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Hon. Makan Delrahim
Assistant Attorney General
Antitrust Division, Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530

Re: US DOJ Review of the ASCAP & BMI Consent Decrees

Dear Assistant Attorney General Delrahim:

I write in response to the Department's request for public comments relevant to whether the ASCAP and BMI Consent Decrees continue to protect competition. I have represented songwriters, music publishers, record labels and other music industry stakeholders for over 15 years. I strongly encourage the Department not to "sunset" or terminate the Consent Decrees with ASCAP and BMI. In direct response to the questions set out by the Department:

- **The Consent Decrees continue to serve important competitive purposes today.**
- **Modifying the Consent Decrees in certain ways would enhance competition and efficiency.**
- **Termination of the Consent Decrees would not serve the public interest.**
- **Competition is adversely affected absent implementation of the terms of ASCAP's 2AFJ within BMI's Consent Decree.**
- **ASCAP's and BMI's "licenses in effect" rules adversely affect competition.**

- **There are insufficient safeguards to protect competition and songwriters/publishers in the absence of Consent Decrees**.

Filed with this letter are various filings from the 2018 arbitration brought by a former ASCAP songwriter/publisher against ASCAP (McAnally, et. al v. ASCAP) (the "McAnally Case"), which concluded earlier this year. The crux of the dispute revolved around ASCAP's "phasing out" of radio airplay bonuses for songs it continued to license several years after the ASCAP member resigned from ASCAP and continued to pay to his co-writers. The dispute was heard by arbitrators self-described as "three individuals who cumulatively have more than ninety years of entertainment law experience." The arbitration panel were the first objective individuals disconnected from ASCAP's inner workings to review the case.[1] These individuals produced five pages of commentary, acknowledging that such commentary exceeded their limited mandate, because they felt "compelled" to add, among other things, that:

- The testimony provided by ASCAP's executives was not credible;
- ASCAP operates with an "utter lack of transparency";
- To the extent rules are available, they are wrought with ambiguity and their implementation by ASCAP does not fairly reflect the value of performances (in the case of resigned members); and
- Rules that ASCAP claims exist actually do not exist and/or were never disclosed in any form, to any ASCAP member or, it seems, to ASCAP officers/employees.

One of my observations during the course of this case was ASCAP's conduct immediately following previous disputes with its members. Whenever ASCAP came out on the "losing" side, ASCAP would promptly amend its governing documents to prevent the same outcome in future proceedings, further narrowing the scope of review of any arbitration panel. For example, in 1985, an ASCAP member sought to have a rule declared unreasonable, arbitrary and/or discriminatory, which, at the time, was fully within the purview of an arbitral panel (then-Article XIV §6B). Later, when an arbitral panel ruled against ASCAP and voided the rule in question, the ASCAP Board of Directors followed that ruling by stripping future arbitration panels of any authority whatsoever to void any rules or find that rules are discriminatory, unreasonable, improper or unlawful, or that any rules are unfair, inequitable or unjust. As it stands today, the sole authority any arbitral panel has, per ASCAP's governing documents, is to affirm, modify or reverse an ASCAP appointed Board of Review decision based solely on a technical reading of the ASCAP appointed Board of Review's interpretation of ASCAP's rules. The ASCAP appointed Board of Review is also specifically prohibited from reviewing whether ASCAP's rules are unreasonable, improper, unlawful, discriminatory, unfair, inequitable or unjust. Yet, ASCAP's own governing documents promise – *repeatedly* – that payments to its members will be done in a "fair and nondiscriminatory manner." If a reviewing body cannot hold ASCAP to its own "fair and nondiscriminatory" standards, then it is a ruse specifically created to fulfill the goals of the ASCAP Consent Decree, ultimately thwarting those purposes as a cynical attempt to placate the Department of Justice while simultaneously flouting the Department's intentions.

The Panel in the McAnally Case cautioned that ASCAP "should take no joy in this Award, because of the inequitable manner in which it treated [the resigned member]…." If the Board of

[1] As required by ASCAP's internal rules, a Member must first file a "protest" to be heard by an internal "Board of Review."

Review and arbitral panel are the sole sources of recourse for ASCAP's members, yet those sources have no authority to actually review such actions, what's a member to do? Auditing ASCAP is not allowed by their rules and litigation is circumvented through the Board of Review process.

1. **The Consent Decrees are needed to protect songwriters and competition, though certain changes should be made to update the purpose behind the Consent Decrees**.

