United States Department of Justice
Antitrust Division

SUBMISSION OF AUDIOVISUAL MEDIA LICENSEES REGARDING REVIEW OF ASCAP AND BMI CONSENT DECREES

Kenneth Steinthal
J. Blake Cunningham
David Mattern
King & Spalding LLP
101 Second Street
Suite 2300
San Francisco, CA 94105

Bruce Sokler
Mintz, Levin, Ferris, Glovsky
& Popeo, PC
701 Pennsylvania Avenue, NW
Suite 900
Washington, DC 20004

Submitted: August 9, 2019

INTRODUCTION

NCTA –The Internet and Television Association ("NCTA") and Netflix, Inc. jointly submit these comments in response to the request of the United States Department of Justice Antitrust Division ("DOJ") for public comment regarding its 2019 review of the antitrust consent decrees governing the conduct of the American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI") (collectively "the Decrees").

NCTA represents content creators, network innovators, and voice providers that entertain, inform, connect and inspire consumers. NCTA is the principal trade association for the U.S. cable industry, representing more than 200 cable program networks as well as cable operators that serve nearly 80 percent of the nation's cable television customers. Cable program networks reach nearly 90 million U.S. television households and have invested more than $430 billion in award-winning news, sports, and entertainment content since 1997. The cable industry also is the nation's largest provider of broadband service after investing over $290 billion over the last two decades to deploy and continually upgrade networks and other infrastructure, which has helped spur more than a decade of innovation in the streaming television space, with tens of millions of consumers accessing billions of minutes of online programming each year.

Netflix is the world's largest subscription audiovisual programming service with over 150 million subscribers. It streams millions of hours of audiovisual content annually to its subscribers via the internet. We refer to NCTA's members and Netflix collectively herein as the "Audiovisual Licensees."

The Audiovisual Licensees constitute some of the most significant licensees of ASCAP and BMI and engage in the transmission of audiovisual content through multiple means of distribution. Collectively, the Audiovisual Licensees make annual payments to ASCAP and BMI

amounting to hundreds of millions of dollars. Many of the Audiovisual Licensees have relationships with ASCAP and BMI that span decades, and the group has a deep collective knowledge of the music licensing marketplace.

QUESTION 1: ***Do the Consent Decrees continue to serve important competitive purposes today? Why or why not? Are there provisions that are no longer necessary to protect competition? Which ones and why? Are there provisions that are ineffective in protecting competition? Which ones and why?***

I. Summary of Response

The Audiovisual Licensees will respond primarily to the first part of Question No. 1 put forth by the DOJ – i.e., whether the Decrees continue to serve important competitive purposes. The short answer to that question is an emphatic "***yes***." Preliminarily, we note that unlike other legacy decrees that DOJ has sought to eliminate because they are no longer necessary or desirable, the ASCAP and BMI Decrees continue to serve a vital function protecting Audiovisual Licensees (and their customers) from the anticompetitive concerns presented by the activities of the two largest U.S. performing rights organizations ("PROs"). As DOJ recognized just three years ago in the August 2016 *Statement of the Department of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees*, the Decrees remain an integral part of the complex United States music licensing ecosystem.

The circumstances that landed ASCAP and BMI under antitrust consent decrees starting almost eighty years ago are just as problematic today, if not more so. Nothing has changed to negate the need for the Decrees.[1] We discuss at length below multiple instances of the PROs'

[1] In order to make a showing that the Decrees should be terminated, the DOJ would have to convince the District Courts supervising the Decrees that termination is in the public interest. To do so, the DOJ must show that the conditions that underlie the Decrees no longer apply – a showing DOJ cannot make for the reasons set forth in these Comments. *See* AFJ2 § XIV; BMI Amended Final Judgment § XIII.

anticompetitive practices that not only led to the creation of the Decrees, but that also demonstrate how competition would have been frustrated – time and again – were the Decrees not in place.

And the continued need for the Decrees could not be clearer, as ASCAP has recently delivered demands for substantial and arbitrary rate increases to multiple Audiovisual Licensees operating cable television programming services; but for the Decrees' protections, those licensees would have no genuine choice but to succumb to ASCAP's demands.

As detailed below, the Decrees are particularly necessary for the Audiovisual Licensees and other distributors of audiovisual content produced by third-party film or program producers. For this content, the music and other film elements are already integrated in final form upon delivery (and contractually cannot be altered) — in industry parlance, they are "in the can." For decades, composers and publishers purposefully have withheld the licensing of public performance rights associated with their musical compositions at the time of program production. It is at that time that every single other copyright associated with the creation of an audiovisual work — including the synchronization and any other right associated with the same music — is negotiated and cleared. Industry practice is that the producer or distributor of audiovisual content represents and warrants to downstream television or other exhibitors that all necessary copyrights have been fully cleared "at the source" of production with the single exception of the right to publicly perform the musical compositions embodied in the licensed film or program.

The time of program production — which is when the music for a given film or program is selected — is the one point in time when price competition could occur. It is then that the producer has choices over what music to use; if a composer or publisher were to license performance rights at that time and seek an unreasonable royalty, the producer could substitute different music. This is the essence of a competitive market and would operate to constrain royalty

demands. But composers and publishers uniformly do not license their public performance rights "at the source." And once the program has been fixed without including performance rights in the bundle of rights cleared by the program producer, substitution is not an option. Each rights-holder in any composition embodied in audiovisual content — whose permission is needed for downstream services operated by the Audiovisual Licensees to lawfully transmit the content — can "hold up" the service by demanding much more than the value of the public performance rights in the music itself.

The protections of the ASCAP and BMI Decrees are thus vital for downstream exhibitors of pre-produced audiovisual content. Because industry practice has developed as described above, downstream exhibitors of "in-the-can" content must secure public performance rights for compositions embedded in that content separately from all the other rights in the programming; and given the many thousands of audiovisual works that Audiovisual Licensees exhibit at any given time, blanket licenses from the PROs are essential. Putting aside the lack of price competition associated with having to license performance rights associated with "music in the can" after program production, direct licensing simply does not represent a viable mechanism for licensing.

There are many reasons why direct licensing is not a viable option for Audiovisual Licensees exhibiting "in-the-can" content. First, there are thousands upon thousands of compositions (often with multiple rights-holders per song) incorporated into such video content; and the exhibitors have no control over the selection of the music and ordinarily lack the contractual right to replace it (even were it feasible to do so, which it is not). The same is true with respect to the commercial advertisements transmitted by ad-supported programming services operated by the Audiovisual Licensees.

Moreover, a significant component of the music in the content distributed by the Audiovisual Licensees is not controlled by the three major music publishers – including both works administered by so-called "indie" publishers and those controlled by foreign PROs whose works are subject to exclusive rights grants and only licensable in the United States through the U.S. PROs.

Any attempt to engage in comprehensive direct licensing of in-the-can content would be a fool's errand, as well, because the information about who controls the rights to compositions embodied in such content simply is not available for a significant portion of the content that Audiovisual Licensees distribute. There has never been and does not exist any comprehensive database which would enable Audiovisual Licensees to identify the owners of all (or anywhere near all) the musical works contained in audiovisual content. *See infra* at n. 2. Indeed, even for programming that Audiovisual Licensees produce themselves, direct licensing is not a viable alternative, particularly with respect to content embodying recently-released sound recordings because composition-ownership information associated with newly-released sound recordings frequently is not determined (never mind made public) until months after the release date of the recordings.

Due to the foregoing circumstances, the practical reality is that Audiovisual Licensees must secure blanket licenses from PROs covering public performance rights in musical compositions, lest they risk crippling infringement exposure or lose the ability to exhibit the audiovisual content they spend billions of dollars to license. It remains entirely true today, as the Supreme Court recognized long ago, that "[a] middleman with a blanket license [i]s an obvious necessity if the thousands of individual negotiations, a virtual impossibility, [a]re to be avoided." *BMI v. CBS*, 441 U.S. 1, 20 (1979).

For decades, the Decrees have protected Audiovisual Licensees against ASCAP's and BMI's otherwise unfettered market power in their respective repertories. And the Decrees have also allowed ASCAP and BMI to continue to collectively license otherwise-competing works without fear of antitrust challenges. For these reasons (and as recounted below in response to other DOJ requests for comment), licensors and licensees, courts, agencies and Congress all have repeatedly relied on the existence of the Decrees. This historic — and current — industry and Government reliance on the Decrees is yet another aspect of these Decrees that separates them from the multiple legacy antitrust consent decrees that DOJ has sought to sunset.

