

Before the Department of Justice, Antitrust Division

**In the Matter of
Antitrust Consent Decree Review
ASCAP and BMI 2019**

Joint Comments of AccuRadio, LLC; Live 365 Broadcaster, LLC and CustomChannels.net, LLC

AccuRadio, LLC; Live 365 Broadcaster, LLC and CustomChannels.net, LLC (the “Companies”), by their attorney, hereby file these Joint Comments on the review by the Department of Justice’s Antitrust Division of the ASCAP and BMI consent decrees. These comments are filed on behalf of three established but independently owned companies who provide music services to consumers and rely on the consent decrees in their operations. These companies submit that, if the consent decrees did not exist, someone would have to invent them, as the decrees perform a crucial role in allowing licensees of ASCAP and BMI to obtain music to provide that music to the consumers who enjoy it. Without consent decrees, the universe of providers would necessarily contract and the number of sources of music available to the public would shrink, raising prices to the public who want access to the music licensed by these organizations. In fact, rather than contracting the scope of these consent decrees, the Companies submit that these decrees should be expanded to cover other similar organizations who are not now subject to antitrust consent decrees which license the musical works of multiple artists to the Companies and other similar music users.

The Companies each provide music services relying on the consent decrees, though each has a slightly different niche in the music industry. AccuRadio is a digital music service providing almost 1000 curated, non-interactive music streams to the public, covering a vast range of musical styles from show tunes to hip-hop. Live365 also is an internet-based consumer-facing music service, but its business has been primarily to host programming channels that are developed by individuals or groups looking for a one-stop platform providing the server capacity, bandwidth and music licensing services necessary to make this diverse programming available to the public. Custom Channels is principally a business-establishment service, creating unique music programming channels for business customers to make available to their customers in food service or retail establishments.

None of these companies are part of a large tech or entertainment conglomerate. Instead, each is a relatively small, privately-held company, all run by entrepreneurs who have been involved in the music industry since before the advent of the current digital music explosion. In each company there are executives who have been very active for well over a decade in arguing for fair royalties and royalty systems that allow entrepreneurs to be able to enter and thrive in the music marketplace. And, while each of these companies has a different approach to that marketplace and in their use of music, all rely on licenses from ASCAP and BMI and believe that the consent decrees play an essential role in the operation of their business.

From its prior review of the Consent Decrees, the DOJ is aware of the complexity of the licensing issues for music – in particular the licensing of musical works as provided by ASCAP

and BMI. As the DOJ noted in its last review of the consent decrees, the musical works which ASCAP and BMI license are extraordinarily difficult to license. Not only would a service looking to directly license these works need to find the correct licensor for the millions of works in the repertoire of each of these organizations, but many (if not most modern musical works) have multiple songwriters - sometime more than a dozen credited writers - who all may need to consent to any licensing of the work. With no authoritative database of who can license which songs (much less who to contact to receive such licenses) currently in existence, all but the largest music user must rely on performing rights organizations like ASCAP and BMI to provide access to the thousands of compositions needed to operate their services.

Even the largest music users, companies like Spotify, have found the musical works licensing regime so fraught with peril that they banded together to support the Music Modernization Act (“MMA”) passed last year to create a collective licensing system for mechanical rights under Section 115 of the Copyright Act. The marketplace envisioned by the MMA will function under rules similar to those that are imposed by the consent decrees. Section 115 deals with the same licensors as do ASCAP and BMI. After a number of lawsuits against some of the biggest music services which had been unable to identify the rights owners for all of the music that they use, Congress agreed in the MMA to intervene to create a collective to collect and distribute royalties, eliminating the need for music users to accomplish the virtually impossible task of identifying all of the licensors from whom they need permission in order to operate their businesses.

