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BMI'S FOR-PROFIT MODEL AND CONSENT DECREE REGULATION

INTRODUCTION

Broadcast Music, Inc. (BMI) was founded as a not-for-profit entity administering public performance rights for individual music composers as a collective. Along with the American Society of Composers, Authors and Publishers (ASCAP), the two performing rights organizations (PROs) have captured approximately 90% market share for musical composition public performance licensing.¹ They are deemed “natural monopolies” and have been subjected to court issued consent decree regulation since 1941.² The Department of Justice subjected the consent decrees to review in 2014 and 2019, but both reviews left the decrees in place.³ However, the efficacy of the decrees may be at issue again with BMI’s October 2022 announcement that it was converting to a for-profit business model and the private equity firm New Mountain Capital acquiring a majority stake in BMI on November 21, 2023.⁴

This paper will analyze potential problems BMI may face as a for-profit, investor-owned entity under the consent decrees. Because BMI must return profits for investors alongside maintaining distributions for affiliates (music creators and publishers), the consent decree should be modified to allow for more robust negotiations between BMI and music users. Moreover, U.S. law should differentiate between PROs that operate as not-for-profit versus those that are for-profit akin to the European Union’s distinction codified in EU Directive 2014/26/EU.⁵ Such changes should be implemented in American PRO regulation serving the interests of BMI as it seeks to increase profits for its investors while protecting the value of distributions to creators.

I. THE SWITCH

On October 12, 2022, BMI announced that it was moving to a for-profit business model.⁶

¹ Makan Delrahim, “*And the Beat Goes On*”: *The Future of the ASCAP/BMI Consent Decrees*, Antitrust Division, U.S. Department of Justice (Jan. 15, 2021), <https://www.justice.gov/opa/speech/file/1355241/download>.

² Ariel Katz, *The Potential Demise of Another Natural Monopoly*, J. COMPETITION L. & ECON. 541 (2005).

³ See Delrahim, *supra* note 1.

⁴ Ed Christman, *BMI Moves to For Profit Business Model*, BILLBOARD (Oct. 12, 2022), <https://www.billboard.com/pro/bmi-for-profit-business-model-expansion-investment/>; see also Jem Aswad, *BMI Sold to New Mountain Capital*, VARIETY (Nov. 21, 2023), <https://variety.com/2023/music/news/bmi-sold-new-mountain-capital-1235804157/>.

⁵ See Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on Collective Management of Copyright and Related Rights and Multi-Territorial Licensing of Rights in Musical Works for Online Use in the Internal Market, 2014 OJ (L 84) 72.

⁶ Murray Stassen, *After Scrapping Sale Plans, BMI Transitions to a For-Profit Business Model*, MUSIC BUS. WORLDWIDE (Oct. 12, 2022), <https://www.musicbusinessworldwide.com/bmi-transitions-to-a-for-profit-business-model/>.

In a statement issued by its CEO, BMI stated the purpose of the change was to give the organization “financial flexibility” to “operate in a more commercial way” with an end goal of increasing “royalty distributions at an even greater rate than...before.”⁷ Under BMI’s new model, BMI posited it could “structure, fund and operate new strategic opportunities, adopt new technologies and enhance and expand...services” in a way that as a not-for-profit “would have come at the expense of distributions.”⁸ But the for-profit change, while allegedly intended to diversify BMI’s business, may come at the expense of those very distributions BMI purports to protect.

BMI’s move is not necessarily negative. Indeed, seeking new ways to generate revenue makes logical business sense. But as a for-profit entity, BMI’s goal will be tied to increasing profits for its stockholders. Should revenue stagnate, there is a risk that BMI may pay out less in distributions to creators to make up the deficit.