Terminating or substantially modifying the ASCAP and BMI Decrees would upset the robust marketplace built upon this reliance — and would harm Audiovisual Licensees, their customers and others in the music ecosystem. Decades of business practices, court opinions, enforcement decisions and legislation would be thrown by the wayside in favor of a dangerous unknown. Indeed, the chaos in the licensing marketplace that would ensue also likely would be detrimental to the composer/songwriter community, as the uncertainties associated with how music performing rights would be licensed for downstream exhibition could well cause program producers to limit their music choices and exhibitors to alter their going-forward programming decisions. For the reasons elaborated upon further below, the public interest rests firmly with leaving the ASCAP and BMI Decrees in place. Any DOJ recommendation to terminate or sunset the Consent Decrees without a viable solution to the "in-the-can" and related circumstances described herein would not be in the public interest.

II. Economic Underpinnings of the Decrees—And Lessons Learned from Decades of ASCAP & BMI Licensing

In addressing DOJ's questions and assessing the critical role that the Decrees have played, it is useful to look at some of the problems historically presented by collective licensing, which are still relevant today. This section discusses the establishment of the public performance right and the rise of ASCAP (and later BMI), the anticompetitive concerns presented by collective licensing of public performance rights, and how the availability of statutory damages serves to amplify the market power of PROs. Finally, this section discusses several examples in which PROs have attempted to abuse their market power in negotiations with licensees to illustrate the risks presented by collective licensing unregulated by the Decrees.

A. Establishment of the U.S. Public Performance Right and Rise of PROs

The Copyright Act of 1909 established an exclusive right of public performance in musical compositions. Copyright Act of Mar. 4, 1909, ch. 320, § 1(e), 35 Stat. 1075 (1909). This new right presented a series of licensing and enforcement challenges for copyright owners and licensees, such as how to secure disparate rights from many songwriters at once and how to ensure that songwriters were properly compensated for public performances by disparate licensees. ASCAP was formed in 1914 to address these challenges. *See* https://ascap.com/100#1914.

The owners of musical works authorized ASCAP to license the public performance rights in their musical works as part of a blanket license to its repertory. ASCAP developed and maintained the infrastructure to license its repertory, monitor for infringements, and collect and distribute royalties to its members. As of 1941, compositions in the ASCAP repertory accounted for approximately 98 percent of U.S. public performances of music. *United States v. Am. Soc'y of Composers, Authors & Publishers*, No. 41-cv-1395 (DLC) (S.D.N.Y. Sept. 5, 2000) (Mem. of

United States in Support of Joint Mtn. to Enter Second Amended Final Judgment ["AFJ2"]) at 16 (hereafter "U.S. Mem. in Support of AFJ2").

In 1939, BMI was formed as an alternative to ASCAP, and over the decades it has grown to share ASCAP's dominant status in the performance rights licensing space. Today, ASCAP and BMI have each grown to control over ten million compositions owned by otherwise-competing composers and publishers; ASCAP and BMI represent the two largest aggregations of music copyrights in the United States.

Beyond the enormous size of their repertories, there are several other factors that convey substantial market power to the PROs. For instance, ASCAP and BMI license their repertories on a blanket basis, meaning that works that otherwise would compete with one another for licensing are sold in a bundle for a single price. Further, the ASCAP and BMI repertories are so large that they are complements rather than substitutes. Large scale licensees of music require licenses from both entities; the PROs do not compete with one another for licensees. This is particularly the case for Audiovisual Licensees exhibiting in-the-can content (with the music unalterably included) and due to the endemic issues regarding transparency of ownership for musical works, particularly as relates to the music in audiovisual content.[2]

[2] There is no database available to Audiovisual Licensees from which to discern in any comprehensive or accurate manner what rightsholders control the rights to musical works embodied in audiovisual content. For example, there is no common format or template for "cue sheets," the starting point for any effort to determine who owns or controls the rights to compositions in a given film or program. Many cue sheets do not include all the information necessary to identify composition ownership. Indeed, for many programs, particularly older programs, cue sheets simply do not exist or are not available to Audiovisual Licensees. Nor is there any registration process or central repository for cue sheet information. In addition, copyrights move from publisher to publisher over time, so the publisher identified on an old cue sheet may no longer be the publisher administering that copyright. And the PRO affiliations of writers/publishers set forth on cue sheets are unreliable, since it is common for composers and publishers to change their PRO relationships over time. To be safe, blanket licenses with the PROs are a necessity for Audiovisual Licensees to avoid copyright infringement risk. The general lack of transparency associated with musical work copyright ownership was a significant focus of the Music

B. The Amplification of Anticompetitive Effects of Collective Licensing by U.S. Statutory Damages

The availability of statutory damages under the Copyright Act exacerbates the anticompetitive effects of collective licensing discussed above. Current statutory damages range from $750 to $30,000 per work infringed, or up to $150,000 per work infringed if plaintiff successfully proves that the defendant was "willful" in his infringement. 17 U.S.C. § 501(c).

Statutory damages have long been a part of U.S. copyright law. Under the 1909 Copyright Act (the same act establishing a U.S. public performance right), statutory damages were meant both to compensate the copyright owner where actual damages or profits were difficult or impossible to prove and to deter future infringement. *Douglas v. Cunningham*, 294 U.S. 207 (1935); *see also F. W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228 (1952); *Peter Pan Fabrics v. Jobela Fabrics*, 329 F.2d 194 (2d Cir. 1964); Register of Copyrights, Report on the General Revision of the Copyright Laws 102 (1961). However, in those early years, the scope of media usage in today's digital world would have been unthinkable.

The statutory damages regime was carried forward in the 1976 general revision of the Copyright Act. *See* 17 U.S.C. § 504 (1976). The upper and lower bounds of the statutory range were increased by 50 percent to their current levels in the Digital Theft Deterrence and Copyright Damages Improvement Act of 1999 in order to strengthen the general deterrent effect of statutory

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Modernization Act passed into law late last year to address issues associated with the statutory license for "mechanical" rights in musical works, but the new database to be created by that Act is a long way from reality and does not address the specific and unique problems associated with audiovisual programming noted herein. Blanket licenses subject to the regulatory constraints imposed by the Decrees are the simplest and most efficient mechanism to both give Audiovisual Licensees access to the rights they need to distribute content, and also to allow thousands of creators and copyright owners to license their works collectively.

damage awards. Pub. L. No. 106-160, 113 Stat. 1774; *see also* Copyright Damages Improvement Act of 1999, H.R. Rep. No. 106-216, 106th Cong., 1st Sess. (1999).

The market power derived from aggregating vast catalogs of music copyrights coupled with the availability of sizable statutory damages awards in a modern distribution environment, where thousands or even millions of works may be performed by a licensee, has only enhanced the PROs' enormous market power.

C. Examples of PRO Attempts to Leverage Their Market Power

The problems discussed above concerning collective licensing are not purely theoretical. History is replete with examples demonstrating that, given the opportunity, performing rights organizations will abuse their market power. We discuss a few of those examples below — from the advent of the Decrees through to the present (including ASCAP's as-we-speak efforts to effectuate a substantial rate hike in the cable programmer industry that would upend decades of precedent).

1. ASCAP Holdup of the Radio Industry. At the end of the 1930s, ASCAP threatened to double its license fees for the fledgling broadcast radio industry effective in 1941. *See* https://www.bmi.com/about/75_years (last visited July 22, 2018). DOJ brought an antitrust suit against ASCAP, resulting in the first consent decree between ASCAP and the Government in 1941. *United States v. Am. Soc'y of Composers, Authors & Publishers*, 1940–1943 Trade Cas. ¶ 56,104 (S.D.N.Y. 1941). The decree "assuage[d] the radio-broadcasting industry's antitrust grievances against ASCAP" and led to a new license between ASCAP and the radio industry later that year. *See* Sigmund Timberg, *The Antitrust Aspects of Merchandising Modern Music: The ASCAP Consent Judgment of 1950*, 19 L. & Contemp. Probs. 294, 301 (1954)

(hereinafter "Timberg"); *see also* https://www.bmi.com/about/75_years (last visited July 22, 2018).

