No. 23-935

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BROADCAST MUSIC, INC.,
Petitioner-Appellee-Cross-Appellant,
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-Appellant-Cross-Appellee.

On Appeal from the United States District Court for the Southern District of New York, No. 18-cv-8749, Hon. Louis L. Stanton

BRIEF OF *AMICI CURIAE* MOTION PICTURE ASSOCIATION, INC., RADIO MUSIC LICENSE COMMITTEE, NATIONAL ASSOCIATION OF BROADCASTERS, DIGITAL MEDIA ASSOCIATION, EXHIBITIONS & CONFERENCES ALLIANCE, AND INTERNATIONAL ASSOCIATION OF VENUE MANAGERS IN SUPPORT OF RESPONDENT-APPELLANT-CROSS-APPELLEE

Anne M. Voigts
KING & SPALDING LLP
601 S California Ave., Ste. 100
Palo Alto, CA 94304

David P. Mattern
KING & SPALDING LLP
1700 Pennsylvania Avenue NW
Washington, DC 20006

Kenneth Steinthal
KING & SPALDING LLP
50 California Street
Suite 3300
San Francisco, CA 94111
(415) 318-1200
ksteinthal@kslaw.com

Counsel for Amici Curiae

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), the Motion Picture Association, Inc., the Radio Music License Committee, the National Association of Broadcasters, the Digital Media Association, the Exhibitions & Conferences Alliance, and the International Association of Venue Managers certify that they do not have a parent corporation and that no publicly held corporation owns more than ten percent of their stock.

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INTEREST OF *AMICI CURIAE*[1]

Amici are the Motion Picture Association, Inc. ("MPA"), the Radio Music License Committee ("RMLC"), the National Association of Broadcasters ("NAB"), the Digital Media Association ("DiMA"), the Exhibitions & Conferences Alliance ("ECA") and the International Association of Venue Managers ("IAVM"). Each amicus is an industry association that represents the interests of music licensees. Each of those licensees would be harmed if the decision below were allowed to stand.

The MPA is a not-for-profit trade association founded in 1922. The MPA serves as the voice and advocate of the film and television industry, advancing the business and art of storytelling, protecting the creative and artistic freedoms of storytellers, and bringing entertainment and inspiration to audiences worldwide.

The MPA's member companies are Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Universal City Studios LLC, Walt Disney Studios Motion Pictures, Warner Bros. Entertainment

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this amicus brief.

Inc., and Netflix Studios, LLC. These entities and their affiliates operate the leading audiovisual content program services and platforms for the transmittal of filmed entertainment in the United States—including via broadcast, cable and streaming platforms.

The RMLC is a non-profit entity that has roots dating back to the 1930s. It represents the interests of the vast majority of commercial radio stations in the United States with regard to music licensing matters involving performing rights organizations ("PROs"), including Broadcast Music, Inc. ("BMI") and the American Society of Composers, Authors & Publishers ("ASCAP").

The NAB is the nonprofit trade association serving as a leading voice for local television and radio stations and broadcast networks across the United States. NAB focuses on ensuring broadcasters' ability to grow and innovate to provide their communities with a lifeline during emergencies, vital local news and investigative reporting, and the entertainment they depend on every day. NAB advocates on behalf of its members regarding music licensing matters, including those concerning all the major PROs.

DiMA is the leading trade association advocating for the digital music innovations that have created unparalleled consumer choice and revolutionized the way music fans and artists connect. Representing the world's leading audio streaming companies for over two decades, DiMA's mission is to promote and protect the ability of music fans to engage with creative content whenever and wherever they want and for artists to more easily reach old fans and make new ones.

