

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA

Plaintiff,

-against-

Civ. Action No. 41-1395

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS

Defendants.
-----X

AND
-----X

UNITED STATES OF AMERICA

Plaintiff,

-against-

Civ. Action No. 64-3787

BROADCAST MUSIC, INC.

Defendants.
-----X

**PUBLIC COMMENTS SUBMITTED TO THE UNITED STATES BY
FOX NEWS NETWORK, LLC CONCERNING REVIEW OF ANTITRUST
CONSENT DECREES IN THE ABOVE-CAPTIONED MATTERS**

PRELIMINARY STATEMENT

On June 4, 2014, Plaintiff, United States, issued a public notice by means of the United States Department of Justice website located at www.justice.gov/atr/cases/ascap-bmi-decree-review.html; the notice has not been published in the Federal Register. The notice informed the public that the Department of Justice, Antitrust Division, is undertaking a review to examine the operation and effectiveness of the consent decrees entered in the two

above-referenced actions (collectively the “Consent Decrees”). The notice invited public comments. Fox News Network, LLC (“Fox News”) hereby respectfully files these public comments for consideration of the Chief, Litigation III Section, Department of Justice, Antitrust Division.

Fox News produces and licenses news and business news programming for distribution through cable television systems in the United States. Fox News owns and operates the Fox News Channel, a 24-hour all news national cable channel currently available to over 97 million U.S. households according to Nielsen Media Research, as well as the Fox Business Network, which is currently available to over 74 million U.S. households. Fox News also produces a weekend political commentary show, *FOX News Sunday*, for broadcast on local Fox television stations throughout the United States. Fox News, through its Fox News Edge service, licenses news feeds to Fox affiliates and other subscribers to use as part of local news broadcasts throughout the United States and abroad. Fox News also produces and runs the websites, FoxNews.com and FoxBusiness.com, and owns and produces the national Fox News Radio Network, which licenses news updates, long form programs and the Fox News Talk Channel to local radio stations and to satellite radio providers.

COMMENTS

Fox News is a licensee of music from both ASCAP and BMI under the Consent Decrees. Fox News will confine its comments here to one question raised in the Department of Justice public notice, *i.e.*, “should the rate-making function currently performed by the rate court be changed to a system of mandatory arbitration?”

Fox News respectfully submits that the rate-setting function currently performed by the rate court under the Consent Decrees should not be replaced by a system of mandatory arbitration, but should remain within the federal judiciary, specifically the federal court in New York that has been designated by the Consent Decrees. The existing rate court has developed extensive expertise in the field, and has provided fairness, transparency and consistency to copyright owners and music users for many decades. The rate court mechanism has thus benefitted competition and has served the public interest. These benefits would be difficult or impossible to achieve under arbitration.

The Department of Justice has previously rejected a proposal to replace the rate court with arbitration, and should do so again. As recently as 2001, the Department of Justice received public comments from the International Association of Assembly Managers (“IAAM”), representing stadium and arena interests, proposing that the ASCAP Consent Decree be amended to add a requirement for arbitration of rate disputes. See Memorandum of the United States in Response to Public Comments on the Joint Motion to Enter Second Amended Final Judgment (“2001 Memorandum”) at 34 (citing IAAM Comments at 2). The Department of Justice rejected the proposal, principally in light of the Fairness in Musical Licensing Act, Pub. L. No. 105-298, passed by Congress in 1998 (“FMLA”).

The FMLA “provides licensing exemptions and an alternative to the rate court for fee disputes for businesses under a certain size,” 2001 Memorandum at 34, which alternative rate-setting procedure is now incorporated in the Copyright Act at 17 U.S.C. §513, captioned “Determination of reasonable license fee for individual proprietors.” The procedure does not involve arbitration, but simply allows federal courts in other jurisdictions to make rate

determinations for certain individual small-business owners encompassed by the statute, notwithstanding the Consent Decrees.