Since the announcement, BMI revenue has steadily increased. In 2021, BMI as a not-for-profit reported a record \$1.361 billion in revenue with \$1.335 billion paid in distributions.⁹ In 2022, the for-profit BMI posted record annual collection revenue of \$1.573 billion with \$1.471 billion paid in distributions.¹⁰ In its latest annual report, BMI claimed that from 2022-2023, “every distribution [BMI] issued in the last fiscal year was higher than the corresponding one from the previous year.”¹¹ However, verifying this claim will be difficult because BMI failed to post figures revealing what their revenue and distributions for 2023 actually were. In its 2023 report, BMI indicates only that it has taken a 15% cut on revenue to cover “expenses/overhead,” up from a cut of approximately 10% when not-for-profit.¹²

As long as revenues increase, a percentage increase in BMI’s cut might not affect distributions. But BMI’s main purpose is no longer to invest in music distribution on behalf of its members. BMI’s financial health was previously a means to represent affiliate interests in public performance copyrights. As a for-profit, the financial health of BMI and its investors are also its ends.¹³ Though BMI has stated its goal is to “increase distributions” for creators, in lean years, distributions could be reallocated to provide returns not for creators, but for investors.

The pressure on BMI’s revenue stream is even more acute given BMI’s sale to New Mountain Capital. After the switch to for-profit, BMI began pursuing a potential sale of the company to a private equity firm which caused concern among creators.¹⁴ In an open letter, BMI’s

⁷ *Id.*

⁸ *Id.*

⁹ See BMI ANNUAL REPORT 2021 (2021), https://www.bmi.com/pdfs/publications/2021/BMI_Annual_Review_2021.pdf.

¹⁰ Tim Ingham, *BMI Will Pay Songwriters and Publishers Smaller portion of Revenue*, MUSIC BUS. WORLDWIDE (Oct. 17, 2023), <https://www.musicbusinessworldwide.com/bmi-pay-songwriters-and-publishers-a-smaller-portion-of-its-revenues-as-a-for-profit-company-while-upping-its-own-margin-from-10-to-15-of-collections/>.

¹¹ See BMI ANNUAL REPORT 2023 (2023), <https://www.bmi.com/pdfs/publications/2023/bmi-annual-report-2023.pdf>.

¹² *Id.*

¹³ Bill Landsberg, *The Nonprofit Paradox: For-Profit Business Models in the Third Sector*, 6 INT’L J. NOT-FOR-PROFIT L. (2004).

¹⁴ See Tim Ingham, *BMI Hires Goldman Sachs to Explore Strategic Opportunities. Could it End Up Selling*, MUSIC BUS. WORLDWIDE (Mar. 9, 2022), <https://www.musicbusinessworldwide.com/bmi-hires-goldman-sachs-to-explore-strategic-opportunities-could-it-end-up-selling/>.

affiliates asked whether writers and composers would receive part of the proceeds of such sale.¹⁵ The letter argued that the broadcasters on BMI's board were essentially receiving a rebate on licensing fees they had paid to BMI for the right to play BMI's catalogue.¹⁶ Essentially, the creators argued, "the broadcasters got to play their music for free."¹⁷

On November 21, 2023, BMI announced that the private equity investor New Mountain Capital was acquiring BMI "to help accelerate BMI's long-term plan to maximize distributions for its affiliates."¹⁸ As a positive gesture, BMI stated it would allocate \$100 million of the sale proceeds to affiliates.¹⁹ BMI's CEO commented that New Mountain was an "ideal partner" because they "understand that the key to success for [BMI] lies in delivering value to [BMI's] affiliates."²⁰

BMI's affiliates constitute the composers, writers, and publishers that they represent (i.e., the creators). But now that New Mountain has acquired the firm, BMI is also beholden to the limited partners holding the investment capital of New Mountain. If New Mountain is the catalyst by which BMI is to pursue new business ventures or expanded services,²¹ BMI could potentially withhold profits from these ventures for the limited partners at the expense of creator distributions. Furthermore, in the face of BMI's consent decree, regular increases in revenue could flounder.