The ECA is the umbrella organization representing the interests of the business events industry. It is a non-profit advocacy association established in 2021 to represent the common interests of the United States business events sector, whose members regularly host and execute conferences, trade shows and other public gatherings across the United States. Its members are comprised of professional, trade, and labor organizations from across the interconnected ecosystem of exhibitors, event organizers, venues, suppliers and destinations that comprise this sector.[2]

[2] ECA's members are: the Center for Exhibition Industry Research, Destinations International, Experiential Designers and Producers Association, Exhibition Services and Contractors Association, International Association of Exhibitions and Events, International

The IAVM is a not-for-profit industry association that represents the interests of public assembly venues and venue managers. IAVM's 7,300+ active members include managers and senior executives from arenas, convention centers, exhibit halls, stadiums, performing arts centers, university complexes, racetracks, auditoriums and amphitheaters. IAVM's mission is to educate, advocate for and inspire public assembly venue professionals worldwide.

Each of these amici and their members have a strong interest in how the district court sitting as a rate court pursuant to the antitrust consent decrees that govern BMI and ASCAP (collectively the "consent decrees") should set rates.[3] Each is part of and/or represents an industry that has developed in the context of, and in reliance on, the consent decrees that establish those rate courts as a bulwark against non-competitive pricing. (Indeed, several of the prior decisions of this Court

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Association of Venue Managers, Professional Convention Management Association, Society of Independent Show Organizers, Trade Show Labor Alliance, and UFI, The Global Association of the Exhibition Industry.

[3] Amici are trade associations that represent the interests of their members and their affiliates, which are the entities that actually obtain licenses from PROs. However, for the sake of simplicity, in this brief we use the term "amici" to include the actual licensees.

and the Supreme Court concerning BMI and ASCAP licensing (and cited *infra*) have involved program services operated by the amici or their affiliated entities.) And each is harmed by rate-setting decisions that, like this one, lose sight of the principal purpose of the consent decrees. Because the potential anti-competitive ramifications of this decision and its flawed reasoning extend far beyond the litigants in the proceedings below and the particular BMI/NACPA dispute, amici respectfully ask this Court to reverse the district court's decision.

INTRODUCTION AND SUMMARY OF ARGUMENT

The district court's decision here is wrong. It set a rate for BMI using as "benchmarks" rates obtained by two very different performing rights organizations, SESAC and GMR, in very different economic circumstances than pertain to the marketplace governing BMI and ASCAP licensing.

BMI and ASCAP, which together control over 90% of all public performance rights in musical works, SPA4-5, are subject to consent decrees intended to protect entities like amici from the anticompetitive abuses that come with the aggregation of vast numbers of copyrights in the hands of a single licensing entity. To protect licensees from the disproportionate market power created by such aggregations, the consent decrees require that BMI and ASCAP issue licenses upon request to entities requesting them and that the courts in the Southern District of New York determine a reasonable license fee when the licensee and BMI or ASCAP cannot reach agreement.

As amici have experienced firsthand, SESAC and GMR are not subject to the same constraints on anticompetitive conduct as BMI and ASCAP, and amici enjoy none of the consent decrees' protections when

they negotiate—as they must—with SESAC and GMR. Although SESAC and GMR have smaller repertories than BMI and ASCAP do (partially because they are invitation-only organizations, unlike BMI and ASCAP), each nonetheless controls the rights to multiple thousands of musical compositions, including works of writers as iconic as those who populate the ranks of BMI and ASCAP (such as Adele and Bob Dylan who are licensed by SESAC, and Bruce Springsteen and John Lennon who are licensed by GMR).

Industry reality thus makes it a necessity for amici to obtain blanket licenses from SESAC and GMR as well as BMI and ASCAP. This is particularly the case because music rights are often fragmented, with multiple PROs controlling interests in a single song. Adding to the problem, composition ownership information is opaque and inaccurate. Amici thus face, on the one hand, the threat of crippling copyright infringement liability if they do not obtain SESAC and GMR licenses and, on the other, supra-competitive prices that SESAC and GMR invariably charge when they do. As a result, they find themselves wedged between a rock and a hard place.

