Response to the Request for Comments from the Antitrust Division of the United States Department of Justice Regarding the ASCAP and BMI Consent Decrees

Submitted by Global Music Rights, LLC

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Global Music Rights, LLC ("GMR") submits these comments in response to the solicitation of public comments by the Antitrust Division of the Department of Justice (the "Division") as part of its review of the consent decrees (the "Decrees") in *United States v. Broadcast Music, Inc*. ("BMI") and *United States v. American Society of Composers, Authors and Publishers* ("ASCAP").

I. WE ARE GMR AND WE WANT THE OPPORTUNITY TO COMPETE FULLY AND FAIRLY

We are GMR, the first new Performing Rights Organization ("PRO") in roughly 80 years. We are a writer-first company, and the first new meaningful PRO choice in generations. By remaining small and nimble, we are able to better align the royalties paid to songwriters with value songwriters create for others. We provide better royalty transparency and we offer first-class concierge service. In a functioning market, willing buyers and willing sellers would determine if GMR's product is superior to that offered by the other PROs.

The PRO market, however, is not functioning properly. Two of GMR's main competitors—ASCAP and BMI—are behemoths that, to this day, still control in excess of 90% of the compositions available for public performance. In addition, certain buyers of GMR's licenses are engaging in unlawful price fixing. Terrestrial radio companies who normally compete *against* one another for access to programming content have agreed *with* one another to fix the price any of them will pay for performance rights licenses. The competitors call their "negotiating arm" the Radio Music Licensing Committee ("RMLC"). In reality, it is the Radio Music Licensing Cartel. By virtue of its colossal buying power, this cartel effectively sets license fees for all of terrestrial radio, the largest buyer of music for public performance.

For decades, the Division has held out hope that new competition to ASCAP and BMI would emerge in the music licensing industry. Indeed, the Division has explained that "the basic approach of the [ASCAP] consent decree to remedying [competitive] concerns" has "been consistent" through several versions of the decree, including "numerous provisions that were intended to promote competition between ASCAP and other PROs and between ASCAP and its members."[1] The Decrees have thus consistently included provisions intended to limit ASCAP's and BMI's power to restrict songwriters from switching to other PROs.[2]

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[1] Mem. of the United States in Support of the Joint Mot. to Enter Second Amended Final Judgment at 14-15, *United States v. ASCAP*, No. 41-1395 (S.D.N.Y. Sep. 4, 2000) ("AFJ2 Memo"), *avail. at* https://www.justice.gov/atr/case-document/file/485996/download; *see also, e.g.*, Mem. in Support of the United States' Unopposed Motion to Enter Proposed Settlement Agreement and Order at 9, *United States v. ASCAP*, No. 41-1395 (S.D.N.Y. May 12, 2016), *avail. at* https://www.justice.gov/atr/file/851446/download ("a core foundation" of the decree is to ensure that "users have available a competitive option to ASCAP"); Mem. of the United States in Response to Public Comments on the Joint Motion to Enter Second Amended Final Judgment at 37, 39, *United States v. ASCAP*, No. 41-1395 (S.D.N.Y. Mar. 16, 2001), *avail. at* https://www.justice.gov/atr/case-document/file/485971/download ("The United States believes that competition will be more effective in protecting members' rights than regulation."); Brief for the United States at 7, *United States v. Broadcast Music, Inc*., No. 00-6123 (2d Cir. June 26, 2000), *avail. at* https://www.justice.gov/atr/case-document/file/489861/download (reiterating that DOJ's support for the BMI consent decree "does not reflect our intention that judicial rate setting should become a substitute for competitive rate setting").

[2] *See infra*, note 3.

With the benefit of these protective provisions, long overdue but still nascent competition for ASCAP and BMI has begun to emerge with GMR's entry in 2013. And while GMR offers the promise of innovation and a competitive alternative, it is today a small boutique operator, with a roster of about 80 songwriters and a catalog that comprises less than one percent of the universe of compositions offered by U.S. PROs.

GMR's ask is therefore simple: give us meaningful time and opportunity to compete with ASCAP and BMI, and give other potential entrants an opportunity to enter and attract songwriters without undue restrictions from ASCAP and BMI.

