23-935(L)

23-1004(XAP)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

BROADCAST MUSIC, INC.,

Petitioner-Appellee-Cross-Appellant,

—against—

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

OPENING BRIEF AND SPECIAL APPENDIX FOR RESPONDENT-APPELLANT-CROSS-APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Respondent-Appellant-Cross-Appellee North American Concert Promoters Association (NACPA) certifies that it has no parent corporation, and there is no publicly held corporation that owns 10% or more of NACPA's stock.

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INTRODUCTION

This appeal concerns a decision of the district court sitting as a "rate court" under the terms of a long-standing antitrust consent decree. The primary purpose of that consent decree is to ensure that a monopolist seller—the music-rights aggregator Broadcast Music, Inc. (BMI)—does not price-gouge buyers. The district court lost sight of that purpose by setting a rate that is more than double the rate negotiated by identically-situated parties in the marketplace—a rate BMI could never have obtained in any real-world negotiation. That decision badly misapplied this Court's precedents, turning the protections of the consent decree into a weapon that amplified the market power of an acknowledged monopolist. The court's order—one that compels the payment of fees that the buyers have no way of calculating, at rates none have come close to paying in the real world—is as commercially impracticable as it is legally erroneous, and reversal is urgently needed to restore the equilibrium that existed for decades before this misguided judicial intervention.

BMI is a performing rights organization (PRO). PROs aggregate and sell the rights to publicly perform songs, which the Copyright Act refers to as "musical works." Two major PROs—BMI and the American Society of Composers, Authors and Publishers (ASCAP)—operate as monopolists in their respective markets for these licenses, collectively (and in roughly equal proportion) controlling the rights to more than 90% of all public performance rights in the country. For decades, both have been subject to antitrust consent decrees negotiated with the U.S. Department of Justice, designed to curb their market power by compelling them to offer reasonable licensing rates—with the backstop of a provision that authorizes the district court to set a reasonable rate in the event that the parties are unable to negotiate one.

This case is about the license that the members of the North American Concert Promoters Association (NACPA) secure to allow artists to publicly perform the many millions of songs in BMI's repertory at live concerts. While NACPA has taken licenses from ASCAP and BMI on behalf of its members for decades, the price of those licenses was, until now, always set without recourse to the rate court. For instance, following extensive negotiations, ASCAP most recently agreed with NACPA to license its repertory for the 2018-2021 period at an average rate of approximately 0.25% of promoters' gross ticket revenues.

In its last negotiation cycle with NACPA, BMI elected for the first time ever to invoke the rate court process, seeking a rate increase that was many multiples of what BMI and ASCAP had historically agreed to accept from NACPA. The district court rejected BMI's request as unreasonable. But it then proceeded to find a "reasonable" rate of 0.50% for the 2018-2022 period[1]—double what ASCAP had negotiated for an essentially identical period, and more than double what BMI had ever before been able to charge. SPA28-33. In other words, the court found that it would be reasonable for promoters to pay BMI twice as much as ASCAP for a bundle of rights with identical utility.

That decision is as wrong as it sounds. The district court itself found that BMI and ASCAP were materially indistinguishable in terms of their negotiating power—they each controlled a similar (and dominant) share of musical works performed at concerts, and each operated under the shadow of an antitrust consent decree that would restrict its exercise of market power. It is out of the question that in a properly analyzed hypothetical competitive market negotiation, promoters would suddenly agree to pay twice as much to BMI as they do to ASCAP. The district court's decision defies not only common sense, but also this Court's precedent, which has long endorsed the conclusion that it would be "anomalous[]" for the "same licensee[]" to pay significantly higher rates to either ASCAP or BMI. *Am. Soc'y of Composers, Authors & Publishers v. Showtime/The Movie Channel, Inc.*, 912 F.2d

[1] For simplicity, this brief refers to the period from January 1, 2014-June 30, 2018 as the 2014-2018 period and the period from July 1, 2018-December 31, 2022 as to the 2018-2022 period.

563, 587-88 (2d Cir. 1990) (district court opinion); *cf. id.* at 588 (rejecting ASCAP's requested rate because it would have been double the rate negotiated by BMI).

The district court reached its conclusion only by inexplicably benchmarking the reasonable price of a hypothetical NACPA-BMI license to the rates that two much smaller PROs (collectively accounting for less than 10% of the public performance rights necessary for live concerts) charged to individual promoters (*i.e.*, deals not negotiated through NACPA). The court did so despite its own determination that the ASCAP-NACPA agreement covering the same time period at issue was the "closest comparator" with a BMI-NACPA license. SPA27-28.

In essence, therefore, the court found agreements where *neither* party was similar to those here were somehow a better benchmark than one between functionally identical parties. And, even more remarkably, it did so without a single word of relevant reasoning. That decision is logically indefensible, contravenes this Court's precedent, and upends decades of settled practice in the industry. This Court has always robustly exercised its supervisory authority over the BMI and ASCAP consent decrees, exercising *de novo* review over both the substantive reasonableness of the rate court's decisions and the adequacy of its reasoning. *Infra* at 9-12, 29-30. It must do so again here, and reverse a district court decision that went badly astray.

The district court also erred by summarily deeming BMI's rate proposal for the earlier 2014-2018 period reasonable. The only basis the court gave for that conclusion was that it would "align the NACPA rates with the rates paid to BMI by *non*-NACPA promoters during that time." SPA36 (emphasis added). But the court offered no explanation why it would be appropriate to "align" the NACPA rate with non-negotiated rates charged to promoters outside of NACPA, who represent only a small percentage of the industry's revenue. And the court again failed to explain how adhesion contracts with small promoters could possibly be a better benchmark for rates than those NACPA negotiated with the "closest comparator" ASCAP. The court's decision as to the 2014-2018 period was thus equally unreasoned, and equally flawed.

Finally, the district court compounded these errors by dramatically expanding the revenue base to which the percentage-based rate applied for the latter part of the time period at issue, to include categories that no domestic PRO's license agreement has ever covered. Those additional categories include, among others, money that does not go to the concert promoter at all—like luxury suite revenue that customers pay directly to a venue for all of the events (including sporting events) that will be hosted in a given year, which neither promoters nor their performing artists typically see a dime of. There is no sensible reason for concert promoters to be charged a license fee based on revenues paid by consumers to third parties—and indeed it is impossible for promoters to even know what those third parties earned without access to their confidential financial information. The district court's unprecedented expansion of the revenue base contravened this Court's precedents, and must too be reversed.

The upshot of these cascading errors is that BMI was able to leverage a rate court process designed to curb its market power to judicially compel a rate increase that NACPA and its members plainly would never have agreed to pay to BMI in a hypothetical competitive market. That upends the fundamental purpose of the consent decree and, unless reversed, results in the federal courts entrenching and amplifying the very anticompetitive conduct they are supposed to prevent.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. The district court entered the judgments on appeal on March 28, 2023, and May 22, 2023. SPA38; SPA39-47. NACPA filed a timely notice of appeal on June 20, 2023. A63-64. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in adopting a license rate of 0.50% of revenue for the years 2018-2022 and a five-tier rate structure ranging from 0.15% to 0.8% of revenue for the years 2014-2018.

2. Whether the district court erred in expanding the definition of "gross revenues" subject to the 2018-2022 rate far beyond the traditional base of ticket sales revenues found in all of the benchmarks it considered.

STATEMENT OF THE CASE

A. Legal Background

1. Copyright Licensing For The Performance Of Musical Works

The Copyright Act, 17 U.S.C. § 101 *et seq.*, provides owners of musical works and other creative outputs with the exclusive rights to reproduce, distribute, and publicly perform their works. *Id.* § 106. A "musical work" refers to a song's underlying composition and lyrics created by the songwriter or composer, while a "sound recording" is a particular artist's recorded performance of the work. *See ABKCO Music, Inc. v. Sagan*, 50 F.4th 309, 313 (2d Cir. 2022); 17 U.S.C. § 102(a)(2), (7). Owners of musical works may authorize others to use their public performance rights under the Act by granting them a license. *See* 17 U.S.C. §§ 106, 201(d)(2).

In the United States, this licensing is controlled by a handful of organizations known as performing rights organizations (PROs), who affiliate with or represent individual owners of musical-work copyrights. *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 4-5 (1979) (*CBS*). Each owner gives the PRO the authority to license performances of their works on their behalf, and the PRO then issues licenses, collects licensing fees, and distributes these royalties to affiliated copyright owners, after deducting a portion as a fee for its services. *Id.*

Songwriters do not necessarily receive royalty distributions from PROs every time their song is played. For example, BMI pays royalties for live concerts and music festivals only to affiliates whose songs are performed at one of the top 300 revenue-grossing live concert tours or events for the quarter. A527. To pay these royalties, BMI draws on license fees from all live events, but songwriters whose songs are not performed at the top 300 do not receive any royalties at all. *See id.* And BMI reduces the funds available for distribution by a "domestic overhead rate," which in recent years has approached 20% of all available funds. A529, 531.

The permissions PROs offer licensees are primarily granted through "blanket licenses." *CBS*, 441 U.S. at 5. A "blanket license" is "a license that gives the licensee the right to perform all of the works in the [PRO's] repertory for a single stated fee" during a specific period of time, regardless of "how much music from the repertory the licensee actually uses." *United States v. Am. Soc'y of Composers, Authors & Publishers*, 627 F.3d 64, 68 (2d Cir. 2010) (*RealNetworks*).

Two PROs, BMI and ASCAP, dominate public performance licensing in the United States. *See CBS*, 441 U.S. at 4-5. Together, BMI and ASCAP "license the music performance rights to most"—indeed, in this case, more than 91%—of the "domestic copyrighted music in the United States." *Broad. Music, Inc. v. DMX, Inc.*, 683 F.3d 32, 36 (2d Cir. 2012); *see* SPA3. They are also relatively equivalent in terms of size: each repertory reflects approximately a 45-46% share of the music performed at concerts. SPA2-3.