Secure in the knowledge that their blanket licenses are necessary complements, not substitutes, for BMI's and ASCAP's licenses, SESAC and GMR have taken full advantage of these very different marketplace circumstances and their ability to set prices free from judicial oversight. But the impact of their supra-competitive licensing practices on licensees has been cabined before the decision below, in large part because (a) the actual prices, while inflated, are not so high as to be ruinous to licensees given the comparatively smaller repertories involved; and (b) no rate court until now had relied on SESAC or GMR rates in setting rates for the much larger BMI and ASCAP repertories.

In relying on SESAC and GMR's rates, the district court turned a long-standing consent decree designed to protect music users on its head. The BMI consent decree was designed to stop BMI, a music-rights aggregator with monopoly power, from abusing that power. But Judge Stanton's decision effectively endorsed those abuses by setting a rate that BMI could never get in a competitive marketplace, even though that is the governing standard for BMI (and ASCAP) rate-setting cases. Absent correction by this Court, that error risks replication; and the procedures put into place to prevent abuses could be used instead to further them.

Nor is this just a theoretical concern. If this Court were to uphold Judge Stanton's benchmarking analysis, BMI and ASCAP would be incentivized to argue in future negotiations and rate proceedings that their rates should be increased in proportion to the greater play-share represented by their repertories on licensee service offerings compared to GMR and/or SESAC. *Indeed, as amici can attest, this is already happening in the broader licensee marketplace.* The potential impact of the district court's error below thus sweeps far beyond the litigants in the case below.

ARGUMENT

I. Music users across industries rely on the consent decrees and their rate court mechanism to ensure a competitive marketplace for music.

A. Amici, like many others, rely on the protections of the BMI and ASCAP consent decrees.

"Every day, hundreds of thousands of restaurants, radio stations, online services, television stations, performance venues, and countless other establishments publicly perform musical works." Dep't of Justice, Statement of the Department of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees 5 (Aug. 4, 2016) ("DOJ Closing Statement"). To license the rights for those

performances, composers, songwriters, and publishers have historically relied on performing rights organizations. The PROs pool the copyrights held by vast numbers of different owners and collectively license those rights to music users like amici. *Id.* And for decades, amici have obtained performance rights for their programming in the United States through licenses with the PROs.

Obtaining those rights through a blanket license is not a nicety for amici, but a necessity—and one that also serves the public's interest. The Supreme Court has addressed this in the context of ASCAP and BMI licensing, before the emergence of SESAC and GMR as essential marketplace PRO players. *BMI v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 5 (1979). PROs provide blanket licenses to users, including amici, across many different industries—spanning everything and everyone from bar owners, restaurants and other public venues, to radio and television stations, to audiovisual content programming services distributed by cable, satellite and streaming, to digital music services and all other distributors of content that contains music. In turn, those blanket licenses enable users to immediately obtain access to huge aggregations of songs without resorting to individualized licensing

determinations or negotiations for each song with each rightsholder (even assuming each rightsholder could be identified in the first place). *Id.; see In re Pandora Media, Inc.*, 6 F. Supp. 3d 317, 322 (S.D.N.Y. 2014), *aff'd*, 785 F.3d 73 (2d Cir. 2015) (per curiam). Historically, blanket licenses have reflected the fact that "[m]ost users want unplanned, rapid, and indemnified access to any and all of the repertory of compositions, and . . . owners want a reliable method of collecting for the use of their copyrights." *BMI*, 441 U.S. at 20-21.

