

Winter 2012

Changing Tides in Music Licensing? BMI v. DMX and In re THP

Carly Olson

Recommended Citation

Carly Olson, *Changing Tides in Music Licensing? BMI v. DMX and In re THP*, 10 NW. J. TECH. & INTEL. PROP. 277 (2012).
<https://scholarlycommons.law.northwestern.edu/njtip/vol10/iss3/8>

This Comment is brought to you for free and open access by Northwestern Pritzker School of Law Scholarly Commons. It has been accepted for inclusion in Northwestern Journal of Technology and Intellectual Property by an authorized editor of Northwestern Pritzker School of Law Scholarly Commons.

N O R T H W E S T E R N
JOURNAL OF TECHNOLOGY
AND
INTELLECTUAL PROPERTY

**Changing Tides in Music Licensing?
*BMI v. DMX and In re THP***

Carly Olson



Changing Tides in Music Licensing? *BMI v. DMX* and *In re THP*

By Carly Olson*

¶1 In cafés, restaurants, bars, and stores, music creates an ambience to keep customers happy. But this music is not free. Most businesses that play music must pay royalties to the copyright holders or else risk liability for copyright infringement. Traditionally, proprietors have protected themselves by entering into blanket agreements with performing rights organizations (PROs), which give licensees the unlimited right to play any music from the PRO's catalog in return for an annual fee.¹

¶2 Recently, however, one company that plays such background music has entered into a different kind of licensing agreement. It makes direct payments to copyright holders to license music and then deducts those payments from its annual fee to the PRO. Last year this arrangement led to two lawsuits in the Southern District of New York which could significantly impact the music business:² *Broadcast Music, Inc. v. DMX, Inc.*³ and *In re THP Capstar Acquisition Corp.*⁴

¶3 The first case involves a dispute between Broadcast Music, Inc. (BMI), one of the two major PROs in the United States, and DMX, Inc. (DMX), a commercial music services provider (CMSP) that provides background music for public spaces. The two companies disagreed over the fees for an adjustable-fee blanket license (AFB license), a method of payment that allows a licensee to reduce the fees it owes the PRO by licensing music directly from the copyright holder.⁵ Both parties agreed that DMX should pay BMI an annual "per-location rate," but they had vastly different views of what the rate should be. BMI requested \$41.81 per location, while DMX proposed \$11.32 per location.⁶

¶4 The case *In re THP* covered largely the same issues as *BMI v. DMX*, but involved the other major PRO, the American Society of Composers, Authors and Publishers (ASCAP). In this case, DMX offered ASCAP the same general fee structure that BMI proposed.⁷ ASCAP contended that an AFB license was unreasonable and that it was not required to issue a license.⁸ Therefore, ASCAP refused to suggest a reasonable AFB

* Carly Olson is a third-year student at Northwestern University School of Law. She would like to thank her family, friends, professors, and peers for all of their support and assistance.

¹ See, e.g., *United States v. Broad. Music, Inc. (In re AEI Music Network, Inc.)*, 275 F.3d 168, 172 (2d Cir. 2001); *United States v. Am. Soc'y of Composers, Authors & Publishers*, 831 F. Supp. 137, 166–67 (S.D.N.Y. 1993).

² Ed Christman, *Licensed to Ill: U.S. Appeals Court's BMI Rate Decision Could Signal Other Changes for PROs*, BILLBOARD, Sept. 18, 2010, at 8.

³ 726 F. Supp. 2d 355 (S.D.N.Y. 2010).

⁴ 756 F. Supp. 2d 516 (S.D.N.Y. 2010).

⁵ *BMI v. DMX*, 726 F. Supp. 2d at 355.

⁶ *Id.* at 355, 357.

⁷ *In re THP*, 756 F. Supp. 2d at 535.

⁸ *Id.* at 539.

license fee structure and instead offered two proposals: a blanket license with no carve-outs and a blanket license with a static carve-out.⁹

¶15 An AFB license is essentially a blanket license, from which CMSPs can subtract a proportional credit reflecting the performances of the PRO's music it has directly licensed. CMSPs still have to contract with large PROs because it is not feasible for them to directly license a PRO's entire catalog, which can consist of millions of musical works and hundreds of thousands of copyright holders.¹⁰ An AFB license allows CMSPs to protect themselves from liability for copyright infringement while still trying to save money by directly licensing music from specific copyright holders.

¶16 This issue has arisen only recently because in past years blanket licenses with PROs were the only practicable way for CMSPs to license musical works. It used to be too laborious and time-consuming for a CMSP to contact individual music publishers or copyright holders to attempt to directly license their works. Now, however, it is relatively quick and easy to contact multiple businesses around the country. Technological advances allow CMSPs to directly license music and to keep track of how much directly licensed music it plays. Therefore, AFB licenses are not only feasible in a way they were not before, but are also an attractive way for CMSPs to try to save money.

¶17 The *BMI v. DMX* and *In re THP* courts came to conclusions that conform to the government's model and further the government's goal of maintaining reasonable music licensing fees. These decisions provide a means by which CMSPs can directly license music from copyright holders and deduct the fees from their blanket licenses. The decisions also recognize that the blanket fees BMI offered were unreasonable.¹¹ This helps fulfill the original intent of the consent decrees under which BMI and ASCAP are allowed to operate: to "provid[e] a mechanism for the setting of reasonable license fees in a unique market in which ASCAP [and BMI] indisputably exercise[] market power."¹² BMI is resisting this decision in court, attempting to thwart the terms of its consent decree to retain its near monopoly on the music licensing industry.¹³

¶18 In Part I, this Note examines the historical developments in music licensing that led to the *BMI v. DMX* and *In re THP* cases. Part II examines how DMX sought direct licenses from copyright holders. Parts III and IV discuss the recent *BMI v. DMX* and *In re THP* decisions, respectively. Part V discusses the decisions' potential future effects on the music licensing industry as well as other industries that use similar licensing practices. Part VI concludes by examining BMI and ASCAP's opposition to the decisions, explaining that the Second Circuit should uphold the decisions of the district court to conform with government intent.

⁹ *Id.*

¹⁰ See e.g., *Search the Repertoire*, BROADCAST MUSIC, INC., <http://www.bmi.com/search/> (last visited Nov. 14, 2011).

¹¹ *BMI v. DMX, Inc.*, 726 F. Supp. 2d at 359.

¹² *In re THP*, 756 F. Supp. 2d at 541.

¹³ See, e.g., *BMI Appeals DMX Rate-Court Decision*, BROADCAST MUSIC, INC. (Aug. 24, 2010), <http://www.bmi.com/news/entry/549016>.

