UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BROADCAST MUSIC, INC., Petitioner, v. NORTH AMERICAN CONCERT PROMOTERS ASSOCIATION, as licensing representative of Live Nation entities including, AC Entertainment, Avalon, and Delsener; AEG; Elevated; and Another Planet Entertainment, together with the additional promoters listed on Exhibit A hereto, Respondent.	18 Civ. 8749 (LLS) Related to *United States v. Broadcast Music, Inc.*, 64 Civ. 3787 (LLS)

PETITION OF BROADCAST MUSIC, INC. FOR THE DETERMINATION OF REASONABLE FINAL LICENSE FEES

Pursuant to Article XIV(A) of its Consent Decree, Broadcast Music, Inc. ("BMI") hereby submits this Petition seeking a determination of reasonable final license fees for the right to perform all BMI-affiliated musical compositions granted to members of the North American Concert Promoters Association ("NACPA")[1] for the time period from January 1, 2014 through December 31, 2022, including final blanket license rates for NACPA members for the new license period from July 1, 2018 through 2022, as well as final fees for the retroactive period from January 1, 2014 through June 30, 2018. In support thereof, BMI respectfully submits as follows:[2]

[1] Based on information provided to BMI from NACPA, a list of known members of NACPA is attached hereto as Exhibit A.

[2] Pursuant to the Order of Judge Louis L. Stanton, dated April 25, 2001, in *United States v. Broadcast Music, Inc.*, 64 Civ. 3787, BMI brings this proceeding by separate petition and notes that this proceeding is related to 64 Civ. 3787.

Introductory Statement

1. The live concert industry is of enormous size and importance to the music industry. Live concerts are an immersive, virtually wall-to-wall musical experience beloved by fans who pay a premium to watch their favorite artists perform their favorite songs.

2. The live concert industry is built on the music created by songwriters and composers. Yet, BMI's affiliated songwriters and composers receive ***far less than one percent*** of the revenues generated by these live music performances in the form of license fees. At present, BMI's total license fees from this $10.5 billion-per-year-industry[3] are less than $20 million annually—an effective rate of less than 0.19% of revenue.

3. Live concerts depend entirely on the ability of performers to perform the compositions that audiences associate with those performers. The value of those compositions to live concert promoters is very significant, and far in excess of the miniscule license fees that are presently being paid to songwriters and composers.

4. The value songwriters and composers provide to the live concert experience is recognized to a much greater degree in a variety of license agreements for live concerts entered into by international and unregulated domestic performing rights organizations ("PROs"), which charge blanket license fees that are significantly higher than BMI's historical rates. Two international PROs, PRS for Music ("PRS") in the United Kingdom, and the Society of Composers, Authors, and Music Publishers of Canada ("SOCAN"), as well as the two unregulated domestic PROs, SESAC, Inc. ("SESAC") and Global Music Rights, LLC ("GMR"), have negotiated benchmark blanket license rates that confirm the appropriateness of a higher license rate for BMI when adjusted for market share. For instance, the rates payable to PRS and SOCAN

[3] Including industry revenues from ticket sales and sponsorships.

on account of live concerts are 4% of revenues (more than 20 times BMI's rate) and 3% of revenues, respectively. Other European societies have rates as high as 10% of revenues.[4]

5. Indeed, it is not surprising that other domestic and international PROs have recently negotiated higher rates from concert promoters. Live concerts are of increasing importance to the music industry, as technological change has reduced mechanical royalty[5] streams available to songwriters and composers, which were historically far more lucrative. Songwriters—through their domestic PROs—historically accepted low rates for live concerts because those performances were an important means of generating mechanical royalties through album sales. Concertgoers experienced an artist's live performance, and then bought physical copies of albums or singles based on that exposure, both at the concert venue and thereafter, resulting in mechanical royalties for songwriters and composers. That paradigm is no longer driving the music industry, because album sales have declined so dramatically.

6. Furthermore, while revenue from sales of recorded music (and, consequently, a songwriter's mechanical royalty income) has declined sharply over the last decade, revenue from live music performances has continued to grow steadily. Live concert promoters have consolidated into multinational entities, and have diversified their revenue streams and activities to include a variety of sources not captured by BMI's traditional license structure. In addition to revenue from ticket sales (the sole basis for license fees under BMI's traditional structure), live

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[4] Even when adjusted for BMI's market share on radio airplay in the United States, the blanket license rate payable to PRS suggests a rate benchmark for BMI of 2% of revenues. The disparity between the international PRO rates and BMI's rate is especially stark, in view of the fact that songwriters and composers in the United States create the most popular music in the world.

