

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

<p>RADIO MUSIC LICENSE COMMITTEE, INC.,</p> <p style="text-align: center;">Petitioner,</p> <p style="text-align: center;">v.</p> <p>BROADCAST MUSIC, INC.,</p> <p style="text-align: center;">Respondent.</p>

18 Civ. 4420 (LLS)

Related to *United States v. Broadcast Music, Inc.*, 64 Civ. 3787 (LLS)

Related to *Broadcast Music, Inc. v. Radio Music License Committee, Inc.*, 17 Civ. 4 (LLS)

**RESPONSE OF BROADCAST MUSIC, INC. TO THE PETITION OF
RADIO MUSIC LICENSE COMMITTEE, INC. FOR THE
DETERMINATION OF REASONABLE FINAL LICENSE FEES**

Broadcast Music, Inc. (“BMI”) hereby submits this response to the Petition of the Radio Music Committee (the “RMLC”) for the Determination of Reasonable Final License Fees (ECF No. 1) (the “Petition”).¹

Introductory Statement

1. On December 22, 2016, the RMLC requested, on behalf of the thousands of FCC-licensed broadcast radio stations operating in the United States that it represents (the “RMLC Stations”), a traditional blanket license, adjustable fee blanket license (“AFBL”), and per-program license for the period from January 1, 2017 through December 31, 2021. The requested licenses would cover, on a “through-to-the-audience” basis, RMLC Stations’ terrestrial analog and multicasting signals as well as certain digital transmissions.

¹ Although the RMLC’s Petition is not a “complaint” under the Federal Rules of Civil Procedure (the “Rules”), and thus responsive pleadings are not required under Rule 12, BMI believes that a response would be helpful to the Court for the purpose of framing the parties’ dispute. As BMI’s response is not an “answer” under Rule 12, it does not address the allegations in the RMLC’s Petition on a paragraph-by-paragraph basis. For the avoidance of doubt, however, BMI denies the substantive allegations contained in paragraphs 7, 8, 12-13, and 15-21.

2. As required by the terms of its Consent Decree,² BMI quoted a reasonable rate for the requested licenses that reflects the meaningful changes in the broadcast radio industry and music licensing marketplace since BMI negotiated its last final license with RMLC Stations in 2012. Over the last six years, the market has seen erosion in the promotional value of radio stations, resulting principally from the decline in overall music sales. Through the adoption of digital streaming and multicasting, there has been explosive growth in the overall use of music by RMLC Stations. In addition, direct deals between performing rights licensing organizations (“PROs”), including new entrants to the marketplace, and RMLC Station group owners, have produced the first free market license agreements in the broadcast radio industry in decades.

3. BMI’s licensing relationship with RMLC Stations has long been distorted by the RMLC’s unchecked aggregation of buying power. With the RMLC acting as the sole buyer in what would otherwise be a robust marketplace teeming with diverse licensees, decades have passed without any meaningful licensing directly with individual stations or station groups. That has recently changed. Over the last few years, unregulated PROs have negotiated license agreements directly with RMLC Station groups. In addition, the RMLC and SESAC LLC (“SESAC”) recently concluded their first mandatory arbitration. These licenses are a better indicator of the fair market value of music to radio broadcasters. When adjusted to account for BMI’s market-leading share of overall music performances, these agreements indicate a rate significantly above what BMI (and the American Society of Composers, Authors & Publishers (“ASCAP”)) have been paid historically. BMI has thus proposed an increase in the percentage-of-revenue rate payable by RMLC Stations.

² “Consent Decree” refers to the Final Judgment entered in *United States v. Broad. Music, Inc.*, 1966 Trade Cas. (CCH) ¶ 71,941 (S.D.N.Y. 1966), as amended by 1996-1 Trade Cas. ¶ 71,378 (S.D.N.Y. 1994).

4. Although market indicators suggest that BMI's prior, and now interim, rate is too low, the RMLC has sought a decrease from BMI. The RMLC can point to no changed circumstances that warrant a *reduction* in BMI's rate. Indeed, the RMLC's final license agreement with ASCAP *increased* the rates payable to ASCAP as of January 1, 2017. The higher rate paid to ASCAP cannot be attributed to a more favorable market share by ASCAP—BMI's internal analyses show that BMI has a significantly greater market share than any other domestic PRO, including ASCAP.