I. HISTORICAL DEVELOPMENTS

¶9 DMX considers itself an “international leader” in multi-sensory branding that has been “creating unforgettable brand experiences for commercial environments” since 1971.¹⁴ This branding includes providing music for clients to play in their places of business. DMX delivers music to customers by satellite transmission, disc, and electronically transmitted programming data.¹⁵ DMX has licenses with both BMI and ASCAP.¹⁶ DMX uses technology that allows it to accurately report music use and to directly license with publishers “representing a total of more than 7,000 catalogs.”¹⁷

¶10 BMI and ASCAP are the two major PROs that license the public performance rights for most copyrighted music in the United States.¹⁸ They “grant[] licenses to music users, collect[] license fees from them, and distribute[] the royalties among [their] affiliated copyright holders.”¹⁹ BMI was founded in 1939 as a not-for-profit organization representing the owners of copyrighted music to issue non-exclusive licenses to music users.²⁰ ASCAP was formed in 1914 as a means to enforce the copyrights for works performed for profit, which were too difficult for the individual copyright owners to manage.²¹ The two organizations have come to dominate the field of music licensing, meaning that nearly anyone who wishes to play music in public has to contract with both.²²

¶11 The U.S. government, concerned that this two-party control of music publishing could be anti-competitive, brought antitrust suits against each company in 1941.²³ To settle both suits, the court approved consent decrees²⁴ that allowed BMI and ASCAP to operate under regulations designed to limit the likelihood of the companies engaging in monopolistic behavior.²⁵ The government believed that the “rate court” mechanism would protect bulk music users from PROs’ attempts to exert their market power in setting blanket licensing fees,²⁶ foster competition, and further the antitrust goals of the consent decrees.²⁷

¶12 The consent decrees allow BMI and ASCAP to license music through non-exclusive blanket licenses, which the Supreme Court has held is not per se invalid under

¹⁴ *About Us*, DMX, <http://www.dmx.com/about> (last visited Nov. 14, 2011).

¹⁵ *BMI v. DMX*, 726 F. Supp. 2d at 364.

¹⁶ *See In re THP*, 756 F. Supp. 2d. at 518, 541.

¹⁷ *Id.* at 532.

¹⁸ *United States v. Broad. Music, Inc. (Music Choice IV)*, 426 F.3d 91, 93 (2d Cir. 2005).

¹⁹ *In re AEI Music Network, Inc.*, 275 F.3d 168, 171 (2d Cir. 2001).

²⁰ *United States v. Broad. Music, Inc. (Music Choice II)*, 316 F.3d 189, 190 (2d Cir. 2003).

²¹ *United States v. Am. Soc’y of Composers, Authors & Publishers*, No. 13-95 (WCC), 1993 WL 60687, at *3 (S.D.N.Y. Mar. 1, 1993).

²² *See* William Sloan Coats et al., *Surfacing from the Depths: Submarine Issues in Copyright and Rights of Publicity Licensing*, in UNDERSTANDING THE INTELLECTUAL PROPERTY LICENSE 2008, at 195, 216–18 (PLI Patents, Copyrights, Trademarks, & Literary Prop., Course Handbook Ser. No. 950, 2008); *see also* Chris Bosman, *ASCAP, BMI, SESAC Hurting Musicians*, PREFIX (Nov. 19, 2009, 7:19 PM), <http://www.prefixmag.com/news/ascap-bmi-sesac-hurting-musicians/34969/>.

²³ *In re AEI*, 275 F.3d at 171–72.

²⁴ *Id.* at 172; *Music Choice IV*, 426 F.3d 91, 93 (2d Cir. 2005).

²⁵ *In re AEI*, 275 F.3d at 175.

²⁶ *Id.* at 176.

²⁷ *Id.* at 172–73.

antitrust law.²⁸ BMI and ASCAP have traditionally conducted business using such blanket licenses, which allow licensors access to the PRO's entire catalog for a flat fee. ASCAP's consent decree, effective since 1950, provides that, in the event that ASCAP and its customers cannot agree on reasonable license fees, a court could determine the rate.²⁹ Since 1994, BMI has been subject to the same regulation.³⁰ The goal of the rate court is to identify a rate that two similarly situated parties, operating willingly, would agree on in an arm's-length transaction.³¹ To determine the rate, the rate court identifies a benchmark—a previous deal reached between similarly situated parties—and then contemplates differences between the parties in the instant case and those in the benchmark deal.³²

¶13 BMI's consent decree places various restrictions on the company. It requires BMI to make licenses of its music available to any applicant, affiliate, or broadcaster.³³ It prohibits BMI from discriminating between similarly situated licensees and bars BMI from preventing the writers or publishers of a musical work from licensing their work directly.³⁴ When BMI negotiated its agreements with CMSPs for blanket fees starting in 2004, seventy-five percent of the CMSPs had been operating for years without a blanket fee agreement.³⁵ This gave BMI bargaining power. The first agreement BMI negotiated in 2004 was with Muzak, one of DMX's fellow CMSPs. Muzak had not had a negotiated blanket fee agreement with BMI since 1994.³⁶ The agreement reached by BMI and Muzak accounted for the difference between the rates Muzak had been paying for the past decade and the rates BMI viewed as reasonable.³⁷ This difference came to between \$4.5 and 5.5 million.³⁸ Instead of retroactively paying the difference, the parties simply made the future rates higher to make up for the past debt; the per-location rate had previously ranged between \$14 and \$15, but the 2004 agreement set each at \$36.36.³⁹ This rate was understood to be a compromise between BMI and Muzak, but was not explicitly stated in the agreement.⁴⁰

¶14 BMI then offered the same rate to the other members of the CMSP industry, including DMX.⁴¹ BMI declared it was unwilling to negotiate the per-location rate of

²⁸ *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 24 (1979); *see also* *Buffalo Broad. Co. v. Am. Soc'y of Composers, Authors & Publishers*, 744 F.2d 917, 918 (2d Cir. 1984) (finding that because there are feasible alternatives to blanket licenses, such as direct licensing, blanket licenses are not per se an unreasonable restraint on trade).

²⁹ *In re AEI*, 275 F.3d at 172.

³⁰ *Music Choice IV*, 426 F.3d 91, 93 (2d Cir. 2005).

³¹ *See Music Choice II*, 316 F.3d 189, 194 (2d Cir. 2003).

³² *See Broad. Music, Inc. v. DMX, Inc.*, 726 F. Supp. 2d 355, 357 (S.D.N.Y. 2010).