[5] Mechanical royalties are 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, permanent digital downloads, and more recently on-demand streaming.

concerts now generate significant revenue from ticket fee surcharges, secondary market sales, sponsorship and advertising, luxury box seat sales at arenas, VIP packages, and parking and concessions, among others. It is patently unreasonable that songwriters and composers affiliated with BMI do not share in these expanded revenue streams.

7. The continued growth in the significance of live concerts to the music ecosystem and the increasing diversification of revenue generated by live concerts, coupled with the higher rates traditionally paid to international PROs and other domestic PROs, have prompted BMI to re-examine its historical live concert license rates. To level the playing field with those higher marketplace benchmark rates, and to take account of the numerous changes in the music industry affecting the value of musical works performed at live concerts, the BMI rate is in dire need of a substantial increase. Accordingly, BMI proposes a blanket license fee of 1.15% of gross revenues for the period from July 1, 2018 through December 31, 2022.[6]

8. BMI's proposal is reasonable as it appropriately accounts for these consistently higher benchmarks and significant industry change factors.

The Parties

9. Founded in 1939, BMI is a music performing rights licensing organization 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 consists of the public performance rights in

[6] The revenue base for the prospective period would include revenues received by the promoter from secondary market sales, sponsorship revenue, VIP packages, ticket broker charges, and other relevant streams of income. BMI also proposes a retroactive fee schedule for the period from January 1, 2014 through June 30, 2018, ranging from 0.15% to 0.8% of ticket sales, depending on the seating capacity of the venue.

approximately 14 million musical works from the catalogs of approximately 900,000 Affiliates and covers the entire range of musical genres.

10. 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.

11. Through BMI, licensees obtain public performance rights in 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.

12. NACPA is an industry association that negotiates licenses on behalf of the live concert promoters operating in the United States attached hereto as Exhibit A.

Jurisdiction

13. BMI commences this proceeding pursuant to Article XIV(A) of the Consent Decree,[7] which provides that "[i]f the parties are unable to agree upon a reasonable fee within ninety (90) days from the date when [BMI] advises the applicant of the fee which it deems reasonable and no such filing by applicant for the determination of a reasonable fee for the license requested is pending," then BMI may "apply to this Court for the determination of a reasonable fee[.]"

[7] "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). A copy of the Consent Decree is attached hereto as Exhibit B.

14. Jurisdiction is therefore proper in this Court, pursuant to this Court's rate-setting authority under Article XIV(A) of the Consent Decree, because: (i) NACPA made a written application for a license pursuant to Article XIV(A) of the Consent Decree; (ii) BMI advised NACPA of the fee BMI deemed reasonable for the license requested; (iii) more than 90 days have passed since BMI advised NACPA of the fee BMI deemed reasonable; and (iv) NACPA has neither agreed to the fee offered by BMI nor petitioned this Court for the determination of a reasonable fee.

15. Venue is proper in this District as a result of the express consent of NACPA in applying for a license pursuant to the Consent Decree.

History Of License Negotiations Between BMI And NACPA

16. In December 1997, BMI entered into its first license agreement with NACPA, covering the period January 1, 1998 through December 31, 2004 (the "1998 License"). The 1998 License included a bifurcated rate structure—for live concerts with paid admission, venues with fewer than 10,000 seats paid 0.3% of gross ticket revenue, and venues with 10,000 or more seats paid 0.15% of gross ticket revenue.[8] In addition, the original 1998 License allowed NACPA to receive a 10% administrative discount in license fees for every quarter during which NACPA represented 80% or more of its members under the agreement.

17. During the 1990s, BMI also negotiated with certain music festival[9] owners a bifurcated rate schedule of 0.3% and 0.4% of gross ticket sales revenues, depending on the number of attendees. The higher rates were premised on the fact that multiday festivals had more revenues

[8] The 1998 License also included a small flat fee for benefit concerts or other similar attractions without paid admission.