2. ASCAP's Efforts to Leverage "Music in the Can." Not long after the entry of its first consent decree, ASCAP found itself embroiled in antitrust litigation with hundreds of movie theaters. *See Alden-Rochelle, Inc. v. Am. Soc'y of Composers, Authors & Publishers*, 80 F. Supp. 888 (S.D.N.Y. 1948); *N. Witmark & Sons v. Jensen*, 80 F. Supp. 843 (D. Minn. 1948). The litigations concerned ASCAP's practice of prohibiting its members from granting public performance rights to movie producers at the same time they granted synchronization rights. *See Alden-Rochelle*, 80 F. Supp. at 892. This allowed ASCAP to seek dramatic rate increases — as much as 1500% — due to the theaters' inability to control the music included in the films they would exhibit. *Id.* The music and other rights required were fixed in the films by the time they arrived at the theaters in metal canisters, giving rise to the "in the can" moniker.

The court in *Alden-Rochelle* highlighted how the practice of withholding public performance rights in the compositions embodied in films at the time of production, leaving them to be licensed to motion picture theaters after they arrive "in the can" without any opportunity for exhibitors to substitute out the music, precluded price competition over those rights that otherwise would exist had they been licensed at the point of production. *Id.* at 894. As a result, the *Alden-Rochelle* court concluded that "[a]lmost every part of the ASCAP structure, almost all of ASCAP's activities in licensing motion picture theatres, involve a violation of the anti-trust laws." *Id.* at 893-94. The *Witmark* court agreed, denying copyright infringement claims by ASCAP member publishers and observing that ASCAP "by a refusal to license, or by the imposition of an exorbitant

performance license fee, can sound the death knell of every motion picture theatre in America." *Witmark*, 80 F. Supp. at 847.

As explained by the then Chief of the Antitrust Division's Judgment and Enforcement Section, Sigmund Timberg: "The *Alden-Rochelle* and *Witmark v. Jensen* opinions laid bare legal infirmities in ASCAP's organization and functioning that could not adequately be dealt with in a proceeding involving private parties with limited legal and economic interests to be adjudicated and conserved by the court." Timberg at 301. In the wake of those litigations, ASCAP and DOJ set about overhauling the ASCAP consent decree to address issues presented by the public performance of audiovisual works via theatrical distribution (and otherwise). *Id.* Among other modifications, the Amended Final Judgment ("AFJ") enjoined ASCAP from licensing movie theaters, prohibited ASCAP from acquiring exclusive rights from its members, and established the ASCAP rate court. *See Buffalo Broad. Co. v. Am. Soc'y of Composers, Authors & Publishers*, 744 F.2d 917, 922-23 (2d Cir. 1984). However, at ASCAP's request, the AFJ did not extend the *Alden-Rochelle* injunction to the nascent television industry, leaving ASCAP free to continue to license non-theatrical exhibitors of "in-the-can" works.

3. PRO Efforts to Double-Charge for Certain Transmissions. A feature included in the AFJ to address the developing television industry was the requirement that ASCAP issue licenses on a through-to-the-audience basis. AFJ § V(A). This meant that ASCAP had to grant broadcast television networks like ABC, NBC, and CBS public performance licenses that covered transmissions of their television programming, through their local affiliates, and to the ultimate viewer. Through-to-the-audience licenses prevent ASCAP and BMI from "double-dipping," *i.e.,* demanding license fees at multiple points in the same chain of transmission. And

the need for such Decree constraints on PRO licensing power has been demonstrated time and again over the years.

For example, as cable television gained prominence in the 1980s, ASCAP (as did BMI) took the position that it was not required to issue through-to-the-audience licenses to cable television networks. *See United States v. Am. Soc'y of Composers, Authors & Publishers (Application of Turner Broad. Sys., Inc.)*, 78 F. Supp. 788 (S.D.N.Y. 1991), *aff'd*, 956 F.2d 21 (2d Cir. 1992). It argued that the new medium of cable television was different from broadcast television and not contemplated by the drafters of the AFJ. *Id*. at 797-99. Essentially, ASCAP and BMI wanted to double-dip by assessing fees at two different points in the distribution chain. The ASCAP rate court disagreed, holding that AFJ section V(A) applied broadly regardless of the means of transmission of television programming. *Id.* at 791 (rejecting attempt to charge cable networks and cable operators separately for transmission of the same programming); *see also, United States v. Am. Soc'y of Composers, Authors & Publishers (Applications of Fox Broadcasting Company and Fox Television Stations)*, 870 F. Supp. 1211, 1219 (S.D.N.Y. 1995) (finding that ASCAP could not charge Fox Broadcasting license fees for programming already licensed by its local affiliates, noting that "[i]t has long been recognized that ASCAP may not 'split' rights in order to collect more than one license fee for any one use of the music in its repertory.").

The *Turner* litigation led to further amendments to the ASCAP decree to clarify ASCAP's obligation to grant licenses on a through-to-the-audience basis. *See* AFJ2 § V; U.S. Mem. in Support of AFJ2 at 22 n.21. But even this did not stop ASCAP from raising similar arguments years later in its rate court case against mobile television distributor MobiTV. *See In re Application of MobiTV, Inc.*, 712 F. Supp. 2d 206, 228-29 (S.D.N.Y. 2010), *aff'd sub nom Am. Soc'y of Composers, Authors & Publishers v. MobiTV, Inc.*, 681 F.3d 76 (2d Cir. 2012). There, ASCAP

sought to justify its unreasonable fee proposal by ascribing separate value first to MobiTV's transmission to the wireless carrier and second from the wireless carrier to the MobiTV subscriber (another form of double-dipping at different points in the distribution chain). *Id.* The court, citing *Turner,* rejected ASCAP's proposed license fee and rationale.

4. Private Antitrust Litigations Against SESAC. SESAC controls a much smaller repertory than ASCAP or BMI, but its licensing activities (and the antitrust litigations those activities have spawned) demonstrate vividly the harm to competition that would arise if ASCAP and BMI – with their much larger repertories – were not subject to the Decrees. SESAC has been subject to private antitrust litigation in recent years based on its aggregation of copyrights and anticompetitive collective licensing practices. *See Radio Music License Committee, Inc. v. SESAC, Inc*., 29 F. Supp. 3d, 487 (E.D. Pa. 2014); *Meredith Corp., et al. v. SESAC LLC*, 1 F. Supp. 3d 180 (S.D.N.Y. 2014). These suits alleged that SESAC used its status as an unregulated PRO to demand license fees for its repertory that were wholly disproportionate to SESAC's share of performances on radio and television. *Radio Music License Committee*, 29 F. Supp. 3d at 492-94; *Meredith*, 1 F. Supp. 3d at 186. Both plaintiffs also alleged that SESAC refused to offer competitive alternatives to a blanket license for the SESAC catalog. *Id*.

After the courts denied SESAC's motions to dismiss and for summary judgment, SESAC settled both cases. In addition to monetary relief from SESAC, the settlements established rate-setting mechanisms through private arbitration and imposed other requirements on SESAC mimicking, to some extent, the protections offered by the ASCAP and BMI Decrees and the rate courts that govern ASCAP/BMI. *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 657-58 (subjecting SESAC to periodic binding arbitration to set rates for a 20-year period); *see* RMLC-SESAC Settlement Agreement (July 23, 2015), *available at*

http://dehayf5mhw1h7.cloudfront.net/wp-content/uploads/sites/893/2017/09/ 22194517/SESAC-Settlement-Agreement-7_23_15.pdf. The first of these arbitrations, between the RMLC and SESAC, vindicated the radio industry's position that SESAC had used its market power to demand supra-competitive rates. *See Arbitrator Says Radio to Pay 60% Less In Royalties to SESAC*, Inside Radio (2017), http://www.insideradio.com/arbitrator-says-radio-to-pay-less-in-royalties-to-sesac/article_0e4ceb6a-763b-11e7-8c6a-e3b8a676cf04.html (last accessed July 11, 2018). Unfortunately, the relief flowing from these private litigations is directed towards the specific plaintiffs rather than music users in general since, unlike an ASCAP or BMI rate court determination, the arbitration decisions against SESAC do not carry precedential value that aids other licensees.[3]

5. ASCAP and BMI Current Marketplace Efforts to Impose Unreasonable Rate Hikes. Even as we submit these Comments, ASCAP is in the marketplace demanding arbitrary and substantial rate hikes in the cable programming industry that are inconsistent with decades of past practices and precedents. Many of the Audiovisual Licensees are impacted by this conduct. Absent the provisions of the Decrees allowing these licensees to obtain licenses on request, and absent the recourse provided by the Decrees to a reasonable fee determination by a federal court judge, these licensees would have to succumb to ASCAP's demands or face draconian copyright infringement exposure.