The Department of Justice noted in the 2001 Memorandum that “the possibility of local arbitration of rate disputes for smaller licensees was the subject of negotiation between the parties” during the legislative process leading to passage of the FMLA, 2001 Memorandum at 34. In fact, an earlier version of the statute, H.R. 789 (104th Cong., 1st Sess.), included a section entitled “Binding Arbitration of Rate Disputes Involving Performing Rights Societies,” the text of which is attached hereto as an appendix. As the Department of Justice noted, *id.*, “ASCAP opposed local arbitration” at the time.

The U.S. Copyright Office also opposed arbitration as an alternative to the rate court. Then-Register of Copyrights, the Hon. Marybeth Peters, gave a statement to the House Judiciary Committee, Subcommittee on Courts and Intellectual Property on July 17, 1997, objecting strongly to H.R. 789’s arbitration provision and noting the benefits and “significant safeguards” for music users achieved by centralizing license-fee determinations in the rate court:

Since 1950, music users have been able to seek determination of a reasonable license fee for ASCAP works in the federal court in the Southern District of New York; in November 1994, BMI’s license fees were also placed under that court’s jurisdiction. Thus, substantial safeguards already exist against abusive practices or unreasonable charges.

Under H.R. 789, dissatisfied users could instead seek to resolve the differences over rates through arbitrators who are instructed to determine “fair and reasonable fees.” The resulting multiplicity of proceedings could cause great expense and lead to widely divergent rulings. Under the consent decrees, in contrast, similarly situated parties must be treated the same, with all determinations made by the single rate court. This court has expertise and provides continuity and consistency in its rulings, thereby promoting settlements.

As urged by Register Peters, Congress deleted the arbitration provision from the FMLA as passed, and instead incorporated the narrow exception of 17 U.S.C. §513 which, as noted, does not call for arbitration. Citing this history, the Department of Justice in its 2001 Memorandum declined to adopt the IAAM's proposal that the ASCAP Consent Decree be amended to replace the rate court with an arbitration mechanism: "[g]iven recent Congressional attention to this area, the United States sees no further need to pursue arbitration as a remedy." 2001 Memorandum at 34-35.

The case for replacing the rate court is no stronger today. Unlike the rate court, arbitrators would not be bound by *stare decisis*, thus increasing uncertainty for all parties as well as the risk of disparate treatment for "similarly situated" licensees, as warned by Register Peters. Unlike the rate court, arbitrators have no inherent enforcement powers to overcome "obstructionist practices" by the PROs such as "making unfounded assumptions about music usage, imposing burdensome reporting requirements, and front-loading per-program or per-segment license payments," *id.* at 24-25. These practices most frequently come to light in the context of resolving a rate dispute. A rate-setting arbitrator could not resolve them. Nor would an arbitrator whose mandate is limited to rate-setting have the power to "order alternative licensing arrangements," as may become necessary to preserve competition under the Consent Decree. *Id.* at 22.

It is thus impossible, as a practical matter, to separate the "rate-making function" of the court from the other aspects of its oversight under the Consent Decrees. See, e.g., *id.* at 24-25 (noting that Section VIII(A) and Section VIII(D), combined with "the Court's inherent authority under Section IX" provide a basis for the court's "broad jurisdiction" over

licensing). To permit arbitrators to perform such oversight *sub rosa*, under the guise of rate-setting, would be to abolish the Consent Decrees, not merely to modify them.

Accordingly, replacing the existing rate court with mandatory arbitration would not serve the public interest. As Learned Hand long ago observed, “[a]rbitration may or may not be a desirable substitute for trials in courts; as to that the parties must decide in each instance.” *American Almond Prod. Co. v. Consolidated Pecan S. Co.*, 144 F.2d 448, 451 (2d Cir. 1944). But where the parties have not consented to arbitration, no one has the power to “force or require parties to submit to arbitration in lieu of the remedies afforded by Congress for enforcing the anti-trust laws.” *U.S. v. Paramount Pictures, Inc.*, 334 U.S. 131, 177 (1948).