The remaining 8% or so of the music performed at live concerts is split between two smaller PROs: SESAC LLC, which the district court found to represent an approximately 3.6% share; and Global Music Rights, Inc. (GMR), which the district court found to represent an approximately 4.5% share. SPA3. However, because each PRO controls access to a different bundle of rights, music users cannot realistically substitute a license to one PRO's repertory for another's. As a result, each PRO is the exclusive licensor, or a monopolist seller, of blanket licenses to the rights in its repertory. *See RealNetworks*, 627 F.3d at 68.

2. The BMI Consent Decree

The U.S. Department of Justice has recognized for decades that both BMI and ASCAP operate as monopolists. *See CBS*, 441 U.S. at 10-12. In 1941, the United States filed separate antitrust suits against ASCAP and BMI, contending that they exercised unlawful market power by demanding supracompetitive prices for blanket licenses, which unlawfully restrained trade in violation of the antitrust laws. *Id.* at 10-12 & n.20.

Both BMI and ASCAP settled these suits through consent decrees, which today contain largely similar terms. *DMX*, 683 F.3d at 36. The decrees have three central features: (1) the availability of licenses on application (which eliminate the

PROs' ability to withhold use of their repertories while negotiations with a licensee are ongoing); (2) nonexclusivity (which allows ASCAP members and BMI affiliates to directly license their works in competition with the PROs, a policy mandate intended to put downward pressure on the PROs' rates); and (3) recourse to a rate court as a backstop to protect licensees against the PROs' monopoly power. *See United States v. Broad. Music, Inc.*, 1966 Trade Cas. ¶ 71,941, 1966 WL 181780 (S.D.N.Y. 1966), *amended*, 1996-1 Trade Cas. ¶ 71,378, 1994 WL 901652 (S.D.N.Y. 1994) (BMI Consent Decree), at arts. V, VIII(A), XIV(C); *CBS*, 441 U.S. at 11-12; *United States v. Broad. Music, Inc.*, 275 F.3d 168, 172-73 (2d Cir. 2001); *DMX*, 683 F.3d at 36-37.

Even under the constraints of the consent decrees, however, the intrinsic characteristics of the PRO model have made anticompetitive conduct from ASCAP and BMI effectively irresistible. Over the years, the rate courts have repeatedly rejected exorbitant fee demands by ASCAP or BMI. *See, e.g.*, *DMX*, 683 F.3d at 46 (affirming rejection of ASCAP and BMI's rate proposals "because they 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) (finding ASCAP's "final fee request" to be "demonstrably unreasonable" and derived from "layers of calculations" "laden with unsupported and faulty assumptions"), *aff'd sub nom. Am. Soc'y of Composers, Authors & Publishers v. MobiTV, Inc.*, 681 F.3d 76 (2d Cir.

2012); *Alden-Rochelle, Inc. v. Am. Soc'y of Composers, Authors & Publishers*, 80 F. Supp. 888, 893, 895 (S.D.N.Y.) (rejecting attempt by ASCAP to increase fees by up to 1500%), *amended*, 80 F. Supp. 900 (S.D.N.Y. 1948).

By contrast, SESAC and GMR are not subject to federal antitrust consent decrees. A55. As a result, these PROs have repeatedly faced claims that they have extracted supracompetitive fees in violation of the antitrust laws, and numerous federal courts have found that SESAC and GMR likely enjoy market power over licensees in their respective markets and violate the antitrust laws, even though they control a much smaller share of public performances compared to ASCAP and BMI.[2] For example, after a district court denied SESAC's motion for summary judgment in an antitrust class action brought by local television broadcasters, SESAC agreed to pay $58.5 million to the plaintiff class and agreed to restrictions on its conduct (though only as to those licensees patterned after the ASCAP and BMI consent decrees. *See Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 657-58 (S.D.N.Y. 2015).

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[2] *See, e.g.*, *Radio Music License Comm., Inc. v. SESAC, Inc.*, No. 12-cv-5807, 2013 WL 12114098, at *13-20 (E.D. Pa. Dec. 23, 2013), *modified in part*, 2014 WL 12617437 (E.D. Pa. Feb. 19, 2014); *Radio Music License Comm., Inc. v. SESAC, Inc.*, 29 F. Supp. 3d 487, 502-03 (E.D. Pa. 2014); *Meredith Corp. v. SESAC, LLC*, No. 09 Civ. 9177, 2011 WL 856266, at *1 (S.D.N.Y. Mar. 9, 2011); *Meredith Corp. v. SESAC, LLC*, 1 F. Supp. 3d 180, 221-24 (S.D.N.Y. 2014); Order, *Radio Music License Comm., Inc. v. Glob. Music Rights, LLC*, No. 19-cv-03957-TJH-ASx (C.D. Cal. Feb. 13, 2020), Dkt. No. 201.

BMI and ASCAP have long sought to avoid or terminate their consent decrees, but the Department of Justice has consistently reiterated, including as recently as 2021, that the decrees are essential to "safeguarding a vibrant and competitive music licensing marketplace." U.S. Dep't of Justice, Remarks of Assistant Attorney General Makan Delrahim, *Statement of the Department of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees* 1 (Jan. 15, 2021), https://www.justice.gov/media/1115796/dl?inline. And the government has continued to enforce the strictures of the consent decrees against the PROs. *See, e.g.*, U.S. Mem. Supp. Mot. Enter Proposed Settlement Agreement 1, 3, *United States v. Am. Soc'y of Composers, Authors & Publishers*, No. 41-1395 (S.D.N.Y. May 12, 2016), Dkt. No. 750 ($1.75 million civil penalty against ASCAP for violating consent decree).

B. Licensing In The Live Concert Industry

1. The rates at issue in this case concern licensing fees for the performance of musical works at live music concerts. Live concerts are managed by concert promoters, who are responsible for virtually every component of the live concert experience. They book talent, secure venues and service providers, facilitate operations, advertise and market the event, and advance costs, often including a guarantee payment to the performing artist. A129, 130-31, 133. When a given

concert turns out to be profitable on balance, performing artists typically receive about 90% of the net profit. *See* A132; A169-70.

As an industry standard, concert promoters do not control which songs the artists choose to perform, but they are nonetheless responsible for securing licenses for the artists' performance of copyrighted musical works during the show. A53. As a technical matter, licenses are required only for songs where the performer does not hold a copyright in the musical work (*i.e.*, songs where the artist is not a writer or co-writer), since a copyright-holder is entitled to publicly perform their own work. But because concert promoters typically do not know all the songs the artist will perform, or which PRO (or PROs) administers the license for each of those songs, promoters must in practice secure blanket licenses from each of the four principal domestic PROs (ASCAP, BMI, SESAC, and GMR) to avoid the risk of copyright infringement. *See* A57.[3]

2. NACPA is an industry association for concert promoters. A313. It has 46 members, each of which stages at least 60 live shows per year. A53; A72. Among other activities, NACPA negotiates on behalf of its members to obtain music performance licenses from domestic PROs—to the extent, of course, that the PROs

[3] For example, artists often perform songs that they did not write, like covers of other artists' songs, and concerts often feature recorded music by other artists played before or after the band takes the stage.

themselves are willing to engage with NACPA to strike a common deal with all of the major promoters. A53. (Not all of them are, and since trial, BMI has newly refused to deal with NACPA going forward.) For decades, NACPA has entered into negotiated licensing agreements with both BMI and ASCAP. *See* A83-86.

The amounts NACPA paid to ASCAP and BMI under final-fee agreements have always been roughly equivalent. *See id.* The BMI license has, since 1998, imposed a rate of 0.30% of "gross ticket revenues," defined to include revenue from ticket sales subject to certain specified deductions,[4] for venues seating less than 10,000 people and 0.15% for venues seating more than 10,000 people. A540, 543. This revenue definition tracks the ticket-sales metric concert promoters and performing artists use to settle payments the night of each concert. The overall effective rate paid under the original BMI license was approximately 0.21% of revenues. SPA25-26; A340, 349.

For the 2006-2010 rate period, BMI and NACPA entered a new blanket license with the same rates and revenues for live concerts, but a separate, higher rate for music festivals. A551-52, 553-54; A59. They extended that license four times,

[4] "Gross ticket revenues" is defined as "the total monies received . . . from all ticket sales," excluding "federal, state and/or local taxes," "building/facility charge per ticket sold," "ticketing agent/service charge placed on each ticket sold," "facility parking fees" and limited deductions for "charitable donations" made from benefit concert revenues. A540.

through 2013, and operated under an interim license with the same terms from 2013-2022. SPA7-8; A60.

The relationship between NACPA and ASCAP was historically similar. NACPA entered its first agreement with ASCAP in 2000 and renewed that agreement at regular intervals through 2017. That license had a five-tier structure, with an effective rate of approximately 0.19% of ticket revenue. A490; A507-08. In negotiating a new license commencing in 2018, ASCAP initially proposed a dramatic rate increase, *see* A506, but after protracted negotiations, the parties reached an agreement for a license for the 2018-2021 period with a much more modest increase. A562-76. For 2018 and 2019, NACPA agreed to pay ASCAP 0.23% of revenue (defined as revenue received from ticket sales minus the industry-standard deductions, *see* A562-63); for 2020 and 2021, NACPA agreed to pay ASCAP 0.275% of revenue, identically defined, A564-65.

NACPA has also maintained a licensing agreement with SESAC since 2003. In the latest iteration of SESAC's agreement with NACPA, which covers the period from January 1, 2019 through December 31, 2024, NACPA agreed to pay SESAC 0.032% of revenue—a small fraction of the latest ASCAP deals. A580. As in NACPA's agreements with BMI and ASCAP, the 2019 SESAC-NACPA license defines the revenue subject to a royalty as gross ticket revenues less certain standard deductions. A578; *see* SPA29. NACPA has never entered into a licensing agreement with GMR, the other unregulated PRO, which was not willing to negotiate with NACPA.