ASCAP and BMI possess the same market power today that they have possessed for decades, including the power to thwart emerging competition by restricting songwriters from switching to other PROs. The Decrees' provisions designed to restrain that market power remain vital today. Materially modifying, sunsetting or lifting the existing Decrees would wreak havoc on the marketplace, crushing the nascent competition that has just started to emerge and discouraging further investment in the very competition that the Decrees were meant to promote. If competition is to have a chance to flourish and to someday obviate the need for Division oversight, it is imperative that those competitive protections remain intact at this time.

II. THE DECREES ARE A NEEDED CHECK ON ASCAP AND BMI'S EFFORTS TO HINDER SONGWRITERS' ABILITY TO SWITCH PROS

While much of the discussion surrounding the Decrees focuses on their protection for licensees and the "rate court" provisions, it is important to recognize that the Decrees were also designed to protect songwriters. Specifically, the Decrees were intended to (i) facilitate songwriter freedom of choice by allowing songwriters to choose a new PRO without penalty, and (ii) thereby promote competition among PROs and facilitate new entry.[3] It is only through these protections that competition might someday flourish to an extent that Division oversight over ASCAP and BMI's conduct is unnecessary.

In the 1930s and 1940s, when ASCAP and BMI first entered the marketplace, they were the *de facto* gatekeepers for all copyrighted music in the United States.[4] Realizing that licensees

[3] *See* AFJ2 Memo. at 14-17 (recounting historical competitive concerns and decree provisions "that were intended to promote competition" between PROs); *e.g.*, ASCAP Second Amended Final Judgment ¶¶ XI.B(3) ("ASCAP shall not restrict the right of any member to withdraw from membership in ASCAP at the end of any calendar year upon giving three months' advance written notice to ASCAP"; "A resigning member shall receive distribution from ASCAP for performances occurring through the last day of the member's membership in ASCAP"; "ASCAP shall not, in connection with any member's resignation, change the valuation of that member's works or the basis on which distribution is made to that member") & XI.C (until the provisions of XI.B(3) become effective, "ASCAP shall not enter into any contract with a writer or publisher requiring such writer or publisher to grant to ASCAP performing rights for a period in excess of five years"); BMI Final Judgment ¶ V.B.(BMI "shall not enter into any contract with a writer or publisher requiring such writer or publisher to grant to defendant performing rights for a period in excess of five years"); V.C ("Upon the termination, at any time hereafter, of any contract with a writer or publisher relating to the licensing of the right publicly to perform any musical composition, defendant shall continue to pay for performances of the musical compositions of such writer or publisher licensed by defendant upon the basis of the current performance rates . . . for so long as such performing rights are not otherwise licensed").

[4] *See Broadcast Music, Inc. v. CBS, Inc*., 441 U.S. 1, 5-6 (1979).

had no other options to getting any music, ASCAP and BMI engaged in highly anticompetitive conduct.[5] The Division stepped in and sued, and the cases were (ultimately) resolved by way of the Decrees. These Decrees imposed restrictions that were designed to prevent further anti-competitive behavior and encourage new entrants into the marketplace. When the Division reviewed and modified the ASCAP Decree in 2000, it recognized the continuing importance of the "numerous provisions" of the decree that "were intended to promote competition between ASCAP and other PROs."[6] As the Division explained, these provisions were necessary because ASCAP had historically "engaged in a variety of practices that made it more difficult for new PROs to enter."[7] For example, ASCAP had "discriminated against members that left ASCAP in distributing its revenues."[8] As a result, the Amended Final Judgment of 1950 "contain[ed] a number of provisions intended both to facilitate entry of new competitors to ASCAP in administering music performance rights, and to provide some constraint on ASCAP's ability to discriminate against certain groups of members."[9] Among other such provisions, the decree prohibited ASCAP from imposing "obstacles to members seeking to leave ASCAP to join another PRO."[10]

As it explained when it reaffirmed the ASCAP Decree in 2000, the Division hoped that competition would be "more effective in disciplining ASCAP's distribution practices than regulation by the Department or the Court."[11] Accordingly, the Decrees' protections for competition "further the public interest by encouraging competition among PROs to serve both copyright holders and music users."[12] Likewise, when the Division concluded its extensive review of the Decrees just three years ago, it left the competitive protections intact, noting that despite the recent entry of GMR and the presence of SESAC, "ASCAP and BMI . . . are responsible for an overwhelming majority of works."[13]

III. MAINTAINING THE CONSENT DECREES WILL FOSTER COMPETITION

In 2013, GMR became the first new PRO in many decades, ending a nearly 80-year status quo. GMR differentiated itself by offering greater transparency for current and prospective licensees, increased clarity and compensation for songwriters, and a wider range of licensing options, including tailored licensing alternatives for licensees for whom the traditional blanket license is not desirable. With time and a fair opportunity, GMR will continue to spur

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[5] Stasha Loeza, *Out of Tune: How Public Performance Rights Are Failing to Hit the Right Notes*, 31 BERKELEY TECH. L.J. 725, 733 (2016).