³³ *In re AEI*, 275 F.3d at 171–72.

³⁴ *Id.* at 172.

³⁵ *BMI v. DMX*, 726 F. Supp. 2d at 359.

³⁶ *Id.* at 358.

³⁷ *Id.*

³⁸ *Id.* at 358–59.

³⁹ *Id.* The \$36.36 rate was merely the \$6 million annual fee Muzak had agreed to pay divided by the amount of locations Muzak had (165,000). The license also provided for increased annual fees in the event that Muzak experiences growth. *Id.*

⁴⁰ *Id.* at 358–59 (“In fact, the \$36.36 per-location figure in the BMI/Muzak 2004–2009 license is no more than an arithmetical allocation of the \$30 million flat fee, and as an economic matter must be understood as including a significant component for the \$4.5 to \$5.5 million ‘retroactive’ claim.”).

⁴¹ *Id.*

\$36.36 because to do so would violate its consent decree's prohibition of discriminating between licensees similarly situated.⁴² In order to challenge the \$36.36 rate, CMSPs would have to appeal to the rate court. However, if they did so, BMI could exert its reserved right to seek retroactive payments for the period in which they had operated without a blanket agreement.⁴³ The CMSPs could not realistically negotiate with BMI, and nearly all of them accepted the form agreement containing the \$36.36 per-location rate set by Muzak's agreement.⁴⁴ In this way, BMI forced the rates for the entire CMSP industry up and inverted the purpose of the consent decree. Instead of protecting CMSPs from BMI's exerting its market force, the consent decree had become a restriction that forced the whole industry to pay the same increased rate.

¶15 In 2001, the Second Circuit decided in *United States v. Broadcast Music, Inc. (In re AEI Music Network, Inc.)* that BMI's consent decree required the company to issue an AFB license with a reasonable fee structure upon request.⁴⁵ The purpose was to "check, to some degree, the market power of the BMI rights holder collective" by "plac[ing] an upper limit on the price that BMI can charge for the blanket license" because direct licensing would act as a market-based constraint on BMI.⁴⁶ Despite this decision, and despite multiple requests for AFB licenses, BMI had not issued a single AFB license at the time that this case was decided.⁴⁷

II. DMX'S DIRECT LICENSING

¶16 In 2005, after DMX had been purchased out of bankruptcy, the company found that the rates BMI and ASCAP were charging it were too high for the difficult economy and the competition in the CMSP industry.⁴⁸ New competitors had entered the marketplace, such as music consultants and streaming Internet-based services, which caused both DMX's fees and its revenues to decrease.⁴⁹ Because the fees DMX pays PROs constitute one of the company's largest costs of sale,⁵⁰ DMX attempted to license performance rights directly from copyright holders to control its costs.⁵¹ It offered copyright holders an annual fee of \$25 multiplied by the number of locations for which DMX provided music.⁵² DMX believed that this rate was reasonable given the market.⁵³ By the time of

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *In re AEI Music Network, Inc.*, 275 F.3d 168, 177 (2d Cir. 2001) ("[W]hen an applicant . . . requests a blanket license with a fee structure that reflects such alternative licensing, BMI must advise the applicant of the fee it deems reasonable Failure to do so will empower the district court to set a reasonable fee.").

⁴⁶ Memorandum of the United States on Decree Construction Issues at 2, *BMI v. DMX*, 726 F. Supp. 2d 355 (S.D.N.Y. 2010) (No. 08 Civ. 216 (LLS)), available at <http://www.justice.gov/atr/cases/f257700/257736.pdf>.

⁴⁷ *Id.* at 1–2.

⁴⁸ *BMI v. DMX*, 726 F. Supp. 2d at 359.

⁴⁹ *In re THP Capstar Acquisition Corp.*, 756 F. Supp. 2d 516, 527–28 (S.D.N.Y. 2010). DMX's rates declined by twenty-five percent from July 2008 to September 2010. *Id.* at 528.

⁵⁰ *Id.* at 528.

⁵¹ *BMI v. DMX*, 726 F. Supp. 2d at 359.

⁵² *Id.*

⁵³ *Id.*

the December 2010 trial, DMX had secured approximately 850 direct licenses covering over 7,000 catalogs, which accounts for thirty percent of the company's programming.⁵⁴

¶17 For the direct licensing effort to pay off, DMX calculated that it needed to secure direct licenses with one or two of the four major music publishers.⁵⁵ DMX realized that this would be difficult, as the practice of blanket licensing was an agreement the music licensing industry was accustomed and dedicated to, and most of the major publishers sat on the board of ASCAP.⁵⁶ To overcome this obstacle, DMX decided to offer incentives: advances of fifty percent over what BMI and ASCAP had been paying the major music publishers for the music DMX played.⁵⁷

¶18 This approach worked to secure a direct license with Sony/ATV Music Publishing, Inc. (Sony), one of the four major music publishers.⁵⁸ This agreement between DMX and Sony was an important factor in persuading other music publishers to enter into direct licenses with DMX.⁵⁹ DMX also attempted to secure a direct license with another major publisher, Universal Music Publishing Group (Universal).⁶⁰ Universal, however, informed BMI of the negotiations to leverage advances from BMI.⁶¹ Universal accepted BMI's offer of a \$1,875,000 guarantee for the years 2008–2010 and did not enter into a direct license agreement with DMX.⁶²

III. *BMI v. DMX*

¶19 Because the court already declared in 2001 that BMI had to offer AFB licenses,⁶³ the issue in *BMI v. DMX* was not whether DMX is entitled to an AFB license, but what the basis is for the rate of such a license.⁶⁴ Even though DMX already succeeded in licensing directly with several music publishers, it had not yet agreed how the fees it owed to BMI would be determined. The two parties had very different ideas as to what constitutes a reasonable market rate to calculate the fees DMX owed.⁶⁵ It was, therefore, the court's duty, as declared in BMI's consent decree, to determine a reasonable rate. The court noted at the outset of its discussion of the issues that, under its consent decree, BMI bore the burden of proof in establishing the reasonableness of the fees it proposed.⁶⁶

¶20 The parties agreed that DMX should owe BMI a per-location rate and that the AFB license should include three components: (1) a "blanket fee," the fee DMX would pay if it did not directly license any of BMI's music it performs; (2) a "floor fee," the lowest fee DMX could pay to BMI, even if it directly licensed all of BMI's music; and (3) a "direct license ratio," which determines the percentage of BMI songs that DMX played that it

⁵⁴ *In re THP*, 756 F. Supp. 2d at 528, 532.