II. THE CONSENT DECREES

As a refresher, BMI and ASCAP are subject to consent decrees issued to settle antitrust litigation against the PROs. In 1941, Roosevelt's Department of Justice brought antitrust litigation against ASCAP arguing they were fixing supra-competitive prices and setting the terms on which they would enter into negotiations with radio stations.²² During the 1930s, as radio profits increased, ASCAP demanded a larger share of these profits for its composer members arguing radio depressed sales for physical copies of musical works and public performance royalties paid by broadcasters should make up the deficit.²³ Broadcasters, in turn, complained of ASCAP's excessive charges, price-fixing, and negotiating tactics and responded by dropping ASCAP music from the airwaves and funding BMI to compete as an alternative licensing body.²⁴ The DOJ filed against

¹⁵ See Dan Rys, *Songwriter Group's Letter to BMI*, BILLBOARD (Aug. 17, 2023), <https://www.billboard.com/pro/bmi-for-profit-plan-songwriter-groups-letter-ceo/>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Tibor Heskett, *Private Equity Firm New Mountain Capital is Acquiring BMI*, MIXMAG (Nov. 28, 2023), [https://mixmag.net/read/private-equity-firm-new-mountain-capital-bmi-acquisition-performing-rights-organisation-goldman-sachs-news#:~:text=Broadcast%20Music%20Incorporated%20\(BMI\)%2C,billion%20in%20assets%20under%20managem ent.](https://mixmag.net/read/private-equity-firm-new-mountain-capital-bmi-acquisition-performing-rights-organisation-goldman-sachs-news#:~:text=Broadcast%20Music%20Incorporated%20(BMI)%2C,billion%20in%20assets%20under%20managem ent.)

¹⁹ *Id.*

²⁰ *Id.*

²¹ See BMI ANNUAL REPORT 2023 (2023).

²² Christopher Sprigman, *What Does Antitrust's Revival Mean for Copyright?*, 68 J. COPYRIGHT SOC'Y USA 401 (2021).

²³ Lucia Schultz, *Performing-Right Societies in the United States*, 35 NOTES 511, 516 (1979).

²⁴ *Id.*

ASCAP and BMI under the Sherman Act²⁵ and on January 27, 1941, BMI agreed to a settlement of the suit by consent decree with ASCAP's decree following closely behind.²⁶

Under the current consent decrees, the PROs are required to 1) offer blanket licenses on a nondiscriminatory basis, 2) issue non-exclusive licenses on behalf of their composer members, and 3) accept all composers that request to join.²⁷ A further mandate is that if the PROs and a potential licensee are unable to agree on a price for a license, the parties must submit to "rate court" to settle the terms.²⁸ The standard for adjudicating a market rate for a blanket license is not specified, but under the Music Modernization Act, the PROs can use evidence of what a music service pays to other rights' holders as evidence of fair market value for public performance license.²⁹ A further limitation imposed on BMI is a "line-of business" restriction that prohibits BMI from pursuing actions akin to a record label or a publisher.³⁰

Because the major PROs must license on a nondiscriminatory basis to anyone who wishes to play their music and must submit to rate court in the event negotiations break down, the value of collective licenses for public performance music copyrights is arguably depressed. Thus, though BMIs revenues have increased to record levels year-over-year, BMI's ability to negotiate ever-higher rates to return continued profits is heavily regulated.³¹

III. RECENT DEVELOPMENTS

In the past ten years, two separate justice departments have subjected the consent decrees to review. The first review was conducted in 2014 when ASCAP and BMI petitioned the Antitrust Division to modify the existing decrees to allow music publishers to partially withdraw their musical works from the PROs.³² The PROs argued that the consent decrees depressed prices evidenced by the outcome of rate court proceedings between Pandora Radio and ASCAP in which partial withdrawal was denied by the Second Circuit and a percentage increase in licensing rate was set by the court disallowing the music copyright owners from negotiating escalations for writers.³³

That review left the decrees in place, but in 2019, the Trump DOJ opened yet another inquiry into whether the decrees should be terminated. Again, the DOJ left the decrees intact to ensure

²⁵ *United States v. ASCAP*, 41 Civ. 1395 (S.D.N.Y. 1941); *United States v. BMI*, 64 Civ. 3787 (S.D.N.Y. 1941).

²⁶ Schultz, *supra* note 23.

²⁷ See Second Amended Final Judgment, *U.S. v. ASCAP*, No. 41-1395 (WCC), 6, 18 (S.D.N.Y. June 11, 2001); Amended Final Judgment, *U.S. v. BMI*, 64-Civ-3787, 2-4 (S.D.N.Y. Dec. 29, 1966).

²⁸ See Second Amended Final Judgment at 12; Amended Final Judgment at 7.