[9] A "festival" is a multiday live concert event with multiple headline acts.

from sponsorship, concessions, parking, and other sources than evening concerts did, and those revenues were not captured by the license fee base of ticket sales revenues only.

18. In late 2004, BMI and NACPA agreed to extend the 1998 License for one additional year, through December 31, 2005. Thereafter, BMI and NACPA reached an agreement for a license term covering the period from January 1, 2006 through December 31, 2009 (the "2006 License"). The 2006 License included the same bifurcated fee structure that had been agreed to under the 1998 License. The 2006 License also permitted NACPA members to license festivals at a rate of 0.4% of gross ticket revenue for venues with fewer than 10,000 seats and 0.3% of gross ticket revenue for venues with 10,000 or more seats. The 2006 License carried over the same 10% administrative discount to NACPA for each quarter during which NACPA represented 80% or more of its members which was in place under the 1998 agreement.

19. In 2009, BMI began an internal review of its live concert rates and concluded that changes in the industry and the longstanding disparity with international rates, required an increase in the public performance rights rates applicable to live concerts. As a result of this review, in October 2009, BMI took an initial step towards a reasonable rate and revised its standard license rates for live concerts upward for smaller venues, and introduced a new form license to the live concert marketplace for individual promoters, venues, and facilities not represented by NACPA. These new licenses included increased rates applied across five tiers, based upon seating capacity, as follows:

Venue Size	Rate[10]
0 to 2,500 seats	0.8%
2,501 to 3,500 seats	0.6%
3,501 to 5,000 seats	0.4%
5,001 to 9,999 seats	0.3%

[10] The license rates applied to gross ticket revenues.

10,000 seats or more	0.15%

20. These new rates were accepted by virtually all non-NACPA concert promoters (and remained the non-NACPA rates through BMI's cancellation of that license in June 2018).

21. Faced with existing and anticipated costly rate court litigations with multiple industries and the cumulative effect of simultaneous litigations, BMI chose not to commence a litigation with NACPA promoters at that time. Even while recognizing the inadequacy of the existing rates to properly compensate its Affiliates, BMI did not seek to terminate the NACPA license on December 31, 2009. The NACPA license renewed automatically for consecutive one-year terms through December 31, 2013.

22. On August 8, 2013, shortly after BMI's radio and television rate cases were resolved, BMI sent notice to NACPA of its intent to terminate the 2006 License as of December 31, 2013. On October 8, 2013, NACPA formally requested a license from BMI for the period commencing January 1, 2014. As required under the terms of the Consent Decree, on November 13, 2013, BMI provided NACPA with a formal written fee quote. BMI's quote proposed applying to NACPA members the same five-tiered rate structure set out in its live concert form license agreement that had by then been agreed to by thousands of independent promoters. NACPA rejected BMI's offer. BMI and NACPA were unable to reach agreement on a final rate, and NACPA has been licensed under an interim consent decree license, the fees for which are subject to adjustment in a final license retroactive to January 1, 2014.

23. After continued study of the industry and BMI's live concert rates, BMI determined that the rates presented to the market in late 2009 required further adjustment. Accordingly, on November 29, 2017, BMI withdrew its final fee quote. In its place, BMI reiterated its offer of final blanket license rates between 0.15% and 0.8% of gross revenues for the retroactive period from January 1, 2014 through June 30, 2018, but without a 10% administration discount to NACPA,

and BMI advised NACPA that BMI would be proposing new rates and terms for the going forward period in 2018. Soon thereafter in April 2018, BMI offered NACPA a new unitary blanket license rate of 1.15% of an expanded gross revenue base for all live music events, regardless of size or type beginning July 1, 2018. The proposed revenue definition properly took account of revenues from ticket broker charges, sponsorships, secondary market sales, VIP boxes, and other revenue streams of the licensee related to the live performance.

24. To achieve consistency in the industry, BMI also exercised its right to terminate all of BMI's existing non-NACPA live concert promoter, venue, facility, and festival form licenses effective June 30, 2018. The vast majority of the live concert industry is now licensed with BMI on an interim basis.

