August 9, 2019

U.S. Department of Justice
Antitrust Division
950 Pennsylvania Avenue, NW
Washington, DC 20530

Re: Review of ASCAP and BMI Antitrust Consent Decrees

COMMENTS OF THE RECORDING ACADEMY

The Recording Academy appreciates the opportunity to submit these comments to the Department of Justice on behalf of the creative music professionals it represents. The Recording Academy ("Academy"), best known for celebrating artistic excellence through the annual GRAMMY Awards, is a trade association representing thousands of songwriters, performers, producers, and engineers. The Academy's voting membership and board leadership consists of individual music professionals with creative and technical credits on commercially released recordings. The Academy is the only music trade association that represents all music professionals. It represents only individuals and has no company or corporate members.

The Academy's membership includes thousands of working songwriters and composers. Accordingly, the state of the consent decrees governing ASCAP and BMI has been of acute interest. In 2014, when the Department last conducted a broad review of the consent decrees, the Academy filed comments to express that the consent decrees had not kept pace with rapid changes in the marketplace and should be modified to allow the PROs to modernize. In 2015, when the Department proposed a disruptive rule to alter the longstanding practice of licensing jointly owned musical works, the Academy again filed comments to demonstrate the harm that would come to songwriters from such a change. Today, the Academy again submits comments to the Department in support of the songwriters and composers it represents.

Guiding Principle

The Antitrust Division notes that "the goal of the antitrust laws is to protect economic freedom and opportunity by promoting free and fair competition in the marketplace."[1] The decades-old consent decrees now have the opposite effect. Once

[1] Mission Statement, Dep't of Justice Antitrust Div. (https://www.justice.gov/atr/mission).

serving to protect local radio stations and small music halls, the decrees now protect giant radio conglomerates and some of the largest technology companies in the world. In short, the individual songwriter is today constrained by regulation to protect companies such as Google and iHeart Media. As the Department considers the efficacy of the consent decrees anew, it should pursue an outcome that provides every songwriter with the opportunity to secure compensation for their work in a fair marketplace.

Significance of PROs

Performance Rights Organizations (PROs) are critically important to the ability of the Academy's songwriter members to make a living. Acting alone, an individual songwriter or composer lacks the capacity to negotiate fair licenses for his or her creative work with every potential licensee. The individual songwriter also lacks the resources and time necessary to collect all of the royalties generated when that work is exploited and to enforce the public performance right for that work.

PROs provide an important service to songwriters and composers through collective licensing that enables PROs to efficiently negotiate for royalties from licensees. PROs also have the infrastructure necessary to collect and distribute those royalties directly to the songwriter with transparency, and to monitor the use of the songwriter's work for possible infringement.

The direct royalty payments provided by PROs are the lifeblood of working songwriters. Josh Kear, a GRAMMY-winning, ASCAP-affiliated songwriter and Academy member, articulated the importance of these royalties in his testimony before the Senate Judiciary Committee last year:

> Unlike the artists who record our songs, we make no revenue off of concert tours, t-shirt sales or endorsement deals. Instead, we make money off of royalties when our songs are publicly performed. It used to be a songwriter could make a decent income from sales of albums or CDs, but those, and the income derived from them, are relics of the past. People don't buy music anymore; they stream it. And that means the money songwriters make off of public performance royalties, which includes streaming, is our livelihood.[2]

While the individual songwriter or composer depends on the PROs to provide these services, the rest of the Academy's membership, and the entire music ecosystem,

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[2] *Protecting and Promoting Music Creation for the 21st Century: Hearing Before the S. Comm. On the Judiciary*, 115th Cong. (2018) (statement of Josh Kear, Songwriter) (testimony available at https://www.judiciary.senate.gov/meetings/protecting-and-promoting-music-creation-for-the-21st-century).

rely on them as well. PROs provide marketplace stability. Licensees enjoy the right to publicly perform virtually any musical composition by simply seeking licenses from a handful of PROs. Without this service, most licensees would be faced with the insurmountable task of licensing millions of songs from thousands of songwriters and publishers.

