

DOJ Public Workshop- July 28, 2020
Competition in Licensing Music Public Performance Rights
Mike O'Neill, BMI President & CEO Comments

Good afternoon, everyone.

And thank you, Mr. Delrahim, for gathering us all together today, and for your continued effort to review all Consent Decrees to determine whether they still serve their intended purposes in today's marketplace. Thank you also for your interest in reviewing BMI & ASCAP's Consent Decrees, which are among the oldest in our country's history.

I'm excited for this opportunity today to continue this very important conversation.

As you have heard me say many times, we believe the decrees should be terminated. But we also believe in an orderly transition to that new world.

We believe that competition – FAIR competition -- is a good thing.

There are now six, possibly seven businesses that have gotten into, or want to get into, the PRO space. The Performing Rights business has become very popular.

We can't say we're surprised, though, because we have always believed in the value of what we do and our mission to advocate on behalf of America's songwriters and composers.

Coming into the beginning of this year, we had hoped that we could have reached a resolution on our Consent Decrees.

But unfortunately, as we all know, the COVID-19 global pandemic has altered the way we work and live, and consumed our collective focus. Our businesses have all been touched by this crisis – the DOJ, BMI, our licensees, and our songwriters. This is a very different world than the one we lived in just this past February.

That said, I was very happy when Mr. Delrahim called me to say he wanted to put this workshop together. That all of the papers that were submitted across the industry and the conversations that have been had as a result will continue.

As you all know, BMI's Consent Decree remains our contract with the government. It outlines the rules under which we do business, and it was most recently updated in 1994.

But when I say updated, really, not that much!

To say it's out of date is an understatement.

Our industry is in a very different place than it was in the early 90s. First, as I just mentioned, there is more competition in our space than ever before. We compete with other PROs that are not regulated and are already operating with the benefits of a free market. Publishers are doing more and more direct deals with licensees. Even foreign licensing societies can compete with U.S. PROs.

And if you look at the licensee equation, as Beth mentioned, we are by no means the Goliath in that scenario.

Then, of course, technology has altered our daily lives. It has certainly transformed the way music is created, consumed and tracked.

We have to evolve with those changes and adapt our practices to meet the needs of those we've been entrusted to serve.

And that's our songwriters, composers and publishers.

We advocate on their behalf every day to protect their rights and maximize the value of their music.

Today, BMI represents over 1 million songwriters, composers, and publishers with more than 15 million musical works.

BMI and ASCAP are the only two companies in this space that operate on a not-for-profit making basis. Almost 90 cents of every dollar we generate in licensing fees goes back into our affiliates' pockets. We're proud to operate with their best interests in mind.

Equally as important are our business partners, many with whom we have longstanding, trusted relationships. Collectively, BMI licenses hundreds of thousands of businesses. These are essential partnerships that we have earned through our service and that we have deep respect for.

The music our songwriters and composers create is vital to these businesses, and these businesses are key to the livelihood of our songwriters and composers.

That's our role, to be the bridge between the people who create music and the people who use it and deliver it to listeners all over the world.

In the last five years, BMI's consent decree has been subject to two reviews by the Antitrust division. The first one, we asked for. But, like the old adage, be careful what you ask for.

Because instead of modifying our outdated decree, which was our intent, the issue of 100% licensing was raised by the DOJ.

I won't bog today down with all the ins and outs of that issue, but it's a model that would have tremendously jeopardized the creative and financial freedom of songwriters, and hamper licensees' ability to have access to the music they want to play.

BMI had to take the DOJ to court. I'm happy to say it wasn't Mr. Delrahim, it was his predecessor. I am also happy to say that we won.

The second review is the one that is taking place right now. It wasn't raised by us. It was started by the DOJ in their effort to review all consent decrees.

Today, under the DOJ's guidelines, there are no modern consent decrees that live on in perpetuity. So, we welcome the idea of terminating them. As long as it's done gradually and thoughtfully.

We believe that a free market is the best way for music creators to be rewarded for their hard work and intellectual property.