⁵⁵ *BMI v. DMX*, 726 F. Supp. 2d at 360.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *In re AEI Music Network, Inc.*, 275 F.3d 168, 171 (2d Cir. 2001).

⁶⁴ *BMI v. DMX*, 726 F. Supp. 2d at 355–56.

⁶⁵ *Id.* at 358, 362–63.

⁶⁶ *Id.* at 357.

directly licensed.⁶⁷ The parties disagreed, however, on what reasonable blanket and floor fees would be and how to calculate the direct license ratio.⁶⁸

A. *Blanket Fee*

¶21 Each party proposed a different benchmark to establish the blanket fee.⁶⁹ BMI argued that the blanket license agreement reached with Muzak in 2004 is the most appropriate benchmark,⁷⁰ given DMX’s other competitors accepted the same rate in their blanket licenses.⁷¹ Therefore, since the goal of the rate court is to determine “the price that a willing buyer and a willing seller would agree to in an arm’s length transaction,”⁷² BMI argued that the price other CMSPs paid in their transactions with BMI represents the fair market value of the licenses. Therefore, BMI declared that the benchmark rate should be \$36.36 annually per location. BMI also demanded to increase the annual per location rate by fifteen percent to compensate BMI for the additional cost it would incur and for the benefit DMX would gain under an AFB license instead of a blanket license.⁷³ DMX’s blanket fee should thus, BMI argued, be \$41.81 annually per location.⁷⁴

¶22 The United States took the “unusual step” of submitting a memorandum on the issue of BMI’s proposed blanket fee increase for the “option value” of the AFB license while the case was still active.⁷⁵ The memorandum declared that “[t]he United States believes that this proposed increased fee undermines the BMI Consent Decree. BMI’s approach would deter users from engaging in direct licensing with rights holders—a critical component of the structures created under the decree.”⁷⁶ The government further asserted that agreeing to BMI’s proposed “option value premium” for the AFB license would subvert the consent decree as well as *In re AEI Music Network, Inc.* by making directly licensing performance rights economically impractical for BMI licensees.⁷⁷ The government clearly opposed the increased fee BMI advocated.

¶23 The court, examining the \$41.81 blanket fee proposed by BMI, found that the competing CMSPs “had no realistic opportunity freely to negotiate the future fees for their licenses,” and, therefore, that the \$36.36 fee they agreed to did not really reflect fair market value.⁷⁸ Therefore, the blanket agreement between BMI and Muzak, as well as all the agreements reached pursuant to that agreement, were “not reliable benchmarks” to use in determining DMX’s blanket fee.⁷⁹ Instead, the court found that DMX’s proposal of using its direct licenses as a benchmark was appropriate because the 550 direct

⁶⁷ *Id.* at 355–56.

⁶⁸ *Id.* at 356, 364.

⁶⁹ *Id.* at 357.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Music Choice II*, 316 F.3d 189, 194 (2d Cir. 2003) (quoting *Am. Soc’y of Composers, Authors & Publishers v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563, 569 (2d Cir. 1990)) (internal quotation marks omitted).

⁷³ *BMI v. DMX*, 726 F. Supp. 2d at 357.

⁷⁴ *Id.*

⁷⁵ Memorandum of the United States on Decree Construction Issues, *supra* note 46, at 1.

⁷⁶ *Id.*

⁷⁷ *Id.* at 2.

⁷⁸ *BMI v. DMX*, 726 F. Supp. 2d at 359.

⁷⁹ *Id.*

licenses DMX acquired were “sufficiently representative of the performance rights BMI provides through its blanket licenses.”⁸⁰ The court therefore found that \$25 per location annually was an appropriate benchmark for the blanket fee,⁸¹ and that the blanket fee should be \$10.25 more than the floor fee.⁸²

B. Floor Fee

¶24 As the court explained, “[t]he Floor Fee represents the value to DMX of the portion of the [AFB license] that is independent of the value of the music performing rights.”⁸³ This fee remains constant, no matter how much of the BMI catalog that DMX has directly licensed.⁸⁴ In determining the floor fee, the court attempted to ensure that BMI would not lose money by administering an AFB license for DMX.⁸⁵

¶25 Both BMI and DMX agreed that the floor fee should include the PRO’s overhead costs.⁸⁶ The rate for the overhead costs was an issue of contention, however; BMI wanted to use its domestic rate of 17% and DMX wanted to use the 11.7% rate BMI had announced in a press release in 2008, which included international performances.⁸⁷ The court found that because this case involved domestic performances, and because BMI monitors and distributes the license fees for domestic performances, the higher rate was appropriate.⁸⁸ Thus, the court included 17% of BMI’s \$36.36 per-location rate, or \$6.18, in the floor fee for overhead costs.⁸⁹

¶26 The court agreed that DMX’s AFB license would be more expensive for BMI to administer than a regular blanket fee.⁹⁰ The court undertook the duty to determine how much of those increased costs should be added to the floor fee. Despite DMX’s objections that the increased costs were unproven, the court accepted BMI’s estimates for the additional cost BMI would incur as a result of the AFB license.⁹¹

¶27 The district court divided the incremental costs into two groups: the one-time costs required to set up the AFB license and the regular costs associated with administering the AFB license.⁹² The court ruled that DMX should be completely responsible for the latter

⁸⁰ *Id.* at 360.

⁸¹ *Id.* at 361.

⁸² In determining the appropriate blanket fee, the court ruled that ten percent of the incremental costs, or \$0.25, should be included in the per-location blanket fee for the “return on investment in the incremental costs.” *Id.* at 364. It also found that the \$10 “music fee” DMX proposed should be included in the blanket fee. *Id.*

⁸³ *Id.* at 361. The value “includes the convenience of gaining access to the entire BMI repertoire in one license, the immediate right to access new BMI works, and protection against copyright infringement.” *Id.* at 361–62.

⁸⁴ *Id.* at 355.

⁸⁵ *Id.* at 362–63.

⁸⁶ *Id.* at 362.

⁸⁷ *Id.* BMI applies this 17% overhead rate to each of its commercial music service industry licenses. *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 364.

⁹⁰ *Id.* at 362.

