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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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BROADCAST MUSIC, INC.,

Petitioner,

2018 Civ. 8749 (LLS)

- against -

OPINION

NORTH AMERICAN CONCERT PROMOTERS
ASSOCIATION, as licensing
representative of the promoters
listed on Exhibit A to the
Petition,

Respondent.

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Article XIV(A) of the Broadcast Music, Inc. ("BMI") Consent Decree entered in United States v. Broadcast Music, Inc., 1966 Trade Cas. (CCH) ¶ 71, 941 (S.D.N.Y. Dec. 29, 1966), amended by, United States v. Broadcast Music, Inc., 1996-1 Trade Cas. ¶ 71, 378 (S.D.N.Y. Nov. 18, 1994) ("BMI Consent Decree") requires BMI to offer any prospective music user a license to publicly perform the songs in its repertoire. If BMI and the licensee are at an impasse over the licensing rate, either party can petition this Court to set a "reasonable" rate. Id. The Court must thus authorize a rate that will allow songwriters and publishers to obtain the benefits derived from the copyright protections afforded to their works, while simultaneously avoiding overly compensating them for the contributions made by others' live performance of the works and eliminating any price inflation derived from BMI's aggregated market power as a monopolist.

BMI petitioned this Court to determine the reasonable rate that the North American Concert Promoters¹ Association ("NACPA") owes for its members' right to perform BMI-affiliated music at live concerts. BMI seeks an order setting the final fee for two blanket licenses, one that covers the "Retroactive Period" stemming from January 1, 2014 through June 30, 2018 and the other that controls the "Current Period" running from July 1, 2018 through December 31, 2022. The parties agree to structure the fee as a percentage of gross revenue but dispute the definition of gross revenue and the rate that applies to the revenue base.

For the reasons that follow, the Court adopts BMI's proposed rate for the Retroactive Period. For the Current Period, the reasonable rate is set at 0.5% of Gross Ticket Revenues, as defined below.

BACKGROUND

a. BMI and Domestic PROS

BMI is a performing rights licensing organization ("PRO") that represents approximately 1.3 million songwriters, composers, and music publishers ("BMI affiliates"). Tr. 129:10-19. BMI licenses the public use of its affiliates' musical

¹ The term "promoters" refers to concert organizers, who provide for the artist, venue, advertising, and general facilitating of a live concert event.

compositions to a broad range of businesses and music users including, radio and television broadcasters, satellite radio, cable television, streaming services, concert promoters, and restaurants. Tr. 130:16-24. BMI operates under the constraint of the Consent Decree, which prohibits it from refusing a license to any music user who is willing to pay a reasonable license fee. Consent Decree § XIV.

The BMI repertoire contains around twenty-one million musical works or approximately 45.4% of the total music market. Tr. 129:15-17; PX 980 at 24. The rest of the market is represented by three other PROs: the American Society of Composers, Authors, and Publishers ("ASCAP"), the Society of European Stage Authors and Composers ("SESAC"), and Global Music Rights ("GMR"). ASCAP's repertoire encompasses approximately 46.5% of musical compositions on the market. PX 980 at 24. It operates under a Consent Decree identical in practice to BMI's. Stip. Facts ¶¶ 21-22.

SESAC and GMR are smaller domestic PROs that do not operate under Consent Decrees. Stip. Facts ¶¶ 23-24. SESAC represents the licensing rights to approximately 3.6% of the market. PX 980 at 24. GMR, the newest PRO, licenses approximately 4.5% of the market. Id.

b. NACPA and its Members

NACPA is an association of concert industry promoters that was formed in 1988. Tr. 1420:12-18. NACPA licenses with BMI, ASCAP, and SESAC to cover the public performance of music at live concerts promoted by its members.² Stip. Facts ¶ 12; see JX 24 (1998 BMI-NACPA Agreement); JX 29 (2006 BMI-NACPA Agreement); JX 57 (2018 ASCAP-NACPA Agreement); JX 62 (2020 SESAC-NACPA Agreement). Although NACPA itself enters into these licenses on behalf of its collective membership, NACPA's members are the ones paying the rate. Tr. 496:10-17; see JX 29. NACPA and its members are thus aligned to keep the license fees low. Tr. 1001:2-11, 1086:23-1087:3. NACPA administers the license by verifying the gross revenues reported from each concert, collecting payments from members, and remitting them to BMI. Stip. Facts ¶ 14.

NACPA has forty-six concert-promoter members.³ Tr. 141:4-6. Of those members, the most notable are Live Nation Entertainment, Inc. ("Live Nation") and AEG Presents, LLC ("AEG"). Live Nation is affiliated with approximately half of NACPA's other members, while another quarter of NACPA's members

² Unlike the other PROs that have entered into licensing agreements with NACPA itself, GMR has licenses with NACPA's individual members. See PX 83, 101.

³ To become a NACPA member, a promoter must have staged at least sixty shows in the prior year, including at least five club shows, five theater shows, and five shows in venues with more than 10,000 seats. Stip. Facts ¶ 11.

are subsidiaries of AEG. Id. Live Nation, AEG, and their subsidiaries pay roughly 90% of the fees under NACPA's license with BMI. Tr. 141:8-11. NACPA members that are not associated with Live Nation and AEG include Another Planet Entertainment ("APE"), Jam Productions ("JAM"), Music and Event Management, Inc. ("MEMI"), and Nederlander Concerts ("Nederlander"). Stip. Facts ¶ 17.

Live Nation and AEG are conglomerates in the music industry. Their businesses include concert promotion, venue ownership, and ticket servicing. Tr. 628:25-629:1, 632:14-17, 638:6-7, 696:1-2, 699:13-17; 700:13-19. Live Nation is the largest concert promoter in the United States generating more revenue from concerts than any other promoter. Tr. 696:13-14; PX 748 at 2-3. It owns Ticketmaster, the largest ticketing servicing company in the nation. Tr. 638:6-7. Ticketmaster requires ticket buyers to pay service fees on virtually all tickets, which amount to an average of 20% of the face value of the ticket. See Tr. 642:12-24, 645:12-23.

AEG is the second-largest concert promoter in the United States. Tr. 696:8-10. It also owns the ticket servicing company AXS, which charges service fees comparable to Ticketmaster. Tr. 700:13-19, 720:10-723:16, 725:15-19.

c. Music Industry

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