The Parties

5. Founded in 1939, BMI is a PRO that operates on a non-profit-making basis. BMI obtains the non-exclusive right to license the public performance right in musical compositions from songwriters, composers, and music publishers (collectively, BMI's "Affiliates"). BMI's repertoire presently consists of the public performance rights in approximately 13 million musical works from the catalogs of approximately 800,000 Affiliates and covers the entire range of musical genres.

6. BMI issues performing rights licenses to music users, collects license fees from them, tracks musical performances, and distributes royalties to its Affiliates. BMI licenses a broad range of music users across a wide array of industries including, *inter alia*, approximately 10,000 commercial radio stations, hundreds of broadcast and cable television networks, thousands of internet digital services and websites, concert halls, concert promoters, universities, and hundreds of thousands of restaurants, nightclubs, retail stores, and hotels.

7. Through BMI, licensees obtain public performance rights in any and all of the works in BMI's repertoire. In this way, BMI increases the availability of music to users, reduces transaction costs, and ensures that songwriters, composers and music publishers are fairly compensated for the performance of their works.

8. The RMLC is a non-profit organization funded by the radio broadcasting industry to collectively negotiate licenses on behalf of approximately 7,200 of the 10,000 total domestic commercial broadcast radio stations. The RMLC collects assessments from its members that it uses to fund rate court litigation with PROs. In addition, owners of approximately 2,200 commercial radio stations who are not part of the RMLC have agreed with BMI to be bound by the outcome of negotiations or rate court proceedings between BMI and the RMLC concerning interim and final license fees.³

History of Negotiations Between BMI and the RMLC

9. In August 2012, this Court approved an industry-wide settlement between BMI and the RMLC covering the seven-year license period from January 1, 2010 through December 31, 2016 (the “BMI-10 License”). The BMI-10 License provides for a blanket license rate of 1.7% of each licensee’s revenue subject to fee for all broadcast and new media offerings.

10. The parties began negotiating the fees and terms of a new agreement in March of 2016. On December 22, 2016, the RMLC formally requested licenses from BMI, pursuant to Article XIV(A) of the Consent Decree, to cover specified public performances by RMLC Stations of BMI-affiliated musical works for the period January 1, 2017 through December 31, 2021.

11. In its December 22, 2016 letter, the RMLC proposed paying BMI a rate of 1.4% of revenue subject to fee on an interim basis, rather than continuing to pay the then-prevailing rate of 1.7% of revenue subject to fee under the BMI-10 License. The RMLC claimed this reduction was appropriate “in light of the RMLC’s understanding of BMI’s market share of public performances on radio relative to ASCAP and the new costs associated with the emergence of Global Music

³ Substantially all of the remaining 600 stations are specialty-format stations represented by the National Religious Broadcasters Music License Committee.

Rights.” The RMLC has also taken the position that, for the same reason, the final fees paid by RMLC Stations to BMI should be lower than the fees paid to ASCAP.

12. Unable to reach a consensual agreement on interim fees, BMI petitioned this Court on January 3, 2017 for the determination of reasonable interim fees pursuant to Article XIV(B) of the Consent Decree. In its interim fee petition, BMI noted that the RMLC’s proposed reduction in the rate payable to BMI was inconsistent with BMI’s internal analyses of its market share, the RMLC’s then-recent final license with ASCAP, and the interim rates paid by RMLC Stations to SESAC and Global Music Rights, LLC (“GMR”),⁴ the two unregulated domestic PROs.

13. Shortly after BMI filed its interim fee petition, the parties settled their dispute about interim rates and agreed to extend the BMI-10 License, on an interim basis, effective January 1, 2017, and subject to retroactive adjustment pending a negotiated agreement of the parties or subsequent determination by the Court of reasonable final fees. On February 24, 2017, this Court entered an order (the “Interim Fee Order”) memorializing that agreement.⁵ The Interim Fee Order provided that it “shall not be considered or construed to constitute a determination by the Court of what constitutes a reasonable final license fee.” (*Id.* ¶ 5.)

