

From: Brett H <sa [REDACTED]>
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To: ATR-LT3-ASCAP-BMI-Decree-Review <ASCAP-BMI-Decree-Review@ATR.USDOJ.GOV>
Subject: Antitrust Consent Decree Public Comments

The Consent Decrees Violate Individual Rights.

I am an American songwriter, a member of BMI and a member of the bands Cracker and Camper van Beethoven. I'm submitting this comment on my own behalf in opposition to the ASCAP and BMI consent decrees. I believe these government actions essentially are a compulsory license outside of the Congress and take away songwriters' rights to due process of law.

Just to be clear, I am not saying that Justice Department consent decrees in general are oppressive. I am saying that the way these particular consent decrees operate is oppressive to songwriters. That operation is oppressive because of the extremely long period of time they have been in effect, because they take away our valuable property rights to negotiate our own licenses, and they essentially force songwriters into being judged guilty before we've even expressed ourselves.

Why Songwriters Matter

Most discussions surrounding the consent decrees start with a striking fiction: The consent decrees only apply to BMI and ASCAP but not to individual songwriters. From a songwriter's perspective, this is extraordinary sophistry.

As a practical matter, all American professional songwriters have to join one of ASCAP, BMI or SESAC in order to earn a living from their chosen craft. Sure, it's possible that SESAC (which is not yet under one of the government's consent decrees) might invite someone like me to join. But they are known to be more difficult to join than ASCAP or BMI.

The only certain choice for all songwriters is joining one of ASCAP or BMI. And that means that the vast majority of songwriters are subject to the consent decree from the time they write their first song. Unless something is done about it, they will remain subject to the rate court until they write their last song and even beyond the grave.

The DOJ has essentially created a single exchange within the federal courts that requires songwriters to join a regulated PRO in order to participate in the market.

So in practice as soon as an individual decides to take the tiniest steps towards being a professional songwriter they immediately fall under one of the two consent decrees and the jurisdiction of one judge in one court. Let's dispense with the fiction that the consent decrees do not apply to songwriters and hence dispense with the fiction that it does not limit the rights of individuals—living, dead and yet to be born.

The Single Exchange Takes My Right to Negotiate

The government limits my ability to participate in a free market; it takes my property rights without due process or just compensation; it even limits my kind of speech (public performance of my songs) as I must participate in this process or effectively forgo compensation when I perform my songs in the public square. I know that there's always the theoretical possibility of a direct license outside of the consent decrees, but as a practical matter, I can tell you that is very rare because it is rarely offered.

I am not a lawyer or a constitutional scholar but I believe the consent decrees violate the American social contract for many reasons, not the least of which is that in practice songwriters are singled out for the government's scrutiny before they have done anything except engage in speech and create songs. When you are on the receiving end, this feels like a kind of writ of attainder. Allow me to explain.

A) Typically when we limit the rights of individuals in the manner prescribed by the consent decrees one of three things must occur:

1) Legislative action by elected officials.

2) Judicial proceedings finding a particular individual (not a class of individuals similar to that individual) guilty of something.

3) The individual must consent to have his/her rights limited (usually to avoid judicial proceedings or because they participated in an election).

As an individual songwriter the consent decrees effectively compel me to submit to this process. At least the compulsory license in the Copyright Act is a legislative action by elected representatives and if I don't like that rule I can work to get someone unelected. Under the consent decrees, generations of songwriters are powerless to stop the government from taking our rights without that legitimacy—for decades. I do not understand how the Department of Justice has the authority to force us to submit to this process.

B) As soon as an ASCAP writer creates their first song, the writer is forced into a court proceeding that was opened in 1941, seventy three years ago. The BMI consent decree is from 1964, fifty years ago. Many songwriters who are subject to the consent decrees weren't even born when the Department of Justice opened the cases.

Even if I accept the premise that I am guilty until I can prove to the government that I am not, and that my licensing decisions require review by a federal judge at great social expense, what possible justification can there be for my decisions today being subject to a case opened so long ago? This seems like some arbitrary federal assignment of “original sin” to a class of Americans. Does the federal government have a crystal ball? Can they see into the future? Can they read my thoughts? How do they know that every single member of this class is doing something wrong? How is that possibly Constitutional?

C) How many of the government’s court cases are “open” for 73 years or even 50 years? How is that not a violation of due process? Why am I and all future songwriters required to pay for whatever misdeeds that occurred decades ago?

D) I can’t emphasize enough that from my point of view as a songwriter, the consent decrees act as a kind of compulsory license by government edict. The government compels songwriters to allow music services to use our songs whether we like it or not. And unlike the Copyright Act, I can’t complain directly to rate court except at great expense. There is nobody to get unelected if we don’t like the rate court’s decision except very indirectly.

As Ari Emmanuel once said, “Fair is where we end up.” He would be wrong in the case of these consent decrees. In practice the consent decrees effectively substitute the opinion of a federal judge for that of a fair negotiation to set the rates at which those services compensate my fellow songwriters and me. After 73 years this has effectively become an unlegislated compulsory license. The consent decrees walk and talk like a compulsory license and after decades of practice they effectively are a compulsory license. At least with a compulsory mechanical license we know where we will end up on the rate.

E) Essentially the consent decrees take valuable rights to negotiate the exploitation of property from over 500,000 Americans simply because they write songs. And there is no end in sight. (Not to mention the foreign songwriters whose works get swept up and who can’t afford to complain to the WTO.)

F) If we must live under consent decrees, why must all the cases be heard before the same judge in New York City? Not only do the consent decrees unfairly impose the government on songwriters, they also force music services to make their case before a single judge in New York City—twice, once for ASCAP and again for BMI. This is a very expensive process that only the most well-heeled services can afford.

Why shouldn’t a service be able to bring their rate case in San Francisco, Los Angeles, Nashville, Austin, Athens—or any federal court? Respectfully, are two federal judges in New York the only federal judges in the entire country capable of trying PRO cases? Surely that can’t be true.

I believe that the decrees have become a crutch on which those well-funded music services that can afford the

litigation have come to depend. Instead of actually innovating and improving their revenues they use the rate courts as a perceived competitive advantage at great expense to their own shareholders, songwriters and, of course, the taxpayer.

There's also a question of how many new entrants don't come into the market at all because they are scared off by the expense of the rate court process and the uncertainty of litigation.

So not only have the operation of these consent decrees created a single market inside a federal court, I suggest that the consent decrees actually limit access to that market to the number of potential buyers who can afford the millions in legal fees required to participate. I think most songwriters would say that they want to license their works to innovators, and yet access to the rate court market is limited to the rich innovators as a practical matter.

Yes—in practice the consent decrees may well be anticompetitive.

Are the ASCAP and BMI Consent Decrees Unconstitutional?

I pose this question not because I'm a learned lawyer or constitutional scholar. I pose it because I can tell you that living under these consent decrees feels oppressive and I have found that when the government acts oppressively it is often acting outside of the Constitution.

This is not to say that the government should not pursue claims against songwriters if we actually do violate the antitrust laws. I'm not asking for a free pass. We should get the same treatment as Google, Microsoft or anyone else. It's also not to say that there wasn't some justification for the consent decrees long ago.

But from this songwriter's perspective, that time has passed. As James Madison wrote in Federalist 44, "[government] interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding." Respectfully, I suggest that Madison could have been describing the Kafka-esque rate courts.

Brett Houston

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Los Angeles CA