Before the
Department of Justice
Antitrust Division
Washington, D.C.
August 9, 2019

In re:

Request for Comments
Review of ASCAP and BMI Consent Decrees

Comments of Internet Association

Internet Association ("IA") appreciates the opportunity to comment on the Antitrust Division's review of the consent decrees in *United States v. ASCAP*, 41 Civ. 1395 (S.D.N.Y.), and *United States v. BMI*, 64 Civ. 3787 (S.D.N.Y.) ("Decrees"). IA represents over 40 of the world's leading internet companies.[1] IA's mission is to foster innovation, promote economic growth, and empower people through the free and open internet. These companies use musical works in a variety of different ways, have all experienced the existing challenges in this marketplace, and all share the belief that the consent decree should not be reopened.

The Department of Justice should neither remove nor weaken the Decrees until Congress creates a suitable framework to replace them. In the Music Modernization Act ("MMA"), Congress brought a vast array of stakeholders together to create a system to efficiently license music and pay songwriters while avoiding anticompetitive tendencies of collective licensing. Congress should be permitted to undergo a similar process with public performance licensing without the looming threat of Department action. The Department would best serve the public by concluding its review and instead encouraging and helping Congress to build a consensus approach.

[1] "Our Members," *Internet Association,* accessed July 24, 2019, https://internetassociation.org/our-members/

I. Background

The importance of the decrees and information about the music marketplace was well-established when the Department closed its two-year review in 2016. It determined that the consent decree system continued to serve its purpose for all affected parties and declined to reopen the Decrees. As explained in detail in the record created by that proceeding, the market for composition rights in the United States is highly fragmented among thousands of individual copyright holders. The venues, broadcasters, and the full-catalog digital services that have become the primary means of music distribution would face an impossible licensing task, but for the existence of performing rights organizations ("PROs") like ASCAP and BMI. These PROs play a critical administrative role in managing licenses, collecting and distributing royalties, and otherwise managing the transaction costs between venues, broadcasters, and digital distributors on the one hand and songwriters and publishers on the other.

However, the collective action among individual copyright holders that is required to enable ASCAP and BMI to perform these administrative functions creates an inherent risk of anticompetitive behavior in setting license prices. By aggregating the rights of thousands of individual competitors, PROs have tremendous power and incentive to increase prices above competitive rates.

For the last 75 years, the Decrees have provided critical functions in maintaining a healthy market. These core functions of the Decrees have protected consumers and served the public interest by requiring compulsory blanket licenses, enabling a clearinghouse for licensing and royalty collection, and preventing coordination among publishers. Any modifications to the Decrees would create broad impacts on licensees and decrease royalty payments to songwriters. Such modifications should only follow Congressional action to codify the crucial functions of the Decrees.

The Department has a responsibility to protect consumers from anticompetitive coordination among competitors. The removal of the Decrees before Congressional action would inevitably result in increased coordination and higher prices for licensees and consumers. Given that the

Department recently concluded a similar review (and concluded to leave the Decrees unmodified) and given the chaos that weakening the Decrees would create, a simple request for comments is insufficient justification for agency action at this time. While acknowledging the insufficiency of this process, IA considers it important to respond to the Department's questions. Accordingly, the following sections address the specific questions that the Department of Justice has posed in its requests for public comment.

II. Do the Decrees continue to serve important competitive purposes today?

Yes. Collective licensing organizations have inherent anticompetitive tendencies, and if left unchecked, their coordinated activities would directly harm consumers and the public interest. That is why—to take just one example—the U.S. District Court for the Southern District of New York found, in 2014, that "the evidence at trial revealed troubling coordination between Sony, UMPG, and ASCAP, which implicates a core antitrust concern underlying" the Decrees.[2] Similarly, just three years ago, the Department investigated ASCAP for "repeatedly violat[ing] core provisions of its consent decree" by "obtain[ing] exclusive licensing right from dozens of members in the face of express and unambiguous prohibitions on such exclusivity" in the consent decree.[3] ASCAP agreed to pay the United States $1.75 million.

The Decrees provide a necessary bulwark against these anticompetitive forces, because purchasers of public performance rights cannot counter them by themselves. Specifically:

- **The Decrees prevent price-raising coordination among publishers by prohibiting, *inter alia*, partial withdrawals.** If the Department removes the Decrees without also suing to prevent the coordination inherent in the collective structure of ASCAP and BMI, the Department risks signaling that PROs are immune from antitrust litigation for their coordination. Publishers will increase prices while escaping the healthy pressures of the free market. They will be able to engage in hold-up tactics that increase overall transaction costs, reduce catalog transparency, and partially and selectively withdraw from PROs with regard to some services in order to increase license fees above fair

[2] United States v. Am. Soc'y of Composers, Authors, & Publishers (In re Pandora Media, Inc.), 12 Civ. 8035 (DLC) (S.D.N.Y. Mar. 14, 2014).
[3] United States v. Am. Soc'y of Composers, Authors, & Publishers, Supplemental to Case No. 41-1395 (DLC) (S.D.N.Y. May 12, 2016).

market value, all without fear of Department intervention. These tactics prevent licensees from being able to know what they are licensing, make informed decisions about the music they play, or see the meaningful downward pressure on price that a healthy market would bring. The publisher coordination predictable outside of the Decrees will raise prices and reduce options for consumers.