25. To ensure that BMI's songwriters are able to participate in the expanded revenue streams generated by live concerts, BMI proposes to expand and diversify the revenue base subject to fee beyond gross ticket sales to include other revenues generated in connection with the performances, such as service fees, VIP packages, box suites, sponsorship, advertising, parking, concessions, and other relevant revenue streams. BMI also proposes to remove the 10% administration discount previously offered to NACPA, which is no longer economically justified because BMI, as a result of industry consolidation and technical advancements, can readily administer the licenses directly with NACPA's small number of large promoters.

26. In the nearly five years since NACPA's most recent rate application, BMI and NACPA have not made meaningful progress towards resolving a rate for a final license. The parties' inability to reach a consensual agreement necessitated this Petition.

The Historical Rates Paid By Promoters Do Not Reflect The Value Of BMI Affiliates' Copyrighted Musical Works Given The Massive Changes Affecting The Market For Performing Rights

27. It is not reasonable to maintain the historical rates paid by NACPA members to BMI. Indeed, the Consent Decree contemplates "changes in rates or terms from time to time by reason of changing conditions affecting the market for or marketability of performing rights." (Consent Decree § VIII.) The 2006 License, and those that preceded it, were negotiated in a marketplace that was meaningfully different from the marketplace today. Changes in the music industry clearly indicate that historical NACPA rates severely undervalue the contribution of musical works to live performances in the current performing rights licensing marketplace.

28. The music industry has seen a dramatic trend of industry-wide revenues away from recorded album sales to live music revenues. Today, live concerts have far-surpassed album sales in importance as a source of revenue for BMI's Affiliates. Although the overall use and consumption of music in the United States has grown exponentially over the last decade, the market for album sales is a small fraction of what it once was, resulting in a substantial decline in mechanical royalties paid to music songwriters and composers. Meanwhile, revenue from digital music downloads and streaming has not filled the void, and instead remains minuscule relative to the revenues previously generated by physical album sales. Notwithstanding the hope that streaming music revenues will continue to grow in the future, the historical rates are facially inadequate and must be increased. In view of these changes, composers and songwriters can no longer rely on royalties from album sales to capture the full value of their copyrighted works. Any historical justification for accepting low rates from NACPA has long-since faded.

29. Additionally, as described above, NACPA members no longer generate revenues from live concerts solely from ticket sales. Instead, their revenue base has expanded to include other revenues generated in connection with live performances, including service fees, secondary

market ticket sales earned by the licensee, VIP packages, box suites, sponsorship, advertising, parking, concessions, and other revenue streams. These new revenue streams must be considered in assessing a reasonable BMI license fee. Many of these additional revenue streams relate directly to the performance of music. For example, a VIP package experience will often include exclusive participation in the performing artists' soundchecks, or acoustic performances by the artists before the actual show. Suite rentals generally also include a number of seats outside the suite in the venue with face prices on the ticket far below that of comparable seats. Although NACPA members' sources of revenue have expanded, the revenue base associated with NACPA's historic licenses with BMI, based solely on revenues generated from ticket sales, has remained the same. As a result, songwriters and composers are receiving an increasingly smaller share of the industry's burgeoning live concert revenues from all sources.

The Increased Value Of Public Performance Rights Licenses Covering Live Concerts Supports An Increase In The Blanket License Rates Payable To BMI

30. Under the terms of the Consent Decree, this Court is tasked with determining whether the rates proposed by BMI are 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 reasonable, 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.

31. 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 in which the agreement was negotiated. The rate quoted by BMI for NACPA members is reasonable and

in line with prevailing rates in licenses between competing PROs and promoters, including NACPA members.

32. Although BMI itself licenses its Affiliates' works only domestically, BMI indirectly licenses its catalog overseas through reciprocal licenses with over 90 international societies. The live concert industry is global, with artists of all genres touring across not only the United States, but also Canada, Europe, Asia, and the rest of the world. As a result, the rates negotiated by international PROs with the very same live concert promoters who are represented by NACPA in the United States, are relevant indicators of the market rate for BMI's performing rights licenses.

33. Those licenses indicate that the historical rates paid by NACPA members greatly undervalue BMI Affiliates' copyrighted musical works. For example, when adjusted for BMI's share of domestic radio airplay, the rates negotiated by PRS and SOCAN, two international PROs, imply a unitary rate of nearly 2% of gross revenues for BMI.