One of the arguments ASCAP repeatedly lodged in the McAnally Case was that a substantial portion of the Second Amended Final Judgment is inoperative solely because the Department of Justice never implemented the same amendments as to BMI. *See* ASCAP Letter Reply dated Feb. 21, 2019 at ¶ 2 (noting that "…AFJ2 itself has no operative distribution rules…). The first step in Consent Decree reform should be implementing those very changes, previously negotiated with ASCAP in 2001, at BMI, whose Consent Decree has not been updated since 1994. Those distribution rules protect members at BMI and ASCAP and ensure that they are paid equally and fairly. ASCAP claims to represent "more than 660,000 members" (*see* https://www.ascap.com/press/2018/04/04-19-financials-2017) and BMI asserts that it represents "more than 900,000 copyright owners" (*see* https://www.bmi.com/faq/category/about). It is clear that between ASCAP and BMI, regulation continues to be necessary in light of the massive market share they collectively represent.[2]

Further, as the three arbitrators noted, ASCAP's rules are anything but transparent, and are extraordinarily convoluted. Moreover, members at ASCAP and BMI are not permitted to audit the societies to ensure proper payment of licensing fees. Somewhere along the way, it seems as though the two societies have forgotten that they work for the songwriters and publishers – not the other way around. Yet, as we sit here today, as evidenced by the recent ASCAP dispute, it is operated in a mafia-style manner. Its members have no legitimate and unbiased way to challenge ASCAP's rules. The internal Board of Review was found to be "powerless" to make the right decision. *See* Final Award at ¶ 21. In short, ASCAP's Management has carefully crafted rules to utterly strip away any reviewing body's right to review ASCAP's actions on the basis of fairness or equity. Given that a member is prohibited from seeking any sort of judicial review of such decisions, one is left to ask – how can a member at ASCAP or BMI ever be assured that he/she is being treated fairly, or that that rules promulgated by each respective Board of Directors are implemented in a fair and non-discriminatory manner?[3] The Department of Justice must maintain its oversight powers with respect to ASCAP and BMI and implement further changes to protect the songwriter/publisher members who are currently powerless. Certainly, based on this concern alone, the Department of Justice should absolutely not terminate the Consent Decrees as they pertain to ASCAP and BMI.

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[2] By contrast, the two societies that are not subject to the Consent Decrees only represent approximately 15% of the market share. *See* https://variety.com/2017/music/news/sesac-radio-music-licensing-committee-price-war-1202511443/.

[3] The very fact that members cannot seek judicial intervention to hold ASCAP/BMI accountable is proof that there are insufficient protections in the absent of Consent Decrees.

2. **Slight modifications could enhance competition**.

One way in which the Consent Decrees could be modified to help competition and protect songwriters is to do away with the "licenses-in-effect" rules that have been adopted at ASCAP and BMI. These rules provide, in summary, that the society will maintain the right to license a songwriter's works, even after the songwriter resigns from the society, for so long as a license remains in place with a third party that was in existence at the time of the member's resignation. For example, if ASCAP enters into a five-year license with the RMLC in 2019 (lasting through 2023), any member who chooses to resign will have his/her works held hostage by ASCAP until the end of 2023, with respect to licenses with the RMLC. This severely restricts a member's ability to take his/her songs to another society (or license directly[4]) and prohibits mobility from one society to another. The policies adopted by ASCAP and BMI, in this regard, trap writers economically and impede their mobility among the various societies. That, in and of itself, is anti-competitive behavior directly targeted by ASCAP and BMI to prevent its biggest writers from leaving and taking their songs with them to another society.

With regard to the underlying dispute relating to the enclosed documents, the Panel stated that they would have ruled "overwhelmingly" in favor of the resigned ASCAP member had they not been limited in their jurisdiction (via rules drafted solely by ASCAP). They noted that they were "troubled by the unavailability of information" to ASCAP members as well as by ASCAP's "utter lack of transparency." The Panel quoted ASCAP's own words that "because the rules are complex, however, it is not possible – nor does ASCAP endeavor – to set forth…the manner in which those rules are implemented in practice" in noting that they believed this statement to be "the single greatest understatement contained in the hundreds of pages that constitute the record for this matter. Further, the Panel found it "impossible to reconcile this to ASCAP's mission statement that these rules are disclosed fully and clearly" adding, instead that the "rules were not disclosed at all."

As one who works tirelessly to protect the rights of copyright holders, I implore the Department of Justice not only to maintain its oversight of ASCAP and BMI, but also to effectuate changes to the Consent Decrees to ensure that the copyright holders are the protected parties – not the societies. As it stands, the societies are using the Consent Decrees (or lack of implementation of the same) as a sword to gain a competitive advantage, all at the expense of and on the backs of songwriters.

Should you have any follow up questions, I am more than happy to make myself available to your team as you review the pertinent materials.

Sincerely,

Jason L. Turner

Enclosures

[4] It is true that licenses issued by ASCAP and BMI are non-exclusive, but it is illusory for the societies to state that its members are permitted to "attempt to" license directly. The reality is that if a third party already has a license with the society, that third party will not have any incentive to license works directly with the same society's individual songwriter(s).