²⁹ See 17 U.S.C. §114(i) *repealed*.

³⁰ See Amended Final Judgment §IV(B); see also *Public Comments of Broadcast Music, Inc.*, U.S. Department of Justice, Antitrust Division Review of Consent Decree in *United States v. Broadcast Music, Inc.*, 23 (Aug. 6, 2014), <https://www.justice.gov/media/965086/dl?inline>.

³¹ Daniel Crane, *Bargaining in the Shadow of Rate-Setting Courts*, 76 ANTITRUST L.J. 311 (2009).

³² See United States Department of Justice, Antitrust Division, Antitrust Consent Decree Review—ASCAP and BMI (2014), <https://www.justice.gov/atr/ascap-bmi-decree-review>.

³³ See *Pandora Media v. ASCAP*, F. Supp. 3d 317, 357 (S.D.N.Y. 2014); *Pandora Media v. Am. Soc'y of Composers, Authors & Publishers*, 14-1158 (2d Cir. 2015).

continuity in the music composition licensing market.³⁴ Digital music providers welcomed the decision with the head of the Digital Media Association declaring that “successive administrations have now rejected calls to alter these essential pro-consumer protections.”³⁵

Market stability is the likely reason both 2014 and 2019 reviews left the court orders in place. Yet this market stability is in flux because BMI operates for-profit and must generate revenues for its private equity investors indicating that a renewed look at the decrees could be forthcoming. Furthermore, certain arguments made by BMI during the reviews are relevant in the wake of the BMI sale. For instance, In BMI’s 2014 public comments, BMI advocated for the right to license individual sticks in the bundle of copyrights to specific music users.³⁶ BMI reasoned that traditionally, public performers of music only needed performing rights licenses under §106(4) of the Copyright Act.³⁷ But in today’s market, users need permission to make and distribute reproductions under §106(1) and §106(3), and further need display rights under §106(5) to transmit graphic copies of lyrics.³⁸ BMI argued that because users must acquire licenses for a bundle of copyrights, the consent decrees which require blanket licensing of all such bundles should be amended. This argument, denied by the DOJ, may have renewed salience due to BMI’s need to increase revenue streams for investors and affiliates. Diversifying the slate of copyrights BMI is able to license would increase their bargaining power, thus increasing revenue while reflecting modern music market realities.

Additionally, during the 2014 review, BMI sought to amend the “new line-of-business” restriction in their consent decree.³⁹ BMI argued that this restriction, originally put in place in 1966 to inhibit BMI from acting like a music publisher or record label, should be removed to allow BMI to pursue new ventures.⁴⁰ Such “out-of-date” restriction, BMI reasoned, serves only “anticompetitive purposes.”⁴¹ This argument, should also be resurrected in light of BMI’s private equity stakeholder which could acquire other entities to deal directly with BMI.

BMI sought to diversify its copyright licensing business by either offering tailor-made copyright licenses to individual users, or by expanding its operations into other areas of the music business including recording agreements, publishing, or acquisitions. Under the management of a private equity firm, it may end up achieving that goal through New Mountain’s acquisition of affiliates that can work in tandem with BMI, thus rendering the “line-of-business” restriction obsolete. BMI asserts that such business ventures will increase distributions returned for creators.

³⁴ See Antitrust Consent Decree Review—ASCAP and BMI 2019, United States Department of Justice, <https://www.justice.gov/atr/antitrust-consent-decree-review-ascap-and-bmi-2019>.

³⁵ Anousha Sakoui, *Justice Department Leaves Decades-Old Music Industry Decrees Unchanged*, L.A TIMES (Jan. 15, 2021), <https://www.latimes.com/entertainment-arts/business/story/2021-01-15/justice-dept-consent-decrees-music-industry-ascap>.

³⁶ See Public Comments of Broadcast Music, Inc., U.S. Department of Justice, Antitrust Division Review of Consent Decree in *United States v. Broadcast Music, Inc.* (Aug. 6, 2014), <https://www.justice.gov/media/965086/dl?inline>.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

But what they fail to enunciate is the risk involved for BMI in a private equity acquisition in the face of consent decree regulation.