CONCLUSION

For the reasons set forth above, Fox News respectfully submits that the rate-setting function currently performed by the rate court under the Consent Decrees should not be replaced by a system of mandatory arbitration.

New York, New York
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REITLER KAILAS &
ROSENBLATT, LLC

By: 

Robert W. Clarida
885 Third Avenue, 20th Floor
New York, NY 10022
Tel. (212) 209-3044

Attorneys for Fox News
Network, LLC

To: Chief, Litigation III Section
Antitrust Division, Department of Justice
ASCAP-BMI-decree-review@usdoj.gov

APPENDIX

(Excerpt from H.R. 789, 104th Cong., 1st Sess., deleted from final legislation)

1. SEC. 3. BINDING ARBITRATION OF RATE DISPUTES INVOLVING PERFORMING RIGHTS SOCIETIES.

(a) IN GENERAL- Section 504 of title 17, United States Code, is amended by adding at the end the following new subsection:

(d) PERFORMING RIGHTS SOCIETIES; BINDING ARBITRATION- (1) ARBITRATION OF DISPUTES PRIOR TO COURT ACTION-

(A) ARBITRATION- (i) If a general music user and a performing rights society are unable to agree on the appropriate fee to be paid for the user's past or future performance of musical works in the repertoire of the performing rights society, the general music user shall, in lieu of any other dispute-resolution mechanism established by any judgment or decree governing the operation of the performing rights society, be entitled to binding arbitration of such disagreement pursuant to the rules of the American Arbitration Association. The music user may initiate such arbitration.

(ii) The arbitrator in such binding arbitration shall determine a fair and reasonable fee for the general music user's past and future performance of musical works in such society's repertoire and shall determine whether the user's past performances of such musical works, if any, infringed the copyrights of works in the society's repertoire. If the arbitrator determines that the general music user's past performances of such musical works infringed the copyrights of works in the society's repertoire, the arbitrator shall impose a penalty for such infringement. Such penalty shall not exceed the arbitrator's determination of the fair and reasonable license fee for the performances at issue.

(B) DEFINITIONS- (i) For purposes of this paragraph, a 'general music user' is any person who performs musical works publicly but is not engaged in the transmission of musical works to the general public or to subscribers through broadcast, cable, satellite, or other transmission.

(ii) For purposes of this paragraph, transmissions within a single commercial establishment or within establishments under common ownership or control are not transmissions to the general public.

`(iii) For purposes of clause (ii), an `establishment' is a retail business, restaurant, bar, inn, tavern, or any other place of business in which the public may assemble.

`(C) ENFORCEMENT OF ARBITRATOR'S DETERMINATIONS-
An arbitrator's determination under this paragraph is binding on the parties and may be enforced pursuant to sections 9 through 13 of title 9.

`(2) COURT-ANNEXED ARBITRATION- In any civil action for infringement of the right granted in section 106(4) involving a musical work that is in the repertoire of a performing rights society, if the defendant admits the prior public performance of one or more works in the repertoire of the performing rights society but contests the amount of the license fee demanded by such society for such performance, the dispute shall, if requested by the defendant, be submitted to arbitration under section 652(e) of title 28. In such arbitration proceeding, the arbitrator shall determine the amount owed by the defendant to the performing rights society for all past public performances of musical works in the society's repertoire. Such amount shall not exceed two times the amount of the blanket license fee that would be applied by the society to the defendant for the year or years in which the performances occurred. In addition, the arbitrator shall, if requested by the defendant, determine a fair and reasonable license fee for the defendant's future public performances of the musical works in such society's repertoire.

`(3) TERM OF LICENSE FEE DETERMINATION- In any arbitration proceeding initiated under this subsection, the arbitrator's determination of a fair and reasonable license fee for the performance of the music in the repertoire of the performing rights society concerned shall apply for a period of not less than 3 years nor more than 5 years after the date of the arbitrator's determination.'