14. As discussed below, since the conclusion of the interim fee proceeding, SESAC and RMLC Stations have entered into a final license agreement contemporaneous with part of the license term at issue here. In the meantime, BMI and the RMLC have made no progress resolving a rate for a final license. On May 17, 2018, citing the parties’ inability to reach a consensual agreement, the RMLC filed its Petition.

⁴ GMR was founded in 2013 to represent a select group of rights holders who felt that the rates paid by the regulated PROs were below market. It has quickly amassed a catalog of an estimated 26,000 works written or performed by popular and well-known artists.

⁵ *Broad. Music, Inc. v. Radio Music License Comm., Inc.*, 17 Civ. 4 (LLS), ECF No. 20.

The Historical Rates Paid By RMLC Stations Do Not Reflect the True Value of BMI Affiliates' Copyrighted Musical Works

15. It is no longer reasonable to maintain the historically-depressed rates paid by RMLC Stations to BMI. The BMI-10 License, and those that preceded it, were negotiated in a marketplace that was meaningfully different from the marketplace today. Radio broadcasts no longer drive music sales, once a critical revenue source for BMI's Affiliates and a factor long considered a justification for lower rates payable to BMI. Nor are radio station broadcasts confined to the radio—RMLC Stations have increased their music use through simulcasts and other digital means of performing BMI-affiliated works. In addition, the RMLC, which controls commercial broadcast radio performing rights license negotiations, has long wielded the considerable aggregate market power of nearly the entire radio broadcasting industry to drive fees well below any reasonable measure of their market value. Only recently have certain PROs been able to break the RMLC's stronghold and negotiate limited deals directly with station owners. Those agreements provide the best, and most recent, measure of the fair market value of performing rights licenses and strongly suggest that BMI's license rate must be increased to properly account for the true value of BMI's repertoire to RMLC Stations.

16. **Radio's Promotional Value Has Declined Dramatically.** BMI's Affiliates no longer benefit to the same degree from the promotion they receive when their song is played on a terrestrial radio broadcast station. Broadcast radio was the dominant means of listening to music programming for most of the last century. During that time, the radio and music industries enjoyed a symbiotic relationship. Radio stations developed large audiences, introducing them to new artists and songs, and, as a result, music sales increased, in tandem, over many decades. Broadcast radio acted as the dominant promotional tool for music sales—listeners heard and liked one or two lead

singles on the radio, and then bought physical copies of albums or singles based on that exposure, resulting in increased mechanical royalties paid to songwriters, composers, and music publishers.⁶

17. The record industry built its marketing efforts around this promotional model. Songwriters and composers accepted very modest blanket license rates from broadcast radio stations given that radio play promoted billions of dollars in sales of recorded music, which, in turn, generated substantial royalties for mechanical license rights. Such royalties associated with record sales were a significant revenue source for music composers and publishers.

18. That is no longer the case. Although the overall use and consumption of music in the United States has grown exponentially over the last decade, the migration of consumers to online streaming services has caused album sales to erode, resulting in a dramatic decline in mechanical royalties paid to music composers, songwriters, and publishers. As the Register of Copyrights recently explained in her comprehensive review of the music marketplace, “as consumer preferences shift away from music ownership, the potential for sales is becoming less relevant, and the promotional value of radio less apparent.”⁷ For example, in 2017 album sales fell 17.7% year-over-year while on-demand audio streams of single songs grew 58.7% over the same period.⁸ In light of these changes, publishers can no longer rely on royalties from album sales to capture the full value of their copyrighted works. The historical justification for accepting

⁶ Mechanical royalties are per-unit payments made by record companies to music publishers (and shared by songwriters and composers) for the reproduction of copyrighted musical compositions appearing on records, tapes, CDs, and permanent digital downloads.

⁷ Maria A. Pallante, U.S. Copyright Office, *Copyright and the Music Marketplace* 139 (2015), <https://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf>.