Also, quite recently, BMI has sought to impose enormous (almost tenfold) rate increases in connection with its licensing of promoters of live events and venue operators, which has led to

[3] In late 2016, the Radio Music License Committee brought a similar antitrust suit against GMR based on GMR's efforts to dramatically raise prices on works previously available from ASCAP and BMI. *Radio Music License Committee, Inc. v. GMR*, No. 16-cv-06076 (E.D. Pa. Nov. 18, 2016). That case is pending.

ongoing proceedings before the BMI rate court in which licensees have been able to rely on the license-upon-request provisions of the BMI Decree to enable them to continue in business without having to succumb to BMI's demands. *See Broadcast Music, Inc. v. North American Concert Promoters Ass'n.*, 18 Civ. 8749-LLS (S.D.N.Y.).

Plainly, the Decrees are just as necessary today as they were decades ago to protect competition in the licensing of music performing rights.

III. Importance of the ASCAP and BMI Decrees to Audiovisual Licensees

A. General Import

Audiovisual Licensees are particularly vulnerable to any changes that would limit the protections offered to licensees by the current ASCAP and BMI licensing system as regulated by the Decrees. This is because of the "music in the can" issue discussed above. Audiovisual content, such as television programming or films, generally will have numerous musical compositions already embedded in the finished content. This can include theme music, feature music, background music, or incidental music that appears in a pre-recorded television show or movie.

Audiovisual Licensees do not control what music comes embedded in the content that it receives from film and television producers (and advertisers). Nor do the Audiovisual Licensees ordinarily have the contractual ability to alter the musical content. To comply with copyright laws, Audiovisual Licensees must secure public performance rights for these embedded compositions but must do so from a position of weakness – as they cannot avoid performing the embedded compositions without having to forgo exhibiting the audiovisual works they have already paid enormous sums to license.

Underlying this circumstance is the historical desire by publishers to segregate sync and public performance rights. Rights-holders historically have refused to license the sync right and the public performance right in one transaction. Rather, they almost uniformly license only the sync and (post-*Alden Rochelle*) theatrical distribution rights to the film or television producer, which then passes all rights necessary for downstream distribution *except public performance rights* through to Audiovisual Licensees and other non-theatrical exhibitors. Public performance rights are separately licensed on a blanket basis by the PROs.

PRO blanket licensing avoids the wildly inefficient outcome of Audiovisual Licensees having to follow up with every publisher of every embedded composition for a second round of negotiations, months or even years after the film or television producer engaged in the first round of negotiations for the sync licenses. But the anticompetitive hazard of such a scheme is obvious, as recognized in *Alden-Rochelle*. And, because the *Alden-Rochelle* injunction does not extend beyond movie theaters, the owners of musical works now license public performance rights associated with U.S. *theatrical exhibition* at the point of production of an audiovisual work (when a producer can choose which compositions to use and price competition can occur), but continue to withhold public performance rights *for all other means of distribution* of the same audiovisual work.[4] Though Audiovisual Licensees, with respect to their "in-the-can" content offerings, stand in the same shoes as the *Alden-Rochelle* movie theaters, they must still secure musical work public performance rights in those audiovisual works separately (or they cannot make those audiovisual works available to their viewers).

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[4] *See* Copyright Office and the Music Marketplace at 34 ("In the context of motion pictures, source licenses do not typically encompass non-theatrical performances, such as on television. Thus, television stations, cable companies, and online services such as Netflix and Hulu must obtain public performance licenses from the PROs to cover the public performance of musical works in the shows and movies they transmit to end users.").

The ASCAP and BMI blanket licenses mitigate this significant market failure by saving Audiovisual Licensees from having to engage in redundant and dispersed negotiations for public performance rights. Without the Decrees (and the licensing practices they permit), the circumstances facing Audiovisual Licensees would be completely unworkable. At the same time, without the licensee-protective provisions embodied in the Decrees, Audiovisual Licensees would be vulnerable to ASCAP and BMI leveraging their market power to hold up the Audiovisual Licensees' ability to play vast swathes of content unless licensees capitulated and agreed to pay fees at whatever (noncompetitive) levels ASCAP/BMI would seek to extract. The PROs' already-substantial market power, derived from their aggregation of otherwise-competing copyrights, is compounded by the Audiovisual Licensees' inability to alter the musical content of the films and television programming in which ASCAP/BMI content appears. This is especially true given the Audiovisual Licensees' substantial sunk costs — billions of dollars annually — in obtaining licenses to transmit such programming which convey all necessary rights *other than* public performance rights in musical compositions.

B. Import of Specific Decree Provisions

DOJ's questions ask, among other things, about the importance of specific provisions of the Decrees. Given the circumstances described above facing Audiovisual Licensees that would otherwise enable the PROs to charge license fees far in excess of the competitive market level, Audiovisual Licensees particularly benefit from five key aspects of the ASCAP and BMI Decrees that DOJ should keep in place even if it determines to seek modifications of the Decrees in other respects.

1. Availability of Licenses Upon Request. The availability of ASCAP and BMI licenses upon request under the Decrees is crucial to preventing holdup by those PROs.

Because Audiovisual Licensees can rely on ASCAP/BMI licenses on request, they are protected from the threat of infringement litigation being used as an unfair bargaining tool. At the same time, the availability of licenses on request under the Decrees promotes innovation benefiting consumers by enabling companies to launch new services without such risks and enables Audiovisual Licensees to make more programming available to consumers on an uninterrupted basis during the times between the expiration of their ASCAP and BMI licenses and the commencement of new licenses (subject, of course, to the payment of license fees). Composers and publishers benefit as well from the continuous and wider exposure of their compositions enabled by these Decree provisions.

2. Rate Court. The availability of recourse to a "rate court" under the Decrees — and the placement of the burden of proof in rate court proceedings on the PROs to establish that the fees they propose to licensees are "reasonable"— promotes price negotiation and other dispute resolution between Audiovisual Licensees and ASCAP/BMI. Without the rate courts, Audiovisual Licensees would be on decidedly unequal footing with the PROs, which could essentially name their own price or put licensees at risk of monumental infringement exposure.

Audiovisual Licensees (and PROs alike) also benefit from the existence of precedent established in past rate court proceedings. This precedent provides stability, predictability and guidance to both sides in negotiations. It also guides the Courts, as exemplified by the *MobiTV* case, discussed *infra* at 41, which relied on past cable industry precedent in rejecting ASCAP's attempt to impose supra-competitive rates on mobile and broadband distribution of audiovisual programming based solely on the fact of its distribution via new, rather than traditional, media.

3. Non-Exclusivity. The Decrees require that ASCAP and BMI receive non-exclusive grants of rights from their members/affiliates. These non-exclusivity requirements

leave open the option of competitive direct license negotiations between Audiovisual Licensees and ASCAP members or BMI affiliates. While it would be a practical impossibility for Audiovisual Licensees to directly license all the music in their programming, the ability to do so for at least some programming which licensees produce themselves (coupled with this Decree requirement) places some competitive pressure on ASCAP and BMI blanket license fees.

4. Meaningful Alternatives to Full Blanket Licenses. The Decrees' requirements that ASCAP and BMI offer meaningful alternatives to the blanket license, such as the per-program license and adjustable-fee blanket licenses, provide further competitive pressure on ASCAP and BMI blanket license fees. These requirements work hand-in-glove with the non-exclusivity provisions to enable Audiovisual Licensees to explore competitive direct licensing as an alternative to relying exclusively on blanket licenses, at least for content produced by Audiovisual Licensees (i.e., for content that is not licensed to them "in the can").

5. Nondiscrimination Provisions. The nondiscrimination provisions of the Decrees are also important, particularly for new marketplace entrants which face the daunting task of competing with long-established media companies and traditional modes of distribution. The nondiscrimination provisions ensure that newer Audiovisual Licensees are treated fairly in comparison to competitors. The existence of these provisions informs and provides discipline to licensee negotiations with ASCAP and BMI.