34. In addition, the PRS license rate applies to a far broader revenue base than that under BMI's 2006 License. For example, the 4.0% blanket license rate payable to PRS that was approved in 2018 by the U.K. Copyright Tribunal is applied to all monies "paid or payable by the consumer," including, among other things, the price of admission (whether sold on the primary or secondary market), box suites, and ticket handling fees. In this way, PRS participates in additional revenue streams its musical works help to generate, beyond the traditional primary ticket-sales-market.

35. In addition, SESAC and GMR, the two domestic PROs not subject to judicially-monitored consent decrees, have achieved higher share-adjusted rates than BMI. These rates, which further demonstrate the reasonableness of BMI's proposal, are not constrained, as are BMI's

and ASCAP's, by the existence of rate courts and are therefore benchmarks of rates that would be achieved in a free market.

36. The music created by songwriters and composers is the backbone of the live concerts industry. The fees paid to BMI for the use of its Affiliates' musical works in live concerts under historical license rates vastly undervalue that contribution. The rates and terms on which concert promoters are licensed must be adjusted to account for changes in how music is consumed and how revenue is generated, and to ensure that BMI Affiliates are fairly compensated for their works.

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 NACPA members the right of public performance in compositions in the BMI repertoire;

B. Directing NACPA members to pay such license fees, effective as of January 1, 2014 and continuing through December 31, 2022; and

C. For such other and further relief as the Court deems just and proper.

Dated: September 24, 2018
New York, New York

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Exhibit A

NACPA MEMBERS

AC Entertainment/Live Nation
AEG LA (SD/LV)
AEG Midwest
AEG NY
AEG PNW
AEG Rockies
AEG SE (FL)
AEG SF
AEG TMG (TN, NO)
AEG TX (South)
Another Planet Entertainment
Arena Management Holdings
Avalon/Live Nation
Belkin/Live Nation
BGP/Live Nation
Bill Blumenreich Presents
Cellar Door/Live Nation (VA, SC, FL, OH, DC, MI)
CMoore Live/Live Nation
Concerts Southern/Live Nation
Contemporary/Live Nation
DayGlo
Delsener/Live Nation
Don Law Concerts/Live Nation
EFC/Live Nation
Electric Factory/LME
Elevated/Live Nation
Evening Star/Live Nation
Frank Productions, Inc./Live Nation
Insomniac
Jam Productions
Knitting Factory
LN PNW
MEMI
Metropolitan
National Shows 2/Live Nation
Nederlander
Outback Concerts
Pace/Live Nation
PromoWest Productions
Silva Touring (Bill Silva Presents)/Live Nation
Sunshine/Live Nation
United Concerts/Live Nation
Waterfront Concerts

Exhibit B

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

BROADCAST MUSIC, INC. and RKO GENERAL, INC.,

Defendants.

Civil No.
64-Civ-3787

FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint herein on December 10, 1964, and defendant having filed its answer denying the substantive allegations of such complaint, and the parties by their respective attorneys having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein and without this Final Judgment constituting evidence or an admission by either party with respect to any such issue:

Now, THEREFORE, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein, and upon the consent of the parties hereto, it is hereby

ORDERED, ADJUDGED and DECREED as follows:

I.

This Court has jurisdiction of the subject matter of this action and of the parties hereto. The complaint states claims for relief against the defendant under Sections 1 and 2 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II.

As used in this Final Judgment:

(A) "Defendant" means the defendant Broadcast Music, Inc., a New York Corporation;

(B) "Programming period" means a fifteen minute period of broadcasting commencing on the hour and at fifteen, thirty and

forty-five minutes past the hour without regard to whether such period contains one or more programs or announcements.

(C) "Defendant's repertory" means those compositions, the right of public performance of which defendant has or hereafter shall have the right to license or sublicense.

III.

The provisions of this Final Judgment shall apply to defendant and to each of its subsidiaries, successors, assigns, officers, directors, servants, employees and agents, and to all persons in active concert or participation with defendant who receive actual notice of this Final Judgment by personal service or otherwise. None of the provisions of this Final Judgment shall apply outside the United States of America, its territories, and possessions.

IV.

Defendant is enjoined and restrained from:

(A) Failing to grant permission, on the written request of all writers and publishers of a musical composition including the copyright proprietor thereof, allowing such persons to issue to a music user making direct performances to the public a non-exclusive license permitting the making of specified performances of such musical composition by such music user directly to the public, provided that the defendant shall not be required to make payment with respect to performances so licensed.