⁸ Sarah Perez, *On-demand streaming now accounts for the majority of audio consumption, says Nielsen*, TechCrunch (Jan. 4, 2018), <https://techcrunch.com/2018/01/04/on-demand-streaming-now-accounts-for-the-majority-of-audio-consumption-says-nielsen>.

below-market rates from radio stations has faded as a result of the seismic changes in the ways in which consumers listen to music.⁹

19. **RMLC Stations Use More Music Than Ever Before.** Commercial broadcast radio stations have not been blind to these changes in consumer preferences. The public's interest in digital music streaming has exploded, and broadcast radio stations have met that demand by offering extensive content online. Since 2012, more than 3,200 music format broadcast radio stations have begun streaming their content online, often by simulcasting their terrestrial radio broadcasts on their websites and mobile apps. In addition, RMLC Stations are now capable of "multicasting," *i.e.* broadcasting multiple programs simultaneously using the station's existing frequency allocation. Over the last five years, the use of multicasting by RMLC Stations has increased by 48%. Practically, this means that the amount of music a single station can perform is no longer constrained to the average 12 songs per hour or, indeed, to the limits of conventional 24-hour-day programming. As a result of streaming and multicasting, overall music use by radio stations, including of music in the BMI repertoire, has increased dramatically since the BMI-10 License was agreed to, and it is expected to continue to increase going forward.

20. **RMLC Station Groups Have Entered Into Licenses Directly With SESAC And GMR.** Although its members include owners of large groups of up to 800 individual stations, groups that are themselves Fortune 500 companies with considerable negotiating power, the RMLC's constituents have long been content to allow the RMLC to further aggregate the industry's bargaining power and collectively negotiate with PROs. With new entrants in the

⁹ BMI has also observed changes in the sources of RMLC Stations' revenue. For example, iHeartMedia recently reported strong earnings fueled largely by increases in trade and barter, but those revenues may be excluded from iHeart's license fee calculation under the terms of the BMI-10 License. To the extent those revenues are earned through the use of BMI's repertoire, it is critical that any future license with RMLC Stations be adjusted to ensure BMI's Affiliates share in those revenues.

marketplace, including some with which the RMLC has refused to negotiate, and perhaps motivated by some of the changes mentioned above, certain RMLC Station group owners have engaged directly with PROs. Those direct deals—which, for the first time in decades, are free from the distorting effects of the compulsory licensing obligation under the BMI and ASCAP consent decrees, the shadow of the rate courts, and the RMLC’s disproportionate market power—represent a meaningful shift in the broadcast radio licensing marketplace and provide new and important data concerning the value of performing rights licenses to the radio industry.

21. **The RMLC’s Monopsony Power Suppresses License Fees Artificially.** Despite the changes facing the broadcast radio industry, one constant feature has been the RMLC. For decades, the RMLC has aggregated the bargaining power of what would be, in a truly competitive marketplace, thousands of independent purchasers of performing rights licenses. In an industry that has seen tremendous consolidation over the past 20 years, the RMLC is no longer the representative of a disparate group of thousands of small business owners, but is instead the agent of some of the largest media companies in the country. Wielding their combined economic power, the RMLC has leveraged its monopsony as a means of realizing artificially low rates. Indeed, the RMLC’s representatives have publicly stated that its principal—and perhaps only—objective is to keep license fees paid by broadcast radio stations as low as possible.

22. Although the RMLC was quick to deploy its well-worn (and patently false) trope depicting BMI as a monopolist (*See* Petition ¶¶ 7, 8, 20), it failed to mention that its own tactics have recently come under fire. In December of 2016, GMR filed suit in the U.S. District Court for the Central District of California alleging that the RMLC is “an illegal cartel” including “powerful radio broadcasters . . . [that] have agreed with one another and with the RMLC to artificially

depress the license fees member stations pay to perform musical composition on the radio.”¹⁰ Specifically, according to GMR, RMLC Stations “refused to enter into license agreements with GMR that, but for the RMLC led boycott, they would have entered into.”¹¹ The California Court subsequently denied the RMLC’s motion to dismiss GMR’s claims for lack of jurisdiction, determining that GMR had adequately alleged “antitrust injury due to an alleged conspiracy between [the RMLC] and its member radio stations that prevents the member stations from negotiating for music licenses directly with Plaintiff.”¹² GMR’s lawsuit raises important questions about the RMLC’s exercise of its monopsony power.¹³