⁹¹ Since BMI had not administered any AFB licenses at the time, the estimates submitted were sufficient because they expressed BMI’s costs associated with administering per-program licenses in the television industry (which also involves direct licensing). *Id.*

⁹² *Id.*

costs, but should only be responsible for its share of the former costs.⁹³ BMI calculated the costs associated with implementing systems to administer the AFB license to be \$339,875.⁹⁴ But since other CMSPs are likely to use these systems in the future, the court found that “[c]harging all the initial costs to DMX would be unfair. Simply being the first licensee to take advantage of the [AFB license] . . . should not require DMX to bear all the developmental costs associated with it.”⁹⁵ Instead, it found that the costs of developing the AFB license system should be spread over all the licensees who take advantage of the AFB license.⁹⁶ Since it is impossible to determine how much of the initial implementation costs will be attributable to DMX before they are incurred, the court found it reasonable for DMX to bear the percentage of the implementation costs that corresponded to its market share of CMSP locations.⁹⁷ The court calculated that this amounted to a \$0.10 annual per-location fee for implementation costs.⁹⁸

¶28 As stated above, the court declared that DMX should pay the routine costs necessary to administer its AFB license.⁹⁹ The court accepted the bulk of BMI’s estimates of the routine expenses associated with administering the AFB license.¹⁰⁰ The court determined the routine costs to be \$2.38 per location.¹⁰¹ The floor fee that the rate court determined comprised \$6.18 for overhead costs, \$0.10 for implementation costs, and \$2.38 for routine costs, for a total of \$8.66.¹⁰² The court set the blanket fee at \$18.91, adding \$10.25 to the floor fee.¹⁰³ This was significantly less than BMI’s proposed blanket fee (which was \$41.81), but more than DMX’s proposed blanket fee (which was \$11.32).¹⁰⁴

IV. *IN RE THP*

¶29 There were two issues at play in *In re THP*: (1) whether ASCAP was required to grant DMX an AFB license, and (2) what constituted a reasonable rate structure for their agreement.

⁹³ *Id.* at 362–63.

⁹⁴ The initial incremental costs will be incurred by BMI’s IT and Operations Departments. *Id.* at 363.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ The court found that DMX’s market share of CMSP locations was approximately 16.6%. *Id.* at 364. BMI estimates the initial costs at \$339,875, arguing DMX should pay for \$56,419.25 of the implementation costs (16.6% of \$339,875). *Id.*

⁹⁹ *Id.* at 362.

¹⁰⁰ The court said that the \$10,000 BMI claimed it would incur for travel would be used for industry conventions and publisher meetings, and should thus not be included. *Id.*

¹⁰¹ *Id.* at 364. These costs will be incurred by BMI’s Licensing, Performing Rights, IT, and Operations Departments. *Id.* at 362. BMI estimated that the Licensing and Performing Rights Departments would incur \$151,000 in routine costs and the IT and Operations Departments would incur \$37,073 in annual costs. *Id.*

¹⁰² *Id.* at 364.

¹⁰³ *Id.*

¹⁰⁴ There was also a determination of the direct license ratio needed to calculate fees, but an examination of the disagreements surrounding that factor is not pertinent to this Note. *See id.* at 364–67.

¶30 DMX requested an AFB license from ASCAP at the same time it did so from BMI.¹⁰⁵ It proposed a rate structure nearly identical to that deemed reasonable and adopted by the court in *BMI v. DMX*.¹⁰⁶ DMX suggested the same benchmark Judge Stanton adopted in that former case.¹⁰⁷ Unlike BMI, however, ASCAP refused to suggest a reasonable fee for an AFB license.¹⁰⁸ It argued that an AFB license is not a reasonable fee structure “because no willing seller would ever offer such a license,” and, therefore, ASCAP should not be required to offer it.¹⁰⁹

¶31 Instead, ASCAP requested a blanket license that charged DMX a flat fee of \$15,677,777 for June 2005 to December 2009 and \$49 per location for January 2010 to December 2012.¹¹⁰ The court found this unacceptable for several reasons. First, it found that a reasonable licensing fee would have to consider DMX’s “well-developed direct licensing program”¹¹¹ and that an AFB license was not only appropriate, but also justified.¹¹² It also noted that DMX had shown that such a license would further the government’s original goal in granting ASCAP a consent decree by adding competition to the marketplace.¹¹³ Finally, the court found that the rates proposed by ASCAP were “far above any yet paid by a licensee” and unreasonable.¹¹⁴

¶32 The court deemed ASCAP’s second proffered option, a blanket license with a static carve-out, to be unacceptable.¹¹⁵ ASCAP proposed that DMX pay a flat fee of \$3,420,606 per year for the period from June 2005 to December 2009, less direct licenses, plus \$25,000 per year for “additional administrative expense[s].”¹¹⁶ For January 2010 to December 2012, ASCAP proposed a \$49 per location annual blanket rate with a \$230,000 carve-out credit each year plus an administrative charge of \$25,000 per year.¹¹⁷ ASCAP derived the \$49 rate, similar to BMI’s proposal in *BMI v. DMX*, from an agreement with Muzak; as in the previous case, the court found that the Muzak agreement was “not a reliable benchmark.”¹¹⁸

¶33 The court noted that the proposed shift from the 2005–2009 fee structure to the 2010–2012 fee structure was highly suspect. The switch coincided suspiciously with DMX’s entry into an agreement with DirecTV to take over the satellite television company’s music channels, which raised DMX’s locations from 70,000 to 95,000.¹¹⁹ The increase in locations would have brought the per-location rate below the flat fee per-location rate in 2010, meaning that ASCAP would not make as much money as it would if it charged per location. The court observed that “ASCAP simply abandons the flat fee

¹⁰⁵ *In re THP Capstar Acquisition Corp.*, 756 F. Supp. 2d 516, 535 (S.D.N.Y. 2010).

¹⁰⁶ *Id.* at 536.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 539.

¹⁰⁹ *Id.* at 541.

¹¹⁰ *Id.* at 539.

¹¹¹ *Id.* at 540.

¹¹² *Id.* at 541.

¹¹³ *Id.*

¹¹⁴ *Id.* at 539.

¹¹⁵ *See id.* at 541–47.

¹¹⁶ *Id.* at 541–42.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 543.