- **The Decrees moderate liability by offering a compulsory blanket license upon request.** The Decrees require that the PROs make a blanket license available to *all* users "upon request," even if all pertinent deal terms have yet to be worked out. This license-upon-request is crucial to ensure that PROs cannot hold up a negotiation in order to extract supracompetitive licensing fees from users, all while wielding the threat of an infringement action—and injunctive relief and statutory damages—to drive up its rates. Further compounding this imbalance in licensee-licensor negotiations is the fact that music publishers and PROs have declined to produce effective, usable, or comprehensive public catalogs that licensees can rely upon in making licensing and distribution decisions. The blanket license prevents this paucity of publisher data from creating significant liability costs. The compulsory blanket license established by the Decrees is crucial to preventing unnecessary liability and cost increases to consumers.

- **The Decrees enable efficient licensing and royalty distribution.** The Decrees permit ASCAP and BMI to perform the valuable functions of licensing and royalty administration *under constraints that limit anticompetitive behavior*. Without a regulated entity to administer licenses, broadcasters, digital distributors, and venues across America, including bars, restaurants, wineries, and concert halls, would each have to license music from each publisher or songwriter whose music may possibly be played on their service or in their venue—a task that proves all the more burdensome as, with such incomplete data that makes it impossible to determine which song is owned by which licensor, small licensees must indeed take out licenses from every conceivable licensor. Similarly, each of those rights holders would be tasked with collecting their own royalties from those thousands of licensees. This administrative nightmare would reduce payments to songwriters and would certainly increase costs to consumers. A limited number of entities that can act as clearinghouses for those administrative functions is crucial to consumer welfare and the continued success of the music industry.

A federal framework that continues a compulsory blanket license, enables a clearinghouse for licensing and royalty collection, and prevents coordination and supra-competitive price-raising

among publishers is key to driving the music industry into the digital age. The Decrees provide that framework, and, as discussed immediately above, removing their protections would harm songwriters,[4] licensees, and consumers of all stripes by leading to monopoly rents, depressed outputs, and decreased diversity and consumer choice.

The Department, however, has suggested that "changes in the music industry" in the "over seventy-five years" that the Decrees have been in effect are what necessitate termination or substantial weakening of the Decrees.[5] This fails to appreciate two crucial and related points. First, it is not as though the Decrees exist today unmodified from their original form in 1941. The Department has repeatedly reevaluated the Decrees and amended them where needed to account for changes in industry practice, most recently in 2001.[6] Second, and most importantly, *in every single case*, the amendments to the Decrees have *strengthened* their protections for licensees, not weakened them.

Indeed, in 2001, the amendments to the ASCAP consent decree were intended to *explicitly extend protections to internet-based services*. For instance, although the ASCAP decree required ASCAP to provide "through-to-the-audience" licenses,[7] in the 1980s, ASCAP resisted efforts by

[4] For example, the Decrees have been interpreted by courts to bar "partial withdrawal" of so-called "new media" rights. Music publishers and PROs have repeatedly urged the Department to amend the Decrees to allow such withdrawal. But the Songwriters Guild of America has explained that it is in "vehement disagreement" with publishers and PROs about this issue, explaining that it would "result in catastrophic losses to songwriters and composers due to obfuscation and oversight inability and failure." See "Response of the Songwriters Guild of America, Inc. To the Solicitation of Public Comments by the United States Department of Justice Regarding the Question of the Continued Efficacy of the Consent Decrees to which the Performing Rights Societies Known as American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI") Remain Subject," Songwriters Guild of America, Inc. for Submission to Chief, Litigation III Section Antitrust Division U.S. Department of Justice, August 6, 2014, accessed July 24, 2019, https://www.justice.gov/atr/page/file/1079026/download

[5] "Department of Justice Opens Review of ASCAP and BMI Consent Decrees," Department of Justice Office of Public Affairs, June 5, 2019, accessed July 24, 2019, https://www.justice.gov/opa/pr/department-justice-opens-review-ascap-and-bmi-consent-decrees

[6] *See, e.g.*, Mem. of the U.S. in Support of the Joint Motion to Enter Second Amended Final Judgment 9-15 (Sept. 4, 2000) (describing history of amendments to ASCAP decree), *available at* https://www.justice.gov/atr/file/851446/download [hereinafter "U.S. AFJ2 Mem."].