Need for Reform

The music economy is changing rapidly, however, and the consent decrees have hampered the ability of ASCAP and BMI to respond to those changes in a way that provides fair value to their – and the Academy's – members. Consumers have accelerated a transition in the music economy from a "purchase-to-own" model based on physical products and digital downloads to a consumption model based on streaming. As streaming becomes the dominant way that music is experienced, professional songwriters will only be able to make a sustainable living if they receive fair compensation for the public performance of their works by music licensees.

Consent decrees, with their fixed and unresponsive nature, are a poor instrument for regulating an industry that is constantly evolving. The consent decrees that regulate ASCAP and BMI were first entered into in 1941, and they were last modified in 2001 and 1994, respectively. In the time since that last modification, Apple launched iTunes in 2003, ushering in the digital download era.[3] Just a few years later, Spotify launched in the United States in 2011, quickly superseding the download era with the streaming era.[4] So the consent decrees are not only nearly eighty years old, the most recent updates to the consent decrees still predate two of the most significant seismic shifts to ever occur in the music industry.

Another significant development in the music economy is the shift in market power away from the PROs and to licensees. The consent decrees were originally put into place to constrain the disproportionate market power of ASCAP and BMI. Today, the PROs license to massive technology companies like Amazon, Apple, Google, and Microsoft. Those four companies in particular are four of the largest corporations in the United States.[5] In short order, ASCAP and BMI have transitioned from Goliath to David.

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[3] Press Release, Apple, Apple Launches the iTunes Music Store (April 28, 2003) (https://www.apple.com/newsroom/2003/04/28Apple-Launches-the-iTunes-Music-Store/).

[4] Don Reisinger, *Spotify (finally) launches in the U.S.*, CNET, July 14, 2011, https://www.cnet.com/news/spotify-finally-launches-in-the-u-s/.

[5] Search Fortune 500, (https://fortune.com/fortune500/search/?).

It's absurd to suggest that ASCAP and BMI need to be constrained against these titans of industry.

In addition, the market power of the radio broadcasters has also shifted. Consolidation in the broadcast radio industry has concentrated station ownership to just a few major players in almost every geographic market. Not only has this consolidation strengthened the negotiating power of the major radio conglomerates, it has reduced opportunities for songwriters. Corporate radio has decreased the variety of genre formats in radio, and it has limited the amount of music played in the formats that remain to tightly controlled playlists.

Stability and Transition

While a free, unregulated marketplace represents the ideal scenario for the PROs and for the songwriters they represent, no one is under the illusion that the licensing of musical works could transition to the free market instantaneously. Current business practices have been in place for decades and songwriters and licensees alike rely on the predictability of the current system. Immediate disruption would harm all stakeholders involved in music licensing. When enacting the Orrin G. Hatch-Bob Goodlatte Music Modernization Act (MMA) last year, Congress contemplated that the consent decrees could be dissolved or dramatically reformed. Notably, the MMA did not prohibit the Department from terminating the consent decrees nor limit the Department's ability to do so. The MMA simply requires robust notice provisions to Congress regarding a decision to file a motion to terminate a consent decree.[6]

Consistent with this congressional understanding, the Department should establish a framework that provides a reasonable transition to a more efficient and free market, avoids disruption to the industry, and allows all stakeholders sufficient time to adjust future expectations. Such a gradual transition could be facilitated by new consent decrees that completely replace the current consent decrees.

To the extent that ASCAP and BMI continue to function under consent decrees and are thus constrained from negotiating licenses in the free market, the new decrees should ensure that any rate-setting process results in royalty rates that reflect what would have been established in competitive market negotiations. This includes preserving the two important reforms to the current rate-setting process that were established by the MMA. First, the MMA repeals subsection (i) of section 114 of title 17 United States Code.[7] This change will allow judges to consider a broader range of

[6] Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, § 105, H.R. 1551, 115th Cong. (2018).

[7] *Id.* § 103.

market evidence when setting rates. Allowing more evidence into consideration, specifically the royalty rates paid for sound recordings, will enable judges to better determine the value of a public performance license for musical works. Second, the MMA establishes a rotating "wheel" of judges.[8] Instead of a single rate court judge for each PRO, judges will be randomly assigned to each proceeding for ASCAP and BMI to provide impartiality. These two reforms were long overdue and necessary improvements to the rate court process.