C. District Court Proceedings

1. In September 2018, BMI petitioned the United States District Court for the Southern District of New York (Stanton, J.) to determine a reasonable rate and terms for the period from January 1, 2014 through December 31, 2022 for live concert performances. A22.

As relevant here, BMI proposed a tiered rate structure for the 2014-2018 period, with rates ranging from 0.15% to 0.8% (scaling down for larger venues) of a revenue base that included only the revenue from ticket sales subject to the standard deductions. SPA8-9, 18; *see* SPA36. For the 2018-2022 period, BMI initially proposed a rate of 1.15% of gross revenues regardless of venue capacity, A25, but ultimately tempered its request to a proposed rate of 0.80%—the same rate ASCAP tried (and failed) to obtain in its market negotiations with NACPA. SPA8; A437. This proposal was nearly three times as high as the rates in previous BMI-NACPA licenses and the eventual 2018-2021 ASCAP-NACPA license. In an attempt to support that rate, BMI relied on a litany of other supposed benchmarks in addition to the BMI-NACPA and ASCAP-NACPA agreements, including the rates charged to concert promoters by foreign PROs; NACPA's agreement with SESAC;

form licenses BMI, ASCAP, and SESAC offer to non-NACPA promoters; and various agreements between individual concert promoters and GMR. SPA16-19.

Instead of the gross ticket revenue base that had featured in every BMI-NACPA license since 1998 (and in every other percent-of-revenue agreement between a concert promoter and a domestic PRO), BMI proposed an expanded revenue base that would include—in addition to the revenues from ticket sales—revenues paid or payable to the licensee from (1) service, administration and handling charges; (2) sponsorships and other forms of advertising; and (3) direct-to-secondary market ticket sales, as well as (4) revenue from the sale of VIP packages and box suites, whether paid to the licensee or not. SPA8.

NACPA, in contrast, proposed continuing the terms of the 2006 BMI-NACPA license, including the same revenue base used in all other PRO agreements. SPA9; *see supra* at 14-16. NACPA also argued that its agreements with ASCAP during the relevant period provided viable benchmarks. *See, e.g.*, NACPA Reply in Supp. Mot J. 34-47, D. Ct. Dkt. No. 210.

2. On March 28, 2023, following a bench trial, the district court issued an opinion setting rates and defining the revenue base for the BMI-NACPA license.

a. The district court's analysis began with consideration of BMI's proposed expanded revenue base. The court did not look to the revenue bases used in any of the benchmarks it accepted—all of which defined the revenue base as revenue derived from ticket sales, less standard deductions, and nothing more. Instead, the district court devised a test under which the base should be set at "the cost consumers pay to attend a concert," which, in the court's view, reflected "the fair market value of the music." SPA12-13. The court proceeded to define the "cost" within that category broadly, to include money consumers pay for services and conveniences that are not part of the basic ticket price or required to attend the concert, such as (1) the additional cost of backstage passes and merchandise included in a VIP package, (2) the administrative ticketing fees paid for the convenience of receiving tickets by mail or digital delivery rather than having to visit the box office, and, most remarkably, (3) the cost of luxury suites that corporations pay directly to a venue (such as MetLife Stadium), typically on an annual basis, for all the events, including sporting events, comedy shows, and other non-music events, that are hosted there. SPA22.[5]

b. The district court turned next to the question of a reasonable percentage rate for the July 1, 2018-December 31, 2022 period. At the threshold, the court

[5] The court defined gross revenues for the 2018-2022 period as "(1) the face value of the ticket; (2) revenues received by the promoter from tickets sold in the first instance directly onto the secondary market (including for amounts above the face value of the ticket); (3) any ticket service, handling, or other fees above the face value of the ticket paid by the consumer if received by the promoter; (4) box suite and VIP package revenues attributable to live concerts and paid to the promoter or a venue or artist with which the promoter has a contractual relationship." SPA36-37.

rejected BMI's proposed rate of 0.8% as unreasonable. SPA21. The court noted that the only benchmarks proposed by BMI with implied rates anywhere near 0.8% were foreign PRO agreements. SPA19-20.[6] But the court concluded that these agreements could not "be relied upon as valid benchmarks" because, among other things, BMI had not carried its burden "to show that the foreign parties are similar to BMI and NACPA and that the agreements were negotiated in similar economic circumstances." SPA20.

Having rejected BMI's proposal, the district court next turned to potential domestic benchmarks identified by the parties. The court first agreed with the parties that the 2006 BMI-NACPA license (renewed repeatedly until 2013) and the 2018-2021 ASCAP-NACPA license were valid benchmarks. SPA26-28; *see* A340, 348-49, 356; A446. As the court observed, these licensing agreements involved the same or materially identical parties—both involved NACPA, and ASCAP is BMI's

[6] BMI's expert first standardized the rates in each potential benchmark to account for different fee structures and the disparate quantum of rights sold under each license and scaled them to account for BMI's overwhelming share of performances. SPA15; A231-34. In other words, if BMI has a share of 50% of performances, and PRO X has a share of 10%, then the standardized or "implied" rate of PRO X would be five times the actual royalty charged. BMI's expert then calculated two sets of "implied rates," one for a revenue base consisting only of ticket sales and revenue from VIP packages and suites, and one for the further expanded revenue base proposed by BMI. SPA16-17. Because it adopted much of BMI's proposed expanded revenue base, the district court looked to the latter set of implied rates. SPA19. Accordingly, references to "implied rates" in this brief refer to these adjusted rates as calculated by BMI's expert.

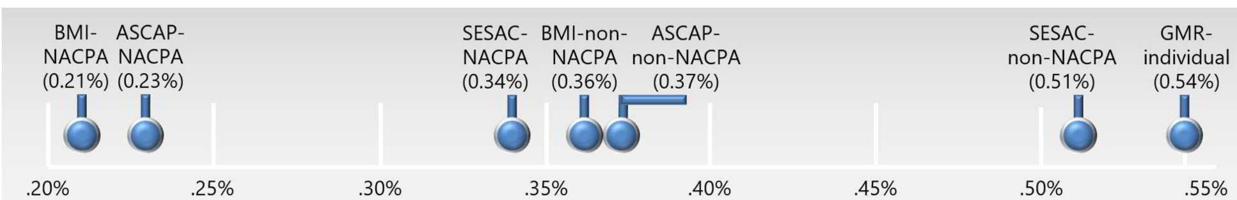
closest comparator in terms of repertory size and market position. SPA26-28. And these agreements were also negotiated under the shadow of consent decrees mandating reasonable rates. SPA26-28. Adjusted to account for the expanded revenue base, the BMI-NACPA license had an implied rate of 0.19%-0.21%, and the ASCAP-NACPA license had an implied rate of 0.23%. *See* SPA25-28. The court also found that BMI and ASCAP form licenses available to smaller non-NACPA concert promoters—which it found had implied rates of 0.36% (BMI) and 0.37% (ASCAP)—were valid benchmarks. SPA26-27.

Finally, the court held that all the proffered agreements with SESAC and GMR were valid benchmarks. SPA29-31. Specifically, the court considered SESAC's agreement with NACPA, which had an implied rate of 0.34%; SESAC's form agreement offered to individual non-NACPA concert promoters, which had an implied rate of 0.51%; and GMR's agreement with individual concert promoters, which had an implied rate of 0.54%. SPA33.

The court deemed the SESAC and GMR agreements with non-NACPA promoters "appropriate" benchmarks because, in the court's view, they were between "similar parties, for similar rights, [that] were negotiated in similar economic circumstances." SPA29. The court acknowledged that SESAC and GMR control a much smaller share of musical works copyrights than BMI, but offered no explanation as to how PROs approximately one-tenth of BMI's size could be deemed "similar parties."

The court also acknowledged that the SESAC and GMR agreements were the product of these PROs' unregulated market power because neither is negotiated under a consent decree. The court deemed this difference "not fatal" because it did "not automatically mean their negotiations were noncompetitive." SPA31. This was because, according to the court, SESAC and GMR are similar in size to "large music publishers that music users would have to negotiate with directly in the absence of PROs," and such a hypothetical music publisher would "have the same market power from aggregation that GMR and SESAC have." SPA31. The "market in which GMR and SESAC operate thus reflects the level of competition that would be inherent in a direct licensing negotiation," which the court found was alone "adequate" "to justify relying on the licenses as benchmarks." SPA31. Further, the court claimed, a promoter could forgo dealing with GMR and SESAC and instead "obtain direct licenses of works in [their] catalogs in advance of the show." SPA32.

The court then identified the range of implied rates suggested by the benchmarks. SPA33. At the low end of this range were the rates in NACPA's agreements with BMI and ASCAP, covering the vast majority of concert revenues and public performance rights, at 0.21% and 0.23%. SPA33. In the middle were the rates in NACPA's agreement with SESAC, covering a much smaller share of performances, at 0.34%, and in individual promoters' agreements with BMI and ASCAP, covering a much smaller share of revenues, at 0.36% and 0.37%. SPA33. And at the high end of the range, well above the others, were the rates in SESAC's and GMR's agreements with individual promoters, also covering smaller shares of performances and revenues, at 0.51% and 0.54%. SPA33. The figure below illustrates the range of BMI rates implied by these seven benchmarks, after adjusting for differences in market share and BMI's proposed expansion of the revenue base:



See SPA33.

From this, the court summarily announced that a 0.50% rate "is therefore a reasonable one," effectively giving no weight at all to the benchmarks at the bottom of the range. SPA33. The court's only justification for this conclusion was its assertion that live concerts are "a music intensive industry," and "[t]hose who contribute to the musical compositions should be compensated accordingly." SPA33-34. The court offered no explanation connecting this observation to the selected 0.50% rate. Nor did the court connect its 0.50% rate to any of the benchmarks, let alone justify its selection of a rate that is more than double the rate supported by the two most analogous benchmarks—NACPA's recent agreement with ASCAP and its prior agreement with BMI—which collectively apply to about 90% of the rights at issue. *See* A462.

Finally, the court found BMI's proposed rate for the 2014-2018 reasonable, relying solely on the fact that it "align[ed]" with the terms of the form licenses BMI imposed on smaller non-NACPA promoters without negotiation. SPA36; *see* A91. The court stated without elaboration that "[h]aving already found that the BMI-non-NACPA benchmark is valid, BMI's proposed rate for the period is reasonable." SPA36.

3. BMI subsequently filed a motion under Federal Rule of Civil Procedure 59 to amend the judgment to assess pre- and post-judgment interest, which the court granted in part and denied in part. SPA39-47 (awarding post-judgment interest and denying pre-judgment interest). NACPA timely filed its notice of appeal, and BMI filed its cross-appeal. A63-64; A65-66.

SUMMARY OF ARGUMENT

I. The rates adopted by the district court rest on a cascading series of legal errors and cannot stand.

A. Under this Court's precedent implementing the BMI Consent Decree, the rate-setting court must determine a reasonable rate by considering what an applicant would pay BMI in a hypothetical competitive market. For NACPA's license with BMI, the closest benchmark by *all* relevant metrics is NACPA's contemporaneous license agreements with ASCAP. Indeed, as this Court has long recognized (and the evidence below confirmed), BMI and ASCAP are incredibly close comparators. They are principal competitors of one another for affiliated songwriters, control roughly equal shares of live music performances, and are both subject to materially identical consent decrees.

NACPA and ASCAP negotiated final-fee agreements for eight of the nine years at issue in this case. Those rates are, beyond question, the most analogous benchmark, and nothing in the district court's opinion suggests otherwise. And they are also in the same ballpark as NACPA's prior agreement with BMI—another key benchmark, and the starting point of any analysis in rate-setting cases. Based on these benchmarks, a reasonable rate must fall within or at least near these parameters.

B. The district court, however, imposed a 0.50% rate for the 2018-2022 period—more than double the implied rates from the most analogous transactions. It did so by wrongly considering, and then inexplicably favoring, a series of outlier agreements that SESAC and GMR reached with a handful of individual promoters.

1. SESAC and GMR agreements have *never* been used as benchmarks for final license fees in ASCAP and BMI rate-setting proceedings, and for good reason: They fail every relevant metric of comparability, as they involve differently situated parties operating in different economic circumstances and under different competitive dynamics. GMR and SESAC's repertories are far smaller than BMI and

ASCAP's repertories. As numerous courts have recognized, a promoter's willingness to overpay for a smaller bundle of rights in order to avoid litigation does not signal that they would be willing to overpay by the *same percentage* for much bigger bundle of rights, when doing so would cost them dramatically more in absolute terms. *Infra* at 37-40.

Moreover, unlike BMI and ASCAP, GMR and SESAC do not operate under the shadow of a consent decree that requires reasonable rates, and their agreements with their affiliates have prohibited direct licensing—thus making it impossible for promoters to contract around them. Accordingly, GMR and SESAC rates are infected by the very anti-competitive conduct that the consent decrees were designed to prevent.

In the face of these problems, BMI offered virtually no evidence explaining why SESAC's and GMR's agreements—especially those made *not* with NACPA but with a handful of individual promoters—should be considered valid benchmarks for a NACPA-BMI license. BMI thus plainly failed to satisfy its burden of proof on that question, and those benchmarks should have been discarded.

The district court instead deemed the SESAC and GMR benchmarks appropriate based on tortured reasoning that BMI never offered, coupled with a clear misreading of the factual record. The court found that that SESAC and GMR would be forced to charge competitive prices based on its unsupported speculation that, given their size, if they were to raise their prices above the competitive level, promoters would engage in direct licensing with music publishers instead. That assumption is incorrect—all of the available evidence indicates that GMR and SESAC *prevent* their affiliates from directly licensing with promoters. Because the foundational premise of the district court's finding that SESAC and GMR are valid benchmarks is wrong, its decision should be reversed for that reason alone. And, in any event, even if direct licensing were permissible, there is no basis for the court's speculation that those PROs' resulting rates would reflect a competitive price.

2. But perhaps the court's most egregious error was to summarily select a rate of 0.50% for the 2018-2022 period without *a single word* of relevant explanation. As noted, even the court itself appeared to find that agreements with BMI and ASCAP were the most comparable benchmarks of the ones it selected. Yet the court nonetheless chose a rate that more than doubles the implied rates reflected in those benchmarks, anchored to GMR and SESAC's agreements with individual promoters—agreements where neither party approximates the hypothetical BMI-NACPA transaction. Correcting even one side of that equation results in a dramatically lower rate. For example, SESAC's agreement with NACPA yielded an implied rate for BMI of 0.34%, which is closer to the 0.23% rate implied by the most recent ASCAP-NACPA agreement than the 0.50% rate the court ultimately selected.

In other words, the court implicitly found the non-NACPA agreements with GMR and SESAC were somehow the *most* probative benchmarks available, and that virtually no weight should be accorded to the ASCAP and BMI licenses with NACPA. That conclusion has no basis in common sense, the trial record, or even the court's own opinion, which found ASCAP to be BMI's closest comparator. Tellingly, the court did not even *try* to offer a reasoned justification for the rate it chose; instead, it essentially plucked 0.50% out of thin air.

C. The district court's determination as to the 2014-2018 period was similarly mistaken. This determination rested solely on the court's conclusion that BMI's own form licenses with non-NACPA promoters were valid benchmarks. The court's entire analysis for that period was a fleeting note that the rates and rate structure it adopted matched those adhesion contracts with small licensees, which collectively account for a small minority of industry revenues. But the court did not explain why a rate in line with the BMI-non-NACPA agreements was reasonable, why these non-NACPA agreements were a better benchmark than NACPA's agreements with ASCAP and BMI, or why the rate for 2014-2018 should differ so dramatically from the rate for 2018-2022. The three sentences that the district court devoted to this critical issue are far from the "sufficient rationale" that this Court's precedent demands. *RealNetworks*, 627 F.3d at 79.

II. Separately, the district court erred by expanding the gross revenue base to include other revenue streams beyond the revenue earned from ticket sales. That expanded base departed from *all* of the relevant benchmarks—and expanded the revenue base well beyond any known agreement. And that revenue base includes, among other things, sources of revenue that are not even paid to the concert promoters at all—like suite revenue that goes to third-party venues who do not pay anything to BMI for NACPA promoters' shows. That expansion is not only inequitable, but also commercially impracticable, because it depends on access to third-party venues' confidential financial information that promoters do not have. The district court reached a contrary result only by badly misreading this Court's precedent as requiring that benchmark analysis be disregarded in favor of an ad hoc analysis of "what retail customers pay to receive the product." SPA13 (quoting *United States v. Broad. Music, Inc.*, 316 F.3d 189, 195 (2d Cir. 2003) (*Music Choice II*)). This Court has reversed the same rate court for a similar "over-reading" of *Music Choice II* before, and it should do so again. *United States v. Broad. Music, Inc.*, 426 F.3d 91, 97 (2d Cir. 2005) (*Music Choice IV*).

STANDARD OF REVIEW

This Court reviews the district court's legal conclusions *de novo*, and it reviews the district court's factual findings for clear error. *RealNetworks*, 627 F.3d at 76; *see DMX*, 683 F.3d at 45-46. As relevant here, "[d]eterminations by the district court that particular benchmarks are comparable and particular factors are relevant are questions of law reviewed *de novo*." *RealNetworks*, 627 F.3d at 76.

ARGUMENT

I. THE DISTRICT COURT'S LICENSE RATE DETERMINATIONS WERE ERRONEOUS

Under the terms of the BMI Consent Decree, the rate court must determine a "reasonable" rate. *See* BMI Consent Decree art. XIV(A); *see United States v. Broad. Music, Inc.*, 316 F.3d 189, 194 (2d Cir. 2003) (*Music Choice II*). A "reasonable" rate is one that "an applicant would pay in a competitive market." *Broad. Music, Inc. v. DMX, Inc.*, 683 F.3d 32, 45 (2d Cir. 2012) (citation omitted). In undertaking that inquiry, the court must "'tak[e] into account the fact that [the PRO], as a monopolist, "exercise[s] disproportionate power over the market for music rights."'" *Id.* (second and third alterations in original) (citation omitted).

This determination is facilitated by examining "benchmarks"—*i.e.*, analogous "agreements reached after arms' length negotiation between other similar parties in the industry." *United States v. Am. Soc'y of Composers, Authors & Publishers*, 627 F.3d 64, 76 (2d Cir. 2010) (*RealNetworks*) (quoting *United States v. Broad. Music, Inc.*, 426 F.3d 91, 94 (2d Cir. 2005) (*Music Choice IV*)). "In assessing whether another agreement provides a valid benchmark, the district court must consider whether [it] dealt with a comparable right, whether it involved similar parties in similar economic circumstances, and whether it arose in a sufficiently competitive market." *DMX*, 683 F.3d at 45 (citing *Music Choice IV*, 426 F.3d at 95). The burden to prove an agreement's validity as a benchmark rests with the proponent of the benchmark. *See id.* at 46-47. And even among putatively valid benchmarks, the court must give greater weight to benchmarks that reflect more comparable circumstances. *See Am. Soc'y of Composers, Authors & Publishers v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563, 569-70 (2d Cir. 1990). In all events, the district court must "provid[e] a sufficient rationale for [its ultimate] decision" based on "measurements that are as consistent and as precise as practicable." *RealNetworks*, 627 F.3d at 79.