23. The alleged RMLC-led boycott is not dissimilar from the behavior BMI has observed during its own negotiations with the RMLC. After BMI refused to accept the RMLC’s take-it-or-leave-it interim rate proposal, the RMLC actively encouraged its members not to pay *any* interim fees until the dispute was resolved. Attempting to starve a negotiation counterpart of critical revenue to which it is undeniably entitled, while sheltered behind a compulsory license from any infringement liability, can hardly be characterized as the pro-competitive behavior of a benevolent “trade association.”¹⁴

¹⁰ Compl. ¶ 1, *Global Music Rights, LLC v. Radio Music License Comm., Inc.*, 16 Civ. 9051 (C.D. Cal. Dec. 6, 2016), Dkt. No. 1.

¹¹ First Amended Compl. ¶ 137, *Global Music Rights, LLC v. Radio Music License Comm., Inc.*, 16 Civ. 9051 (C.D. Cal. Jan. 6, 2017), Dkt. No. 23.

¹² Order re Def.’s Mot. to Dismiss Pl’s First Am. Compl. at 7, *Global Music Rights, LLC v. Radio Music License Comm., Inc.*, 16 Civ. 9051 (C.D. Cal. Apr. 7, 2017), Dkt. No. 40.

¹³ The RMLC has also filed an antitrust complaint against GMR, which is currently pending in the Eastern District of Pennsylvania. See *Radio Music License Comm., Inc. v. Global Music Rights, LLC*, 16 Civ. 6076 (E.D. Pa. Nov. 18, 2016).

¹⁴ The RMLC also claims that BMI’s blanket license has a “reduced indemnification value” as a result of BMI’s successful litigation against the United States Department of Justice. (Petition ¶¶ 20-21.) The Second Circuit neither spoke to, nor altered, the scope of BMI’s blanket license. Rather, that Court merely confirmed that “since the decree is silent on fractional licensing, BMI may (and perhaps must) offer [fractional interests] unless a clear and unambiguous command of the decree would thereby be violated.” *United States v. Broad. Music, Inc.*, 720 F. App’x 14, 16 (2d Cir. 2017). As the Second Circuit noted, “BMI seeks to offer all its interests, full and fractional, to any user[.]” *Id.* at 17. BMI has for decades offered and priced its licenses on that basis.

24. This stands in stark contrast to the Supreme Court’s decision in *Broadcast Music, Inc. v. Columbia Broadcasting Systems, Inc.*, which held that BMI’s blanket license is not a *per se* restraint of trade because, among other reasons, it substantially lowers transaction costs while providing music users with “great flexibility in the choice of musical material.” 441 U.S. 1, 20-22 (1979).

**The Market for Public Performance Rights Licenses on Radio
Supports an Increase in the Fees Payable to BMI**

25. Under the terms of the Consent Decree, this Court is tasked with determining whether the fee proposed by BMI is reasonable. In making that determination, a rate court attempts to determine the fair market value of a license, that is, the price that a willing buyer and a willing seller would agree to in an arm’s-length transaction, and considers the reasonableness of the rate quoted by BMI relative to that free-market rate. If the Court determines that BMI’s proposed fee is within a reasonable range, the Court’s inquiry concludes. The Court need not determine that BMI’s proposed rate is the *sole* reasonable rate, but rather that it is *a* reasonable rate.

26. A range of reasonable rates is typically discerned by examining license agreements entered into by parties in comparable circumstances and then, if necessary, adjusting those license agreements to account for differences between the parties or the economic circumstances within which the agreement was negotiated. The rate quoted by BMI for RMLC Stations’ terrestrial broadcasts is reasonable and in line with prevailing rates in licenses between competing unregulated PROs and RMLC Stations or RMLC Station groups.