Congress similarly recognized the need for collective licensing of sound recordings in the Digital Millennium Copyright Act in establishing a collective license for the digital use of sound recordings, even though sound recordings are less likely than musical works to have multiple licensors. Each of the Companies relies on some form of these statutory licenses under Sections 112 and 114 of the Copyright Act to operate their businesses. These small businesses have small staffs principally engaged in the curation of their music services, its delivery to customers and, for AccuRadio and Live365, the sale of advertising to fund these operations and, for CustomChannels, the acquisition of customers for its business services. Without the blanket licenses afforded through the statutory royalties for sound recordings and through the consent decrees for musical works, the Companies would never be able to license music on their own. They could never hire sufficient staff to license all the music they need. Not only would the staff be prohibitively expensive as these employees would be purely a cost to the business without producing any new revenues, but it would be an utter waste. If the biggest music service providers cannot reliably determine who owns the rights to the songs they need to license, what hope would there be for these far smaller independent players? The inability to license the music on which their services depend would leave their customers with fewer choices of music providers, assuredly raising the prices to music users in obtaining access to the music they enjoy.

Even were these Companies able to acquire the knowledge to determine who needed to be approached to license the music they need, and to afford the staff to engage in the negotiations needed to obtain these licenses, without the protections afforded under the statutory licenses and under the consent decree, these services would likely be subject to pricing practices that would further imperil their existence. The current consent decrees protect music services like the Companies by ensuring that the PROs, with their market power and must-have catalog of music,

cannot discriminate in their pricing against smaller businesses like the Companies. As the consent decrees require that all similarly situated licensees be treated in the same way, the Companies can be assured that their competitors – whether in the webcasting or business establishment space – are paying equivalent royalties to what they pay. If not for these decrees, larger licensees and the PROs could agree to discriminatory terms that would favor larger users over smaller ones, effectively making it even harder for these smaller businesses to survive.

The current consent decrees require that the PROs negotiate reasonable rates with user groups and impose a rate court review process when service deem rates proposed by these organizations to be anticompetitive. Given the effective control of ASCAP and BMI over access to vast amounts of must-have music used by any music service, and the fact that their businesses would be imperiled if rates were pushed too high, the rate court process provides important protections to services. To be sure, smaller services like those of the Company have difficulty participating in the rate court process given the litigation costs involved. However, the fact that larger services with similar interests can avail themselves of the process with the outcome of these proceedings being public and transparent and applicable to all services equally, smaller services like those of the Companies can be assured that they can take advantage of these fair rates on a non-discriminatory basis.

Similarly, the decrees impose stability on the industry by assuring that a licensee, when entering into a license, will have access to the entire catalog of music available at the beginning of the license throughout the term of that license. Allowing the withdrawal of music from the catalog during the life of a license could vastly diminish the value of that license.

Through the access to music that they provide on reasonable, universally available terms, the consent decrees have allowed services like those provided by the Companies, and by other businesses even less experienced in the licensing of musical works, to provide music that can be enjoyed by the public. Without these decrees, music would not be available in the way that it currently is unless Congress stepped in and effectively re-established a system similar to that provided by the consent decrees through some form of statutory license. With a system already in place, and seemingly functioning efficiently, the old adage of “if it ain’t broke, don’t fix it” would seem to apply to the consent decrees. They provide for an efficient, competitive marketplace that should not be disturbed.

In fact, the greatest threat to the competitive, effective marketplace that has existed for the licensing of public performances of musical works through the consent decrees has been the rise of PROs not subject to those decrees – whose existence and behavior provide exactly the same risks addressed by the decrees themselves. Organizations that have not been subject to the decrees, but who accumulate the rights to a sufficient number of must-have songs that music users cannot operate without, can now charge supra-competitive rates for even relatively small catalogs of music.¹ The DOJ should be looking not at abolishing the consent decrees, but instead

¹ The Companies note that, SESAC, for instance, entered into private consent decrees with both the radio and television industry music licensing committees following litigation asserting that their operations raised the same risks as would an unregulated ASCAP and BMI. While these decrees cover these two industries, outside broadcasting, there are not the trade organizations that provide the financial support to bring actions like those

at extending these decrees to other organizations who act in a fashion similar to ASCAP and BMI to ensure that the music marketplace continues to function smoothly and competitively into the future.

To insure an efficiently functioning marketplace providing fair and transparent music licensing, the Companies urge the DOJ to recognize the continuing benefits of the consent decrees and to not take any action to significantly alter their operations. Representatives of the Companies stand willing to provide additional information to the Department to aid in its resolution of this most important matter.

Respectfully submitted,

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brought against SESAC. Thus, marketplace participants like the Companies have not been accorded the same protections as accorded to broadcasters through their litigation.