IV. CRITIQUES OF PRIVATE EQUITY

Private equity firms are driven by a financial strategy that emphasizes profit maximization as its overriding goal.⁴² Many private equity acquisitions rely on one or more of four basic components: (1) debt reliance to finance acquisitions; (2) a corporate structure shielding investors from liability for claims of creditors; (3) sale of assets of an acquired entity to an entity related to the private equity firm; and (4) vertical integration with other entities managed and owned by the private equity firm to increase margins.⁴³

Some companies fair well during private equity control and post-private equity exit evidenced by increased sales, earnings, employment, market share, and productivity.⁴⁴ These features are what has made private equity an attractive vehicle both for capital investors and companies seeking acquisition. Moreover, according to an index created by the investment firm Cambridge Associates, over the 25-year period ending March 2019, private equity funds returned more than 13% annualized compared to approximately 9% for an equivalent investment in the stock market.⁴⁵

However, leveraged acquisitions have been shown to increase bankruptcy risk for target firms. Companies acquired through leveraged buyouts, in which the acquirer borrows against the assets of the target to make the purchase, can leave the acquired firm with an unsustainable amount of debt on its balance sheet impacting its ability to survive once a private equity investor exits.⁴⁶ An “exit” can take many forms including an initial public offering (IPO), a sale to a strategic buyer or financial entity, or bankruptcy or out of court restructuring.⁴⁷ One study tracked a sample of 484 leveraged buyouts from 1980 to 2006 finding that the probability of bankruptcy for private equity-owned companies post-exit increased by approximately 18%, a rate ten times that of the study’s control group.⁴⁸

As yet, the details of the BMI acquisition have not been published as the deal is expected to close at the end of the first quarter of 2024.⁴⁹ But if New Mountain acquired BMI by imposing substantial debt upon the company, this could strain the organization. Under a debt obligation, should BMI’s revenue fail to meet New Capital’s projections, could the private equity investors put the company up for auction, or sell the copyright administration rights to another firm? Or could

⁴² Field et al. *Private Equity in Health Care: Barbarians at the Gate?* 15 DREXEL L. REV. 821 (2023).

⁴³ *Commercial Real Estate Investor & Private Equity Liability*, FIRST NATIONAL REALTY PARTNERS (Mar. 2, 2022), <https://fnrpusa.com/blog/commercial-real-estate-investor-private-equity-liability/>

⁴⁴ *See Everything Is Private Equity Now*, BLOOMBERG (Oct. 3, 2019), <https://www.bloomberg.com/news/features/2019-10-03/how-private-equity-works-and-took-over-everything>.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Brian Ayash & Mahdi Rastad, *Leveraged Buyouts and Financial Distress*, 38 FIN. RSCH. LETTERS, (2021).

⁴⁸ *Id.*

⁴⁹ Jed Aswad, *BMI Sold to New Mountain Capital*, VARIETY (Nov. 21, 2023), <https://variety.com/2023/music/news/bmi-sold-new-mountain-capital-1235804157/>.

New Mountain end up making an initial public offering for BMI? How is BMI going to generate ever higher returns for its private equity investors without cutting into distributions to creators when it is subject to consent decrees that mandate it cannot offer different licensing bundles, diversify its business practices, or negotiate freely in an open competitive market? These restrictions in the face of potential debt obligations and the need to increase profits could lead to cuts in distributions to make the model work.

V. SOLUTION: CONSENT DECREE AMENDMENTS AND THE INTERNATIONAL REGIME

One possible solution is to look to international regulation as a framework for implementation in the United States. In 2014, the European Union passed EU Directive 2014/26/EU on the Collective Management of Copyright which distinguishes between collective management organizations (CMOs) run as not-for-profits owned and operated by their members and independent management entities (IMEs) run privately on a for-profit basis.⁵⁰ Thus, in the EU, there is an explicit differentiation between not-for-profit collective copyright management and collective copyright management undertaken for-profit. Article 2(4) specifies which articles within the Directive apply to CMOs and IMEs.⁵¹ IMEs are not subject to the same financial structure as CMOs and have been highlighted as a new potential revenue stream for music creators.⁵² Moreover, they are excluded from mandatory collective management, meaning they can choose which copyright holders they sign.⁵³

The benefits of private, for-profit collective management of copyright is already evidenced in the U.S. with the two smaller PROs (SESAC and GMR) licensing and negotiating on behalf of their slate of writers represented by invitation only without the burden of consent decree regulation. Mandatory representation in the case of for-profit BMI under its consent decree should be discarded analogous to IME regulation.

