever they choose.” *Pandora*, 785 F.3d at 78. To the extent that individual copyright owners were to “hold up” music users for higher royalties, it is their prerogative under the copyright law and is not a cognizable antitrust concern. Certainly such behavior would not be governed by BMI’s Consent Decree.

Moreover, in *CBS*, this Court rejected CBS’s argument that copyright owners would hold out for “unconscionably high fees,” thereby making direct licensing impossible. *CBS v. ASCAP*, 620 F.2d at 938. Instead, this Court affirmed the district court’s conclusion that “hold ups” are “not a consequence of the blanket license.” *Id.*

The long history and common practice of fractional licensing of the mechanical right and the synchronization right⁴² further demonstrate that the hypothetical harm of “hold up” or “copyright trolling” is entirely speculative. Indeed, this Court previously pointed to the experience of music users regularly obtaining synch rights “at fair prices after the recording had been accomplished” to

⁴² See, e.g., *Industry Br. 23*, n.7.

refute the hold up concern posited by CBS. *Id.* The Government has cited no evidence of anticompetitive hold up occurring since the *CBS* case was decided and fractional licensing of the public performance right has been the norm.

This appeal is not the proper forum to resolve the vigorous policy debate about fractional licensing. If the Government believes that a new prohibition on PRO licensing of fractional interests is required due to a change in market circumstances its recourse is to seek modification of the Consent Decree. This Court is not the proper forum to make factual determinations about the economic effect of such a prohibition, *a fortiori*, where there is no record on that question.

CONCLUSION

For all the foregoing reasons, the Court should affirm the District Court's decision that "[t]he Consent Decree neither bars fractional licensing nor requires full-work licensing."

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Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH
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I, Scott A. Edelman, counsel for appellee Broadcast Music, Inc., and a member of the Bar of this Court, certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C)(i), that the attached Brief for Appellee Broadcast Music, Inc. is proportionately spaced, has a typeface of 14 points or more, and contains 12,762 words.

/s/ Scott A. Edelman
Scott A. Edelman

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