Before the
UNITED STATES DEPARTMENT OF JUSTICE
Antitrust Division
Washington, DC 20530

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

COMMENTS OF THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION (IMLA); NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS (NATOA); ALLIANCE FOR COMMUNITY MEDIA (ACM); CITY OF OKLAHOMA CITY, OKLAHOMA; THE NORTH METRO TELECOMMUNICATIONS COMMISSION; THE NORTH SUBURBAN COMMUNICATIONS COMMISSION; THE SOUTH WASHINGTON COUNTY TELECOMMUNICATIONS COMMISSION; CITY OF MURFREESBORO, TENNESSEE; AND CITY OF EDMOND, OKLAHOMA.

I. INTRODUCTION

Local governments and Public, Educational, and Governmental Access ("PEG") cable programing providers throughout the country rely on the Antitrust Consent Decrees negotiated by the Department of Justice with the two largest Professional Rights Organizations ("PROs"), ASCAP and BMI to ensure fair and reasonable license fees and terms for the public performance of music in live and recorded events.[1] The above-referenced entities (the "Local Government Commenters") respectfully submit the following Comments.[2]

[1] *United States v. American Society of Composers, Authors, and Publishers*, Civ. Action No. 41-1395 (S.D.N.Y June 11, 2001) ("ASCAP Consent Decree"); *United States v. Broadcast Music, Inc.*, Civ. No. 64-Civ-3787 (S.D.N.Y. Nov. 18, 1994) ("BMI Consent Decree") (collectively "the Consent Decrees").

[2] The Local Government Commenters are comprised of national organizations, and cities and consortia of cities in the states of Minnesota, Oklahoma, and Tennessee listed below in order of population size (individual municipal populations are provided in parentheses):

International Municipal Lawyers Association (IMLA), a non-profit, non-partisan professional organization comprising more than 2,500 municipal entities including cities, counties, and

Like local municipal and county governments nationwide, the Local Government Commenters are not profit-making entities and operate on severely limited budgets. If municipalities are to enhance the services they provide to constituents by including copyrighted music – the value of which is unquestionable – then it is essential that they be able to do so economically and pursuant to clear legal and financial parameters that eliminate the risk of

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subdivisions thereof. IMLA was established in 1935 and is the nation's oldest and largest association of local government attorneys;

National Association of Telecommunications Officers and Advisors (NAOTA). NATOA's membership includes local government officials and staff members from across the nation whose responsibility is to develop and administer communications policy and the provision of such services for the nation's local governments;

Alliance for Community Media (ACM), a national nonprofit membership organization representing over 3,000 Public, Educational, and Governmental (PEG) access organizations, community media centers and PEG channel programmers throughout the nation. Those PEG organizations and centers include more than 1.2 million volunteers and 250,000 community groups that provide PEG access cable television programming in local communities across the United States;

City of Oklahoma City, Oklahoma (579,999);

City of Murfreesboro, Tennessee (population 136,372)

North Metro Telecommunications Commission (collective population 109,779), a Minnesota municipal joint powers commission consisting of the Minnesota cities of Blaine (57,186), Centerville (3,792), Circle Pines (4,918), Ham Lake (15,296), Lexington (2,049), Lino Lakes (20,216), and Spring Lake Park (6,412);

North Suburban Communications Commission (collective population 106,991), a Minnesota municipal joint powers commission consisting of the Minnesota cities of Arden Hills (9,552), Falcon Heights (5,321), Lauderdale (2,379), Little Canada (9,773), Mounds View (12,155), New Brighton (21,456), North Oaks (4,469), Roseville (33,660), and St. Anthony (8,226);

South Washington County Telecommunications Commission (collective population 105,571), a Minnesota municipal joint powers commission consisting of the Minnesota municipalities of Woodbury (61,961), Cottage Grove (34,589), Newport (3,435), Grey Cloud Island Township (307), and St. Paul Park (5,279);

City of Edmond, Oklahoma (population 91,950);

copyright infringement claims and litigation. Local governments use music in many different ways, including playing music in public places, such as parks and recreational areas, reception areas, public schools, phone systems, PEG access television productions, and many more. Local governments are not commercial entities and therefore never receive any direct or indirect commercial advantage from using copyrighted musical works. In almost all instances, local government does not receive any private financial gain.