This Court reviews *de novo* both a district court's selection of appropriate benchmarks and the weight it allocates to the selected benchmarks. *See id.* at 76. And this Court has not hesitated to enforce these standards—it has repeatedly set aside district court decisions that fail to comply with them. *See, e.g.*, *id.* at 83-85; *Music Choice IV*, 426 F.3d at 98-99; *Music Choice II*, 316 F.3d at 195-97.

In this case, the district court purported to identify as benchmarks seven different agreements with implied rates for BMI ranging from 0.21% to 0.54% and, from that broad spectrum, it summarily announced a rate close to the top end of that range, 0.50%, for 2018-2022, more than doubling the effective rate in the previous BMI-NACPA license. SPA33. That result is flawed many times over, and must be reversed.

A. The District Court's 0.50% Rate For 2018-2022 Is More Than Double The Rates Implied By Directly Analogous ASCAP And BMI Benchmarks

The most glaring sign that the district court's 0.50% rate for the 2018-2022 period is unreasonable is its striking departure from the rates contained in the most analogous benchmark agreements: (1) the most recent agreement between NACPA and ASCAP, which governed a virtually identical rate period, and is indistinguishable in every material respect; and (2) BMI's own historical rates for NACPA, which had prevailed in the marketplace for decades.

1. For purposes of setting a reasonable rate for NACPA's 2018-2022 license from BMI, the most analogous benchmark—by far—is NACPA's agreement with ASCAP, which prescribed an implied rate of 0.23% for the 2020-2021 period. SPA27. This recent agreement between NACPA and BMI's closest comparator grants rights to NACPA that are functionally identical to the rights at issue, covers the same time period for a repertory of similar size and value, and was negotiated under the same economic circumstances that govern here. It thus meets *every* metric that this Court enumerated in *DMX* and *Music Choice IV*. *See DMX*, 683 F.3d at 45; *Music Choice IV*, 426 F.3d at 95. There is no sensible reason for the rate here to depart from the rate implied by that agreement at all, let alone to double it.

As this Court has long recognized, BMI and ASCAP "operate in the market in such similar manners" that their agreements are especially "instructive" as benchmarks. *RealNetworks*, 627 F.3d at 83; *see Showtime*, 912 F.2d at 571. ASCAP is BMI's "principal competitor in licensing the performance rights for musical works," and the two PROs control "roughly equal shares" of musical works. *RealNetworks*, 627 F.3d at 83; *see* A462; A246, 248, 250, 252. Consequently, music users "need the same protection with respect to [BMI's] repertory as they require with regard to [ASCAP's]," giving the two PROs roughly "equivalent bargaining leverage." *Showtime*, 912 F.2d at 587-88. Both ASCAP and BMI, moreover, "offer the blanket license as their principal" product and "operate under equivalent consent decrees" designed to curb their monopoly power. *Id.*

Thus, for decades, "ASCAP and BMI have agreed to fees that are generally in a similar range." *Id.* at 588; *see* A83-86; A325. And because BMI and ASCAP are so comparable in terms of their market position, their agreements have long served as key benchmarks in setting "a reasonable rate for [a] license" from either one. *Showtime*, 912 F.2d at 571; *see also, e.g.*, *In re Application of MobiTV, Inc.*, 712 F. Supp. 2d 206, 248 (S.D.N.Y. 2010), *aff'd sub nom. Am. Soc'y of Composers, Authors & Publishers v. MobiTV, Inc.*, 681 F.3d 76 (2d Cir. 2012); *In re THP Capstar Acquisition Corp.*, 756 F. Supp. 2d 516, 536 (S.D.N.Y. 2010), *aff'd sub nom. Broad. Music, Inc. v. DMX Inc.*, 683 F.3d 32 (2d Cir. 2012). It would therefore be "anomalous[]" for the "same licensee[]" to pay significantly higher rates to either ASCAP or BMI. *Showtime*, 912 F.2d at 587-88; *cf. id.* at 588 (rejecting ASCAP's requested rate because it would have been double the rate negotiated by BMI). Indeed, even though BMI and ASCAP each have many thousands of licensees, BMI's Head of Licensing could not identify any licensee that pays BMI twice what it pays to ASCAP. *See* A83-86.

All of the evidence in this case similarly supported parity with the ASCAP-NACPA license—as even the district court itself acknowledged. The evidence re-affirmed that "ASCAP is indisputably BMI's closest comparator" with virtually equal shares of the music market, and "NACPA has paid ASCAP and BMI at near parity in prior agreements." SPA28; *see* A246, 248-50, 252; A462 (market shares); A83-86. Moreover, "[t]he rights in question in the [2018] ASCAP agreement are essentially the same as those NACPA seeks to license from BMI." SPA28. And because ASCAP also operates under the shadow of a consent decree, its agreement with NACPA "was negotiated in a market" that is comparable to "the market in which BMI and NACPA are operating." SPA28. Finally, the 2018 ASCAP-NACPA agreement covers most of the 2018-2022 period at issue here and reflects the same "economic circumstances" affecting the live concert industry during that period. SPA28.

In light of these findings, setting a 2018-2022 rate for BMI that is more than double the effective rate for ASCAP was plainly unreasonable.

2. Confirming the unreasonableness of the district court's 0.50% rate is the historical rate that NACPA has previously paid BMI for the rights at issue, which has consistently been at an implied effective rate of 0.19%-0.21%. SPA26. The case for using the parties' most recent voluntary agreement as a benchmark here is straightforward and compelling: the prior BMI-NACPA license features the exact same buyer and the exact same seller; it concerns the same rights; it was reached in an environment in which either party could have sought rate-setting for a reasonable fee if it believed the proposed rates were not reasonable; it arises from arm's-length negotiations among seasoned executives for both parties, including a significant modification to the rates paid for music festivals that was negotiated over the course of several years; and the rates and terms were repeatedly reaffirmed by the parties through their voluntary extensions of the agreement in 2009, 2010, 2011, and 2012. *See* A330-35.

The district court thus correctly acknowledged that "fairly negotiated prior agreements are the proper starting point from which to determine reasonable fees for subsequent periods." SPA27 (quoting *United States v. Am. Soc'y of Composers, Authors & Publishers*, 157 F.R.D. 173, 195 (S.D.N.Y. 1994)); *see also, e.g.*, *United States v. Am. Soc'y of Composers, Authors & Publishers*, 831 F. Supp. 137, 145 (S.D.N.Y. 1993) ("[P]rices negotiated voluntarily in an arms-length transaction offer the only palpable point from which to proceed towards an estimation of fair value for later periods."). But, again, the district court failed to justify its dramatic departure from that starting point.

While the district court gestured at the idea that "[t]here have been significant market changes" since that rate went into effect, SPA27-28, it did not elaborate on what those changes were or how they could possibly justify a doubling of the rate—especially where ASCAP, BMI's "closest comparator," had recently agreed to only a modest increase on the historic rates paid to ASCAP and BMI under the exact same market conditions. *See supra* at 15. To the extent there were any market changes, ASCAP, a party as sophisticated as BMI, would have been fully aware of them, but nonetheless agreed to a license with much lower rates. *See* A257-62.

In sum, the only agreements that involved the same or functionally identical parties, rights, and economic circumstances indicated benchmark rates of 0.19%-0.23%. These agreements not only provide the best approximation of the fair market value of the BMI-NACPA license, but any significant departure from them would require a tremendous weight of contrary evidence. Nothing in the record or the district court's opinion even explains—much less justifies—the court's decision to place effectively no weight on its *own* findings that (1) the BMI-NACPA license sets the proper starting point for its analysis and reflects a valid benchmark and (2) the ASCAP-NACPA license was the "closest comparator" during the same period at issue in this case.

B. The District Court's 0.50% Rate For 2018-2022 Has No Valid Support in the Record

The district court nevertheless announced a rate more than double the rates contained in those directly analogous benchmarks. The district court's pathway to that conclusion was based on two errors, both of which are legal issues subject to *de novo* review. *RealNetworks*, 627 F.3d at 76. First, the court erred by considering several other agreements as comparable benchmarks, despite marked differences between those agreements and the circumstances present here. Second, the court compounded that error by setting a 0.50% rate anchored toward the extreme end of those inapposite agreements, without any coherent explanation for doing so.

1. The District Court Committed Legal Error By Treating The GMR And SESAC Agreements As Valid Benchmarks

The district court's first error was its decision to expand the range of benchmarks to include five other agreements that bore little relationship to the transaction at issue. The court not only included NACPA's agreement with the much smaller SESAC (which, in any event, only contained an implied rate of 0.34%), but it also included individual concert promoters' separate agreements with SESAC and GMR, which contained much higher implied rates of 0.51% and 0.54%. SPA29. In other words, the court included as appropriate benchmarks agreements in which *neither* party to the transaction resembled NACPA or BMI. *See DMX*, 683 F.3d at

45; *Music Choice IV*, 426 F.3d at 95. The district court's decision to consider these agreements as benchmarks does not withstand scrutiny.

A. As the proponent of the GMR and SESAC agreements as benchmarks, BMI had the burden to establish that each agreement "involved similar parties in similar economic circumstances" and that "it arose in a sufficiently competitive market." *DMX*, 683 F.3d at 45. BMI did not come close to satisfying its burden. To the contrary, both sides of these agreements—the PRO side and the promoter side—involve parties and economic circumstances that differ sharply from those at issue here.

