



August 8, 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:

I am the President of the Cincinnati Symphony Orchestra (“CSO”) and respectfully submit these comments, on behalf of CSO and the other American orchestras indicated below, in response to the recent request for public comment issued by the United States Department of Justice, Antitrust Division (the “Division”) in connection with the Division’s review of the American Society of Composers, Authors, and Publishers (“ASCAP”) and Broadcast Music, Inc. (“BMI”) consent decrees (the “Consent Decrees”).

The Unique Role of American Orchestras in the Music Ecosystem

Among the many types of music licensees that have depended on the protections of the Consent Decrees for many decades, orchestras are unique. Although music licensing policy discussions often focus on commercial interests (whether those of corporate music publishers, songwriters, or licensees such as streaming services and broadcasters), America’s orchestras are all local, non-profit cultural institutions and are a vital part of the music ecosystem and civic life.

There are approximately 1,600 orchestras serving communities, large and small, throughout the United States. These orchestras create and increase public appreciation of classical and other orchestral music, not only through live performances but also through various educational and community outreach programs. The programs include pre-school learning, in-depth residencies in schools, afterschool partnerships in high-poverty communities, educational classes for seniors, and health and wellness programs. Orchestras also fund the creation of new musical works through direct commissions paid to composers and arrangers.

Indeed, the market for classical and other orchestral musical works would eventually disappear if it were not for the efforts of the orchestras that commission, perform, and promote those works.

Orchestras also fuel local economies in all 50 states by creating jobs, engaging in commerce with local businesses, and spurring local expenditures on related goods and services (such as hotels, restaurants, parking, and more) by patrons attending orchestra events. This economic impact in their local communities exceeds several times each orchestra's direct expenditures.

In providing all these cultural and economic benefits, America's orchestras do much with little. Approximately 66% of those orchestras have annual budgets below \$300,000, and another 25% have budgets under \$2 million. Given the significant expenses involved in employing the large number of highly skilled performing artists comprising an orchestra, no orchestra can possibly fund its operations solely from ticket sales. Instead, we rely heavily on private charitable contributions, investment interest, and other ancillary revenue sources to fund our operations. Many orchestras have years where they operate at a deficit.

Orchestras purchase blanket licenses from ASCAP and BMI for a set fee based upon a percentage of revenue from concert ticket sales. ASCAP and BMI have tiered pricing systems for classical and pop concerts depending on the orchestra's gross receipts. For example, BMI has different pricing for venues with up to 3,500 seats and venues with over 3,500 seats. Although BMI and ASCAP offer a "per-program" license covering only specific performances on certain dates, as a practical matter orchestras typically must purchase a blanket license to perform their entire repertory.

Response to Questions Posed in the Request for Public Comment

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?

The Consent Decree requirements that ASCAP and BMI offer a license upon request and on non-discriminatory terms, and the availability of a rate court to resolve licensing disputes are essential to our ability to serve the public. Today, we find ourselves in an environment where ASCAP and BMI are demanding unreasonable royalty rates which is making it financially difficult for us to continue providing live classical and other orchestral music. We rely on the Consent Decrees to constrain

the exercise of market power by ASCAP and BMI so that we may continue our mission to serve the public.

The requirement that ASCAP and BMI offer a blanket license on request serves several procompetitive purposes. First, the blanket license reduces the administrative cost and uncertainty of engaging in individual negotiations with a multitude of music rights owners. Second, compulsory licensing ensures there will be no gap in licensing in the event we and ASCAP or BMI are unable to reach agreement on price or other terms. Finally, a license upon request prevents ASCAP and BMI from exercising “hold up” power by using the threat of refusing to license to extract supracompetitive royalties. Without these protections, when faced with an unjustified royalty demand we would have to either stop performing music or accept ASCAP’s and BMI’s demands for higher royalties.

The non-discrimination provision ensures that orchestras receive comparable rates and terms. The provision also ensures that we will not be treated differently from other similarly situated non-profit venues that perform live music. This provision is particularly important for orchestras and other non-profits with limited resources because it provides a measure of price protection without having to engage in rate court litigation.