The primary purpose of the Consent Decrees – to promote competition in the marketplace for musical works and to protect music users from PROs using their monopoly power over their repertories to impose unfair and unreasonable fees and terms —remains as important to municipal music users today as when the Consent Decrees were entered into in 1941. As frequent consumers/licensees of musical works, the Local Government Commenters believe strongly that the Consent Decrees' mandates for fairness and transparency must be preserved—and be applied to all Performing Rights Organizations.

In part because of the Consent Decrees, local governments, through IMLA, have been able to negotiate blanket license agreements. These blanket license agreements are generally beneficial to PROs and local governments. But there remain issues that have not been addressed in court decisions or the Consent Decrees that we urge the DOJ to address. As further discussed below, these issues include:

- Clarifying that "trolling" activities that imply infringement without clear evidence should be prohibited.
- Clarifying charitable use and use for special events;
- Clarifying that operators of PEG access channels should not be subject to obtaining additional licenses when licenses have been obtained by the local government it serves or the cable system operator that plays back the PEG channel; and

- Continuing to provide an adequate dispute resolution process, but not modify the process to include resolution mechanisms in addition to litigation.

II. COMMENTS

A. Termination of the Consent Decrees would be Contrary to Public Interest.

The Local Government Commenters believe that many specific provisions of the Consent Decrees, particularly the ASCAP Consent Decree, are critically important for protecting the rights and legitimate interests of music users. Those provisions are identified and discussed in this Section. Eliminating these essential protections by terminating the Consent Decrees would have strong negative impacts and would be contrary to the public interest. The same is true for modifications to the Consent Decrees that would reduce their effectiveness. On the contrary, in a number of instances, we contend the provisions should be modified to make them more effective for local government users and/or should be applied to BMI, where not contained in the BMI Consent Decree, and to all PROs. These instances are specifically identified and discussed.

1. The Consent Decrees' Prohibition of Discrimination as to License Terms Must be Retained.

Section IV(C) of the ASCAP Consent Decree prohibits the PRO from "[e]ntering into, recognizing, enforcing or claiming any rights under any license for rights of public performance which discriminates in license fees or other terms and conditions between licensees similarly situated." If this prohibition is eliminated or weakened, the PRO will be free to enter into licenses with user-favorable terms on fees and other provisions with large, well-counseled jurisdictions that have the resources to field sophisticated negotiating teams, then "make themselves whole" by using their monopoly bargaining power to impose harsher

terms and less favorable fees on less-resourced users.[3] PROs can also use their monopoly control over their catalogs to give favorable terms to corporations that are in a position to benefit the PRO, again to the detriment of the majority of music users. In order to ensure that copyrighted musical works are available to all users on fair and reasonable terms, and not reserved to a few corporate users with deep pockets, all similarly situated music users should be afforded the same license terms. The Local Government Commenters believe the non-discrimination provisions in the ASCAP Decree must therefore be retained.

2. Requirement of Fair and Reasonable Terms Must be Retained.

As a result of the Consent Decrees, local governments, through IMLA, have negotiated blanket license agreements with ASCAP and BMI.[4] The fees in the blanket license agreements are based upon the population size of the local government. Given the size of the music catalogs of the two largest PROs, these PROs hold significant market and bargaining power. If there were no Consent Decrees requiring fair and reasonable terms, the Local Government Commenters are concerned that these negotiated blanket license agreements would be eliminated and/or altered in ways that would harm public interests. Absent the protections of the Consent Decrees, the largest PROs will be free to exercise their control of performance rights to charge whatever license fees they choose.

3. Public Lists of Licensed Music Must Continue to be Made Publicly Available in Electronic, Searchable Form.

The ASCAP Consent Decree requires that ASCAP maintain a "public electronic list"

[3] The three major PROs in some respects constitute a triopoly, but each PRO is unquestionably a monopoly with respect to its catalog of musical works and has all the bargaining power, against would-be users, of a classic monopoly, which is of course the genesis of the litigation giving rise to the Consent Decrees.

[4] International Municipal Lawyers Association, *Music Licensing* (retrieved Aug. 9, 2019), http://www.imla.org/component/content/article/23-programs/112-music-licensing.

of all musical works which it has the right to license, i.e. all works in its "catalog" or "repertory," update the list weekly, and publish the list on the Internet.[5] This public electronic list requirement is essential to protect municipal music users. Without it, licensees cannot know whether a purported "blanket license" offered by the PRO for a specified fee in fact covers the musical works it intends to use. Relaxing or eliminating this basic requirement invites "gotcha" licensing practices under which the PRO can issue a "blanket license" that is represented to cover works the licensee intends to use, subsequently contend they in fact are not covered, and demand additional fees, licenses or terms. Indeed, some songs require a license from multiple PROs because different PROs represent the singer and the songwriter.[6] Notably, neither ASCAP's nor BMI's sample license agreements contain any language requiring the PRO to indemnify a licensee for failure to obtain an additional license, despite both PROs' assurances that entering into a license agreement will grant unencumbered use of a copyrighted work.

Each PRO – ASCAP, BMI, SESAC and the others – maintains its own exclusive catalog of musical works it licenses. Without a fully transparent public list of the works the PRO has the right to license, a user has no objective, neutral and fully reliable way of determining whether specific works are covered before entering into a license and paying license fees. In the event of a dispute as to whether a work is covered, the user can have no effective recourse against the PRO. Indeed, the entire idea of a "blanket license" becomes impracticable if a catalog of works covered on a "blanket" basis is not published and updated at least weekly, as required by the

[5] ASCAP Consent Decree § X. Specifically, the ASCAP Consent Decree requires that "ASCAP make the public electronic list available through on-line computer access (e.g., the Internet), update it weekly, and make copies of it available in a machine-readable format (e.g., CD-ROM) for the cost of reproduction, and update the machine-readable copies semi-annually."

[6] For example, use of the song "Old Town Road" by Lil Nas X and Billy Ray Cyrus requires entering into three separate license agreements. *See* ASCAP, *Old Town Road* (retrieved Aug. 9, 2019), https://www.ascap.com/repertory#ace/search/workID/896732606.

Consent Decrees. It is equally important that the updated public list be available on the Internet so that users can easily and reliably determine the works covered at or near the time of performance. The contents of PRO catalogs are subject to change, and if users cannot reliably determine what their blanket licenses cover at the time they are making performance decisions, they will be exposed to inadvertent infringement and the attendant liability, including potentially significant damages.

For these reasons, the Local Government Commenters believe the Public Electronic List requirement must be retained for ASCAP, applied to BMI by appropriate modification of its decree, and, though outside the scope of this proceeding, applied to all PROs. The Local Government Commenters further contend that certain modifications of this requirement as stated in the ASCAP Consent Decree are essential to maintaining the effectiveness of its protections.

4. The DOJ Should Require PROs to Develop Integrated "Comparative" Databases of Their Repertories.

As noted, the ASCAP Consent Decree requires the PRO to "*make the public electronic list available* through on-line computer access (*e.g*. the Internet) [and] update it weekly."[7] But "make . . .available" must certainly mean more than the mere ability to check, on a per-title or per-composer basis, which of the millions of copyrighted works are in which PRO repertory. It must mean that a municipality can download or otherwise access each PRO's public electronic list in an electronically searchable database format in common current use, in order to quickly and efficiently compare their respective repertories, easily identify works that require multiple licenses, and determine whether one or more repertory satisfies municipal requirements. Given the truly enormous number of published musical works, without such availability, municipalities

[7] *Id.*

have no meaningful way to comparison shop between PROs, or to "police" the music performed on their premises to ensure it is limited to the catalog covered by its "blanket license." Thus while BMI and ASCAP offer access to online electronic databases of their respective repertories, as does SESAC, the absence of a *common, integrated and comparative* database,[8] easily downloadable and easily searchable, that includes *all* PRO titles, nonetheless makes "comparison shopping" of PRO offerings virtually impossible.[9] It also makes it virtually impossible for a music user to determine which of the PROs has licensing rights to the particular musical works it intends to use, or whether it is covered by any of their blanket licenses.