(B) Engaging in the commercial publication or recording of music or in the commercial distribution of sheet music or recordings.

V.

(A) Defendant shall not refuse to enter into a contract providing for the licensing by defendant of performance rights with any writer who shall have had at least one copyrighted musical composition of his writing commercially published or recorded, or with any publisher of music actively engaged in the music publishing business whose musical publications have been commercially published or recorded and publicly promoted and distributed for at least one year, and who assumes the financial risk involved in the normal publication of musical works; provided, however, that defendant shall have the right to refuse to enter into any such contract with any writer or publisher who does not satisfy reasonable standards of literacy and integrity if the defendant is willing to submit to arbitration in the County, City

and State of New York the reasonableness and applicability of such standards, under the rules then prevailing of the American Arbitration Association, with any writer or publisher with whom defendant has refused so to contract.

(B) Defendant shall not enter into any contract with a writer or publisher requiring such writer or publisher to grant to defendant performing rights for a period in excess of five years, provided, however, that defendant may continue to license, as if under the contract, all musical compositions in which the defendant has performing rights at the date of termination of any such contract until all advances made by defendant to such writers and publishers shall have been earned or repaid.

(C) Upon the termination, at any time hereafter, of any contract with a writer or publisher relating to the licensing of the right publicly to perform any musical composition, defendant shall continue to pay for performances of the musical compositions of such writer or publisher licensed by defendant upon the basis of the current performance rates generally paid by defendant to writers and publishers for similar performances of similar compositions for so long as such performing rights are not otherwise licensed.

VI.

(A) Defendant shall not acquire rights of public performance in any musical compositions from any publisher under a contract which requires the officers, directors, owners or employees of such publisher to refrain from publishing or promoting musical works licensed through another performing rights organization, provided that nothing contained in this paragraph shall prevent defendant from entering into a contract with a publishing entity which requires such entity not to license any performance rights through any other performing rights organization during the term of the contract, and requiring that any works licensed by such officers, directors, owners or employees through another performing rights organization be licensed by a separate publishing entity which does not have a name identical with or similar to the name of any publishing entity with which defendant has contracted.

(B) Defendant shall not enter into any agreement for the acquisition or the licensing of performing rights which requires the recording or public performance of any stated amount or percentage of music, the performing rights in which are licensed or are to be licensed by defendant.

VII.

(A) Defendant shall make available at reasonable intervals, to all writers and publishers who have granted performance rights to it, a complete statement of the performance payment rates (to writers, those applicable to writers, and to publishers, those applicable to publishers), currently utilized by it for all classifications of performances and musical compositions.

(B) Defendant will not offer or agree to make payments in advance for a stated period for future performing rights which are not either repayable or to be earned by means of future performance to any writer or publisher who, at the time of such offer or agreement, is a member of or under direct contract for the licensing of such performing rights with any other United States performing rights licensing organization, provided that this restriction shall not apply (1) in the case of any such writer or publisher who at any time prior to said offer or agreement had licensed performing rights through defendant or (2) in the case of any such writer or publisher who is a member of or directly affiliated with any other United States performing rights licensing organization which makes offers or makes payments similar to those forbidden in this subparagraph to writers or publishers then under contract to defendant.

(C) Defendant shall include in all contracts which it tenders to writers, publishers and music users relating to the licensing of performance rights a clause requiring the parties to submit to arbitration in the City, County and State of New York under the then prevailing rules of the American Arbitration Association, all disputes of any kind, nature or description in connection with the terms and conditions of such contracts or arising out of the performance thereof or based upon an alleged breach thereof, except that in all contracts tendered by defendant to music users, the clause requiring the parties to submit to arbitration will exclude disputes that are cognizable by the Court pursuant to Article XIV hereof.

VIII.

(A) Defendant shall not enter into, recognize as valid or perform any performing rights license agreement which shall result in discriminating in rates or terms between licensees similarly situated; provided, however, that differentials based upon applicable business factors which justify different rates or terms shall not be considered discrimination within the meaning of this section; and provided further that nothing contained in this section shall prevent changes in rates or terms from time to time by reason of changing conditions affecting the market for or marketability of performing rights.

