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DOJ v. BMI: The Fight over Consent Decrees and Fractional Licensing

BY [WILLIAM ANIELLO](#)/ ON FEBRUARY 8, 2017

In continuation of an ongoing battle, the Department of Justice has filed a notice that it will appeal the September 2016 decision by Judge Stanton which concluded that fractional licensing is allowed under the current Broadcast Music, Inc. ("BMI") consent decree.[\[1\]](#)

Back in 2014, music publishers' displeasure with the resolution of the partial withdrawal issue sparked the DOJ's review of American Society of Composers, Authors and Publishers ("ASCAP") and BMI's consent decrees.[\[2\]](#) The DOJ's assessment resulted in an unexpected inquiry of the decrees. While intending to highlight and clarify licensing practices among the performing rights organizations ("PROs"), the DOJ posed a series of questions related to fractional licensing which resulted in the DOJ request for public comment on these issues.[\[3\]](#)

Under their latest decision, the DOJ has required ASCAP and BMI to grant a complete 100% license for any song they administer, even if only a portion.[\[4\]](#)

This 100% license, commonly known as a blanket license, has to be granted even if the PRO only administers the royalties for a small percentage (1% is enough) of the song.[\[5\]](#) Further, the DOJ has declared that contractual agreements between co-authors that mandate fractional licensing are a violation of antitrust law.[\[6\]](#)

After taking legal action against the DOJ, in a surprising turn of events, BMI's rate court judge ruled that fractional licensing is allowed through the consent decree the performing-rights organization operates under.[\[7\]](#) According to Stanton's ruling, "The consent decree neither bars fractional licensing nor requires full-work licensing," which is the exact opposite of what the DOJ determined when it came down with its ruling giving ASCAP and BMI one year to employ full-works licensing.[\[8\]](#) In his decision, Judge Louis Stanton ruled against the DOJ's controversial [decision on June 30](#) — which insisted that the consent decree mandated full-works licensing (also known as 100 percent licensing) and gave both ASCAP and BMI a year to adopt that type of licensing.[\[9\]](#) The decision, although criticized by the publishing industry, was embraced by licensees, including digital services and radio networks.[\[10\]](#) It is this decision by Judge Stanton which the DOJ is now appealing.

In response to the appeal, BMI's president and CEO Michael O'Neill stated that "while we hoped the DOJ would accept Judge Stanton's decision, we are not surprised it chose to file an appeal," and that "[i]t is unfortunate that the DOJ continues to fight for an interpretation of BMI's consent decree that is at odds with hundreds of thousands of songwriters and composers, the country's two largest performing rights organizations, numerous publishers

and members of the music community, members of Congress, a U.S. Governor, the U.S. Copyright Office and, Judge Stanton, a federal judge.”[\[11\]](#)

The DOJ and opponents of fractional licensing claim that if the consent decrees were modified to allow such licensing, the change “would undermine the traditional role of the ASCAP and BMI licenses in providing protection from unintended copyright infringement liability and immediate access to the works in the organizations’ repertoires.”[\[12\]](#) The DOJ and opponents also argue that the value of blanket licenses that [the Supreme Court](#) looked to in determining that blanket licenses by BMI are not illegal under the antitrust laws and that without them, the legality of ASCAP and BMI could be called into question again.[\[13\]](#)

If ASCAP and BMI were required to carry out a 100% licensing system as the DOJ is pushing for, opponents of the system argue that there are technical and practical implications of this system that would seriously hinder royalty payments. A central argument is that currently, these PROs account only to their own affiliates and there is no system in place if they were suddenly required to remit payment to non-affiliate songwriters and publishers.[\[14\]](#) Challengers urge that the time and costs associated with attempting to gather this information would be burdensome for the PROs and increase transaction costs for both affiliates and music licensees.[\[15\]](#)

It is unclear how or whether the incoming Trump administration will affect the DOJ’s approach to the pending appeal.

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[\[1\]](#) Ed Christman, *Dept. of Justice Appeals BMI Consent Decree Decision*, Billboard (Nov. 11, 2016), <http://www.billboard.com/articles/business/7573537/doj-appeal-bmi-consent-decree-decision-fractional-licensing>.

[\[2\]](#) Statement of the Department of Justice on the Closing of the Antitrust Division’s Review of the ASCAP and BMI Consent Decrees, Dept. of Justice (Aug. 4, 2016), <https://www.justice.gov/atr/file/882101/download>.

[\[3\]](#) *Id.*

[\[4\]](#) Ed Christman, *The Dept. of Justice Said to Be Considering a Baffling New Rule Change for Song Licensing*, Billboard (July 30, 2015),

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

[5] *Id.*

[6] *Id.*

[7] Ed Christman, *BMI Rate-Court Judge Rules Against Dept. of Justice's '100 Percent' Licensing Decision* (Sept. 16, 2016), <http://www.billboard.com/articles/news/7511194/bmi-rate-court-judge-rules-against-dept-of-justices-100-percent-licensing>.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] Nate Rau, *DOJ Takes Fight with BMI to Appeals Court* (Nov. 11, 2016, 5:35 PM), <http://www.tennessean.com/story/money/2016/11/11/doj-takes-fight-bmi-appeals-court/93660886/>.

[12] David Balto, *Why DOJ is Right to Appeal BMI Consent Decree Ruling* (Nov. 28, 2016, 11:58 AM), <https://www.law360.com/media/articles/866213/why-doj-is-right-to-appeal-bmi-consent-decree-ruling>.

[13] *Id.*

[14] Statement of the Department of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees (Aug. 4, 2016), <http://www.justice.gov/atr/antitrust-consent-decree-review-ascap-and-bmi-2015>

[15] *Id.*