But as amici have experienced, the practice of providing at a single price the rights to play multiple thousands of separately owned and competing songs carries with those benefits a separate and substantial price: it risks lessening competition and licensing music at unfair and supra-competitive levels. That aggregation of so many licensing rights in the hands of so few results in PROs (including SESAC and GMR) wielding extraordinary power that, absent external correction, distorts normal marketplace economics, raises profound antitrust concerns, and is why the United States first brought price-fixing charges against ASCAP and BMI more than 80 years ago. Those suits were resolved through consent decrees that saved the then-existing two essential PROs

from condemnation as a *per se* restraint of trade. *BMI,* 441 U.S. at 20; *United States v. BMI*, 275 F.3d 168, 172 (2d Cir. 2001). While those consent decrees have been amended over the last 80 years, their central purpose remains: to "disinfect[]" BMI and ASCAP "as . . . potential combination[s] in restraint of trade." *ASCAP v. Showtime/Movie Channel, Inc.*, 912 F.2d 563, 570 (2d Cir. 1990) (quoting *K-91, Inc. v. Gershwin Publ'g Corp.*, 372 F.2d 1, 4 (9th Cir. 1967)). When the government decided in 2016 to reevaluate whether those consent decrees should either be eliminated or significantly pared back, it concluded that they should not because "the current system has well served music creators and music users for decades and should remain intact." DOJ Closing Statement at 3. That is certainly true for amici and those who enjoy the content that they distribute and provide to the public.

For decades, amici have relied on the consent decrees' protections that "disinfect" BMI and ASCAP as a restraint of trade. Those protections include, as noted above, requiring that BMI and ASCAP issue licenses on request, that any fee set by BMI or ASCAP be reasonable, and that BMI's and ASCAP's rate proposals be subject to the oversight of a rate court, where parties can litigate disputes over rates

and courts determine "a reasonable fee for the license requested." *United States v. BMI,* 1966 Trade Cas. (CCH) ¶ 71,941 (S.D.N.Y. 1966), *amended,* No. 64-CIV-3787, 1994 WL 901652, 1996-1 Trade Cas. (CCH) ¶ 71,378 (S.D.N.Y. Nov. 18, 1994) (BMI Decree § XIV(A)); *see United States v. ASCAP,* No. 41-1395(WCC), 2001 WL 1589999 (S.D.N.Y. June 11, 2001) (ASCAP Decree § IX.A). The consent decrees also prohibit BMI and ASCAP from requiring their members to exclusively license through them. This feature enables the possibility that music users can seek "direct licenses" of BMI and ASCAP works from individual BMI/ASCAP writers or publishers. That possibility, coupled with other consent decree obligations requiring BMI and ASCAP to offer alternative-to-blanket licenses the price for which must take into account any such direct licensing initiatives, can provide meaningful rate relief for licensees.

Oversight by the so-called "rate courts" has proven to be vitally necessary to ensure that PROs offer fair, competitive rates to amici and others. Operating *without* rate courts would put the proverbial fox in charge of the henhouse. After all, "rate-setting courts . . . exist as a result of monopolists exercising disproportionate power over the market

for music rights." *United States v. BMI* (*Music Choice IV*"), 426 F.3d 91, 96 (2d Cir. 2005).

Accordingly, the rate courts have time and again (correctly) pushed back on PRO rate requests that would result in supra-competitive prices. *BMI v. DMX Inc.*, 683 F.3d 32, 46 (2d Cir. 2012) (rate proposals "did not reflect rates that would be set in a competitive market"); *In re Application of MobiTV, Inc.*, 712 F. Supp. 2d 206, 244 (S.D.N.Y. 2010) (rejecting fee request). In turn, this Court has served as a bulwark against wayward decisions that failed to provide this oversight and thus failed to ensure the sort of reasonable fee outcomes a competitive market would produce. *United States v. ASCAP* (*RealNetworks*), 627 F.3d 64, 83-85 (2d Cir. 2010); *United States v. BMI* (*Music Choice II*), 316 F.3d 189, 195-97 (2d Cir. 2003); *Music Choice IV*, 426 F.3d at 98-99.

While the BMI and ASCAP decrees' protections to licensees have proven to be essential in ensuring that BMI and ASCAP rates remain available to amici and other licensees at reasonable, competitive market levels, SESAC and GMR are subject to *none* of these constraints—notwithstanding the fact that both SESAC and GMR, as they and their substantial repertories have developed and grown over the last several

years, are also must-have licenses for amici. *See infra* Points I.B and II (explaining why and the important consequences of that for this appeal).