27. The most recent such license was the product of the first mandatory arbitration between SESAC and the RMLC.¹⁵ The parties were engaged in arbitration throughout the first

¹⁵ In July of 2015, SESAC and the RMLC entered into a settlement agreement resolving their ongoing antitrust suit and setting forth the scope and structure of their licensing relationship through December 31, 2034. Significantly, the settlement agreement includes provisions mandating a negotiation and arbitration process and structure that is functionally equivalent to, and intended to mirror, the process outlined in Article XIV of the Consent Decree. Under

half of 2017 and, on July 27, 2017, a panel of arbitrators determined that the SESAC blanket license for the period January 1, 2016 through December 31, 2018 should be 0.2557% of RMLC Stations' adjusted gross revenues. On August 28, 2017, the Supreme Court of the State of New York entered an order and judgment confirming the panel's arbitration award.¹⁶

28. When adjusted to account for BMI's significantly larger share of performances on terrestrial radio broadcasts, the SESAC arbitration award suggests BMI's proposed rate is reasonable and the prior rate of 1.7% of adjusted gross revenues included in the BMI-10 License greatly undervalues BMI's repertoire.

29. In addition, BMI expects that final agreements entered into between large RMLC Station groups and GMR and SESAC, respectively, will support an increase in final rates to BMI. Upon information and belief, the free market deals currently in place between GMR and SESAC and some of the largest RMLC Station groups, such as iHeart Radio, Townsquare, and CBS Radio, compel this conclusion. Again, upon information and belief, when accounting for BMI's significantly greater share of performances on broadcast radio, those free market deals suggest that a higher rate for BMI is appropriate, not a lower one. Direct agreements between unregulated PROs and individual station owners are unprecedented in recent history and provide new and compelling evidence, outside the shadow of the rate court, of the value ascribed to music by willing buyers and willing sellers in the free market.

the terms of the settlement, that mandatory negotiation and arbitration procedure will remain in place until the license period ending December 31, 2037.

¹⁶ *SESAC Inc., et al. v. Radio Music License Comm., Inc.*, Index No. 655267/2017 (N.Y. Sup. Ct. Aug. 28, 2017), Dkt. 11.

**The 2017 ASCAP License Rate Does Not Reflect
The Value of the BMI Blanket License**

30. As in the interim fee proceeding, the RMLC seeks a reduction in the rate payable to BMI, ostensibly based on the RMLC's agreement with ASCAP. Indeed, although its Petition is coy, the RMLC's website is explicit—it intends to “demonstrate that BMI's market share calls for a lower *final fee*, which will be retroactive to January 1, 2017.”¹⁷

31. The RMLC's agreement with ASCAP (the “2017 ASCAP License”) was announced publicly on December 15, 2016 and covers the five-year period from 2017 through 2021.¹⁸ RMLC Stations previously paid ASCAP the same rate of 1.7% of gross revenue and corresponding per-program license rate as that called for in the BMI-10 License. In an unprecedented act for an industry-wide license covering approximately 10,000 broadcast radio stations, neither ASCAP nor the RMLC have publicly disclosed the rates or terms of their new agreement. However, industry publications have reported that the new agreement “starts at 1.73 percent of revenue and escalates to 1.75 percent of revenue over the life of the deal.”¹⁹ Although BMI cannot independently confirm those reports, both ASCAP and the RMLC have acknowledged that their agreement calls for “*increases* in the rates paid by radio stations to perform music by ASCAP members.”²⁰

32. The RMLC contends that BMI is not entitled to the rate increases achieved by competing PROs because BMI's “market share is demonstrably smaller than ASCAP's” and “it

¹⁷ Radio Music License Committee, RMLC Applies for 2017-2021 BMI License and Interim Fee Payments Set, <http://www.radiomlc.org/bmi/>

¹⁸ See Radio Music License Committee, ASCAP and the Radio Music License Committee Announce New Agreement, (Dec. 15, 2016), <http://www.radiomlc.org/ascap/>.

¹⁹ Ed Christman, *ASCAP and Radio Group's 5-Year Pact Doesn't Address the Elephant in the Room*, Billboard (Jan. 3, 2017), <https://www.billboard.com/articles/business/7640666/ascap-rmlc-radio-licensing-agreement-analysis>.