In addition, the new decrees should establish an expedited process for setting interim rates. Presently, any service that wants to use music from ASCAP or BMI can do so upon request, before any rate for the license is established. While the service is immediately able to use and profit from that music, the songwriters and composers receive no compensation until an agreement is reached between the PRO and the licensee. This is both inequitable and unjust. Under the new consent decrees, an interim rate-setting process should be established so that songwriters are compensated as soon as their work is exploited.

As this transition takes place and the market for music licensing continues to shift and evolve, the PROs should also be given the freedom to innovate to better serve the needs of licensees and secure the best value for their songwriters. ASCAP and BMI have already demonstrated their willingness to respond to marketplace demands without any government intervention. The two PROs announced that they would create a joint database to provide an authoritative information source regarding the ownership of musical works.[9] While that integrated data solution is being completed, ASCAP and BMI already offer fully searchable, free online databases of their individual repertoires.[10]

But while the PROs are willing to respond to the market, the consent decrees can make it difficult for them to do so. In today's marketplace, there are different kinds of licensees that have different needs for music. A streaming service owned by a giant tech company may not require the same kind of license as a local winery that hosts live music once or twice a month. Similarly, an established music service may not have the same licensing needs as a new entrant into the marketplace. The PROs should have the flexibility to respond to different music users differently. A small or medium-sized business like a café or winery that only occasionally and irregularly performs musical

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[8] *Id.* § 104.

[9] Press Release, ASCAP, ASCAP & BMI Announce Creation of a New Comprehensive Musical Works Database to Increase Ownership Transparency in Performing Rights Licensing (July 26, 2018) (https://www.ascap.com/press/2017/07-26-ascap-bmi-database).

[10] The ASCAP database can be accessed at https://www.ascap.com/repertory; the BMI database can be accessed at http://repertoire.bmi.com/StartPage.aspx.

works may be ill-served by a blanket license and would instead be attracted to a per-use license. Similarly, certain venues or services may not need to license a full catalog from a PRO and may only want to license select portions of that catalog. The consent decrees' prohibitions on "volume discounts," which offer lower rates to incentivize higher use of a PRO's catalog, and the requirement that similarly situated licensees be treated similarly are two examples of restrictions that have a chilling effect. They make it more difficult for ASCAP and BMI to respond to what customers actually want and discourage them from trying to modernize. The consent decrees, which were initially put in place to promote competition, now constrain competition. ASCAP and BMI do not have the ability to experiment and innovate with new kinds of licenses that meet the needs of different customers.

In addition, voluntary, non-compulsory blanket licensing for all rights related to musical compositions could lead to efficiencies in licensing just as there are marketplace efficiencies from the blanket licensing regime for public performances. Allowing the bundling of all rights for musical compositions – public performance, mechanical, synchronization, and print reproduction – would result in a more efficient licensing process with more services and more works being available in the marketplace. But a heavily restrictive consent decree only makes it less likely that a PRO will be either willing or able to differentiate its licensing practices to meet the changing needs of licensees. While BMI has only recently been given the explicit flexibility to issue bundled licenses, ASCAP is still restricted from doing so.

The consent decrees don't just restrict the ability of ASCAP and BMI to better serve users of music, they also restrict their ability to serve the creators of music – the songwriters and composers they represent. PROs often compete for the privilege of signing affiliation agreements with songwriters and composers. This competitive process affords songwriters with the ability to secure the best possible remuneration for their work and talent. And, today, with the addition of other PROs in the marketplace, songwriters and composers have more choice than ever. But the consent decrees limit ASCAP and BMI from offering the same kinds of benefits that the other PROs can provide to attract songwriters. These limitations reduce the overall level of competition for songwriters and consequently may suppress the full value of total compensation that a songwriter can receive. ASCAP and BMI should be allowed to offer inventive guarantees and advances to attract songwriters. These types of payments are often a significant benefit to songwriters and their families. Furthermore, ASCAP and BMI should be able to sign songwriters and composers to long-term affiliate deals that extend beyond five years. A multi-year deal can provide security and stability for songwriters.