¹¹⁹ *Id.* at 521, 543.

when it no longer benefits from it and proposes a different method of calculating an annual fee for this latter period.”¹²⁰

¶34 The court also found the proposal unreasonable because “it [did] not allow DMX to reduce its payments to ASCAP based on the proportion of directly licensed music that it performs.”¹²¹ If allowed, this would remove any incentive for DMX to enter direct licenses because any time DMX enters into a new direct licensing agreement it will be paying more in total licensing fees.¹²² ASCAP’s proposal would have forced DMX to either reduce the amount of music it directly licenses below the ASCAP-granted credit or not have an ASCAP blanket license at all.¹²³

¶35 ASCAP also failed to provide evidence supporting the \$25,000 annual administrative costs fee and, in fact, “did no formal analysis or study to arrive at th[at] figure.”¹²⁴ The court found ASCAP’s proposals “extraordinarily aggressive”¹²⁵ and “strongly anti-competitive.”¹²⁶ Instead, the court opted to accept DMX’s proposal, referring to *BMI v. DMX*: “[I]t is noteworthy that BMI did not contest that its licensing fee arrangement with DMX should be structured in a manner very similar to this. Also, Judge Stanton recently approved this structure in setting the blanket license fee that DMX owes to BMI.”¹²⁷ The court noted that Judge Stanton’s judgment on issues similar to those present in *BMI v. DMX* affirmed the reasonableness of DMX’s proposal in *In re THP*.¹²⁸

V. FUTURE EFFECTS

¶36 This section examines the effects these decisions may have. It discusses the potential positive and negative effects on current industry players, as well as the effects on outside industries, and the potential they create for new industries.

A. Negative Effects for Rights Holders

¶37 In a press release on its website, BMI announced that it had filed an appeal on behalf of its songwriters, composers, and music publishers.¹²⁹ The release asserts that the decision would cause BMI’s copyright holders to lose “more than half of their income from DMX.”¹³⁰ It characterizes the fees established by DMX’s direct licenses as “deeply discounted,” asserting that the market rate for both BMI and ASCAP before the decision was \$77 per location.¹³¹ BMI, a not-for-profit company, declares that more than eighty-

¹²⁰ *Id.* at 544.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 545.

¹²⁵ *Id.* at 539.

¹²⁶ *Id.* at 544.

¹²⁷ *Id.* at 548 (citing *Broad. Music, Inc. v. DMX, Inc.*, 726 F. Supp. 2d 355, 367 (S.D.N.Y. 2010)).

¹²⁸ *Id.* at 552.

¹²⁹ See, e.g., *BMI Appeals DMX Rate-Court Decision*, *supra* note 13.

¹³⁰ *Id.* (internal quotation marks omitted).

¹³¹ *Id.*

seven percent of all the fees paid to BMI go to the affiliated copyright owners.¹³² The overarching theme of the press release is that the decision reached in *BMI v. DMX* will result in rights holders receiving a fraction of what they previously received for the right to perform their works. Some media outlets estimate that “the decision could cost BMI songwriters and publishers about \$9 million per year, as well as \$17 million in retroactive adjustments.”¹³³ ASCAP stated in its 2010 Annual Report that it is appealing the district court decision.¹³⁴

B. Positive Effects for Rights Holders

¶38 Despite claims to the contrary, this decision may benefit rights holders. DMX’s general counsel claims that direct licensing “presents an opportunity for [music] publishers—and the writers they represent—to receive greater royalties through DMX’s increased use of their musical compositions.”¹³⁵ Since DMX aims “to construct programs that rely heavily on music covered by its direct licenses,” direct licensors are likely to experience increased royalties from DMX due to increased numbers of performances.¹³⁶

¶39 DMX’s general counsel also touts the direct licenses’ transparency, which allows licensors to see exactly how many times DMX has performed any given song, as well as the resulting royalty payments.¹³⁷ Many users have criticized PROs’ lack of transparency because the PROs are unable to offer such an accurate representation of the exact number of times a song has been performed for purposes of royalty calculation. BMI describes its method for determining how frequently commercial radio plays affiliates’ music as such:

All licensed stations are requested to log performances for a three-day period each year, with different stations logging each day of the year. This sample is then factored to create a statistically reliable projection of all feature performances on all commercial music format radio stations throughout the country. In addition to the sample, BMI includes data provided by proprietary pattern-recognition technology, which identifies performances from any source containing audio, achieving extraordinary accuracy, even in high-noise environments, after detecting audio for as little as one to two seconds.¹³⁸

¹³² *Music Licensing General FAQs*, BROADCAST MUSIC, INC., <http://www.bmi.com/licensing/faq> (last visited Nov. 14, 2011) (follow “Q: What Happens to the Fees We Pay and How Much Profit Does BMI Make?” hyperlink).

¹³³ Christman, *supra* note 2, at 8.

¹³⁴ John A. LoFrumento, *You Can Count on ASCAP*, in AM. SOC’Y OF COMPOSERS, AUTHORS & PUBLISHERS, 2010 ANNUAL REPORT 4–5 (2011), available at http://www.ascap.com/about/annualReport/annual_2010.pdf.

¹³⁵ Jesse Greenspan, *DMX Wins 1st-of-a-Kind Blanket License from BMI*, LAW360 (July 28, 2010, 6:18 PM EST), <http://www.law360.com/articles/183728> (second alteration in original) (internal quotation marks omitted).

¹³⁶ *In re THP*, 756 F. Supp. 2d 516, 528 (S.D.N.Y. 2010).

¹³⁷ Greenspan, *supra* note 135.

¹³⁸ *Royalty Policy Manual*, BROADCAST MUSIC, INC., http://www.bmi.com/creators/royalty_print/detail (last updated Nov. 11, 2011).

¶40 BMI then calculates a “unique royalty rate” for each work using the licensing fees collected from the radio stations that performed that work and the amount of times the work was performed on the stations.¹³⁹ BMI calculates royalties for television performances using “a census of program information from music cue sheets and performance information provided to BMI by BMI television licensees, the TV Data Corporation, and other qualified sources.”¹⁴⁰ The company calculates a “unique royalty rate” for television as well, “based upon the license fees available . . . in combination with the duration of the performance, the weighted royalty value for each usage type and television audience measurement data provided by Nielsen Media Research for each program aired on that network.”¹⁴¹ For sources that it does not monitor, BMI states that it may distribute the fees it collects “against performances from a source or sources where sufficient data is available.”¹⁴² BMI may add or remove a distribution source that was previously unmonitored “if the availability of accurate performance data changes.”¹⁴³

¶41 To keep track of licensed performances, ASCAP conducts a “census survey,” counting performances in a medium, so long as “the cost of collecting and processing accurate performance information is a low enough percentage of the revenues generated by that medium.”¹⁴⁴ ASCAP conducts census surveys of major television stations, general entertainment cable networks, live concerts, and CMSPs.¹⁴⁵ When the cost of a census survey is too great, ASCAP conducts a “sample survey designed to be a statistically accurate representation of performances in a medium.”¹⁴⁶ Sample surveys are designed to account for “[a]ll times of the day, all days of the year, every region of the country and all types and sizes of stations.”¹⁴⁷ ASCAP surveys in proportion to the amount of fees a licensee pays; the more a station pays ASCAP in licensing fees, the more (proportionately) it is sampled.¹⁴⁸ DMX, on the other hand, gives copyright holders counts of each time a given work was played.¹⁴⁹ With these direct counts, copyright holders can be certain they are receiving royalties for each and every performance of their work.