[7] As the Department has explained, "[t]hrough-to-the-audience licenses allow more licensing decisions to be made by the entities that control the musical content of programs or other broadcasts, and thus are in the best position to benefit from potential competition among PROs or individual rights holders." U.S. AFJ2 Mem. 21; see also *In re Application of MobiTV, Inc.*, 712 F. Supp. 2d 206, 229-30 (S.D.N.Y. 2010) (extending this reasoning to internet and broadband radio and TV service).

what were then considered "new media" services—cable networks—to obtain such licenses. This led to protracted and costly litigation in the rate court. Although the cable networks eventually prevailed,[8] the Department observed that "the through-to-the-audience provisions in the existing AFJ do not expressly apply to other developing industries, such as the Internet, where through-to-the-audience licenses could have significant competitive benefits."[9] Accordingly, "[t]o ensure that such licenses are made available to users in these industries, and to avoid further litigation over the scope of the decree," the Department insisted the decree be amended to clarify "that the through-to-the-audience requirement applies to on-line transmitters, as well as to any other as yet unanticipated industry that transmits programs in a manner similar to television and radio broadcasters."[10] Similarly, the Department made clear that the "per-program" licensing option should also be made available to internet services as well.[11]

In the years since those 2001 amendments, the relevant changes in the industry call for the Decrees need to be further strengthened, not weakened or eliminated. Among other things, technological progress has made it easier than ever to create new music and, as a result, internet services need to be able to clear more and more songs. Direct licensing is a poor solution to the anticompetitive nature of PROs—indeed, a number of IA members have learned this lesson firsthand. Major publishers refuse to directly license rights at the source on a through-to-the-audience basis, with the intent of forcing the licensing obligation onto internet platforms; the platforms, of course, are thus effectively forced to take blanket licenses from the PROs, which have then employed hold-up tactics against the platforms. In contrast, there have been *no* developments in the industry that support terminating or sunsetting the Decrees.

III. Would termination of the Decrees serve the public interest?

No. If the Department terminates the Decrees, it will be thwarting an entire legislative

[8] See *United States v. ASCAP (In re Application of Turner Broadcasting System, Inc.)*, 782 F.Supp. 778 (S.D.N.Y.1991), *aff'd*, 956 F.2d 21 (2d Cir.1992).
[9] U.S. AFJ2 Mem. at 22.
[10] *Id*.
[11] *Id.* In that filing, the Department suggested that technological developments may in the future "erode many of the justifications for collective licensing of performance rights by PROs." *Id.* at 9. n.10. But, as noted, just three years ago the Department examined those developments and determined that the Decrees remain vital and declined to modify the Decrees to allow publishers to partially withdraw new-media rights.

architecture and reintroducing the same problems into the music marketplace that Congress has solved in the MMA. As the recent committee report accompanying the MMA clearly states:

> There is serious concern that terminating the ASCAP and BMI decrees without a clear alternative framework in place would result in serious disruption in the marketplace, harming creators, copyright owners, licensees, and consumers. In fact, sections of the [MMA] assume the continued existence of the decrees . . . . Enacting the [MMA] only to see the Department of Justice move forward with seeking termination of the decrees without a workable alternative framework could displace the [MMA]'s improvements to the marketplace with new questions and uncertainties for songwriters and copyright owners, licensees and consumers.

Removing or significantly weakening the Decrees before Congress has created a suitable replacement would ignore the inherent risks of collective action among competitors, the continuing need for oversight of the licensing regime, and the disruption to the music industry.

Congress has recently seen great success in the MMA, a bill that brought stakeholders from all sectors of the music industry together to create a mechanical licensing framework that ensured a compulsory blanket license, established a clearinghouse for licensing and royalty management, and tempered the inherent anticompetitive nature of collective licensing.

The MMA should serve as a model for codification of the core functions of the Decrees, and any significant changes to the Decrees should be preceded by Congressional action. Indeed, *that was Congress's intent* in enacting Section 105 of the MMA, which prevents the Department from unilaterally seeking termination of the Decrees. As the committee report accompanying the MMA makes abundantly clear, the amendments to the copyright laws made by the MMA were *designed to work in tandem with the Decrees*.

IV. Are existing antitrust statutes and applicable case law sufficient to protect competition in the absence of the Decrees?

