

August 9, 2019

Mr. Makan Delrahim
Assistant Attorney General, Antitrust Division
U.S. Department of Justice
450 5th Street NW
Washington DC, 20001

Comments by the City of Philadelphia, Pennsylvania
Re: Antitrust Consent Decree Review – ASCAP and BMI 2019
Submitted via email to ATR.MEP.Information@usdoj.gov

Mr. Delrahim,

The City of Philadelphia (the “City”) submits these comments in response to the U.S. Department of Justice’s (the “DOJ”) review of the consent decrees in *United States v. ASCAP*, 41 Civ. 1395 (S.D.N.Y.), and *United States v. BMI*, 64 Civ. 3787 (S.D.N.Y.) (“Consent Decrees”).¹ The City emphatically agrees with the conclusions reached by this DOJ a mere three years ago when, after a thorough investigation by the DOJ’s Antitrust Division, it determined that modifications to the Consent Decrees were not warranted. These Consent Decrees serve important purposes for cities by prohibiting performance rights organizations ASCAP and BMI from anti-competitive behavior and engaging in exploitative conduct toward cities.

Philadelphia is a city of the First Class, the largest city in the Commonwealth of Pennsylvania and the sixth most populous city in the United States. We submit these comments to express our belief that the Consent Decrees should remain in full force and effect. Termination of the Consent Decrees would not be in the public interest, and despite some recent legislative changes, antitrust statutes and caselaw are insufficient to protect competition in the absence of the Consent Decrees themselves. Removal of these Consent Decrees would have enormous ramifications for the music used by city recreation centers, airports, schools, and public educational and government television programming in cities around the country.

Because there are so few entities aggregating and licensing copyrights over musical works, the DOJ required ASCAP and BMI to enter into the Consent Decrees, requiring these performance rights organizations to provide licenses on fair and reasonable terms. The Consent Decrees, created under Section 1 of the Sherman Act, 15 U.S.C. § 1, have been an important backstop in preventing excessive market power through the accumulation of public performance rights held by their member songwriters and music publishers.² Without these Consent Decrees in place, ASCAP and BMI could abuse their

¹ “American Society of Composers, Authors and Publishers/Broadcast Music, Inc.,” U.S. Department of Justice, accessed July 30, 2019, <https://www.justice.gov/atr/antitrust-consent-decree-review-ascap-and-bmi-2019>

² Sherman Antitrust Act, July 2, 1890 26 Stat. 209, 15 U.S.C. §§ 1–7

market power and force cities to pay exorbitant rates or even limit how a licensed copyright could be exercised. Although the Music Modernization Act of 2018 revised the nation's copyright regime, it does not adequately address many concerns of city governments and the many other venues that rely on a competitive marketplace.

Philadelphia, like most cities around the country, strives to provide the best and most effective services for its citizens, with limited resources and dollars. Eliminating the Consent Decrees would put already cash-strapped cities in a worse position to negotiate with these large corporations that have tremendous market power. Because BMI and ASCAP control nearly all music licenses, the removal of the Consent Decrees will allow them to operate as monopolies and engage anti-competitive behavior. By remaining in effect, the Consent Decrees will continue to ensure that the City, its agencies, departments, and other similarly situated cities, provide services to citizens without having to spend large amounts of tax dollars paying exorbitant fees and fighting unfair pricing and licensing practices.

The DOJ just conducted a review and investigation of the Consent Decrees through 2016. Then, like now, the DOJ solicited comments on whether the Consent Decrees continue to serve important competitive purposes. After that investigation, the DOJ concluded that modification to those Consent Decrees was unwarranted. We agree. If left unchecked, ASCAP and BMI, as the largest aggregators and licensors of music rights, can invariably exploit their market position. Withdrawing the Consent Decrees, or even significantly modifying them, without ample regard for this threat would invite abuse through more restrictive terms and significantly higher royalties for licensees. For the reasons stated above, the City writes to strongly oppose the termination of these Consent Decrees.

CITY OF PHILADELPHIA LAW DEPARTMENT

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