First, on the PRO side, BMI is materially different from GMR and SESAC. The most obvious difference is the sizes of their repertories. *See Showtime*, 912 F.2d at 571 (explaining that comparability for purposes of benchmarking considers "the number of songs in [each PRO's] repertory"). BMI licenses an enormous repertory of music, commanding some 45.4% of musical works. SPA3. GMR and SESAC, by contrast, have much smaller repertories—as the district court found, 4.5% and 3.6% of concert performances, respectively. SPA3 (citing A462). And unlike BMI and ASCAP (which have relatively stable shares), SESAC and GMR's shares are also notoriously volatile and not ascertainable from publicly available information, making them difficult to measure with precision and susceptible to inflation or error during negotiation with promoters. *Compare, e.g.*, A462 (estimating GMR's share at 4.5%), *with* A306 (acknowledging GMR's representations to promoters that it had a 12-15% share), *and* A364 (estimating GMR's market share at 8.6%).

These differences alone diminish the usefulness of SESAC and GMR agreements as benchmarks. As courts have recognized, "SESAC's small size" combined with its volatility, "amplifies any error in a projection" to "ASCAP and BMI" and makes it "difficult to adjust . . . [and] arrive with confidence at an implied [BMI] rate." *In re Pandora Media, Inc.*, 6 F. Supp. 3d 317, 362 (S.D.N.Y. 2014), *aff'd sub nom. Pandora Media, Inc. v. Am. Soc'y of Composers, Authors & Publishers*, 785 F.3d 73 (2d Cir. 2015); *see id.* at 361 n.75; *MobiTV*, 712 F. Supp. 2d at 253-54. Indeed, BMI's expert conceded this point at trial. A304; *see also* A363 (NACPA's expert making similar point).

Moreover, because SESAC and GMR have considerably smaller repertories, the total dollars at stake in concert promoters' negotiations with these smaller PROs represent a small fraction of the dollars at stake in their negotiations with BMI or ASCAP. As a result, promoters have significantly less incentive to resist unwarranted rate demands from GMR and SESAC, even while insisting on reasonable rates from ASCAP and BMI. *See* A377. That is particularly the case since resisting GMR and SESAC rates means bringing costly antitrust proceedings against those presently unregulated entities. Promoters' willingness to overpay by a certain percentage for use of the relatively limited share of musical works SESAC and GMR control, and thereby to avoid the likely higher costs of antitrust or copyright litigation, does not indicate willingness to overpay by *that same percentage* on ASCAP or BMI's substantially larger catalogs—where any overpayment is dramatically larger in absolute terms.

Rate-setting courts have repeatedly recognized this problem and rejected SESAC agreements as benchmarks for that exact reason, explaining that "SESAC's small size, when compared to ASCAP and BMI, . . . reduces the incentive to resist SESAC's rate requests." *Pandora*, 6 F. Supp. 3d at 362. "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 (rejecting ASCAP's benchmarks under which the amounts of money payable "d[id] not constitute a large proportion of the companies' overall costs," noting that "it was certainly understandable for these companies to agree to payments they may have viewed as 'excessive'"); *MobiTV*, 712 F. Supp. 2d at 254 (noting that the SESAC fee was "insubstantial in terms of the risks that Mobi faced in litigation" against SESAC).

BMI also failed its burden to demonstrate that the SESAC and GMR agreements "arose in a sufficiently competitive market." *DMX*, 683 F.3d at 45. SESAC and GMR are not subject to consent decrees that are designed to approximate market competition. And while their repertories are small, their licenses are still "must haves," meaning concert promoters have no option to walk away from any negotiation with SESAC and GMR without taking a license. *See, e.g.*, A117; A138-39; A215; A273-74, 282; A319-20; A394.

There is significant real-world evidence that SESAC and GMR licenses do not reflect competitive prices. *See, e.g.*, A400-01 (testimony that Nederlander acquiesced to GMR's inflated rates only to avoid litigation); A117 (same with respect to AEG Presents); A377 (similar with respect to SESAC). Unsurprisingly, SESAC and GMR have repeatedly faced claims that they have extracted supracompetitive fees in violation of the antitrust laws, and resolution of this litigation has resulted in lowered fees and enhanced protections for certain licensees. *See supra* at 11.

Given all of this, it is hardly surprising that SESAC and GMR agreements have *never* been used as benchmarks to set final license fees in rate-court proceedings. *See MobiTV*, 712 F. Supp. 2d at 254 ("SESAC agreements have never been used as benchmarks in ASCAP rate court proceedings . . . ."); *Pandora*, 6 F. Supp. 3d at 362 (rejecting SESAC agreement as a benchmark).[7]

[7] *United States v. American Society of Composers, Authors & Publishers*, 616 F. Supp. 2d 447, 453 (S.D.N.Y. 2009), involved an *interim* licensing case in which the rate court compared ASCAP's proposed rate to "the flat fee . . . that YouTube agreed to pay for the right to perform SESAC music in the United States."

Second, on the promoter side, agreements with individual promoters offer a much weaker comparator than those where NACPA was a negotiating party. Individual-promoter agreements are difficult to generalize, because they are often shaped by idiosyncratic circumstances. *See Music Choice II*, 316 F.3d at 192 ("idiosyncratic circumstances" may "distort[] . . . negotiation so that the resulting agreement does not accurately reflect the relative bargaining strengths of [the parties]"). And the record shows that was very much the case here. For example, some individual promoters had a relationship with GMR's founder that influenced their willingness to pay higher rates under an individual GMR license—a promoter-specific factor that would not play a role in NACPA's negotiations on behalf of its entire membership. A123-24; A388-89; A394. Similarly, some individual promoters acquiesced to higher fee demands due to explicit threats of copyright infringement litigation, reasoning that for them "it would not in any way be cost effective to engage in" litigation. A209; *see* A198; A390-94, 395; A509-10; A520; A532. That same reluctance to engage in litigation might not necessarily be true for an organization like NACPA that is negotiating rights on a much larger scale. Yet BMI's expert admitted that she did not *even analyze* how these differences between NACPA and individual promoters may have affected the resulting rates. *See* A281-82.

The district court's reliance on SESAC's agreements with non-NACPA promoters was particularly flawed. The SESAC-non-NACPA license on which BMI's expert (and the district court) relied is a non-negotiated *form license* with a fixed-fee rate. *See* A446; A473-80. Neither the expert's analysis nor her testimony shed any light on the number, size, or identity of the individual non-NACPA promoters who may have bought this form license. BMI offered no fact testimony of any kind—including any testimony from SESAC executives—about the provenance of this form license. And there is no information in the record explaining how SESAC arrived at the rate it charged to non-NACPA promoters, or whether it even entertained any input or feedback from potential buyers, *see* A289-90.

This lack of evidence makes plain that BMI did not carry its burden with respect to this proffered benchmark. BMI, as proponent of the SESAC-non-NACPA license, had to prove its validity as a benchmark—which means that BMI had the burden to show that each of the benchmark factors was met. *See DMX*, 683 F.3d at 45-47. But without any record evidence about key aspects of this agreement, there was no way for the district court to know whether it was a valid benchmark. And without knowing how SESAC set the form license's rate, or who paid it and why, the court could not decide whether it arose in similar economic circumstances or in a competitive market. *See Music Choice IV*, 426 F.3d at 95-96. At a minimum, this benchmark should clearly have been discarded. Yet, unbelievably, the SESAC-non-NACPA rate (0.51%) was the closest to the court's ultimate chosen rate (0.5%).

b. The district court's conclusion that the GMR and SESAC agreements with individual promoters were valid benchmarks is untenable. *See* SPA29-33. The district court did not address, let alone adequately account for, any of the significant differences in terms of the parties, rights, and economic circumstances. Instead, it skipped over those considerations in a conclusory sentence, declaring that "the SESAC and GMR licenses are between similar parties, for similar rights, and were negotiated in similar economic circumstances." SPA29. That naked assertion is completely unexplained, lacks any "sufficient rationale," *RealNetworks*, 627 F.3d at 79—and is plainly not true for the reasons discussed above. The court's complete "fail[ure] to give consideration to [these] legally relevant factors" is a legal error that itself warrants reversal. *Showtime*, 912 F.2d at 569.

The court instead focused entirely on considering whether SESAC and GMR extract supracompetitive prices due to the absence of competition. SPA30-33. Even as to this consideration, the court's analysis rested on an incorrect premise. In the court's view, SESAC and GMR cannot charge supracompetitive prices because promoters could instead engage in direct licensing with individual copyright owners, sidestepping SESAC and GMR altogether. SPA32. But that assertion was manifestly false. It was undisputed at trial that promoters *cannot* directly license with GMR members. BMI's economic expert conceded that it was "not possible to do direct licensing" with GMR members because the members' agreements with GMR prevent them from entering such arrangements. A276, 277, 284-85. And other courts have recognized that SESAC likewise restricts "direct licensing by refusing to offer carve-out rights and obscuring the works in its repertory," *Radio Music License Comm., Inc. v. SESAC, Inc.*, 29 F. Supp. 3d 487, 501 (E.D. Pa. 2014), and imposing financial penalties on members who directly license their works, *Meredith Corp. v. SESAC, LLC*, 1 F. Supp. 3d 180, 193-94 (S.D.N.Y. 2014). BMI made no record to the contrary.

Thus, BMI failed to establish the predicate for the district court's assumption—that the ability to direct license would prevent GMR and SESAC from exercising their exclusive control over a "must have" resource to extract supracompetitive prices.[8] Because the district court's decision "was premised on [that] flawed assumption[]," its decision "must be set aside." *Music Choice II*, 316 F.3d at 197; *see RealNetworks*, 627 F.3d at 76.

Even apart from this mistaken premise, the district court's reasoning does not withstand scrutiny. The court suggested that the rates in the SESAC and GMR

[8] The sole transcript page cited by the district court to support its belief that promoters could directly license songs, SPA27 (citing A175), does not address the role of direct licensing in SESAC and GMR negotiations.