QUESTION 2: ***What, if any, modifications to the Consent Decrees would enhance competition and efficiency?***

It is the position of the Audiovisual Licensees that the Decrees in their current form continue to serve the public interest and promote competition. However, there are certain modifications that would further promote competition and efficiency, including the following:

- ASCAP and BMI should be required to make available comprehensive ownership information about compositions in their repertories, in a manner/format that is useful for licensees. In practice, this means that such data must be: (i) updated in timely fashion (ideally in real time as new compositions enter the PROs' repertoires); (ii) made available in technical formats that allow small and large-scale licensees alike to "operationalize" the data; and (iii) provided on an authoritative basis. Such improvements in data transparency (*see* discussion in n. 2, *supra)* could facilitate more competitive licensing alternatives to blanket licensing. *It is important to note, however, that such improvements in data transparency would not obviate the need for the Decrees and the protections against PRO anticompetitive pricing of licenses that the Decrees provide.*

- ASCAP and BMI should be required to engage in full-work licensing. A recent Second Circuit decision held that the BMI Consent Decree neither requires full-work licensing nor prohibits fractional licensing of BMI's affiliates' compositions. *See United States v. Broadcast Music, Inc*. 16-3830-cv, 2d. Cir. (Dec. 19, 2017) (summary order). The ruling upset settled understandings and was inconsistent with the perceived efficiencies of blanket licensing that the Supreme Court had relied upon in determining that ASCAP/BMI collective licensing activities survived a rule of reason analysis. *See Broadcast Music, Inc. v. CBS, Inc.,* 441 U.S. 1, 10, 13 and 20 (1979). Especially given the lack of transparency of musical work ownership (including with respect to who owns all the fractional shares of co-owned works), permitting PROs to engage in fractional licensing exacerbates the very inefficiencies that blanket licensing was designed to remedy.

- ASCAP/BMI "license-in-effect" practices should be codified. "License-in-effect" provisions currently in place for ASCAP members and most BMI affiliates ensure that works in the ASCAP and BMI repertories remain licensed for the term of existing blanket licenses even after writers resign from ASCAP or BMI. Uniform license-in-effect rules would disincentivize gamesmanship and mitigate transparency issues caused by PRO membership switching.

QUESTION 3: ***Would termination of the Consent Decrees serve the public interest? If so, should termination be immediate or should there instead be a sunset period? What, if any, modifications to the Consent Decrees would provide an efficient transitionary period before any decree termination?***

The short answer to the initial part of this question is an emphatic "***no***." Termination would not serve the public interest. As such, there is no basis for DOJ to advocate termination of the Decrees, nor is there a public interest basis for the District Courts which supervise the Decrees to make such a finding. Terminating the Decrees and thus eliminating the provisions that protect competition and licensees would severely harm competition, licensees and consumers.

I. Termination of the Decrees Would Harm Competition by Enabling Holdup Behavior, Thus Harming Consumers

Absent the Decrees, ASCAP and BMI would be unconstrained in their ability to exercise the market power they have acquired through aggregating and setting prices for rights in millions of distinct works. As explained above, Audiovisual Licensees of previously-created "in-the-can" video content would be especially vulnerable.

At the time of production of a film/tv program, a producer has the ability to choose from competing providers of the music that will be embodied in the program. If one composer's fee is too high, or if the relevant rights are priced excessively by a publisher, the producers can seek out alternative suppliers of such inputs. There is price competition in that context.

The context is quite different when licensing public performance rights for non-theatrical exhibition of previously-produced video works. If an Audiovisual Licensee wishes to exhibit the movie *The Big Chill*, for example, it has no choice but to license the composition public performance rights associated with Three Dog Night's "Joy to the World," Marvin Gaye's "I Heard it Through the Grapevine," the Young Rascals' "Good Lovin'," and many other songs in addition to the film's score. Audiovisual Licensees typically have hundreds or thousands of movies and TV

series that pose this challenge. Given the prohibitive transaction costs associated with approaching dozens of musical licensors *per show* and the lack of transparency of composition ownership information (never mind the contractual inability to change the music "in the can"), securing PRO blanket licenses has become a necessity for Audiovisual Licensees.

Absent the availability under the Decrees of licenses upon request and the fallback of a judicial determination of reasonable rates constraining ASCAP/BMI pricing, those PROs could effectively prevent Audiovisual Licensees from exhibiting content unless the licensee succumbed to the PROs' pricing demands. The cost of making audiovisual content available for transmission to viewers would increase substantially — inevitably leading to reduced availability of content, constraints on creativity, use of less music in new audiovisual works, and higher costs to consumers.

In the absence of the Decrees, particularly the right to a license upon request and the rate court oversight provided by the Decrees, holdup is virtually certain to occur, to the detriment of licensees and consumers. Here are a few examples:

- On day one of a new product offering, Audiovisual Licensees would no longer be entitled to immediate access to the ASCAP and BMI repertories. Before launching a new product that required clearance of performance rights, a licensee would have to engage in negotiations with the PROs (which can sometimes take years) and arrive at price terms in a marketplace absent of price competition. The only alternative would be to face crippling infringement exposure.

- Without automatic blanket licensing, any partial owner of the public performance rights in a television theme song could force the takedown of multiple seasons of a show for which an Audiovisual Licensee has already secured all other necessary licenses.

- The three major publishers could exercise holdup and each demand excessive fees for their full catalogs based on the market power they have acquired. The Decrees prevent that holdup today by ensuring that licensees have access to the publishers' full catalogs through ASCAP and BMI, so long as those publishers choose to affiliate

with the PROs for purposes of licensing their catalogs generally. *See Pandora Media, Inc. v. ASCAP,* 785 F.3d 73 (2d Cir. 2015).

- Absent the supervisory role of the rate courts, the PROs could freely raise license fees well beyond competitive levels. Audiovisual Licensees would have no viable alternatives and would have to succumb.

This list of possible — even likely — negative competitive effects could go on and on.

ASCAP and BMI cannot credibly argue that they will not engage in holdup. Although ultimately their businesses can succeed only if their rights are licensed (and paid for), the only factor that prevents their license fees from reaching or exceeding monopoly levels for all licensees is the presence of the Decrees. Terminating the Decrees would eliminate that constraint, yielding substantially higher prices through the exercise of the PROs' significant market power. This is not speculation. The history of events summarized *supra* at 11-17 demonstrates over and again how the PROs have sought to exploit opportunities for holdup via both potential loopholes in the Decrees or industry developments. *See Pandora Media, Inc. v. ASCAP*, 785 F.3d 73 (2d Cir. 2015).

II. There is No Cause for DOJ to Change Course

Over the 75-year period of the Decrees, no administration has ever proposed eliminating them. The facts are precisely the opposite. Just three years ago, the DOJ issued its "Statement on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees." Although done in a prior administration, the review was extensive and nonpartisan. It called for a "comprehensive legislative solution" but, in the interim, concluded: "After carefully considering the information obtained during its investigation, the Division has concluded that the industry has developed in the context of, and in reliance on, these consent decrees and that they therefore should remain in place."

That conclusion was correct in 2016 and nothing since has called it into question. In the absence of a legislative fix — which one would expect to mirror the current status quo to a large extent — the risk of serious adverse consequences from abrupt termination is extremely high.

- As an initial matter, no one would know whether ASCAP and BMI could continue to exist. The existence of the Decrees was critical to the Supreme Court's rejection of the *per se* rule and the ultimate finding that blanket licenses did not represent an unlawful restraint of trade. *See* discussion *infra* at 34-35. Without the Decrees, the legality of the blanket licenses and the PROs themselves would be unclear.

- If the Decrees were terminated, it would take years for the legal issues surrounding ASCAP and BMI to be resolved. The PROs could charge whatever they want, albeit subject to a risk of private antitrust litigation at the end.

The Decrees have been remarkably effective and efficient. In the many years the Decrees have been in effect, the number of fully-litigated rate court proceedings has been relatively few. The DOJ has weighed in on just a handful of those actions and has engaged in only two decree-enforcement actions separate from the rate court process — a contempt motion against ASCAP and its opposition to BMI's petition for declaratory judgment on the fractional licensing issue, both in 2016. Considering the vast quantity of music available for license, the ratio of court proceedings to licenses is not even a rounding error. The work is done through negotiations between the PROs and licensees. Resort to the rate courts is rare because the courts' decisions have provided, for the most part, the guidance the parties need. The need for DOJ intervention is therefore relatively limited. There can be no serious argument that the DOJ spends excessive resources on Decree monitoring and enforcement *relative* to the important benefits of the Decrees.

III. If DOJ Recommends Any Sunset of the Decrees, It Should be Deferred Until After Certain Conditions Are Satisfied

The Audiovisual Licensees strongly oppose any termination of the Decrees, including any contemplation that they would be sunset at a time in the future. Among other things, a sunset date

does nothing to solve the "in-the-can" problem which plagues Audiovisual Licensees as described in these Comments. But if DOJ is determined to recommend an ultimate sunset of the Decrees, that sunset date should be deferred until after certain conditions and thresholds are first met.

A. Legislative Solution

The Decrees should not be terminated (or sunset) unless and until Congress first steps in to enact legislation that provides for protections to licenses on par with those embodied in the Decrees today and ensures that the protections currently afforded by the Decrees will remain in effect without any lapse in time prior to the effective date of such legislation. It would be inappropriate to assume that necessary legislative action can be accomplished swiftly; and the PROs and their members should not be permitted to engage in the types of marketplace activities that the Decrees have previously prevented during any interval between the date of any potential Decree termination/sunset and the effective date of legislation.

As the legislative process surrounding the Music Modernization Act of 2018 ("MMA") recently reaffirmed, congressional action on copyright and music licensing issues can be slow, and it often requires "buy in" from all the major stakeholders affected. And as to the latter point, any termination or sunset of the decrees without deferring and conditioning it on a legislative solution first being enacted is likely to undermine the very ability to achieve the buy-in of PROs and their members (who, absent the continued viability of the Decrees, are unlikely to support establishment of legislation that would embody the types of procompetitive measures currently embodied in the Decrees).

There is good reason to believe Congress would work with DOJ on developing a legislative alternative. Last November, Congress adopted into law the MMA to address improvements in the licensing system governing publishers' "mechanical" licenses. The MMA was adopted with the

understanding that the PRO Decrees were a longstanding fact of life in the music licensing marketplace; indeed, it expressly addresses the assignment of rate-setting cases under the ASCAP and BMI Decrees and modifies pre-existing language in the Copyright Act regarding the admissibility of certain evidence in Decree rate proceedings. The adoption of the MMA thus suggests a consistency with, rather than a rejection of, the rationales underpinning the ASCAP and BMI Decrees.

Moreover, Congressional desire to maintain the existence of the Decrees was made explicit during the proceedings surrounding passage of the MMA. While the bill was pending (and after DOJ's review of the ASCAP/BMI Decrees became public), bipartisan representatives of the House and Senate Judiciary Committees made clear that DOJ should not take steps to terminate or substantially modify the ASCAP and BMI Decrees before consulting with Congress and ensuring that alternative remedies were in place. *See* June 8, 2018 Letter From House and Senate Judiciary Committees to Asst. Attorney General Makan Delrahim Regarding Termination of ASCAP and BMI Consent Decrees (accessible at http://www.nrbmlc.com/wp-content/uploads/2018/06/Letter-to-DOJ-Antitrust-Division-060818.pdf) (stating "it is obvious that the marketplace for licensing public performance rights in musical works has been shaped for decades by these decrees" and "[t]erminating them without a clear alternative framework in place would result in serious disruption in the marketplace, harming creators, copyright owners, licensees, and consumers."). The legislators continued that "destabilization of the music marketplace would undermine our efforts on the Music Modernization Act" and implored DOJ "not to move to terminate the ASCAP and BMI decrees without first having worked with Congress to establish an alternative framework to govern the marketplace for musical works public performance rights in the absence of these decrees." The MMA as enacted ultimately included language requiring DOJ to consult with

Congress before taking any steps to substantially modify or terminate the Decrees. Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, sec 105(c) (2018).

This was followed more recently by correspondence from Senator Lindsay Graham, Chairman of the Senate Judiciary Committee, who wrote to DOJ on February 12, 2019, restating the Judiciary Committee's "concern that moving to terminate or even sunset the ASCAP & BMI consent decrees … could severely disrupt the entire music licensing marketplace" absent the "establish[ment of] an alternative licensing framework … that provides the needed efficiencies of collective licensing, and at the same time protects consumers from anticompetitive abuses in this marketplace." *See* Feb. 12, 2019 Letter from Lindsey Graham to Asst. Attorney General Makan Delrahim Regarding Termination of ASCAP and BMI Consent Decrees (accessible at https://mic-coalition.org/cms/assets/uploads/2019/02/LG-letter-to-Delrahim-Consent-Decrees-02121911-1.pdf).

The circumstances thus plainly warrant that, were DOJ to consider a recommendation that the Decrees be sunset at some future date, such sunset be deferred and conditioned on prior adoption of legislation to address the marketplace circumstances that the Decrees currently address.

B. Data Transparency

No remotely competitive marketplace can exist without the Decrees unless complete, accurate and readily accessible data is made available identifying all rightsholders. And there is no excuse for the lack of such a database, since the information lies exclusively with the rightsowners themselves. PROs, publishers and composers cannot have their cake and eat it too – i.e., a marketplace that remains plagued by information absences, inaccuracies and asymmetries that prevent even those licensees that produce their own (non-"in-the-can") content from engaging

in a comprehensive direct licensing campaign, while being freed from the automatic licensing, court oversight and related licensee protections embodied in the Decrees.

If the Decrees are to be sunset, such sunset should be deferred not only until after a legislative solution is put into place, but it also should be conditioned on the publication by ASCAP, BMI and the remainder of the rightsholder community of composition ownership information, publicly accessible for small and large-scale users alike (and available via API, download, etc.) in a single, searchable (including by audiovisual work title) database reflecting current ownership shares and PRO affiliation status of each share-owner. Such a condition, in order to be meaningful, should not be satisfied unless and until current information for at least 95% of the "active" ASCAP and BMI repertories (i.e., for which any royalties have been earned or paid during the last two years) is available in such a database. And any condition to sunset should also require that ASCAP and BMI stand by the accuracy of such data (e.g., warranting that any music user that obtains licenses relying on the information in the database will be indemnified against any claims arising from inaccuracies in that data).

As important as the availability of this information is to support a more transparent marketplace, it is not a solution for the fundamental antitrust issues created by the aggregation of millions of copyrighted works by ASCAP and BMI. Given the complexity of rights information and the difficulties of identifying ownership (or ownership splits), including at the time when a musical work is being published for the first time, it is vital that the other protections to licensees afforded by the Decrees first be replicated by a legislative solution.

C. DOJ Re-Approval Prior to Sunset

Even if DOJ currently is of the mind to recommend to the courts supervising the Decrees that the Decrees be modified to provide for an ultimate sunset of the Decrees, any such

modification should provide that no sunset can be effective until and unless DOJ conducts a further evaluation some time (e.g., one year) before whatever target sunset date might initially be recommended, and then provides the courts supervising the Decrees with a report reaffirming its recommendation. Such a provision would give DOJ an opportunity to evaluate the state of the marketplace, including any marketplace developments that may occur between now and then which could affect the then-state of competition in the performing rights marketplace—and to provide the Decree courts with up-to-date information upon which the courts could make their public interest evaluation.

QUESTION 4: ***Do differences between the two Consent Decrees adversely affect competition? How?***

The Audiovisual Licensees do not believe that the differences between the two Decrees are competitively significant. However, the Audiovisual Licensees would not oppose amendments aimed at harmonizing the Consent Decrees to the extent the provisions differ, provided the consequences of doing so do not diminish the protections to Audiovisual Licensees under the current Decrees.

QUESTION 5: ***Are there differences between ASCAP/BMI and PROs that are not subject to the Consent Decrees that adversely affect competition?***

The PROs not subject to the Consent Decrees have exhibited anticompetitive behavior that distorts competition and undermines the efficiency of the music licensing market. *See* discussion of the *SESAC* litigation *supra* at pp. 15-16. Providing a window into a world without the Decrees, each of SESAC and GMR has been able to extract supra-competitive rates from licensees that are substantially disproportionate to the rates charged by ASCAP and BMI (despite such PROs having

much smaller catalogs). The fact that PROs with significantly smaller catalogs have been able to extract supra-competitive rates should erase any doubts about ASCAP and BMI's ability to abuse their market power absent the Decrees.

Because SESAC and GMR are unregulated, licensees have resorted to private antitrust litigation against them. After years of fighting, legal efforts by certain licensees to curtail GMR's exercise of market power remain ongoing. *Radio Music License Committee, Inc. v. GMR*, No. 16-cv-06076 (E.D. Pa. Nov. 18, 2016); *Radio Music License Committee, Inc. v. GMR*, No. 2:19-cv-03957 (C.D. Cal. May 6, 2019). And while private litigation against SESAC has demonstrated that SESAC's conduct in the market is at odds with the antitrust laws, such litigation has only secured relief for a segment of the market (through settlements). *See Radio Music License Committee, Inc. v. SESAC, Inc*., 29 F. Supp. 3d, 487 (E.D. Pa. 2014); *Meredith Corp., et al. v. SESAC LLC*, 1 F. Supp. 3d 180 (S.D.N.Y. 2014). These examples help demonstrate the efficiency of the Decrees; in their absence, market participants have had to undertake hugely expensive and lengthy litigations that have only benefited a subset of licensees.

