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Litigators of the Week: The Team Who Made the Feds Sing

By Charles Toutant

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For two lawyers from Milbank, Tweed, Hadley & McCloy in New York, facing off in court against the U.S. government is not so difficult if you know you're right.

Milbank chairman Scott Edelman and partner Atara Miller won a ruling striking down a Department of Justice directive on music licensing that critics said would have thrown the recording industry in turmoil.

The Milbank Tweed lawyers contended that the government wrongly interpreted a 1966 consent decree between their client, Broadcast Music Inc., and the Justice Department to prohibit fractional licensing of songs with more than one composer. U.S. District Judge Louis Stanton of the Southern District of New York agreed, ruling on September 16 that "nothing in the consent decree gives support to" the government's position. Stanton also said the decree neither bars fractional licensing nor requires full-work licensing.

Fractional licensing is when two or more composers and lyricists who collaborate on a song agree to split licensing fees generated when the song is played publicly. Sometimes, one of them will be affiliated with BMI and the other will use a competing company.

Milbank's Scott A. Edelman and Atara Miller

When asked if it was difficult to face the federal government as an adversary, Edelman replied, "Not when they're wrong. That's the great thing about our federal court system."

Miller said the government appears to have taken the side of digital music providers and the television and radio industry in the case, instead of companies like BMI that charge to license songs.

"When you look at the consent decree, there is not a place that says anything about fractional licensing. What the government was trying to do was find language in the consent decree to adopt a new policy," Edelman said.

BMI asked the government to review the 1966 consent decree, which stems from an antitrust dispute and is used as the basis for negotiations between the company and licensees. The review came after a 2015 trial victory that Edelman and Miller achieved in a dispute with Pandora over licensing fees. The ruling gave BMI a 2.5 percent share of all revenue from Pandora, up from the previous rate of 1.75 percent.

BMI sought guidance on whether it could comply with requests by owners of music to refuse to license songs to digital streaming services, Miller said. The Department of Justice said that BMI cannot refuse to license songs to streaming services, but then its review took a "change of course" and focused on whether songs with two songwriters could be licensed on a half basis, Miller said.

It's unclear where the government's concern about fractional interests in songs came from, Miller said. But after studying that issue for about nine months, it issued its report permitting licensing of songs only on a 100 percent basis, she said.

Stuart Rosen, senior vice president and general counsel for BMI, and Fiona Schaeffer and Rachel Penski Fissell of Milbank Tweed, also worked on the case.

Edelman and Miller said in pleadings that the government directive would stifle songwriters' creativity and clamp down on the variety of music the public can choose from. Some songs would no longer be played on the radio if multiple composers and songwriters had shares of the rights. They said the government's directive would create a barrier to entry or expansion by smaller upstarts, undermining the antitrust purpose of the consent agreement with BMI and a similar pact with its main competitor, the American Society of Composers, Authors and Publishers.

"The effect [of the Department of Justice directive] is to decrease the free-market, unregulated competitors' clout. But that free-market, unregulated competitor is the fear of the radio industry and the television industry," Miller said.

Edelman and Miller also managed to include a Beatles reference in their argument that songwriters would choose collaborators based on licensing company affiliation, rather than talent, personal chemistry or artistic compatibility. But it's unclear how the judge received that piece of their argument.

"In the world proposed by the DOJ, iconic songwriting teams like John Lennon and Paul McCartney might have worked with each other only if they agreed to join a single (performing rights organization). To impose these kinds of restrictions cannot be in the public interest," they said in a court filing.

"That was not part of the basis for his ruling so I don't know. You never know what resonates with a judge," Edelman said.

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