As a result, municipalities have little means to ascertain, efficiently and accurately, which PRO is the licensor of which title in a given performance and therefore whether it will be infringing, even if it has one or more blanket licenses, if it uses a given work. For as we have noted, each PRO has its own repertory and its own blanket license, none of them can license the works in another PRO's repertory, and if the user is mistaken in thinking its license covers the particular work it intends to use, then it will be infringing. It is critically important that users be able to determine the scope of each PRO's license easily and quickly. It may be possible to download each database and create a common database, but that is a considerable technical challenge for multiple databases with multiple formats that were not intended for integration, and many municipalities simply do not have the resources to invest in such a project. And in any event, such manipulation of their databases is prohibited by the PROs' terms of use, based, presumably, on their contention that their databases are proprietary and are protected by

[8] Such a unified "comparative" database would be a seamless compilation of all titles licensed by all PROs, allowing a user to enter title of any musical work and rapidly and reliably confirm which PRO is the licensor. With such a database, a playlist could be easily vetted in a matter of minutes to ascertain which PRO(s) have rights over the titles.

copyright.[10] This prohibition precludes users from legally creating the necessary integrated database and makes it imperative that DOJ require the PROs do so, as BMI and ASCAP promised.

Alternatively, to the extent the PROs refuse or fail to create such a fully integrated and comprehensive database, a third party, including any of the municipal signatories to this comment, should be free to create their own such databases, free of any copyright concerns or other legally enforceable prohibitions, whether from the PROs or otherwise. These compilations would not themselves qualify for copyright protection and should be deemed to be in the public domain. Such a right would of course be an imperfect solution, given that, as noted, many municipal music users do not have the resources to pay for such expensive technical work. The Local Government Commenters therefore strongly urge DOJ to require the PROs to create promptly the integrated, comparative database described.

It is essential to note that more than two years ago, ASCAP and BMI announced the joint development of a comparative database.[11] According to a notice on the BMI website, "[t]he database, which will be publicly available initially via ASCAP's and BMI's websites, will feature aggregated information from BMI's and ASCAP's repertories and will indicate where

[10] *See* ASCAP Terms of Use, *available at* https://www.ascap.com/help/legal/ace-terms-of-use; BMI Terms and Conditions of Use, *available at* https://www.bmi.com/legal/entry/terms_and_conditions_of_use; SESAC Terms of Service, *available at* https://www.sesac.com/#/terms-of-service. All contain language that effectively prohibits downloading or otherwise accessing their respective repertories for the purpose of creating an aggregated database. It is also worth noting that they typically contain a disclaimer of responsibility for any errors or omissions in the electronic repertory in an effort to shift the risk of same to the music user, which arguably obviates the utility of the databases for reliably determining coverage for any particular musical work.

[11] *See BMI & ASCAP Announce Creation of New Musical Works Database* (July 26, 2017), https://www.bmi.com/news/entry/bmi-ascap-announce-creation-of-new-musical-works-database.

other performing rights organizations may have an interest in a musical work."[12] To date, no such aggregated database has been made publicly available. The Consent Decrees should be modified to require that ASCAP and BMI develop and publish such a database on the Internet, with a deadline for compliance – which deadline should be an early one, given they have ostensibly been working on the database for at least two years. Once promulgated, the database should be accessible, without limit, by any municipality and any other music user desiring to assess its music licensing options before signing a license with any PRO.