[6] AFJ2 Memo. at 15.

[7] *Id.* at 16.

[8] *Id.*

[9] *Id.* at 17.

[10] *Id.*

[11] *Id.* at 42.

[12] *Id.* at 4.

[13] Statement of Dep't of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees at 5 (Aug. 2016), *avail. at* https://www.justice.gov/atr/file/882101/download.

innovation in the PRO market, improving the experiences of both music users and music creators.

Yet the conditions that prevailed when the Division last amended the Decrees—and which prompted the Division to emphasize the need to protect songwriters' freedom of movement to competing PROs—persist today. Just as in 1994 (when the BMI decree was amended) and in 2001 (when the ASCAP decree was amended), BMI and ASCAP today account for over 90 percent of artists and works represented by the U.S. PROs. And that continued dominance emboldens ASCAP and BMI to exercise their power by perpetuating non-transparent membership rules that constrain songwriters' movement to competing PROs—a power that, as the Division concluded, ASCAP exercised to the exclusion of competitors when it was not subject to a Decree.[14]

On the licensee side, demonstrating an aversion to competition which would benefit songwriters, the Radio Music License Committee, Inc. ("RMLC")—the designated negotiating arm for virtually all of terrestrial radio—organized its members in a conspiracy to fix prices for a GMR license below competitive rates. Openly telling its members that negotiating directly with GMR will undermine their collective buying power, the cartel successfully convinced over 99% of its members to refuse to negotiate with GMR.[15] Only 2 of 3,000 radio companies entered into a long-term deal with GMR.[16] In late 2016, without a hint of irony, the colossal RMLC cartel composed of 3,000 companies with 10,000 stations and billions in collective revenue filed an antitrust suit against GMR accusing the pioneering startup, with less than one-tenth of one percent of songs available for performance, of being a "monopolist."[17] RMLC expressly asks the court to impose consent decree type regulation on GMR, including compulsory licensing and a rate court.[18]

Thus, while GMR's entry is noteworthy, it is still nascent. The competitive landscape has begun to change, but real change will take time. GMR's entry should be viewed as a sign that the Decrees have it right. With protection from anticompetitive restrictive practices by ASCAP and BMI, there is hope that meaningful competition may emerge in time. It would thus be precisely the wrong approach to materially modify, remove or sunset those protections, thereby putting at risk emerging competition and discouraging new entrants.

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[14] *See* AFJ2 Memo. at 16 (describing the "variety of practices" by ASCAP "that made it more difficult for new PROs to enter").

[15] First Amended Complaint, *Global Music Rights, LLC v. Radio Music License Committee, Inc.*, Case No. 16-cv-9051-TJH(ASx) (C.D. Cal.), Dkt. 23, ¶¶ 1-3, 5-6, 8-10, 14, 44-49, 50-55, 56-70, 77-78, 111, 121-126, and 129-131.

[16] *Id.* at ¶ 69.

[17] Complaint, *Radio Music License Committee, Inc. v. Global Music Rights, LLC*, Case No. 19-cv-03957-TJH(ASx) (C.D. Cal.), Dkt. 1.

[18] Second Amended Complaint, *Radio Music License Committee, Inc. v. Global Music Rights, LLC*, Case No. 19-cv-03957-TJH(ASx) (C.D. Cal.), Dkt. 163, Prayer for Relief.

IV. CONCLUSION

GMR—indeed any new PRO—is faced with a daunting challenge of competing with entrenched and giant PROs and simultaneously negotiating against a cartel of buyers willing to threaten a boycott of valuable music in order to break GMR's spirit. But GMR entered the industry to provide an alternative for songwriters and will not go down without a fight. We just ask for time and opportunity to compete fully and fairly.

The Decrees are critical at this juncture to nurture emerging competition and foster conditions which encourage new entry. Thus, we respectfully suggest that the Division give competition the air it needs to breathe and that it should not take any action to materially modify, sunset or lift the Decrees at this time.