¶42 The payment schedule DMX offers is also preferable to that which BMI and ASCAP currently use for their blanket licensing. BMI distributes royalties to writers and publishers quarterly,¹⁵⁰ however, “BMI does not distribute payments to its affiliates for CMS industry performances until approximately seven to nine months after the

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *ASCAP Payment System: Keeping Track of Performances*, AM. SOC’Y COMPOSERS, AUTHORS & PUBLISHERS, <http://www.ascap.com/members/payment/keepingtrack.aspx> (last visited Nov. 14, 2011) [hereinafter *Keeping Track of Performances*].

¹⁴⁵ *ASCAP Payment System: The ASCAP Surveys*, AM. SOC’Y COMPOSERS, AUTHORS & PUBLISHERS, <http://www.ascap.com/members/payment/surveys.aspx> (last visited Nov. 14, 2011).

¹⁴⁶ *Keeping Track of Performances*, *supra* note 144.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Mark Northam, *DMX Wins Major Direct Licensing Royalties Case; May Fundamentally Change Performance Royalty Landscape*, *FILM MUSIC MAG.* (July 28, 2010), <http://www.filmmusicmag.com/?p=5992>.

¹⁵⁰ *Royalty Policy Manual*, *supra* note 138.

performance dates.”¹⁵¹ ASCAP distributes royalty checks eight times a year.¹⁵² ASCAP states that it has worked to quicken the process of domestic royalty payments so that copyright holders receive royalty payments “approximately six months after a performance quarter.”¹⁵³ In contrast, DMX accounts to publishers and writers for its direct licensed works quarterly, forty-five days after the end of each quarter.¹⁵⁴ It goes without saying that copyright holders would prefer to receive royalties sooner rather than later, and, thus, DMX’s method is the preferred one for them.

C. Negative Effects on PROs and Positive Effects on CMSPs

¶43 These two recent decisions will definitely affect PROs such as BMI and ASCAP. Understandably, PROs dislike these decisions because such decisions decrease the fees PROs receive from CMSPs. The court’s decisions also allow other CMSPs to seek AFB licenses, which will further decrease the amount of fees BMI and ASCAP receive.

¶44 The amount a PRO makes under a finding such as Judge Stanton’s is significantly lower than that which it made from CMSPs previously. As discussed above, under BMI’s standard blanket license agreement, for instance, it would receive approximately \$36.36 per location from a CMSP.¹⁵⁵ If BMI were to have its way in determining the AFB license, it would have received \$41.81 per location from DMX.¹⁵⁶ Yet, in light of Judge Stanton’s decision, the most it will ever receive from DMX is \$18.91 per location (the blanket fee).¹⁵⁷ So, theoretically, the most BMI can make now from DMX is fifty-two percent of what it received previously. Given that DMX had already directly licensed with approximately 5,500 rights holders at the time of the trial, the blanket fee is certain to be reduced further, so BMI will not even recover fifty-two percent in practice.¹⁵⁸ Many CMSPs, observing this result, may seek AFB licenses without directly licensing at all, as they will be able to spend approximately half of what they had previously for PRO licenses without exerting any extra effort.

¶45 At the time of the trial, two other CMSPs had already requested an AFB license.¹⁵⁹ Music industry specialists expect that many more CMSPs will request similar AFB licenses from PROs.¹⁶⁰ Other industries, such as local television and commercial broadcast radio, have already requested AFB licenses as well.¹⁶¹

¶46 Based on the court’s analysis of the agreements BMI entered into pursuant to the 2004 Muzak agreement, CMSPs who continue contracting with BMI using the traditional blanket license may also look to negotiate for a lower annual per-location fee which more accurately reflects fair market value.¹⁶² The court’s decision in *BMI v. DMX* may

¹⁵¹ *Broad. Music, Inc. v. DMX, Inc.*, 726 F. Supp. 2d 355, 367 (S.D.N.Y. 2010).

¹⁵² *The ASCAP Advantage*, AM. SOC’Y COMPOSERS, AUTHORS, & PUBLISHERS, <http://www.ascap.com/about/ascapadvantage.aspx> (last visited Nov. 14, 2011).

¹⁵³ *Id.*

¹⁵⁴ Northam, *supra* note 149.

¹⁵⁵ *BMI v. DMX*, 726 F. Supp. 2d at 357.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 364, 367.

¹⁵⁸ *Id.* at 360.

¹⁵⁹ *Id.* at 363.

¹⁶⁰ Christman, *supra* note 2.

¹⁶¹ *BMI v. DMX*, 726 F. Supp. 2d at 363.

¹⁶² *Id.* at 355, 359.

encourage CMSPs to challenge the form licenses offered by BMI in rate court, whereas previously they had no realistic option but to accept the form agreement modeled on that entered into with Muzak.¹⁶³

D. Positive Effects on PROs

¶47 Despite the negative effect these decisions may have on the fees PROs receive, these decisions may provide PROs some benefits. For instance, Trusonic, a small CMSP that also deals in direct licensing, refused to “pay ASCAP anything for locations that only play music within the ASCAP repertory that Trusonic has directly licensed from publishers, or that play no ASCAP music.”¹⁶⁴ In light of these two decisions, which assert that PROs should at least receive a floor fee, Trusonic would not be able to simply refuse to pay ASCAP anything.

¶48 This idea of carve-out licensing “could potentially be applied to public performance areas beyond in-store play, such as terrestrial radio.”¹⁶⁵ If radio stations were to directly license with copyright holders, they may opt to purchase the performance rights for hit songs they play frequently. This would decrease the performance fees CMSPs pay PROs, as those fees would be deducted from the blanket fee.

E. Effects on Radio and Songwriters

¶49 If radio stations were to begin direct licensing with copyright holders, it could have varying effects on songwriters. Radio stations might play the songs they directly license more frequently, hoping to reduce the fees owed to PROs, which could lead to decreased diversity in the songs played on radio stations. This would be particularly likely if radio stations directly licensed for artists’ complete catalogs. One artist would likely be played repeatedly, leaving less airtime for artists who are not directly licensed. On the other hand, if lesser-known artists were willing to directly license performance rights to radio stations at discounted rates to gain entry into the radio market, that could promote new artists and add to the diversity of music played on radio stations.