Additionally, it is essential that the integrated database also include, or at least facilitate, comparison of the BMI and ASCAP catalogs with the hundreds of thousands of titles licensed by the third major PRO, SESAC, which represents a significant and growing percentage of musical works.[13] Without such inclusion, municipal decision makers will continue to operate from an unfair and unnecessarily disadvantaged bargaining position.

Given that BMI and ASCAP have been "working on" such an integrated database for years with no result, the Local Government Commenters urge DOJ to give them a firm deadline, with penalties for failure to meet it.

B. The Consent Decrees Should be Modified to Prohibit Abusive Practices and Protect Licensees.

1. "Trolling" Activities That Imply Infringement Without Clear Evidence Should Be Prohibited

Failure to require the PROs to provide comparative databases, discussed in Section A.4, can encourage "trolling" activities as PROs seek new licensees. Municipalities have received written notices from PROs implying that they may be violating music copyrights and should sign

[12] *Id.*
[13] *See* https://en.wikipedia.org/wiki/SESAC ("SESAC has 30,000 songwriters and over 400,000 compositions in its catalogue.").

a license agreement to avoid potential liability. Where users cannot readily and definitively determine that specific musical works they are using is or is not in a particular repertory and covered by the corresponding license, such "trolling" activities are reasonably likely to work.[14] Particularly in the case of smaller localities which have neither the staff nor the funds to evaluate or challenge the veracity of such implied allegations, the easiest course may be to accede.

Often, in the course of these trolling activities, no specificity as to either the copyright being infringed or manner of infringement is provided. Unless and until the PROs produce a comprehensive, easily searchable comparative database that will enable any municipality to easily ascertain which titles are licensed by which PRO and compare them with the music they are using, such practices should be prohibited, and the Consent Decrees modified to include the prohibition. Specifically, PROs should be prohibited from sending send any notice to a municipality implying misuse without at least colorable indicia of infringement, clearly stated in the notice. In the absence of that indicia, such communications should be limited to legitimate marketing activities which promote the quality, comprehensiveness, pricing and other attributes of the PRO's offering without suggesting or implying infringement.

2. The Consent Decrees Should Be Modified To Prohibit PROs From Charging Municipal Users Fees Additional To The Blanket License Fee For Single Performances Of Musical Works That Are For Charitable Purposes

Not all use of copyrighted music by municipalities requires a license under the Copyright Act of 1976 ("Act").[15] Under section 110(4) of the Act, "nonprofit" performances of

[14] *See, e.g.*, Department of Justice, *Minnesota Attorney Sentenced to 168 Months in Prison for Multi-Million Dollar Pornography Film Copyright Fraud Scheme* (June 14, 2019), https://www.justice.gov/usao-mn/pr/minnesota-attorney-sentenced-168-months-prison-multi-million-dollar-pornography-film.

[15] Copyright Act of 1976, Pub. L. 95-553, 90 Stat. 2541 (1976).

nondramatic music are exempt if the performers, promoters, or organizers of the event are not paid and if there is no direct or indirect admission charge. Based on the statement of the General Counsel of the U.S. Copyright Office in 1991 in response to a Congressional inquiry regarding use of music in public parks, the exemption applies even where there is an admission charge, so long as all proceeds are used exclusively for charitable purposes.[16] We are not aware of any judicial determination holding to the contrary.

The same principle should apply generally to fully charitable municipal events: no licensing or fees should be required where performers are not being paid and all proceeds are used exclusively for charitable purposes. While the ASCAP and BMI forms of blanket licenses for municipalities cover a broad range of uses, they require additional fees for municipal "Special Events," based on "Gross Receipts." For example, the BMI Special Events Report form requires an accounting and additional payment for any "Special Event" where "Gross Revenues" exceed $25,000. "Gross Revenues" means "all monies received by Licensee or on Licensee's behalf from the sale of tickets for the Special Event. If there are no monies from the sale of tickets, 'Gross Revenues' [means] contributions from the sponsors or other payments received by the Licensee for each Special Event."[17]

Where municipalities are raising funds solely for charitable causes, such as for victims of natural disaster (or to restore their own services in the wake of a disaster), use for the special

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[16] *See* James C. Kozlowski, J.D., Ph.D., *Federal Counsel Responds to NRPA, Clarifies Copyright Music Public Park Exemption*, 27 GEO. MASON L. REV. 14 (1992).