B. Amici's experiences vary dramatically when negotiating with PROs which are under a consent decree as opposed to those which are not.

Amici have vastly different experiences licensing with BMI/ASCAP on the one hand, and GMR and SESAC on the other. BMI and ASCAP *cannot* "hold up" a licensee because the consent decrees' protections require them to provide a license upon request and to do so for a "reasonable," competitive market fee. By contrast, GMR and SESAC can and do. The economic circumstances of the marketplace in which GMR and SESAC negotiations take place—as compared to BMI and ASCAP negotiations—are thus markedly different.

As noted, amici's service offerings and operations require that they take licenses from *each* of the four PROs. Amici do not fully control the music played on their platforms, at their venues/places of business, etc. For instance, amici have no control over the music in advertisements and other third-party produced programming aired through their platforms. Nor, for that matter, is ownership information associated with all the compositions embodied in their programming content known or available

to them before their programming is transmitted (and sometimes not even after). The upshot is that amici must take licenses from each of the four PROs or risk liability for copyright infringement.

The Department of Justice has properly noted both the lack of transparency and the impossibility of licensing songs on an individual song-by-song basis in a marketplace characterized by multiple thousands of dispersed and often not easily identifiable individual copyright holders, and the economic hold-up opportunity that these circumstances create absent the consent decrees' protections. *See* DOJ Closing Statement at 13-14 ("[M]usic users seeking to avoid potential infringement liability would need to meticulously track song ownership before playing music. As the experience of ASCAP and BMI themselves shows, this would be no easy task."). And music copyright owners have exploited these information asymmetries to compel music users like amici to accept a license on their terms or face copyright infringement. *E.g.*, *Pandora*, 6 F. Supp. 3d at 360.

These difficulties—and the necessity to take a license from each of the PROs—are exacerbated by the fragmented ownership of performance rights. It is not uncommon for songs to have as many as eight (or more)

co-owners, who may collectively be represented by each of ASCAP, BMI, SESAC, and GMR. *See Crafting a Hit: How Many Songwriters Does It Take?*, Billboard (June 12, 2014) (noting that many hit songs have eight or more co-writers). Indeed, these "splits," where multiple PROs control an interest in a single work, are the norm.

These problems are magnified for motion pictures and television programming—such as the programming distributed by many of the amici. From the perspective of these amici, music in motion pictures and television programming supplied to them by third parties is already "in the can": in other words, music has already been irrevocably embedded in the programming, and there is no meaningful opportunity for downstream distributors to negotiate with the fragmented composers or publishers of that music regarding its value.

Complicating matters even further, history has shown that music users including amici—even if they were able to overcome the impossibility of identifying every rightsowner associated with every composition embodied in all their programming or content transmissions—cannot simply get direct licenses from the writers/publishers affiliated with SESAC and GMR. Both SESAC and

GMR have disincentivized—or outright prohibited—their members from offering direct licenses. Nor are SESAC or GMR under any compulsion, as BMI and ASCAP are under their consent decrees, to provide alternative-to-blanket licenses to all licensees that would enable cost-savings based on such direct licensing initiatives. As both case law and amici's own experience bear out, SESAC and GMR historically have refused to offer these deductions to amici and have even fined their members for agreeing to direct licenses; indeed, GMR has refused to permit its members to grant direct licenses at all (and *requires* an exclusive grant of rights in its membership agreements). *See also Radio Music License Comm., Inc. v. SESAC, Inc.*, 29 F. Supp. 3d 487, 501 (E.D. Pa. 2014) (noting that SESAC has hindered "direct licensing by refusing to offer carve-out rights and obscuring the works in its repertory"); *Meredith Corp. v. SESAC, LLC*, 1 F. Supp. 3d 180, 193-94 (S.D.N.Y. 2014) (referring to SESAC having fined its members for issuing direct licenses).