F. New Industries

¶50 Other sub-industries may also evolve to service the needs of the burgeoning direct licensing system. For instance, DMX hired Music Reports, Inc. (MRI), a company which specializes in “high-volume music license administration,” to help in the development of its direct licensing campaign.¹⁶⁶ MRI was founded in 1989 with the aim “to help radio and television broadcasters take advantage of the per-program license available under the PRO consent decrees.”¹⁶⁷ MRI identified the publishers whose works were most often played by DMX and developed a generic direct license agreement that would help DMX avoid in-depth individual negotiations with publishers and to negotiate and administer

¹⁶³ *Id.* at 359.

¹⁶⁴ *In re THP Capstar Acquisition Corp.*, 756 F. Supp. 2d 516, 527 (S.D.N.Y. 2010).

¹⁶⁵ Christman, *supra* note 2, at 8.

¹⁶⁶ *In re THP*, 756 F. Supp. 2d at 528.

¹⁶⁷ *Id.*

deals en masse.¹⁶⁸ These decisions will allow companies such as MRI to develop to meet the changing needs of CMSPs and others seeking AFB licenses.

VI. CONCLUSION

¶51 BMI vehemently opposes the decision reached by the court in *BMI v. DMX*, and has already filed an appeal with the Second Circuit.¹⁶⁹ The argument BMI has offered against the decision is that it “ignores the long history of [PRO] licensing agreements in the background music industry.”¹⁷⁰ BMI argues that because PROs have traditionally contracted for performance rights for CMSPs using blanket licenses, it should always stay that way. The company is demanding deference due to the powerful position it has held in the CMS industry. However, that is exactly what the government has been trying to combat since 1941, when it filed antitrust suits against BMI and ASCAP.

¶52 In its memorandum on this case, the government stated that “[t]he United States supported blanket carve-out licenses in [*In re*] *AEI* because they check, to some degree, the market power of the BMI rights holder collective,” creating a competitive constraint more realistic than the court’s ratemaking power.¹⁷¹ Allowing music users to directly license from copyright holders places a limit on how high a fee PROs can charge for their blanket licenses because “[i]f the [PRO] collective charged more for a blanket license than users would pay if they licensed directly, users would forego a blanket license from [the PRO].”¹⁷² Thus, direct licensing creates a more competitive market.

¶53 BMI’s attempt to combat CMSPs from opting for AFB licenses was to increase the blanket fee for AFB licenses.¹⁷³ The government worried that such an “option value premium” would work against BMI’s Consent Decree and the decision in *In re AEI*, taking away constraints on the PRO’s market power because “[t]he greater the ‘option value premium,’ the fewer licensees will find the carve-out license mandated by [*In re*] *AEI* to be economically viable.”¹⁷⁴

¶54 Both BMI and ASCAP took ethically questionable steps in attempting to thwart DMX’s direct licensing campaign. The CEO of ASCAP, John LoFrumento, attempted to dissuade both Sony and Universal from entering into AFB licenses with DMX.¹⁷⁵ Sony signed with DMX, but Universal used DMX’s offer as leverage to secure from BMI a nearly \$2 million “guarantee” in royalty payments for agreeing not to directly license with DMX.¹⁷⁶ BMI also strong-armed some music publishers into refusing to renew their direct licenses with DMX. Only fourteen of seventy-eight publishers have refused to renew their direct licenses with DMX.¹⁷⁷ BMI contacted three of those fourteen who controlled significant catalogs, telling one publisher that “if it renewed its direct license agreement with DMX, BMI would force [the publisher] to repay BMI the payments BMI

¹⁶⁸ *Id.* at 529.

¹⁶⁹ *BMI Appeals DMX Rate-Court Decision*, *supra* note 13.

¹⁷⁰ Northam, *supra* note 149 (internal quotation marks omitted).

¹⁷¹ Memorandum of the United States on Decree Construction Issues, *supra* note 46, at 2.

¹⁷² *Id.*

¹⁷³ *Id.* at 1.

¹⁷⁴ *Id.* at 3.

¹⁷⁵ *In re THP Capstar Acquisition Corp.*, 756 F. Supp. 2d 516, 535 (S.D.N.Y. 2010).

¹⁷⁶ *Broad. Music, Inc. v. DMX, Inc.*, 726 F. Supp. 2d 355, 360 (S.D.N.Y. 2010).

¹⁷⁷ *In re THP*, 756 F. Supp. 2d at 533.

had made to it during the direct license period.”¹⁷⁸ The extralegal actions taken by BMI to prevent direct licensing demonstrates both the fear that PROs have of the change in licensing and their acknowledgement that the law is not on their side on this issue.¹⁷⁹

¶55 The *BMI v. DMX* and *In re THP* decisions further the government’s goals of creating a competitive marketplace within CMS licensing and checking the market power of PROs like BMI and ASCAP. Creating a competitive market for CMS licensing will force PROs to compete for customers in a way they have not before experienced. This competition will force the PROs to lower their blanket fees and increase the transparency of their operations to make licensing an attractive option to customers.¹⁸⁰

¶56 As unpopular as the decision may be with PROs, it is not improper. It is merely a shift away from the traditional method of blanket licensing, one that was set in motion when the government first instituted antitrust suits against BMI and ASCAP in 1941.

¶57 When the *BMI v. DMX* case goes to the Second Circuit on appeal, the court should find that the district court was correct in not granting BMI the \$41.81 per-location rate it requested, which represented the per-location rate determined by Muzak’s 2004 blanket fee negotiation plus fifteen percent for the “option value” of the AFB license.¹⁸¹ As the blanket license fee is the result of a misuse of BMI’s consent decree and the high option value premium would deter CMSPs from seeking AFB licenses, granting the blanket fee BMI seeks is impermissible. This is why the Second Circuit should uphold the bulk of the district court’s decision. Though certain figures may need to be reconsidered, the heft of the decision is well founded and furthers the government’s interests in combating anticompetitive behavior in music licensing.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 533–35.

¹⁸⁰ Peter Cronin, *DMX Wins Rate Court Lawsuit Against BMI*, MUSIC ROW (July 28, 2010), <http://www.musicrow.com/2010/07/dmx-wins-rate-court-lawsuit-against-bmi/>.

¹⁸¹ *Broad. Music, Inc. v. DMX, Inc.*, 726 F. Supp. 2d 355, 357 (S.D.N.Y. 2010).