(B) Defendant shall, upon the request of any unlicensed broadcaster, license the rights publicly to perform its repertory by broadcasting on either a per program or per programming period basis, at defendant's option. The fee for this license shall relate only to programs (including announcements), or to programming periods, during which a licensed composition is performed. The fee shall be expressed, at defendant's option, either (1) in dollars, (2) as a percentage of the revenue which the broadcaster received for the use of its broadcasting facilities or (3) in the case of sustaining programs or programming periods, as a percentage of the applicable card rate had the program or programming period been commercially sponsored. In the event defendant offers to license broadcasters on bases in addition to a per program or per programming period basis, defendant shall act in good faith so that there shall be a relationship between such per program or such per programming period basis and such other bases, justifiable by applicable business factors including availability, so that there will be no frustration of the purpose of this section to afford broadcasters alternative bases of license compensation.

IX.

(A) Defendant shall not license the public performance of any musical composition or compositions except on a basis whereby, insofar as network broadcasting by a regularly constituted network so requesting is concerned, the issuance of a single license, authorizing and fixing a single license fee for such performance by network broadcasting, shall permit the simultaneous broadcasting of such performance by all stations on the network which shall broadcast such performance, without requiring separate licenses for such several stations for such performance.

(B) With respect to any musical composition in defendant's catalogue of musical compositions licensed for broadcasting and which is or shall be lawfully recorded for performance on specified commercially sponsored programs on an electrical transcription or on other specially prepared recordation intended for broadcasting purposes, defendant shall not refuse to offer to license the public performance by designated broadcasting stations of such compositions by a single license to any manufacturer, producer or distributor of such transcription or recordation or to any advertiser or advertising agency on whose behalf such transcription or recordation shall have been made who may request such license, which single license shall authorize the broadcasting of the recorded composition by means of such transcription or recordation by all stations enumerated by the licensee, on terms and conditions fixed by defendant, without requiring separate licenses for such enumerated stations.

(C) Defendant shall not, in connection with any offer to license by it the public performance of musical compositions by

music users other than broadcasters, refuse to offer a license at a price or prices to be fixed by defendant with the consent of the copyright proprietor for the performance of such specific (i.e., per piece) musical compositions, the use of which shall be requested by the prospective licensee.

X.

(A) Defendant shall not assert or exercise any right or power to restrict from public performance by any licensee of defendant any copyrighted musical composition in order to exact additional consideration for the performance thereof, or for the purpose of permitting the fixing or regulating of fees for the recording or transcribing of such composition; provided, however, that nothing in this paragraph shall prevent defendant from restricting performances of a musical composition in order reasonably to protect the work against indiscriminate performances or the value of the public performance rights therein or to protect the dramatic performing rights therein, or, as may be reasonably necessary in connection with any claim or litigation involving the performance rights in any such composition.

(B) Defendant, during the term of any license agreements with any class of licensees, shall not make any voluntary reductions in the fees payable under any such agreements, provided, however, that nothing herein shall prevent defendant from lowering any fees or rates to any or all classes of licensees in response to changing conditions affecting the value or marketability of its catalogue to such class or classes, or where necessary to meet competition.

XI.

For the purpose of securing or determining compliance with this Final Judgment, and for no other purpose, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division. and on reasonable notice to defendant made to its principal office, be permitted, subject to any legally recognized privilege:

(A) Access, during office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of defendant relating to any matters contained in this Final Judgment;

(B) Subject to the reasonable convenience of defendant and without restraint or interference from it, to interview officers or employees of defendant, who may have counsel present regarding any such matters.

Upon written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, defendant shall submit such reports in writing with respect to the matters contained in this Final Judgment as may from time to time be necessary to the enforcement of this Final Judgment.

No information obtained by the means permitted in this Section XI shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the Plaintiff, except in the course of legal proceedings in which the United States is a party for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

XII.

All of the provisions of this Final Judgment shall become effective on the entry thereof, except as to paragraph C of Article VII, which shall not become effective until 90 days after the date of entry of this Final Judgment.

XIII.

Jurisdiction is retained by this Court for the purpose of enabling either of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions thereof, for the enforcement of compliance therewith and for the punishment of violations thereof.

