League of American Orchestras

Advancing the Orchestral Experience for All

August 9, 2019

Via Electronic Mail
Owen Kendler
Chief, Media, Entertainment, and Professional Services Section
Antitrust Division
U.S. Department of Justice
450 5th Street NW, Suite 4000
Washington, DC 20530-0001

Re: Antitrust Division Review of ASCAP and BMI Consent Decrees

Dear Mr. Kendler:

The organization I represent, the League of American Orchestras ("The League"), is the not-for-profit service organization for the field of symphony orchestras. Founded in 1942 and chartered by Congress in 1962, the League has a diverse membership of orchestras across North America and it links a national network of thousands of instrumentalists, conductors, managers and administrators, board members, volunteers, and business partners. There are more than 1,600 nonprofit orchestras in all 50 states, serving virtually every community, most with annual budgets of under $300,000. As members of the 501(c)(3) charitable sector, orchestras depend upon private philanthropy and civic support to fuel programs that serve community needs.

The League has been following with great interest the Department of Justice review of the ASCAP and BMI consent decrees (the "Decrees"). Orchestras are usually responsible for the payment of the public performance license fees associated with the compositions embodied in the works they perform. For decades, they have relied on the protections provided by the ASCAP and BMI consent decrees (particularly the license-upon-request and reasonable fee/rate oversight provisions thereof) in securing licenses from ASCAP and BMI.

The League endorses fully the Comments submitted by Cincinnati Symphony Orchestra ("CSO"), on behalf of itself and thirteen additional orchestra groups, a copy of which is attached hereto, in response to the DOJ Antitrust Division's request for public comment regarding the Decrees. The outcome of the DOJ's review of the Decrees will have a significant impact on nonprofit orchestras throughout the country that pay royalties to ASCAP and BMI. As organizations that encompass both content creators and music presenters, we urge you to keep the Decrees in place. For the reasons stated in the CSO

letter attached, the Decrees remain as vital today as they were when they were initially put into place.

We understand that the DOJ has considered the possibility of recommending that the Decrees be sunset at some future date. To be clear, the League does not believe that any such sunset is appropriate or warranted. At a minimum, the Decrees should not be terminated (or sunset) until after Congress enacts legislation that provides for protections to licensees no less comprehensive than those embodied in the Decrees today. We note that Congress shares our concern that the DOJ not act precipitously in eliminating the Decrees. 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 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 Regarding Termination of ASCAP and BMI Consent Decrees, stating: "it is obvious that the marketplace for licensing public performance rights in musical works has been shaped for decades by these decrees" and that "[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. *See* Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, sec 105(c) (2018).

This correspondence was followed more recently by a letter 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."

In sum, the public interest would not be served by substantially modifying or terminating the Decrees, at least until after such time as legislation is in place that provides for licensee protections no less comprehensive than those embodied in the Decrees today.

Respectfully submitted,

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