It would create a more productive, efficient and level playing field for everyone. As I started out by saying, we believe competition is a good thing.

We also understand that change is hard. Our decrees have been in place for nearly 80 years and suddenly terminating them would cause chaos in the marketplace. We want to avoid that at all costs.

So, Beth and I joined forces and issued a proposal that would gradually lead us towards a free market while protecting all parties.

We proposed an orderly transition that includes forming new consent decrees, which like all modern decrees, would each include a sunset provision.

In discussing this with our licensing partners, we determined that the new decrees would contain four key provisions.

- First, allow all licensees to still gain automatic access to the BMI and ASCAP repertoires with the ability to immediately play our music. As long as they also begin paying immediately. Music is not free, and neither is any type of intellectual property.
- Second, retain the rate court process for resolution of rate disputes, as refined by the MMA.
- Third, preserve the system that allows songwriters & publishers to still do direct deals if they so choose. As we've seen over the years, this is an important provision for both licensees and our affiliates alike.

- Fourth, at a minimum, keep the current forms of licenses that the industry has grown accustomed to, while allowing us to offer new forms of licenses and experiment with innovative business solutions.

These provisions don't necessarily benefit ASCAP & BMI today, but they benefit the industry and will help facilitate a thoughtful transition to a free market.

But we have to be vigilant.

As we've seen, some organizations are using this moment to their advantage. Unregulated parties and licensees are using this review of our consent decree to try to increase regulations on BMI and ASCAP, not for the benefit of songwriters and composers, but we believe for their own benefit. Frankly this is just amazing to me and completely contradictory to what the DOJ is trying to do overall with Consent Decrees.

Issues like 100% licensing, length of songwriter contracts and similarly-situated licenses are coming into play. Issues that are more about regulating the marketplace through our Consent Decrees than the actual Consent Decrees themselves.

And then there is the position being raised by the National Music Publishers Association on Rights Withdrawal.

We know the publishing community wants to include withdrawal of rights in any PRO consent decree reform.

Let me say, overall, we agree with this in concept, however, we don't agree with the timing.

I truly believe, that advancing this issue now, given how divisive this concept is with our music users, we will find ourselves with a push in Congress for compulsory licensing.

To think otherwise is simply foolish. And by the way, that push in Congress will lead us right back to 100% licensing which we all fought so hard against.

Let me stress... compulsory licensing is not where we want to be. It may seem like an easy and efficient solution – one license that covers everything for everyone – but that's far from the truth.

It would have dire consequences for the music business. First, we've seen compulsory licensing depress pricing. Second, it means even more government regulation.

We see no scenario in which more government regulation of the music industry would benefit anyone.

We need to ensure that the profession of songwriting doesn't simply turn into a hobby, because no one can make a sustainable living by writing music under compulsory licensing.

BMI is not looking to increase our power or stifle competition – all of us here think competition is a good thing -- we just think the market needs time to adjust.

Once we get there, there are antitrust laws already in place, and people like Mr. Delrahim, that would continue to govern all parties when the decrees eventually go away.

I want to note that in nearly 80 years, BMI has never been found by the DOJ to be in violation of the terms of our decree or any antitrust laws,

I think it is fair to say that there are a lot of different perspectives on decree reform, but there are also a lot of points I'd venture to say we all agree on.

We all want more transparency.

We all believe competition is beneficial and necessary.

We want to see change, and we want to do it in the right way that makes sense for everyone.

So, if we all give and take, like we did with the MMA, we can make great things happen. That spirit of compromise can go a long way for our industry and better serve songwriters, businesses and the public. That is why BMI & ASCAP put forth our transition plan.

I'm confident we can find the path forward together to ensure a vibrant future for music and the businesses that use it.

Mr. Delrahim, thank you for shining a spotlight once again on these issues. With our proposal, we will protect competition and innovation, while ensuring American songwriters are fairly compensated for their creative work.

And, thank you to everyone who is with us today for joining this vital conversation.

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