

Before the
U.S. DEPARTMENT OF JUSTICE
ANTITRUST DIVISION
Washington, DC 20001
August 9, 2019

In the Matter of)
)
American Society of Composers,) Antitrust Consent Decree Review
Authors and Publishers/Broadcast)
Music, Inc.)

COMMENTS OF THE CONSUMER TECHNOLOGY ASSOCIATION

Consumer Technology Association (CTA[®]) is deeply concerned that the Antitrust Division may terminate the ASCAP and BMI Consent Decrees. Removing these decrees jeopardizes the licensing system that enables millions of businesses across the country to efficiently play and pay for music performed publicly. The ultimate result of such action would be substantial harm to consumers, businesses, and performers of live music.

CTA is the trade association representing the \$401 billion U.S. consumer technology industry, which supports more than 18 million U.S. jobs. More than 2000 American companies – 80% are small businesses and startups; others are among the world’s best-known brands – enjoy the benefits of CTA membership including policy advocacy, market research, technical education, industry promotion, standards development and the fostering of business and strategic relationships. CTA also owns and produces CES[®] – the world’s gathering place for all who thrive on the business of consumer technologies.

From a general policy perspective, CTA endorses the comments of the Digital Media Association (“DiMA”) as submitted to the Division in its 2014 Review.¹ CTA filed in that

¹ See In the Matter of Review of ASCAP and BMI Consent Decrees, Comments of Digital Media Association. See also, Digital Media Association, [Comments on Music Licensing Study](#) at 26 – 33 (“DiMA CO Comments”).

Review as Consumer Electronics Association (CEA). As neither the underlying facts nor CTA's concerns have changed, these comments are consistent with that filing.

Trade Shows And Associations Have Vital Interests In Performances of Live and Recorded Music.

CTA sponsors events and forums, some open to industry or press and some open to the public.² For some venues and occasions, where music is presented as a performance, CTA has agreed with one or more Performing Rights Organizations on a reasonable license. At such events, segments of music may be heard incidentally as portions of audiovisual works or otherwise incident to a product or service demonstration. In such incidental circumstances, CTA is not providing a venue for public performance. In both circumstances CTA has an interest in the Consent Decrees being maintained, and believes they continue to serve an important competitive purpose.

Where an association such as CTA does provide a venue for public performance, the business focus usually is on the event, the attendees, and the purposes for which they are brought together. CTA staff and its volunteer industry leaders cannot spend their time picking and choosing for artistic purposes, nor, as the provider of a venue, can they delegate any venue licensing obligation to artists. In this circumstance the "blanket license" made possible by the Consent Decrees is at least as important, and perhaps more important, than it is for venues that are primarily directed toward artistic achievement, where it is the venue's core business to select artists and music on a performance by performance basis.

CTA Opposes Partial or Full Withdrawals.

CTA would strongly oppose modification to allow ASCAP or BMI to make partial or limited grants of license, or for members to withdraw on a venue-selective basis. To the extent

² CTA events are listed on a published calendar. See <https://www.cta.tech/Events.aspx?Page=1>.

CTA provides a venue that requires a license, CTA staff could not possibly deal with music publishers on an *a la carte* basis. CTA understands that courts, for similar reasons, have not permitted the partial withdrawal of catalogs from licensing by ASCAP or BMI.³ Nor should full withdrawal be permitted. *It is simply not feasible for a venue to instruct artists to limit their performances on the basis of current negotiations among publishers and service providers* that are directed to relative service rate issues that are of no interest to either the artist or the venue.

CTA Supports the Division's 2016 Findings and Present Stance on Fractional Licensing.

CTA agreed with the Division's 2016 conclusion, and agrees with its present stance in litigation, that widespread fractional licensing will be damaging, *inter alia*, to live music and to the venues that support it. As the Computer and Communications Industry Association said in its November 20, 2015 Comments at 2:

When implemented on a sector-wide scale, contractual terms that require fractional licensing have the effect of unwinding Congress's anti-gridlock rule. These contractual provisions between multiple co-rightsholders purport to deprive one another of the ability to authorize the full use of the work. Thus, in the case of multi-author works, a potential licensee may be compelled to strike 10 contracts with 10 co-authors to use one individual work.

As CTA discusses above, the uncertainty (or "gridlock") imposed by creating separate exclusive monopolies over songs, without any matching obligation re performance, is likely to sound a death knell for many live performance venues and for the musicians who look to them for their livelihoods.

Associations and Trade Shows Could Risk Vicarious Liability.

The concerns described above are multiplied in the context of association and trade show endeavors because the variety of differing claimants might seek to hold the association or show sponsor responsible vicariously for actions and decisions taken by members or lessees of space

³ See DiMA CO Comments at 15 – 16 and nn. 34 & 35.

who effectively provide their own venue within the context of an association-sponsored event or show. This would add to the reluctance of associations and sponsors to allow or include music in circumstances where it otherwise may be commercially valuable for all concerned, including artists.

In summary, these Decrees remain necessary to protect musical performers and those who would employ them. CTA appreciates this opportunity to share its views.

Respectfully submitted,

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