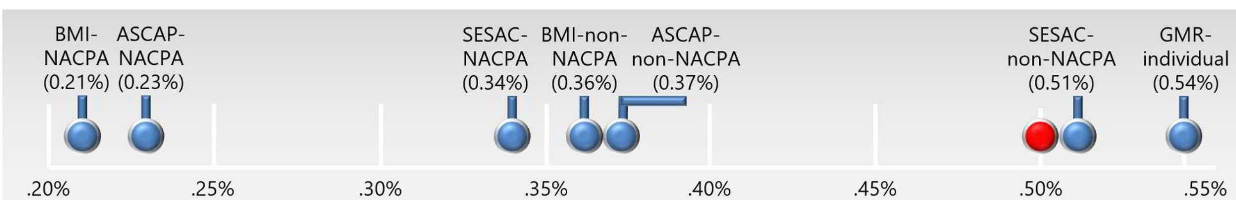
agreements were the functional equivalent of rates that might be charged by "large music publishers" that administer multiple licenses. SPA30-31. From this premise, the court seemed to assume, without evidence of a single representative transaction in the record, that such large music publishers would charge competitive rates, and consequently, SESAC and GMR must also charge competitive rates. SPA30-31. This hypothetical speculation was completely unfounded. There are no large publishers that engage in direct licensing on the scale of SESAC and GMR. None of BMI's witnesses or any of the documentary evidence addressed what these hypothetical large publishers may or may not charge. And BMI's economic expert admitted that she did not study the market power of music publishers at all. A311.

There was thus *nothing* to ground the district court's assumption that this hypothetical large publisher would charge a competitive price. To the contrary, it stands to reason that if a publisher amassed a repertory with enough copyrighted works to become "must haves" for any live concert licensee—and operated without rate court protections—that the publisher *too* could exert anticompetitive market power, and charge supercompetitive prices. As the proponent of these benchmarks, it was BMI's burden to establish that GMR and SESAC struck effectively competitive license terms, not to speculate about a counterfactual without no evidentiary support. The district court's uncritical—and unexplained—adoption of this "large publisher" analogy does not constitute the "sufficient rationale" that this Court's precedent requires. *RealNetworks*, 627 F.3d at 79.

2. The District Court Failed To Justify Its Substantial Departure From The Directly Analogous ASCAP And BMI Benchmarks

Even assuming the SESAC and GMR agreements could be considered as comparable benchmarks at all, the district court's decision still must be set aside for failing to adequately *weigh* the various rates it deemed to be benchmarks—an error, again, subject to *de novo* review. *See RealNetworks*, 627 F.3d at 79. Instead of engaging in any comparative analysis, the court simply announced a 0.50% rate that inexplicably favors SESAC's and GMR's deals with individual promoters over any of the deals with NACPA itself—including the directly analogous ASCAP-NACPA agreement. SPA33. That skewed weighing defies common sense and even the district court's own findings—and the court provided *no* rationale, let alone a "sufficient" one, to justify it. *RealNetworks*, 627 F.3d at 79.

a. As explained above, not all benchmarks are created equal—and more comparable benchmarks should receive greater weight in the final rate calculation. *See Showtime*, 912 F.2d at 569-70; *RealNetworks*, 627 F.3d at 81-83. But here, after declaring ASCAP BMI's "closest comparator," SPA28, the district court did not engage in any weighing whatsoever. Instead, it simply listed the rates implied by the seven different benchmarks it considered—which spanned 0.21%, 0.23%, 0.34%, 0.36%, 0.37%, 0.51%, and 0.54%—and declared a rate of 0.50% to be "reasonable." SPA33. The district court did not suggest how it derived that rate from the benchmarks, and it certainly did not explain why it landed on a rate at the extreme end of the spectrum, dramatically skewed toward (non-NACPA) SESAC and GMR agreements (0.51% and 0.54%) covering a much smaller share of the musical works, and away from the ASCAP-NACPA and BMI-NACPA benchmarks (0.21% and 0.23%) applicable to the vast majority of public performance rights and concert performer revenues. To illustrate just how skewed the rate is, the figure below situates the court's 0.50% rate (highlighted in red) among the seven benchmarks:



See SPA33.

The selection of 0.50% makes absolutely no sense. As noted above, this rate more than doubles the rate that the court itself acknowledged was the "closest comparator," SPA28, and more than doubles any rate that BMI has been able to negotiate for itself in the marketplace. The rate is also inexplicably closer to the benchmark derived from SESAC's agreement with individual promoters (0.51%) than the benchmark derived from SESAC's agreement with NACPA itself (0.34%).

Even assuming (contrary to the evidence) that SESAC agreements may be valid benchmarks in this context, the rate negotiated by NACPA itself is surely more probative as to NACPA's negotiations with BMI than a rate imposed on a handful of individual promoters.

Nor does the district court's rate even reflect an attempt to give the benchmarks similar weight. Giving equal weight to all four PROs' agreements with NACPA based on the pro rata share of total live concert performances represented by each PRO would have produced a rate of 0.24%. A369. And a straight average of the benchmarks with no consideration for their respective weights—whether based on PRO share or share of industry revenues subject to the benchmark rates—would yield a number somewhere in the middle of the range. Rather, the 0.50% rate appears to rely on the implicit premise that GMR and SESAC's licenses with individual promoters are somehow the *most* probative benchmark in determining a reasonable rate. But whatever else is true, there is no reason to think rates extracted by much smaller PROs from a handful of individual promoters are the *best* evidence of the reasonable rate for a BMI/NACPA negotiation. Yet that is what the district court necessarily concluded.

This Court has not hesitated to set aside rate determinations that improperly favor less comparable agreements, *see RealNetworks*, 627 F.3d at 81-84, and that same result is warranted here.

b. The court compounded the problem by failing to "provid[e] a sufficient reason"—or, indeed, any reason—for its decision. *Id.* at 78-79 & n.15. The court's only attempt to justify its selection of a 0.50% rate comes in two paragraphs in which it observed that because "music is essential to a live concert," live concerts are more "musical[ly] intensive" than talk radio or televised sports. SPA34. But the court did not even try to connect this abstract and utterly irrelevant observation to the benchmarks (all of which involve the live concert industry and therefore bake in the exact level of music intensity of live concerts) or to its ultimate rate determination. Instead, it just stated that, for live concerts, "[t]hose who contribute to the musical composition should be compensated accordingly." SPA34. That platitude certainly cannot sustain the court's otherwise entirely arbitrary rate determination of 0.50%, particularly given the existence of a much more precise metric—the "closest comparator" NACPA-ASCAP agreement. *Cf. RealNetworks*, 627 F.3d at 78 n.14 ("We find this sort of rough estimation, with no basis in the record, unreasonable because there appears to be a much more precise metric available to the district court.").

Moreover, the result here is not only unreasoned and arbitrary but contrary to the purpose of BMI's consent decree. That decree is designed to "'substantially control[]' . . . BMI's licensing practices and minimize the 'danger of unreasonable activity' caused by . . . BMI's market power." *DMX*, 683 F.3d at 36 (first alteration in original) (citations omitted). This Court has stressed that "rate-setting courts must take seriously the fact that they exist as a result of monopolists exercising disproportionate power over the market for music rights." *Music Choice IV*, 426 F.3d at 96. By selecting a rate of 0.50%, the district court's decision allowed BMI—a monopolist that has long exercised a stranglehold on the music industry—to charge a rate that is even higher than the rates extracted from NACPA by an unregulated monopolist like SESAC, and more than double the rate that ASCAP, BMI's closest comparator, could achieve in negotiation. The decision below thus turns the concept of benchmarking on its head while allowing, without explanation, a regulated monopolist to bootstrap its way into higher rates by applying a nine-times multiplier to agreements with unregulated monopolists—precisely what the consent decree is designed to prevent. That decision cannot stand.

C. The District Court's Rate Determination For 2014-2018 Was Also Unreasonable

The district court's rate determination for the 2014-2018 period, *see* SPA18, 36, was also unreasonable. That decision was grounded in the same improper selection of benchmarks as for the later period, and must be reversed for the same reasons.

In a cursory half-page of analysis, the district court concluded that BMI's proposal for this period was reasonable because it "align[ed] . . . with the rates paid to BMI by non-NACPA promoters" and the court had "already found," in its analysis for the 2018-2022 period, "that the BMI-non[-]NACPA benchmark is valid." SPA36. The Court did not explain why the rate for BMI's license with NACPA should "align" with the rate for the form licenses BMI offers to *individual* promoters. Those agreements are, on their face, less probative than NACPA's agreements. Unlike the NACPA rates, which were the product of extensive negotiations over many years, the rates charged to non-NACPA promoters were instead imposed unilaterally on a take-it-or-leave-it basis in circumstances that made it cost-prohibitive for promoters to leave it. *See* A91; A112; A370-71. And these adhesion licenses apply only to promoters representing a very small fraction of industry revenues. *See* A451.

Rate courts have routinely discounted such agreements as potential benchmarks.[9] Yet, the district court did not even acknowledge these differences, and just summarily concluded that the rate should be deemed reasonable because it "align[ed]" with one of seven (vastly differing) benchmarks. Even if one assumes that all of those benchmarks are valid, the selection between them must be more than

[9] *See, e.g.*, *United States v. Am. Soc'y of Composers, Authors & Publishers*, 559 F. Supp. 2d 332, 413 (S.D.N.Y. 2008) (rejecting as benchmarks agreements that "were unilaterally developed and . . . accepted by only a limited number of relatively small licensees"), *aff'd in part, vacated in part on other grounds*, 627 F.3d 64 (2d Cir. 2010); *United States v. Am. Soc'y of Composers, Authors & Publishers*, 902 F. Supp. 411, 420 (S.D.N.Y. 1995) ("[A]greements negotiated by ASCAP and third parties are less persuasive . . . than prior negotiated agreements between ASCAP and applicants.").

picking names out of a hat. *See Showtime*, 912 F.2d at 569-70; *RealNetworks*, 627 F.3d at 81-83.