QUESTION 6: ***Are existing antitrust statutes and applicable caselaw sufficient to protect competition in the absence of the Consent Decrees?***

The answer to this question is decidedly "***no.***" The Decrees have been the glue that has enabled the performing rights marketplace to function in a reasonably competitive manner for almost eighty years. They have been a fixture upon which all three branches of Government have relied in making decisions about copyright policy and antitrust issues, and upon which varied industry participants have relied in building and managing their businesses. Removal of the Decrees would result in chaos that would fundamentally challenge all of these constituencies to the profound detriment of Audiovisual Licensees and their viewing customers.

Below is a brief synopsis of how all the above-mentioned constituencies have relied on the existence and perpetuation of the ASCAP and BMI Consent Decrees. These examples help illustrate how the Government itself has determined that the antitrust statutes and applicable caselaw are not sufficient to protect competition in the absence of the Decrees. And this steadfast reliance on the Decrees by all concerned counsels strongly against terminating the Decrees.

I. Judicial Reliance on the Decrees

Even under the Decrees, ASCAP and BMI have been subject to antitrust lawsuits challenging their collective licensing practices. As discussed above, the *Alden-Rochelle* case led to amendments to the ASCAP Decree to address certain anticompetitive behavior. In later cases, courts have relied on the very existence of the ASCAP and BMI Decrees as the principal basis for rejecting antitrust challenges to ASCAP's and BMI's licensing practices. In this sense, the Decrees have insulated ASCAP and BMI from antitrust challenges. Removing the Decrees therefore would upend decades of settled antitrust case law in the public performance licensing arena. We discuss three examples below.

K-91, Inc. v. Gershwin Publishing Corp. In the 1960s, a group of ASCAP-member music publishers sued three broadcast radio stations in Washington State for copyright infringement. The district court found in favor of plaintiffs, rejecting defendants' claims that plaintiffs had unlawfully extended their copyright and violated federal antitrust laws through membership in ASCAP. *Tempo Music, Inc. v. Intern. Good Music, Inc.*, 143 U.S.P.Q. 67 (W.D. Wash. Sept. 15, 1964). In so doing, the district court noted that ASCAP's "practices are guided by the Amended Final Decree of 1950," that "under the terms of the Amended Final Decree . . . ASCAP may not refuse to license prospective users of compositions from its repertory," and that "[i]n case of disputes concerning

license fees, the Amended Final Judgment provides for judicial determination of reasonable fees . . . ." *Id.*

The Ninth Circuit affirmed, holding that "ASCAP cannot be accused of fixing prices because every applicant to ASCAP has a right under the consent decree to invoke the authority of the United States Court for the Southern District of New York to fix a reasonable fee whenever the applicant believes that the price proposed by ASCAP is unreasonable . . . In other words, *so long as ASCAP complies with the decree*, it is not the price fixing authority." *K-91, Inc. v. Gershwin Pub. Corp.*, 372 F.2d 1, 4 (9th Cir. 1967) (emphasis added). "In short," the court found, "as a potential combination in restraint of trade, *ASCAP has been 'disinfected' by the decree*." *Id.* (emphasis added).

BMI v. CBS. Almost a decade after *K-91*, CBS sued ASCAP and BMI for violations of the Sherman Act. The central question of that case was whether the PROs' issuance of blanket licenses constituted price fixing that was *per se* unlawful under the Sherman Act. The district court found that blanket licensing by the PROs did not constitute unlawful price fixing *because of* the availability of direct licenses with ASCAP members and BMI affiliates — availability guaranteed by the Decrees' non-exclusivity provisions. *See Broad. Music, Inc. v. Columbia Broad. Sys., Inc*., 441 US 1, 24 (1979). The Second Circuit disagreed and held the ASCAP and BMI blanket licenses to be *per se* illegal under the Sherman Act. *Id.* at 5-7. On appeal, the Supreme Court reversed after examining the various competitive protections provided by the Decrees. *Id*. at 11-12.

The Supreme Court's reasoning turned largely on the fact that DOJ had already examined ASCAP's and BMI's conduct and had struck an adequate balance with the Decrees that would safeguard against anticompetitive pricing that would have otherwise arisen in a collective licensing scenario. *See id*. at 13 ("But it cannot be ignored that the Federal Executive and Judiciary have

carefully scrutinized ASCAP and the challenged conduct, have imposed restrictions on various of ASCAP's practices, and, by the terms of the decree, stand ready to provide further consideration, supervision, and perhaps invalidation of asserted anticompetitive practices."). The Supreme Court held that "the decree is a fact of economic and legal life in this industry, and the Court of Appeals should not have ignored it completely in analyzing the practice" of blanket licensing by ASCAP and BMI. *Id*.

On remand, the Second Circuit relied on the Decrees in dismissing CBS's claims, noting "one indisputable fact that perhaps overshadows all others": the availability of blanket licenses on application at "rates determined to be reasonable by the court if negotiations fail" meant that CBS could attempt to engage in competitive direct licensing with ASCAP members without risk. *Columbia Broad. Sys., Inc. v. Am. Soc'y of Composers, Authors & Publishers*, 620 F.2d 930, 938 (2d Cir. 1980). The existence of the ASCAP Decree's protections (including the non-exclusivity provisions that enable the possibility of direct licensing) led the court to conclude that CBS had failed to establish "that the existence of the blanket license has restrained competition" and thus could not establish liability under Section 1 of the Sherman Act. *Id.* at 939.

Buffalo Broadcasting v. ASCAP. Shortly after the *BMI v. CBS* case, the Southern District of New York found that ASCAP's and BMI's blanket licensing of public performances of music in syndicated programming on local television stations was an unlawful restraint of trade. The court's decision rested on the premise that, for syndicated programming where music selections had already been made by third parties, alternatives to the blanket license such as direct licenses, source licenses, and per-program licenses were not meaningfully available to local television stations. *See Buffalo Broad. v. Am. Soc'y of Composers, Authors & Publishers,* 744 F.2d 917, 925-26 (2d Cir. 1984). Because the local stations lacked meaningful alternatives to ASCAP and BMI

blanket licenses, the district court held that those licenses represented an unlawful restraint of trade. *Id*. at 926, 928. Based on these findings, the district court ordered an injunction similar to the injunction ordered in *Alden-Rochelle*, this time barring ASCAP, BMI and their members and affiliates from anticompetitive licensing of local television stations. *See Buffalo Broad. Co. v. Am. Soc'y of Composers, Authors & Publishers*, 546 F. Supp. 274, 296 (S.D.N.Y. 1982).

The Second Circuit reversed, relying predominantly on the existence of the ASCAP and BMI Consent Decrees and rate courts. *See Buffalo Broad.*, 744 F.2d at 922-24. For example, it noted that, "even if there were evidence that showed the program license rate to be too 'high,' that price is always subject to downward revision by Judge Conner, who currently supervises the administration of the Amended Final Judgment." *See, e.g.*, *Buffalo Broad.*, 744 F.2d at 927-28. Similarly, the court found that any complaint that the per-program license involved impractically burdensome reporting requirements could be addressed through the rate court. *Id*. In addition, the court distinguished the plight of local television stations from the movie theaters in "*Alden-Rochelle*, where ASCAP's acquisition of *exclusive* licenses for performing rights was held to restrain unlawfully the ability of motion picture exhibitors to obtain music performing rights directly from ASCAP's members." *Id*. at 932 (emphasis in original). For those reasons, the Second Circuit concluded that the ASCAP and BMI Decrees absolved ASCAP and BMI from antitrust liability.

II. Executive Branch Reliance on the Decrees

As the Supreme Court observed in *CBS v. BMI*, the Executive Branch (through the Department of Justice) carefully scrutinized ASCAP's and BMI's activities when implementing the ASCAP and BMI Decrees. It renewed that scrutiny when it supported amendments to those decrees in 1950, 1966, 1994, and 2001. And it again renewed its scrutiny when it declined to

modify the decrees as recently as 2016. Each time, the Government found the Decrees necessary to address competition issues presented by the licensing practices of ASCAP and BMI. Many of DOJ's statements made about the Decrees in connection with the above proceedings are worthy of repeating here, and they apply no less today than they did previously.