Unintended Consequences

While the review of the consent decrees provides a tremendous opportunity to modernize the marketplace for licensing musical works for public performance, the Department should hold fast to the principle that its goal is to reduce government regulation and allow for free, open competition to the greatest extent possible. While the very act of reviewing the consent decrees for their continued relevance would seem to presume such an outcome, this has not always proven to be true. In 2014, the Department of Justice commenced a similar review to determine if the consent decrees "still served to protect competition" or whether modifications to the consent decrees would enhance competition and efficiency "to account for changes in how music was delivered to and experienced by listeners."[11] Many proposals to modify the consent decrees to give ASCAP and BMI more flexibility in how they license works were offered by commenters. In its comments submitted on August 6, 2014, for example, the Academy noted that "[s]ongwriters deserve compensation as soon as their work is exploited" and advocated for a faster, fairer process to establish interim rates.[12] This proposal is still relevant today and reflected in the Academy's comments above.

After deliberating for over a year, however, the Department did not adopt any of the constructive proposals that were offered. Instead, the Department proposed,[13] and a year later imposed,[14] a new interpretation of the decrees that were never contemplated in the original request for information or in the comments that were submitted in response to it. This new interpretation would have not only put new restrictions on how the PROs license works, it would have caused massive disruptions to the marketplace with very little time for transition. Fortunately, this misguided directive was rejected in federal court, a decision that was upheld by the Second Circuit Court of Appeals.[15]

The entire saga is instructive because a process that began as an effort to modernize the consent decrees to better meet the needs of a dynamic music marketplace ended two years later with yet more government regulation and potentially

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[11] Request for Public Comments by the Dep't of Justice for 2014 Review of the ASCAP and BMI Consent Decrees (https://www.justice.gov/atr/ascap-bmi-decree-review).

[12] Comments of the Nat'l Academy of Recording Arts & Sciences Submitted to the Dep't of Justice in Connection with its 2014 Review of the ASCAP and BMI Consent Decrees at 5 (August 6, 2014).

[13] Request for Public Comments by the Dep't of Justice of 2015 Review of the ASCAP and BMI Consent Decrees (https://www.justice.gov/atr/ascap-and-bmi-consent-decree-review-request-public-comments-2015).

[14] Statement of the Dep't of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees (August 4, 2016) (https://www.justice.gov/atr/file/882101/download).

[15] *United States v. Broad. Music, Inc.*, 720 F. App'x 14, 16–17 (2d Cir. 2017).

dramatic disruption with unforeseen impact. The Assistant Attorney General has testified before Congress that the Antitrust Division under his leadership is "guided by the view that antitrust enforcement is law enforcement, not regulation."[16] Accordingly, the outcome of any review of the consent decrees governing ASCAP and BMI should be less regulation, not more.

Conclusion

Assistant Attorney General Delrahim has expressed his view that tools used to regulate markets such as consent decrees "set static rules devoid of the dynamic realities of the market."[17] The Department should keep this axiom in the forefront of its deliberation over the future of the consent decrees governing ASCAP and BMI. Perhaps no marketplace has shown as much rapid and ongoing change in such a short period of time as the music industry. The Department's review should be forward-looking, and seek to create a new framework that will serve the needs of songwriters both today and in the years ahead.

Songwriters and composers represent the foundation of the music marketplace. Before a song can be recorded, distributed, performed, and enjoyed by the public, a writer must first put pen to paper and create that song. A competitive marketplace for public performance rights is a marketplace where songwriters can make a viable living from their creative work. If they cannot, the entire marketplace will collapse. The Academy applauds the Department for its recognition that the consent decrees are in need of review and stands ready to assist in any way that would further inform the Department's work. Thank you for your consideration.

Todd Dupler
Senior Director, Advocacy & Public Policy

Daryl Friedman
Chief Industry, Government, & Member Relations Officer

Recording Academy
1200 G Street NW, Suite 950
Washington, D.C. 20005

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[16] *Oversight Hearing for the Antitrust Enforcement Agencies: Hearing Before the Subcomm. On Regulatory Reform, Commercial and Antitrust Law of the H. Comm. On the Judiciary*, 115th Cong. (2018).

[17] Makan Delrahim, Assistant Att'y Gen. for the Antitrust Div., Keynote Address at American Bar Association's Antitrust Fall Forum (November 16, 2017) (transcript available at https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar).