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## **CISAC comments on Consultation on the ANTITRUST CONSENT DECREE REVIEW - ASCAP and BMI 2019**

CISAC thanks the Department of Justice (“DOJ”) for the opportunity to submit comments on the review of the ASCAP and BMI consent decrees (“Consent Decrees”).

Rather than specific answers to the questions posed by the DOJ, this submission provides general comments on the need to revise and adapt the Consent Decrees to the current music licensing landscape in the United States.

## CISAC

The International Confederation of Societies of Authors and Composers (“CISAC”) is the leading worldwide organization representing authors’ societies or collective management organizations (“CMOs”). With 239 member societies in 122 countries, CISAC represents the interests of over 4 million creators from all over the world and all artistic repertoires, including music, audiovisual works, drama, literature and visual arts. In the US, CISAC counts performing rights organizations (“PROs”) ASCAP, BMI and SESAC, among others, as its members.

CISAC works to protect the rights and promote the interests of creators worldwide. CISAC enables CMOs to seamlessly represent creators across the globe and ensure that royalties flow to authors for the use of their works anywhere in the world. To this end, CISAC provides the highest business, legal, and information technology standards to protect creators’ rights and support the development of the international network of collective management societies.

CISAC also manages a set of professional rules and binding resolutions for all member societies that incorporate governance, transparency and operational aspects. This self-regulation ensures the highest standards of excellence throughout the industry.

CISAC wishes to make the following comments for the DOJ’s consideration:

The global music market has undergone an enormous transformation during the past decades, and the United States has been at the forefront of this process. There has been, and continues to be, an urgent need to adapt to the changes which have taken place in the music licensing landscape, in particular with regards to digital and online exploitations. It is obvious that the architects of the Consent Decrees, now in force for nearly 80 years, could not have foreseen the profound evolution of the way musical works are consumed in the 21<sup>st</sup> century, which has made the Consent Decrees outdated.

CISAC believes that the current review of the Consent Decrees is a great opportunity to adapt the current regulatory environment to the new and modern licensing market and to technological change.<sup>1</sup>

A more nimble regulatory approach is needed; one that is reflective of the current developments in the music market. At the same time, the transition must be managed in an evolutionary and orderly fashion.

These principles inform the points raised below:

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<sup>1</sup> The need to adapt to the changes in the marketplace was one basis for the adoption of the Directive on Copyright in the Digital Single Market (“DSM Directive”)[Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC]. According to Recital 3 of the DSM Directive, “*Rapid technological developments continue to transform the way works and other subject matter are created, produced, distributed and exploited. New business models and new actors continue to emerge. Relevant legislation needs to be future-proof so as not to restrict technological development.*”

**The Consent Decrees as currently framed may restrict ASCAP and BMI’s ability to compete internationally.** European CMOs have been able to grow and adapt to the needs of the music market in Europe, without having constraints similar to those imposed on ASCAP and BMI by the Consent Decrees. ASCAP and BMI may be disadvantaged, in terms of licensing, collection and efficiency in rights management and administration, compared to their European counterparts, because of the restrictions imposed under the Consent Decrees.

**Discrimination between societies should be avoided.** While ASCAP and BMI operate under their respective Consent Decrees, other U.S. music market participants are only subject to antitrust litigation and enforcement, which has a discriminatory effect. ASCAP and BMI’s unregulated competitors (both within and outside of the U.S.) are able to negotiate freely in the marketplace and provide flexible and creative licensing solutions to music users, creating an asymmetrical competitive environment to the disadvantage of ASCAP and BMI.

**Competition rules are an adequate safeguard.** CISAC believes that competition laws in force in the United States are sufficient to regulate and control any potential anticompetitive behavior, as occurs in Europe. The antitrust and competition laws in force in the European Union (both at the national and at European level<sup>2</sup>) are sufficiently robust to ensure a level playing field among European CMOs, as well as in the relationship between CMOs and their member rightsholders, and between CMOs and music users. Indeed, the European market actively promotes competition among CMOs: as stated in the 2014 EU Directive on Collective Rights Management<sup>3</sup> (“CRM Directive”), rightsholders have the right and freedom to authorize the CMO of their choice to manage their rights<sup>4</sup>.

**An orderly transition is essential.** The U.S. music licensing market has operated against the background of the Consent Decrees for nearly eight decades. Therefore, any revision of the Consent Decrees should be managed in such a way as to avoid disrupting the market and to allow all market participants to adjust to the updated regulatory environment.