Furthermore, rate court proceedings and nondiscriminatory licensing should be reformed to allow BMI to negotiate freely with users to maintain adequate revenues for their investors and affiliates. Court dictated rates for BMI, alongside the “line-of-business” restriction impose stringent conditions under which BMI must successfully negotiate to increase profits. In its 2019 public comments, BMI argued that rate court should end were its decree to terminate.⁵⁴ BMI should be allowed to negotiate at will absent a mandated rate court proceeding. At the very least, the standard for setting license rates should more accurately reflect market realities. Rates could be

⁵⁰ See Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on Collective Management of Copyright and Related Rights and Multi-Territorial Licensing of Rights in Musical Works for Online Use in the Internal Market.

⁵¹ *Id.*

⁵² See Alzaga et al., *Independent Management Entities: An Alternative to Collective Management*, GARRIGUES DIGIT. (Jun. 2018), https://www.garrigues.com/en_GB/garrigues-digital/independent-management-entities-alternative-collective-management-organizations.

⁵³ *Id.*

⁵⁴ See BMI’s Response to the Department of Justice’s June 5, 2019 Request for Public Comments Concerning the BMI and ASCAP Consent Decrees, 54, (Aug. 9, 2019), <https://media.justice.gov/vod/atr/ascapbmi2019/pc-077.pdf>.

judged under a willing buyer and willing seller standard used by the Copyright Royalty Board to set online streaming licensing rates under the Copyright Act.⁵⁵

Additionally, implementing a lower standard for DSP safe harbor claims under the Digital Millennium Copyright Act (DMCA) could strengthen BMI's bargaining position against the field of potential music users. The safe harbor provisions of the DMCA⁵⁶ available to DSPs combined with potential rate court proceedings should negotiations with BMI break down puts music users at a superior bargaining position.⁵⁷ The EU could again serve as a guide. EU Directive 2019/190 on Copyright and Related Rights in the Digital Single Market regulates uses of copyrighted content to establish a "well-functioning marketplace."⁵⁸ Article 17 lowers the threshold at which a digital music provider could be liable for infringing content on its services. Distinct from U.S. law where DSPs can receive "safe harbor" protection for *hosting* content under the DMCA, Directive 2019/790 Article 17(1) imposes liability upon a digital service provider whenever such provider grants the public *access* to copyrighted works.⁵⁹ Lowering the threshold for DSP liability could increase PRO bargaining power.

CONCLUSION

The U.S. should amend the decrees and implement similar standards. The traditional consent decrees do not distinguish between not-for-profit and for-profit PROs. Distinct PRO models should receive different treatment. Moreover, BMI needs to continue to increase rates by negotiating in an open market absent the threat of rate court as it is beholden not just to its 1.4 million⁶⁰ affiliates, but also to the limited partners of New Mountain Capital. Rate court should be terminated, or a market standard for licensing negotiations should be implemented. Furthermore, Congress should implement a provision akin to Article 17(1) of EU Directive 2019/790 imposing potential liability on DSPs for providing access to copyrighted content conferring greater bargaining power on the PROs. These consent decree modifications implemented alongside international standards will serve the interests of BMI, other American PROs, and in turn music creators and investors by both increasing revenue and protecting distributions.

⁵⁵ 17 U.S.C. § 115(c)(1)(F).

⁵⁶ See 17 U.S.C. § 512.

⁵⁷ See Daniel Crane, *Bargaining in the Shadow of Rate-Setting Courts*, 76 Antitrust L.J. 311 (2009).

⁵⁸ See Directive 2019/790/EU DSM Copyright Directive, Article 1(1), <https://eur-lex.europa.eu/eli/dir/2019/790/oj>.

⁵⁹ *Id.*

⁶⁰ See *What We Do*, BMI, <https://www.bmi.com/about>.