²⁰ *Supra* note 18. The RMLC's Petition is less candid, stating only that the 2017 ASCAP License is “largely consistent with the rates and terms offered to Stations under the expiring ASCAP agreements.” (Petition ¶ 15.)

has lost significant radio songwriters to SESAC and GMR.” (Petition ¶ 21.) Neither assertion withstands meaningful scrutiny. If anything, the ASCAP rate further supports an *increase* in the BMI blanket license rate. Although a PRO’s market share on radio tends to fluctuate over time due to the variation in popularity of certain songwriters and songs from year to year, BMI’s internal analyses of the most recent performance data from 2017 show that, contrary to the RMLC’s assertion, BMI has a significantly greater market share than any other domestic PRO, including ASCAP. Despite having reviewed BMI’s market share data, and despite agreeing to *increase* ASCAP’s rate on a final basis (indeed, perhaps *because* it agreed without basis to do so), the RMLC seeks to lower BMI’s rate.

33. In addition, the 2017 ASCAP License was negotiated without the RMLC having reliable information concerning BMI’s market share or accounting for the impact of GMR’s market share on ASCAP. Although both BMI and ASCAP have lost affiliates or members to GMR, by the RMLC’s own admission, those losses impact ASCAP disproportionately.²¹ BMI’s data confirms as much; upon information and belief, ASCAP has lost five times as many affiliates to GMR as BMI and many of those former ASCAP members generate significant radio play, including Bruno Mars, Ryan Tedder, Eddie Vedder, Bruce Springsteen, and Jon Bon Jovi. Importantly, the brunt of that impact was only felt as of January 1, 2017, when ASCAP members who had moved their catalogues to GMR were no longer subject to ASCAP’s “licenses in effect” with RMLC Stations.²² BMI’s data shows a dramatic decline in ASCAP’s share through the first two quarters of 2017, with nearly all of that share moving to GMR.

²¹ See Compl. ¶ 52, *Radio Music License Comm., Inc. v. Global Music Rights, LLC*, 16 Civ. 6076 (E.D.P.A. Nov. 18, 2016) (“Before joining GMR, all or virtually all of GMR’s affiliates were members of ASCAP or BMI. In fact, the vast majority were affiliates of . . . ASCAP.”)

²² “License in effect” is a term used in the by both ASCAP and BMI and refers to the fact that termination of affiliation with either PRO can be subject to any existing licenses agreements that were then in effect.

34. It is not surprising, then, that in the fourth quarter of 2016 ASCAP rushed to finalize the 2017 ASCAP License—which was negotiated using market share data from 2015—or that the agreement includes what the RMLC claims to be the first ever express affirmation by ASCAP of its “share of radio performances.” (Petition ¶ 15.) It was only with the expiration of the parties’ previous license that GMR’s true impact on ASCAP’s radio market share was laid bare. Facing the prospect of looming license negotiations with BMI and GMR, and arbitration with SESAC, the RMLC sought to use its ASCAP agreement to establish a rate that would preserve or decrease the size of the “total royalty pool payable to U.S. PROs by music-format Stations.” (*Id.* ¶ 12.)²³ ASCAP, on the other hand, saw it as an opportunity to lock in a rate based on a market share that ASCAP knew would not hold come January 1, 2017.

35. More fundamental than the RMLC’s mistaken understanding of BMI’s market share is the fact that the 2017 ASCAP License remains tethered to historical assumptions about broadcast radio that are no longer true. The 2017 ASCAP License predates many of the free market benchmarks referenced above and, upon information and belief, was negotiated without any knowledge by ASCAP of the rates being negotiated in the free market. As discussed above, the radio industry has changed—in this short time, the 2017 ASCAP License is no more useful a benchmark for a BMI license than the price of a rotary phone is an indicator of the value of an iPhone.