Due to this combination of circumstances, amici have been forced to take licenses not just with BMI and ASCAP, but with GMR and SESAC as well, as they have no practical ability to ensure that works from one or more of those PROs will *not* be performed. Licenses from all four of

the PROs thus are "must haves" to avoid potentially crippling copyright infringement exposure. *See* DOJ Closing Statement at 13-14 (the "difficulties, delays, and imperfections" associated with this lack of transparency "would prove fatal to the businesses of music users, who need to resolve ownership questions *before* playing music to avoid infringement exposure"). And that means that they have no meaningful choice but to take a license from both GMR and SESAC, even at unreasonable rate levels.

II. The court below relied on a flawed benchmarking approach that conflicts with this Court's precedents and could have clear applications to amici and other licensees.

Rate courts are supposed to ensure a competitive marketplace and reasonable prices. The rate court here eviscerated that principle, with sweeping potential ramifications for other cases should other courts adopt a similar approach. Here's why that decision was so wrong and why it matters—not just for the parties, or amici, but the marketplace as a whole.

Despite recognizing that the ASCAP-NACPA agreement covering the same time period was the "closest comparator" with a BMI-NACPA license, SPA27-28, the court benchmarked the reasonable price of a

hypothetical NACPA-BMI license against the rates charged to concert promoters by the two much smaller PROs (who collectively account for what was determined to be less than 10% of the public performance rights necessary for live concerts). In short, the district court decided to credit agreements with GMR and SESAC—which are *not* subject to the consent decrees and thus can and do exact supra-competitive prices—as a benchmark in determining what competitive prices would be for BMI. In doing so, it departed from the settled precedent of this Circuit and the rate courts, and imposed rates that were more than double what BMI had previously charged.[4] (Notably, it was also double what ASCAP had negotiated for roughly the same period, despite ASCAP being the only other PRO similarly situated to BMI.) That approach, if adopted more widely, has potential ramifications for the industry in general and amici in particular.

Typically, courts have used the license agreements of the two largest PROs as benchmarks for each other. *Showtime*, 912 F.2d at 587-

[4] It did so even though fairly negotiated prior agreements should serve as the starting point from which to determine reasonable fees for subsequent periods. *United States v. ASCAP*, 157 F.R.D. 173, 195 (S.D.N.Y. 1994).

88 (rejecting ASCAP's requested rate because it would have been twice BMI's). That makes good sense: both are similarly situated in terms of market offerings to licensees, both (collectively) have been found to control upward of 90% of all public performance rights, and both operate under the framework of the consent decrees.

Here, by contrast, the court relied on licenses set by PROs that are *not* similarly situated. Neither SESAC licenses nor GMR licenses had *ever* been used to set a benchmark for ASCAP and BMI. *See MobiTV*, 712 F. Supp. 2d at 254 ("SESAC agreements have never been used as benchmarks in ASCAP rate court proceedings[.]"); *see also Pandora*, 6 F. Supp. 3d at 362 ("The SESAC license has historically been a benchmark of limited value."). These decisions have rightly recognized that BMI and ASCAP are similarly situated to each other—but not at all as to SESAC or GMR.

Judge Stanton's decision below cannot be squared with controlling case law or amici's own experience. In setting rates (and reviewing rate court decisions), courts look to benchmarks, but not every agreement is a valid or relevant one for those purposes. *RealNetworks*, 627 F.3d at 76. Accordingly, courts must consider whether an agreement "involved

similar parties in similar economic circumstances," "dealt with a comparable right," and arose "in a sufficiently competitive market." *DMX*, 683 F.3d at 45. Logically enough, the more similarities there are, the more weight accorded that particular benchmark. *Showtime*, 912 F.2d at 569-70. The district court's decision here turned those principles upside down.