## Recommendations

CISAC strongly believes that the best way forward would be to amend the Consent Decrees, with a view to serve the interests of the creators of the musical works consumed in the United States, as well as those of the United States consumers and music users, based on a set of basic principles outlined below.

CISAC’s recommendations are as follows:

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<sup>2</sup> According to Recital 56 of the 2014 Collective Rights Management Directive (“CRM Directive”), the provisions of the Directive are without prejudice to the application of rules on competition.

<sup>3</sup> Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.

<sup>4</sup> Recital 19, CRM Directive: *Having regard to the freedoms established in the TFEU, collective management of copyright and related rights should entail a rightholder being able freely to choose a collective management organisation for the management of his rights, whether those rights be rights of communication to the public or reproduction rights, or categories of rights related to forms of exploitation such as broadcasting, theatrical exhibition or reproduction for online distribution, provided that the collective management organisation that the rightholder wishes to choose already manages such rights or categories of rights.*

As the outset, the consent decrees should be amended to create a modified, limited decree with a sunset provision that would include, during the transition period, only the core protections requested by music users. An orderly transition would allow market participants to prepare and adjust to the new marketplace. Additionally, we recommend:

- Authors and creators should be entitled to a fair and proportional remuneration for the use of their works. This principle needs to be maintained and protected, as recognized most recently in the Directive on Copyright in the Digital Single Market (“DSM Directive”)<sup>5</sup> and in general in the US and in Europe, to ensure the development of a strong digital music market. This is in line with the US Copyright’s Office Music Licensing Report of February 2015<sup>6</sup>.
- During the transition period, music users should continue to benefit from a system based on immediate and automatic access to the performing rights of US PROs’ repertoires, provided that fair interim fees are paid, and users provide accurate and transparent information on the use of musical works on the services. The obligation of users to provide accurate and detailed information has been introduced in Europe both in the CRM Directive<sup>7</sup> as well as in the recently adopted DSM Directive<sup>8</sup>.
- Any revision of the Consent Decrees should maintain the positive changes introduced by the Music Modernization Act, such as the amendment to the rate court process; and avoid a disruption of long-existing US PRO mechanisms and licensing solutions. In response to user demands, BMI and ASCAP should be given more flexibility to adjust and adapt to the needs of the music users. At the same time, ASCAP and BMI will be able to maintain their existing licensing solutions which work well in the current music market.

We hope this submission will be useful and thank again the Department of Justice for taking them into consideration.

CISAC remains at the Department of Justice’s disposal for any question or clarification needed on the above-mentioned considerations, as well as for any additional information required on the situation outside the US.

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<sup>5</sup> Recital 73 of the DSM Directive: *“The remuneration of authors and performers should be appropriate and proportionate to the actual or potential economic value of the licensed or transferred rights, taking into account the author’s or performer’s contribution to the overall work or other subject matter and all other circumstances of the case, such as market practices or the actual exploitation of the work. A lump sum payment can also constitute proportionate remuneration, but it should not be the rule.”*

<sup>6</sup> *There is broad consensus across the music industry on a number of key points: (1) creators should be fairly compensated; (2) the licensing process should be more efficient; (3) market participants should have access to authoritative data to identify and license sound recordings and musical works; and (4) payment and usage information should be transparently available to rightsholders.*

<sup>7</sup> Recital 29 CRM Directive: *Fair and non-discriminatory commercial terms in licensing are particularly important to ensure that users can obtain licences for works and other subject matter in respect of which a collective management organisation represents rights, and to ensure the appropriate remuneration of rightholders. Collective management organisations and users should therefore conduct licensing negotiations in good faith and apply tariffs which should be determined on the basis of objective and non-discriminatory criteria. It is appropriate to require that the licence fee or remuneration determined by collective management organisations be reasonable in relation to, inter alia, the economic value of the use of the rights in a particular context. Finally, collective management organisations should respond without undue delay to users’ requests for licences.*

<sup>8</sup> Recital 75 of the DSM Directive: *“As authors and performers tend to be in the weaker contractual position when they grant licences or transfer their rights, they need information to assess the continued economic value of their rights, compared to the remuneration received for their licence or transfer, but they often face a lack of transparency. Therefore, the sharing of adequate and accurate information by their contractual counterparts or their successors in title is important for the transparency and balance in the system governing the remuneration of authors and performers. That information should be up-to-date to allow access to recent data, relevant to the exploitation of the work or performance, and comprehensive in a way that it covers all sources of revenues relevant to the case, including, where applicable, merchandising revenues.”*