²³ The RMLC has often argued that there is but one industry-wide “royalty pool,” which should be divided pro-rata among all PROs based on market share. In this “one pie” model, the total size of the royalty pool (*i.e.* the total percentage of revenues that each radio station should pay for all public performance rights), is set by the RMLC itself. Only a monopsonist could dream up and seek to impose such a distorted view of a free market onto its suppliers. In any event, the notion that the aggregate royalty payments made by RMLC Stations should be determined by negotiations concluded in 2012 is absurd. Since the BMI-10 License was negotiated, RMLC Stations’ use of music has increased and BMI’s repertoire has more than doubled in size. *See* Petition of Broadcast Music, Inc. for the Determination of Reasonable License Fees, *Broad. Music, Inc. v. Pandora Media, Inc.*, 13 Civ. 4037 (LLS) (S.D.N.Y. June 13, 2013), ECF No. 1 (noting BMI’s repertoire includes “the public performing right in approximately 7.5 million musical works on behalf of over 600,000 affiliated composers, songwriters, and music publishers”).

36. Attempts to use a below-market ASCAP deal to impose a reduction in BMI rates have become common in recent years. That is true even where, as here, BMI's market share is greater than ASCAP's share. Recently, music users have been uniformly successful in litigating against ASCAP in its rate court. That success has created a perception, shared by ASCAP and music users, that music users will receive favorable litigated outcomes in ASCAP's rate court as presently constituted. Whether well-founded or not, that perception has skewed negotiated outcomes. ASCAP has repeatedly sought to avoid litigation and instead has agreed to bargain-basement deals that stand as outliers in an increasingly robust marketplace. Indeed, ASCAP and the RMLC's unwillingness to disclose the rates or terms of the 2017 ASCAP License suggests that their agreement may be distinguishable on grounds other than those discussed above.

37. BMI is not bound by ASCAP's perceptions of the marketplace, its outdated assertion of competitive market share, or the impact that its perceived litigation risks plays in its negotiations. Nor is this Court. Although the 2017 ASCAP License represents a data point for this Court to consider, it does not represent the one true reasonable rate for a BMI license (or even *a* reasonable rate). On the contrary, the 2017 ASCAP License suggests that the rate payable to BMI should increase. As discussed above, despite the disproportionately large number of ASCAP members who have moved to GMR, the RMLC and ASCAP have agreed to *increase* the rate payable to ASCAP by RMLC Stations.

**BMI's Proposed Fee Covering RMLC Stations' New Media Transmissions
Is Consistent With Prevailing Market Rates**

38. The RMLC has requested licenses that cover, on a "through-to-the-audience" basis, RMLC Stations' broadcasts of BMI-affiliated works via the internet or mobile devices. BMI has quoted a rate structure that is consistent with this Court's decision in *Broadcast Music, Inc. v. Pandora Media, Inc.*, 13 Civ. 4037 (LLS) (S.D.N.Y.) and BMI's subsequent license agreement

with Pandora. There have been no changed circumstances warranting a departure from those recent benchmarks. BMI's proposal is therefore reasonable.

39. BMI's proposed license does not include the wide range of digital uses covered by the BMI-10 License, such as co-branded on-demand subscription streaming services. In the wake of this Court's *Pandora* decision, and the continued growth of digital streaming services, the licensing marketplace for those uses has changed dramatically since the BMI-10 License was negotiated. It is no longer appropriate to allow large RMLC Station groups to shoehorn standalone services that use high volumes of BMI-affiliated music into a license focused primarily on terrestrial broadcasts.

Relief Requested

WHEREFORE, BMI respectfully requests that the Court enter an Order:

- A. Confirming as reasonable the rates and terms requested by BMI for a license granting RMLC Stations the right of public performance in compositions in the BMI repertoire;
- B. Directing RMLC Stations to pay such license fees, effective as of January 1, 2017, and continuing through December 31, 2021; and
- C. For such other and further relief as the Court deems just and proper.

Dated: May 29, 2018
New York, New York

MILBANK, TWEED, HADLEY & McCLOY LLP

/s/ Scott A. Edelman

Scott A. Edelman
Atara Miller
Eric I. Weiss
28 Liberty Street
New York, New York 10005-1413
Telephone: 212-530-5000
Facsimile: 212-530-5219
Email: sedelman@milbank.com

-and-

Stuart Rosen
Joseph J. DiMona
7 World Trade Center
250 Greenwich Street
New York, New York 10007

Attorneys for Respondent Broadcast Music, Inc.