Music Licensing Consent Decrees Prevent Marketplace Chaos

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The issue:
The Department of Justice (DOJ) recently initiated another review of the critically important antitrust consent decrees that underpin the music licensing marketplace. Television and radio broadcasters strongly oppose any significant modification or termination of these decrees, which would upset the balance Congress strived to achieve in the 2018 Music Modernization Act (MMA).

Here’s why:
The two largest performing rights organizations (PROs) – ASCAP and BMI – license public performances of songs to virtually every venue and music platform in the United States. The music you hear on your favorite television show, during the broadcast of live events, on the radio, at a store or restaurant or through your favorite customized stream are all licensed through these PROs.

To comply with copyright laws, broadcasters and others obtain licenses from ASCAP and BMI (in addition to two unregulated organizations, SESAC and GMR) to play the songs the PROs control. These licenses can cover all the works in each organization’s repertoire and provide a more efficient way to obtain necessary public performance rights than negotiating with every copyright owner individually. Despite that efficiency, however, collective licensing practices raise significant antitrust concerns that have long been recognized by the Supreme Court.

The catalogs of ASCAP and BMI cover more than 90 percent of the market for musical works performances. To ensure they operate consistently with antitrust laws, the DOJ entered into antitrust consent decrees that provide these organizations the ability to conduct business in a fair, efficient and equitable manner to benefit both songwriters and licensees. As a backstop, there are federal courts to oversee the PROs’ behavior and decide rate disputes between ASCAP and BMI and any entity wishing to license their songs. The decrees have paved the way for efficient licensing, benefiting consumers, licensees and songwriters for decades. Given the rapid changes in the music licensing marketplace, they are more important today than ever.

In 2016, after a thorough, multi-year review based on an extensive public record, the DOJ rejected proposed modifications from ASCAP and BMI that would weaken the consent decrees and reaffirmed their fundamental protections. Recently, despite no discernable changes in the marketplace, the DOJ again initiated a review of these decrees and has signaled a strong interest in terminating them.

(See reverse)
Terminating the consent decrees without an effective alternative licensing framework in place would bring chaos to the music marketplace, threatening the availability of music to consumers on every platform and in every venue across the country. This is why Congress included explicit oversight of the DOJ’s ongoing review of the decrees in the Music Modernization Act enacted into law in 2018 along with clear DOJ reporting requirements prior to any efforts to terminate or modify the decrees. Seeking to terminate the decrees, even over an extended period of time (sunsetting), just as the music industry works to implement the most extensive rewrite of music licensing laws in decades, is particularly ill-advised.

The bottom line:

The music licensing marketplace is complex and requires certainty for all parties. Congress has recognized efforts to bring more clarity through the MMA, which is largely premised on the continued existence of the ASCAP and BMI consent decrees. Congress specifically acknowledged the importance of the decrees by including critical oversight of any DOJ review. To avoid harming licensees, songwriters and consumers, and raising serious questions about the ability of the public to continue enjoying music, Congress should ensure the DOJ does not unilaterally terminate, sunset or modify the decrees.