SESAC and GMR agreements lack the indicia of good benchmarks for several reasons based on the governing case law. First, SESAC and GMR are not at all "comparable" licensors to BMI or ASCAP because they are not subject to any vehicle to compel a reasonable fee-setting. Because of this, and the fact that SESAC and GMR licenses are "must haves" for amici and other licensees (such that would-be licensees cannot just "walk away" from these PROs' demands), SESAC and GMR can and do extract higher rates through collective licensing of their repertories than they could obtain in a freely competitive market.

Second, in this different marketplace, driven by different imperatives, music users do not negotiate with SESAC and GMR under "similar economic circumstances" as they do with BMI/ASCAP—another criterion this Court has established for distinguishing between good

benchmarks and bad ones. *DMX*, 683 F.3d at 45; *Music Choice IV*, 426 F.3d at 95. Specifically, having no ability to walk away or access a rate court process for setting SESAC/GMR rates, licensees like amici have significantly overpaid SESAC and GMR compared to what they pay BMI and ASCAP on a "share adjusted" basis (meaning the amount of the fee when reduced to an effective PRO per-share-point basis). They have done so because the marketplace circumstances applicable to their negotiations, as described above, are so decidedly different than those applicable to BMI/ASCAP negotiations.

In addition, because SESAC and GMR are comparatively small, that "reduces the incentive to resist" their rate requests. *Pandora*, 6 F. Supp. 3d at 362. The same is not true of BMI's and ASCAP's rate requests. "While the cost associated with resistance may not be justified when a license fee is relatively small, the willingness to incur those costs will necessarily grow with the size of the anticipated payments." *Id.; see also Showtime*, 912 F.2d at 585-86.

Accordingly, the amounts of any such overpayments to SESAC or GMR, when viewed in isolation, have been rationalized by licensees (including amici) based on the combination of (i) the huge copyright

infringement risk associated with *not* taking these "must-have" licenses, (ii) the smaller total amount of those fees, and (iii) the comparative cost and delay associated with bringing litigation against SESAC or GMR.

A final important factor also has been at play in incentivizing amici and other licensees to make these decisions to pay SESAC and GMR disproportionate license fees relative to their share: licensees have been able to rely on the fact that their payment of such supra-competitive rates will not negatively impact their payment obligations to BMI or ASCAP. Before the district court decision below, every other court considering the issue had determined that SESAC (and by analogy GMR) rates were poor benchmarks for ASCAP/BMI rate setting, in part due to the much smaller market share they control relative to ASCAP/BMI coupled with the difficulties in measuring same. *See supra*. As amici have experienced, and courts have found, SESAC's and GMR's shares of licensed performances are volatile; and this, coupled with the notorious difficulty in measuring their share, makes it "difficult to adjust [and] arrive with confidence at an implied [BMI] rate." *Pandora*, 6 F. Supp. 3d at 362. As a result, rate court precedent has correctly recognized that the relatively smaller and volatile nature of the SESAC (and by extension GMR)

repertories make them undesirable benchmarks for setting ASCAP and BMI license rates (due to the enhanced risk of error in adjusting any license rate based on a given PRO's estimated share of overall performances relative to the ASCAP/BMI share). *See supra.*

Finally, agreements with GMR and SESAC are not like agreements that amici might enter into with individual BMI or ASCAP publishers, as the district court erroneously surmised. SPA31-33. Licensees interested in obtaining a direct license from a given BMI or ASCAP publisher can walk away from a direct license negotiation with that publisher because they can always obtain licenses to the publisher's music at a reasonable fee through ASCAP and BMI. But amici have no such ability to walk away from negotiations with GMR and SESAC; instead, they must obtain licenses from each for the many reasons detailed above. Negotiating against an unregulated PRO like GMR/SESAC thus is nothing like negotiating with an individual publisher. Judge Stanton erred in assuming otherwise.