In 1994, BMI moved to amend its Consent Decree to add a rate court provision mirroring the one in the 1950 ASCAP Amended Final Judgment. Citing its "extensive consideration" of the issue, DOJ noted it was "reluctant initially to join in imposing a significant administrative and regulatory burden on the Court. For several reasons, however, we have concluded that empowering the Court to resolve licensing disputes . . . is sound enforcement policy and is in the public interest." *United States v. Broad. Music*, Inc., No. 64-cv-3787 (LLS) (S.D.N.Y. June 20, 1994) (Mem. of United States in Response to Mtn. of BMI to Modify the 1966 Final Judgment at 9). DOJ went on to cite the *BMI v. CBS* and *Buffalo Broadcasting* decisions as examples where "courts, including the Supreme Court, when considering the antitrust implications of ASCAP and BMI blanket licensing of music, have cited with apparent approval the rate court provision in the ASCAP judgment as an effective restraint on potential abuse of market power," and noted multiple ways in which the BMI Decree had followed suit. *Id.* at 10-11. In sum, DOJ affirmed in 1994 its continuing belief that "the Judgment provides important protections against supra-competitive pricing of the BMI blanket license for those music users wishing to explore competitive licensing alternatives" and posited that "the opportunity to ask the decree court to determine a reasonable licensing fee may provide additional protection against any attempt by BMI to exercise market power in the pricing of its blanket license." *Id.* at 11-12.

In 2000, DOJ and ASCAP moved jointly to amend the ASCAP Decree. In its memorandum in support of the proposed amendment, DOJ noted that "at the time the AFJ was entered, ASCAP

had, *and it continues to have*, market power over most music users. This is especially true of music users that are unable to anticipate, track, or otherwise control their performances . . . ." U.S. Mem. in Support of AFJ2 at 14 (emphasis added). Although "the specific anticompetitive conduct by ASCAP, and the specific provisions contained in the Final Judgments to remedy that conduct, have varied over the years . . . the competitive concerns that ASCAP's conduct has raised, and the basic approach of the consent decree to remedying those concerns, have been consistent." *Id*. The amendment kept the core aspects of the preceding decrees: non-exclusivity, nondiscrimination, license on application, availability of competitive alternatives to the blanket license, and a rate court procedure in the event ASCAP and licensees cannot agree on license fees.

These most recent amendments to the ASCAP and BMI Decrees occurred *after* the Antitrust Division adopted the practice of including "sunset" provisions in its antitrust decrees, yet neither includes such provisions. Indeed, the Antitrust Division recently confirmed the continued need for the ASCAP and BMI Decrees in August 2016 when, after years of review and investigation, it concluded that "the current system has well served music creators and music users for decades *and should remain intact*." *See* United States Dept. of Justice, *Statement of the Department of Justice on the Closing of the Antitrust Division's Review of the ACAP and BMI Consent Decrees* (Aug. 4, 2016), at 2 (emphasis added).

III. Legislative Reliance on the Decrees

The ASCAP and BMI Decrees have been in place at the time of all the major amendments to the Copyright Act in the past century. None of the copyright legislation that has been adopted has acted to replace or eliminate the Decrees. Indeed, to the contrary, in some cases, including most recently in connection with the MMA, the legislation and surrounding commentary have embraced the ASCAP and BMI Decrees.

The Copyright Act of 1976 for the first time introduced the definition of "performing rights society," listing ASCAP and BMI as examples. 17 U.S.C. § 101. When Congress established a public performance right in sound recordings in 1995, it adopted language in Section 114(i) that "[l]icense fees payable for the public performance of sound recordings under section 106(6) shall not be taken into account in any administrative, judicial, or other governmental proceeding to set or adjust the royalties payable to copyright owners of musical works for the public performance of their works." This language came at the request of ASCAP and BMI, which had voiced concerns that sound recording public performance rates would be established at levels below the rates ASCAP and BMI received for their public performance licenses.

In 1998, when considering the Sonny Bono Copyright Term Extension Act and Fairness in Music Licensing Act, Congress understood that "there are two major PROs who control virtually all licensing of the performing right in nondramatic music" and that "[b]oth . . . operate under antitrust consent decrees that establish restrictions and conditions on their music licensing activities." Dorothy Schrader, Congressional Research Service, "Copyright Term Extension and Music Licensing: Analysis of Sonny Bono Copyright Term Extension Act and Fairness in Music Licensing Act," CRS Report for Congress 98-904A, P.L. 105-298, at 8 (1998). The Fairness in Music Licensing Act introduced language that became Section 513, which establishes a modified rate-setting mechanism under the Decrees for small-business owners that own seven or fewer establishments in which musical works are publicly performed. Section 513 expressly applies to "any performing rights society subject to a consent decree which provides for the determination of reasonable license rates or fees to be charged by the performing rights society."

And just last year, the Music Modernization Act was passed into law, reflecting the continued reliance by Congress on the Decrees by including provisions that changed the

administration of and evidentiary rules applicable to rate court cases under the ASCAP and BMI Decrees. And the explicit language quoted *supra* at 27-29 from the House and Senate Judiciary Committees evidences without doubt the views of those Committees regarding the importance of perpetuating the Decrees.

IV. Industry Reliance on the Decrees

Licensees have relied on various protections of the ASCAP and BMI Decrees for decades. Innumerable Consent Decree license applications have been submitted to each of ASCAP and BMI, allowing prospective licensees immediate, indemnified access to the ASCAP and BMI repertories (or, for those with expiring licenses, continued indemnified access) while licensees and the PROs negotiate license terms free from holdup pressure. This has allowed new consumer products and services harnessing the latest technological innovations to emerge. Without the ASCAP and BMI Decrees, these now-pervasive consumer offerings may have been delayed or may even have failed to come into existence.

Some licensees have relied on the Decrees to preserve the availability of competitive alternatives to blanket licenses from ASCAP or BMI. For example, the local television industry fought for the availability of per-program licenses as an alternative to a blanket license when local stations only required PRO licenses covering some of the programs they broadcast. *United States v. Am. Soc'y of Composers, Authors & Publishers (Application of Buffalo Broadcasting Co., Inc., et al.)*, No. Civ. 13-95 (WCC), 1993 WL 60687 (S.D.N.Y. Mar. 1, 1993). And background/foreground music services like Muzak and DMX, with DOJ support, relied on the Decrees to allow for adjustable fee blanket licenses ("AFBLs") that permitted those licensees to enter into competitive direct licenses with ASCAP members and BMI affiliates while relying on ASCAP and BMI for non-directly licensed public performance rights, without double payment.

United States v. Broad. Music, Inc. (Application of AEI Music Network, Inc., et al.), No. 64-cv-3787 (LLS), 2000 WL 280034 (S.D.N.Y. Mar. 15, 2000); *In re THP Capstar Acquisition Corp*., 756 F. Supp. 2d 516 (S.D.N.Y. 2010); *Broad. Music, Inc. v. DMX Inc*., No. 08-cv-00216 (LLS) (S.D.N.Y. Jan. 10, 2008). As noted above, the Decrees' protection of these competitive alternatives to the traditional blanket license helps to mitigate ASCAP's and BMI's market power, even with respect to users including many of the Audiovisual Licensees who do not, or cannot, engage in meaningful direct licensing.

Lastly, but no less importantly, many licensees have relied on the Decrees to prohibit price gouging or discriminatory pricing by ASCAP and BMI. In just one example, MobiTV, an emerging company that developed technology to facilitate mobile television streaming, endured the costs of litigating a rate court proceeding initiated by ASCAP because it felt ASCAP's fee demands were excessive and discriminatory against new technologies. *MobiTV, Inc*., 712 F. Supp. 2d 206. The rate court agreed and, relying for benchmarks on ASCAP's licenses covering distribution of the same content via cable and satellite, set a fee equivalent to *less than two percent* of ASCAP's demanded rate. *Id.* at 255. Without the Decrees, MobiTV would have had a "choice" of capitulating to ASCAP's demands or shuttering its business.

In circumstances like this, where industries spanning the entire spectrum of media distribution companies have relied for decades on the Decrees, as have the three branches of Government, terminating or sunsetting the Decrees is simply unwarranted — and, because it would not be in the public interest, unjustifiable. We hope these comments from the Audiovisual Licensees help the DOJ again reach that conclusion.