To best preserve the independent conduct of defendant's music licensing activities, the jurisdiction retained by this Court over this Final Judgment shall be exercised by a Judge of this Court other than one to whom has been assigned any action in which a judgment has been entered retaining jurisdiction over any music performing rights licensing organization (e.g. ASCAP) other than defendant. No reference or assignment of any issue or matter under this Final Judgment shall be made to a Magistrate Judge or Master to whom has been referred or assigned any pending issue or matter in which any music performing rights licensing organization other than defendant as to which this Court has entered judgment retaining jurisdiction, (e.g. ASCAP) is a party.

XIV.

(A) Subject to all provisions of this Final Judgment, defendant shall, within ninety (90) days of its receipt of a written application from an applicant for a license for the right

of public performance of any, some or all of the compositions in defendant's repertory, advise the applicant in writing of the fee which it deems reasonable for the license requested. If the parties are unable to agree upon a reasonable fee within sixty (60) days from the date when defendant advises the applicant of the fee which it deems reasonable, the applicant may forthwith apply to this Court for the determination of a reasonable fee and defendant shall, upon receipt of notice of the filing of such application, promptly give notice thereof to the Assistant Attorney General in charge of the Antitrust Division. If the parties are unable to agree upon a reasonable fee within ninety (90) days from the date when defendant advises the applicant of the fee which it deems reasonable and no such filing by applicant for the determination of a reasonable fee for the license requested is pending, then defendant may forthwith apply to this Court for the determination of a reasonable fee and defendant shall promptly give notice of its filing of such application to the Assistant Attorney General in charge of the Antitrust Division. In any such proceeding, defendant shall have the burden of proof to establish the reasonableness of the fee requested by it. Should defendant not establish that the fee requested by it is a reasonable one, then the Court shall determine a reasonable fee based upon all the evidence. Pending the completion of any such negotiations or proceedings, the applicant shall have the right to use any, some or all of the compositions in defendant's repertory to which its application pertains, without payment of any fee or other compensation, but subject to the provisions of Subsection (B) hereof, and to the final order or judgment entered by this Court in such proceeding;

(B) When an applicant has the right to perform any compositions in defendant's repertory pending the completion of any negotiations or proceedings provided for in Subsection (A) hereof, either the applicant or defendant may apply to this Court to fix an interim fee pending final determination of what constitutes a reasonable fee. It is the purpose of this provision that an interim fee be determined promptly, and without prejudice as to the final determination of what constitutes a reasonable fee. It is further intended that interim fee proceedings be completed within 120 days of the date when application is made to fix an interim fee, subject to extension at the request of defendant or the applicant only in the interest of justice for good cause shown. If the Court fixes such interim fee, defendant shall then issue and the applicant shall accept a license providing for the payment of a fee at such interim rate from the date the applicant requested a license. If the applicant fails to accept such license or fails to pay the interim fee in accordance therewith, such failure shall be ground for the dismissal of its application. Where an interim license has been issued pursuant to this Subsection (B), the reasonable fee finally determined by this Court shall be retroactive to the date the applicant requested a license;

(C) When a reasonable fee has been finally determined by this Court, defendant shall be required to offer a license at a comparable fee to all other applicants similarly situated who shall thereafter request a license of defendant, but any license agreement which has been executed without any Court determination between defendant and another applicant similarly situated prior to such determination by the Court shall not be deemed to be in any way affected or altered by such determination for the term of such license agreement;

(D) Nothing in this Article XIV shall prevent any applicant from attacking in the aforesaid proceedings or in any other controversy the validity of the copyright of any of the compositions in defendant's repertory nor shall this Judgment be construed as importing any validity or value to any of said copyrights.

AND IT IS FURTHER ORDERED, ADJUDGED and DECREED that with respect to any music user heretofore licensed by defendant the license agreement of which expressly provides for determination by this Court of reasonable license fees or other terms for any period covered by such license, either defendant or such music user may apply to this Court for such determination provided that such license agreement provision has not otherwise expired.

Dated: New York, N. Y.
December 29, 1966

EDWARD C. MCLEAN
United States District Judge

JUDGMENT ENTERED DECEMBER 29, 1966

JOHN J. OLEAR, JR.
Clerk

Dated: New York, New York
November 18, 1994

Robert P. Patterson, Jr.
U.S.D.J.