No. For the reasons given above,[12] there is no reason to believe that ASCAP and BMI will not simply return to their anticompetitive ways, whatever the "antitrust statutes and applicable case law" say on paper. Without the Decrees in place to discipline ASCAP and BMI, they will face substantial antitrust litigation. And, in the end, every court will conclude the same thing: left unchecked, ASCAP and BMI violate the antitrust laws and they either need to remain subject to the Decrees or dissolve. The latter is untenable.

Private actors with the resources and ability to fund private antitrust litigation will be forced to file individual lawsuits against ASCAP and BMI when such anticompetitive conduct occurs. If successful, those actors will get the benefit of whatever judgment or private settlement they can obtain. But the result will be a patchwork of protection that leaves the smallest licensees exposed to the full force of ASCAP and BMI's anticompetitive behavior.

This exact dynamic is playing out with respect to the PROs that are not subject to the Decrees. SESAC was sued by the radio and television industry, and entered into private settlements with both; no other group of licensees get the benefits of those protections. Similarly, Global Music Rights has been sued by the radio industry but no other as of yet.

V. Do differences between the two Decrees adversely affect competition?

Potentially. Although the Department has taken the position that the terms of the Decrees should be interpreted consistently, the Decrees themselves are written in differing terms. As a result, BMI has, for instance, taken the position that certain restrictions that apply to ASCAP do not apply to it, such as the prohibition on licensing non-performance rights.[13]

---

[12] *See supra* p. 2 (discussing the Department's investigation of ASCAP for "repeatedly violat[ing] core provisions of its consent decree" by "obtain[ing] exclusive licensing right from dozens of members in the face of express and unambiguous prohibitions on such exclusivity" and the subsequent $1.75 million fine).

[13] Comments of Broadcast Music Inc. on Copyright Office Music Licensing Study 6 (2014), *available at* https://www.copyright.gov/policy/musiclicensingstudy/comments/Docket2014_3/BMI_MLS_2014.pdf.

These differences in the Decrees could potentially affect competition to the extent that one decree is deemed to have weaker constraints on the competitive issues presented by the PRO it governs. As discussed below, an ideal solution would be a single blanket license that covers the entire market for public performance rights, subject of course to the kind of antitrust oversight that the Decrees provide.

VI. Are there differences between ASCAP/BMI and PROs that are not subject to the Decrees that adversely affect competition?

Any PRO with a repertory of works that music users, like IA's members, cannot practically avoid playing creates a substantial risk of anticompetitive licensing behavior. All such PROs should be subject to constraints like those the Decrees provide.

Without the Decrees, or other similar court-ordered or contractual protections, PROs are not only permitted to create these indispensable bundles, but also can engage in other behaviors that insulate them from any possible competitive constraints. For example, a PRO who is not subject to consent decree-like limitations can enter into exclusive licenses with its affiliates and can obscure the contents of its repertory so no one can reliably know what is in it. SESAC employed those tactics before it got sued by both the radio and TV industries and ended up being compelled to settle those lawsuits by agreeing to abide by terms similar to the Decrees for the next twenty years.[14] New PRO Global Music Rights is currently embroiled in similar litigation.[15]

In short, the solution to the coordination inherent in collective licensing is not to deregulate ASCAP and BMI, but rather to ensure that there are appropriate checks on the coordination of publishers core to all PROs.

---

[14] "Sesac Pays $3.5m To Settle With Commercial Radio Body RMLC,"*Music Business Worldwide*, July 24, 2015, accessed July 24, 2019, https://www.musicbusinessworldwide.com/sesac-pays-3-5m-to-settle-with-commercial-radio-body-rmlc/

[15] "In New Antitrust Case, RMLC Accuses GMR Of A 'Shakedown,'" *InsideRadio,* June 6, 2019, accessed July 24, 2019, http://www.insideradio.com/free/in-new-antitrust-case-rmlc-accuses-gmr-of-a-shakedown/article_8078d894-8826-11e9-b195-87d330f591d5.html

VII. What, if any, modifications to the Decrees would enhance competition and efficiency?

As explained, the Decrees should remain intact until Congress acts. If the Department chooses to modify the Decrees, those changes should work to increase protections for licensees, as the Department has done with every previous modification. Only increased protection from anticompetitive behavior would enhance competition.

* * * * *

IA thanks the Department for taking seriously its role in ensuring healthy markets that serve the interests of consumers. IA companies and other members of the music industry have learned through the passage and implementation of the MMA that Congress has the desire and capability to build effective licensing frameworks that benefit songwriters, distributors, and the public interest. Unilateral changes to the Decrees by the Department would signal mistrust of Congress and harm the public interest. IA trusts that the Department's review will reveal, as it always has before, that the Decrees perform invaluable functions in maintaining a healthy market for music and that the wisest course of action is to maintain those functions—at least until Congress establishes a suitable replacement.