Accordingly, it is manifest, based on amici's experience, that SESAC and GMR benchmarks are not derived (or "spawned" to use this Court's terminology) from a competitive marketplace that can "justify

reliance" on them. *Showtime*, 912 F.2d at 577; *Music Choice IV*, 426 F.3d at 96. To the contrary, they are examples of the anticompetitive abuses that the consent decrees were intended to remedy. By relying on their supra-competitive rates, the district court effectively incorporated those abuses into the very system designed to prevent them.

In short, as amici's real world experience shows, the "benchmark" marketplace here lacks the hallmarks of BMI/ASCAP licensing that ensure a competitive market result for BMI/ASCAP licenses: unlike BMI and ASCAP, whose consent decrees prevent them from withholding licenses and require them to adjudicate disputes over rates, the SESAC and GMR benchmarks are derived from a marketplace that lacks these protections—and puts licensees at risk of massive copyright exposure absent reaching some agreement with them. Indeed, as amici know from firsthand experience, SESAC and GMR have obtained licenses through explicit threats of copyright infringement litigation, the costs of which would have far surpassed even the supra-competitive price of those licenses. (Indeed, they have also demanded higher fees *because* of purported copyright infringement deriving from the inability of amici to obtain a license upon request.) Judge Stanton's decision cannot be

squared with those market realities, the purpose of the consent decrees, or this Court's case law.

III. If uncorrected, the district court's benchmarking approach could have potentially sweeping and negative effects for amici and other licensees in future proceedings before BMI and ASCAP rate courts.

The consequences of the rate court's decision here are not limited to a single set of improperly high rates. Because BMI rate court decisions often serve as precedent for future proceedings before BMI and ASCAP rate courts, and by the PROs themselves in license negotiations, the ripple effects of this decision could potentially extend far beyond the particular circumstances of the NACPA litigants and eat away at the protections built into not just BMI's consent decree, but ASCAP's as well.

Thus, for example, if the Second Circuit were to uphold Judge Stanton's benchmarking analysis, BMI and ASCAP would no doubt take the position in future negotiations that their rates should be increased in proportion to the greater play-share represented by their repertories on licensee service offerings compared to GMR and/or SESAC. *Indeed, as amici can attest, this is already happening in the marketplace.* If endorsed by this Court, that will throw gas onto the fire, and the rate court's benchmarking analysis will thus become a means by which the

PROs can potentially ratchet fees ever upward. That would create a real risk that music users including amici will potentially have to pay supra-competitive rates to *all* PROs. That of course conflicts fundamentally with the very purpose of the BMI and ASCAP consent decrees, eviscerates the rate courts which were intended to carry out that purpose, and converts them into obstacles to competitive price outcomes.[5]

[5] Affirmance of the decision below likely will also trigger unwarranted additional rate court litigation (and associated burdens on the judicial system) as BMI and ASCAP seek to capitalize on the benchmarking approach adopted by the district court below. At a minimum, should this Court affirm, it should make clear that Judge Stanton's decision should be limited to the facts, circumstances and record developed in the proceedings below, in the limited circumstances applicable to NACPA, and not be applied more broadly.

CONCLUSION

For the reasons set forth above, this Court should reverse the decision below.

Respectfully submitted,

/s/Kenneth Steinthal

Kenneth Steinthal
KING & SPALDING LLP
50 California Street
Suite 3300
San Francisco, CA 94111
(415) 318-1200
ksteinthal@kslaw.com

Anne M. Voigts
KING & SPALDING LLP
601 S California Ave., Ste. 100
Palo Alto, CA 94304

David P. Mattern
KING & SPALDING LLP
1700 Pennsylvania Avenue NW
Washington, DC 20006

Counsel for Amici Curiae

October 11, 2023

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Second Circuit Local Rule 32.1(a)(4) because it contains 5,383 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Date: October 11, 2023

/s/Kenneth Steinthal
Kenneth Steinthal

Counsel for Amici Curiae

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I hereby certify that on October 11, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/Kenneth Steinthal
Kenneth Steinthal

Counsel for Amici Curiae