[17] License Agreement – Local Government Entities § 2(b), *available at* https://www.ascap.com/~/media/files/pdf/licensing/classes/2017-licensing-agreements_rates_reports/municipalities-license.pdf?la=en&hash=8484C0BDE159FC574C2DF2864D9DFE1CBA7DB957. *See also* Music License for Local Government Entities, Schedule B, *available at* https://www.bmi.com/forms/licensing/gl/lge.pdf.

event should be covered by the blanket license, with no additional fee for single use at the special event. Under the PROs' current terms, a significant portion of contributions and ticket proceeds for the charitable fund raiser will go to the PRO. That result is hardly in the public interest for this type of municipal special event, and it goes directly against the U.S. Copyright Office's 1991advice.

3. Operators of PEG Channels Should not be Charged a License Fee in Addition to any Blanket License held by the Local Government or Cable System Operator.

PEG channels are non-commercial cable channels that are played back over a cable system. At times, PEG programming is also streamed on the cable system's streaming platform and through other streaming services such as Granicus, YouTube, and Vimeo. The PEG channels are programmed by volunteer or staff producers. On cable systems, PEG channels are included in the basic tier of cable services. Typically, PEG channels are operated primarily by local governments or non-profit corporations.[18] PEG channel operations are primarily funded publicly and do not generate private financial gain. The Consent Decrees should be modified to provide that operators of PEG channels do not need to obtain additional music licenses if licenses have been obtained by the local government it is serving or if the cable operator has secured a music license.

[18] For example, the PEG channels in the North Suburban Communications Commission are programmed by the North Suburban Access Corporation, a Minnesota non-profit corporation. The PEG channels in the North Metro Telecommunications Commission and South Washington County Telecommunications Commission are programmed by the two Commissions respectively. Similarly, the City of Murfreesboro operates and programs a government access channel.

4. The Consent Decrees Should Continue To Require A Court Supervised Dispute Resolution Procedure For Disputes Over License Fees And Terms

The Consent Decrees' provision of a judicial mechanism for ensuring fairness and reasonableness in PRO pricing should be retained, but with modifications to provide for mechanisms other than litigation in the Southern District of New York in order to afford meaningful recourse for smaller jurisdictions that do not have the resources to pursue such litigation.[19] Specifically, the Consent Decrees should be modified to provide for the option of invoking an administrative procedure, or a form of proceeding decided by the court on the pleadings, by which all users, including smaller, resource-challenged users, can access the court's dispute resolution authority without the expense of appearing, with counsel, for hearings in New York. Alternatively, music users should have the option of having license fee and terms disputes heard by the federal court in the district where they reside.

C. All PROs should be Required to Comply with the Terms and Conditions of the Consent Decrees

While ASCAP and BMI remain the largest distributors of music licenses, other PROs not subject Consent Decrees have used the limited market to harm music licensees. Even though the the smaller PRO libraries are significantly smaller that the two largest PROs, smaller PROs have been demanding annual license fees from local government at similar rates, but significantly less content, as ASCAP and BMI. Due to the lack of competition in music licensing all PROs should be instructed to comply the terms and conditions of the Consent Decrees. All PROs must be required to deal fairly with consumers. Eliminating the Consent Decrees will not solve this issue. It will only free these select licensors to use its market position to harm consumers.

[19] *See* BMI Consent Decree § XIII; ASCAP Consent Decree § IX.

III. CONCLUSION

For the reasons set forth above, the DOJ should continue to require the Consent Decrees and to modify them consistent with these Comments.

Respectfully submitted,

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