Moreover, the stark difference between the 2014-2018 and 2018-2022 rates the district court adopted only underscores the arbitrariness running through its decision. The court did not identify any basis for distinguishing these two periods, yet it gave near-dispositive weight to different benchmarks for each. Its opinion does not provide any explanation of why a rate in line with SESAC's and GMR's non-NACPA agreements is reasonable for 2018-2022 while a rate in line of BMI's own non-NACPA agreements is reasonable for 2014-2018. There is no record of any radical change in the industry on June 30, 2018 (the date the lower rate period in the court's prescription ended), and in fact the ASCAP-NACPA license refutes such a theory. This total lack of logic is the hallmark of unreasoned, arbitrary decisionmaking. The district court's rate determinations for both periods should be reversed.

II. THE DISTRICT COURT ERRED IN EXPANDING THE GROSS REVENUE BASE

The district court separately erred by expanding the royalty base to include various sources of revenue that have never been counted as part of the royalty base in *any* market-negotiated domestic agreement. This error reflected a misunderstanding of this Court's decision in *Music Choice II*. The district court focused (SPA13) on *Music Choice II*'s pronouncement that ""what retail customers pay to receive the product or service in question . . . [is] an excellent indicator of its fair market value." *Music Choice II*, 316 F.3d at 195. The court misconstrued that statement as indicating that the correct measure of "the fair market value of the music" is the sum of every dollar that "the consumer pays to attend the concert." SPA13. But *Music Choice II* did not create any such per se rule. Rather, it considered the retail price of music a reliable touchpoint to assess its fair market value "absent some valid reason for using a different measure." 316 F.3d at 195.

This Court has since recognized that this "important qualifying phrase" means that *Music Choice II*'s "contention that 'retail revenues derived from the sale of music fairly measure the value of the music'" is not "universally true." *Am. Soc'y of Composers, Authors & Publishers v. MobiTV, Inc.*, 681 F.3d 76, 86-87 (2d Cir. 2012) (quoting *Music Choice II*, 316 F.3d at 195); *see Music Choice IV*, 426 F.3d at 97 (clarifying that *Music Choice II* "did not require [retail price] to be used in all circumstances"). Indeed, far from the categorical approach the district court took, a rate court may "find fair market value on any basis adequately supported by the record," *Music Choice IV*, 426 F.3d at 97, which supplies a "valid reason" for adopting a revenue base other than total retail price, *Music Choice II*, 316 F.3d at 195.

Here, there were at least two "valid reasons" for using revenue recorded from ticket sales, less standard deductions, as the revenue base for the 2018-2022 period.

First, every single one of the seven benchmarks that the district court accepted uniformly defined the revenue base in exactly that way. Indeed, the undisputed record at trial showed that every percent-of-revenue domestic benchmark available for a 25-year period calculated revenue base as revenues from gross ticket sales minus standard deductions. *See* A295-96; A412; A420; A426; A433; A484-85; A499; A503; A540; A552; A562-63; A577-78.

That industry-wide consensus was ample reason for the district court to refrain from expanding the base here. As this Court has explained, revenue-base determinations, just like rate determinations, should be "facilitated by the use of benchmarks" to ensure that the overall amount a licensee is charged is reasonable. *RealNetworks*, 627 F.3d at 76 (citation omitted); *see Music Choice II*, 316 F.3d at 194-95 (treating revenue base as part of the fair market value analysis and considering benchmark's revenue base). The fact that every agreement in the history of the industry—whether in voluntary negotiations with regulated PROs, in agreements with unregulated PROs, or even in adhesion contracts *developed by PROs themselves*—has defined the revenue base the same way represents stark evidence that this definition would obtain in a hypothetical market negotiation. *See Showtime*, 912 F.2d at 569-70.

At an absolute minimum, a district court departing from the standard practice in every available benchmark agreement must explain why those benchmarks should be disregarded. Yet the district court offered no such explanation, and instead just ignored the benchmarks altogether—appearing to believe, contrary to this Court's clear instruction, that *Music Choice II required* a different result. That legal error warrants reversal. *See RealNetworks*, 627 F.3d at 79 (holding that "the district court erred by adopting an imprecise metric" to calculate revenue "without providing a sufficient rationale for that decision").

Second, the expanded revenue base should have been rejected because it was commercially impracticable. Unrebutted testimony at trial made clear that NACPA promoters do not have access to the revenue data that would be necessary to apply all of these expanded revenue categories to the rate period at issue. *See* A150; A187 (ticketing fees); A163-64; A383, 386-87 (VIP Lift); A153, 157-58; A192-93; A385 (box seats and suites). Most glaringly, the district court expanded the revenue base to include suite revenue that is not paid to the promoters at all. Rather, that revenue goes directly to the venue itself, which sells suites to corporate customers through an "annual contract[]" for *all* the events—including sporting events—that are hosted there. A203 ("[O]ut of 300 suites, probably 294 of them are on annual contracts."). Aside from being inequitable, *infra* at 58, charging promoters on the basis of revenues paid to third parties is impossible to administer. Promoters have no way of knowing how much an annualized box suite costs without access to a third-party venue's confidential financial information; and, even if they did, there is no way of knowing how much of that revenue is attributable is to live music events, let alone to a particular concert.

Indeed, even BMI's expert conceded that the revenue base should only include revenue streams for which the concert promoters have adequate information to compute and transmit fees. A299. This "unimpeached testimony" explaining why the ticket sales revenue base was "far superior" to an interpretation of retail price that included these ancillary categories was "a very valid reason for using a different measure." *MobiTV*, 681 F.3d at 86.

Compounding these administrative difficulties is the complex, error-prone exercise of adjusting the rates in benchmark transactions that an expanded revenue base requires. BMI and NACPA's experts both testified that appropriate use of benchmarks required downward adjustment of their rates if the revenue base were expanded. *See* A240-41, 286, 297, 298-99; A348. Such adjustment is necessarily speculative, and the adjusted rates on which the district court relied therefore unreliable. *See* A345-52. That is yet another reason why the industry has coalesced around using ticket sales as the appropriate metric.

The district court overlooked these pragmatic considerations and the industry-wide consensus because it understood *Music Choice II* as a categorical rule requiring it to set the revenue base at retail price. But that is simply incorrect. As this Court explained in *Music Choice II* itself, in some cases, "there may be reason to approximate fair market value on the basis of something other than the prices paid by consumers." 316 F.3d at 195. Here, the benchmarks were plainly a "valid reason" to use a measure other than retail price. *Music Choice IV*, 426 F.3d at 97 (citation omitted). The court's "over-reading" of *Music Choice II*—the exact legal error for which this Court reversed the same rate court in *Music Choice IV*, *id.*—tainted its entire revenue-base analysis and warrants reversal.

In any event, even under the district court's erroneous interpretation of *Music Choice II*, its revenue-base determination was incorrect. The court relied on the premise that the revenue base should consist of "what retail customers pay to receive the product or service in question." *Music Choice II*, 316 F.3d at 195. But, here, the "product" in question is the music—not the various add-ons that consumers may purchase in the course of listening to that music. A consumer might, for example, buy a soft pretzel at MetLife Stadium while attending a concert, but it would be highly unusual to attribute that purchase to the music that the consumer went to hear.

The same is true for earnings that the district court included in the calculation of the revenue base here, such as the cost of VIP packages. The price of a VIP package includes ancillary perks that are unrelated to the performance of music like artist-themed merchandise or backstage passes, and other non-music benefits, such as privacy, and ready access to higher-quality food and drinks. While the face value of a premium ticket included in that package may be reflective of the fair market value of the music, the costs *above* the face value necessarily reflect the value of these ancillary benefits—which is precisely why VIP customers pay more to listen to the same music.

Box-suite revenues are even more disconnected from the live performance of music. Much of that revenue is attributable to sports games and other events hosted by the venue, and, in any event, the principal value of the box suite is not just access to events, but the variety of non-music benefits that corporate customers receive from purchasing such a suite. A181-82. And, as noted above, concert promoters do not even receive any revenue from box suites—all of that money accrues to the venue itself. Whatever else is true, it is grossly inequitable to charge concert promoters on the basis of revenues that they do not receive.

The district court similarly erred in including ticketing and service fees. Not a single domestic benchmark agreement requires concert promoters to pay PRO royalties on these fees, *see* A295-96; A412; A420; A426; A433; A484-85; A499; A503; A540; A552; A562-63; A577-78, which are separate from the face value of the ticket and typically are paid to different constituencies altogether—the venue or whichever ticketing company the venue uses, *see* A145-47. To make matters worse, while the district court's order limits the ticketing and service fees included in the revenue base to those that concert promoters themselves receive, in practice, since the court's decision, BMI has demanded that concert promoters *affiliated* with ticketing companies pay royalties on all fees that their affiliate ticketing companies receive in service and handling charges for the promoter's shows. To the extent that is BMI's position in the real world, it should defend on appeal a district court opinion imposing *that* obligation rather than the softer (though still erroneous) ruling that the court plainly made on this issue.

In short, as with its rate determination, the district court's expansion of the revenue base departed from decades-long industry practice, defied the evidence and was grounded in impermissible reasoning. That decision should likewise be reversed.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed or, at a minimum, vacated for further proceedings.

Dated: October 4, 2023
San Francisco, CA

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This brief complies with the type-volume limitations of Second Circuit Rule 28.1.1(a) because it contains 13,959 words, including 44 words manually counted in any visual images, and excluding the parts exempted by Federal Rule of Appellate Procedure 32(f).

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Dated: October 4, 2023
San Francisco, CA

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