Finally, the rate court provides a fail-safe mechanism in the event we reach an impasse during licensing negotiations. The rate court determines a fair and reasonable rate based on the licensing history between the parties and the licenses for similarly situated licensees. Thus, the rate courts act as a constraint on ASCAP and BMI’s ability to exercise market power during negotiations because the rate court will examine their justifications for any change in royalty rates.

We would not be able to provide live classical and other orchestral music to the public without the Consent Decrees. Historically, we have enjoyed excellent relations with ASCAP and BMI. Today, however, BMI is attempting to grab an increasing and unjustified share of revenue streams that drive the sustainability of orchestral institutions and its ability to produce concerts, provide access to underserved communities, in-school education, and other community engagement offerings.”

Over many years, BMI’s fees have been based on a percentage of gross box office receipts. Recently, BMI terminated our licensing agreements and is now seeking not only higher top-line rates, but also payment on essentially all our revenue, including program advertising, sponsorships, charitable contributions, concessions sales, and parking. Given our limited resources, any significant net increase in royalty payments would have a devastating effect on our ability to continue serving the public.

Because of the BMI Consent Decree, we remained licensed after BMI suddenly terminated our old licenses and we can negotiate new licenses without a gun to our heads. Without the BMI Consent Decree, we would have faced the choice of paying the demanded royalty, risking a copyright infringement lawsuit or stopping performance of music. Each option would have left patrons of orchestral music, the communities they serve, and composers themselves worse off. Consumers would have had access to fewer performances or paid higher prices, while their communities would be deprived of the many community services provided by orchestras. Without the educational and promotional services provided by orchestras, public demand for symphonic music would recede, as would commissions paid directly to composers and arrangers for new orchestral works. The BMI Consent Decree is currently helping to prevent these anticompetitive outcomes.

The rate court is one of the most important protections provided by the Consent Decrees. We are hopeful we will be able to voluntarily resolve this dispute. But given the existential threat posed by BMI's excessive royalty demands, it is possible this dispute will need to be resolved by a neutral rate court. One thing is for certain, however. If the rate court were suddenly eliminated, no voluntary resolution would be possible because there would be absolutely no check on BMI's market power.

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

Modifying the Consent Decrees to require ASCAP and BMI to offer full-work licenses, rather than fractional licenses, would enhance competition and efficiency. Only full-work licensing allows the immediate use of covered compositions, and thus gives effect to the license upon request provision of the Consent Decrees.

ASCAP, BMI, and orchestras have operated for decades with the understanding that the Consent Decrees required full-work licensing. Indeed, the Division came to this same conclusion just a few years ago based on the language and purpose of the Consent Decrees, years of interpretation of the Consent Decrees by federal courts, and ASCAP's and BMI's own licenses that purported to offer full-work licenses for decades.¹ But a recent Second Circuit decision has created uncertainty on this issue.² In 2017, the Second Circuit held that the BMI consent decree does not

¹ U.S. DEP'T OF JUSTICE, Statement on the Closing of the Antitrust Div.'s Review of the ASCAP and BMI Consent Decrees 3 (Aug. 4, 2016), <https://www.justice.gov/atr/file/882101/download> ("only full-work licensing can yield the substantial procompetitive benefits associated with blanket licensees that distinguish ASCAP's and BMI's activities from other agreements among competitors that present serious issues under the antitrust laws").

² See *U.S. v. Broadcast Music, Inc.*, 720 Fed. Appx. 14 (2nd Cir. 2017).

prohibit fractional licensing, a practice which the Division stated goes against the “public interest.”³ The Second Circuit concluded its decision by inviting the Division to “move to amend the decree” if it decided that fractional licensing “raises unresolved competitive concerns.”⁴

The Division should do just that: move to amend the Consent Decrees to require full-work licensing. Without full-work licensing, the license upon request provision cannot achieve its intended effect to “license the rights publicly to perform” a work “upon the request of any unlicensed broadcaster.”⁵ Nor can the blanket license continue to provide the key procompetitive benefit recognized by the Supreme Court as justifying its continued existence, namely “unplanned, rapid, and indemnified access to” all of the songs in each of ASCAP’s and BMI’s respective repertoires.⁶

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 transitional period before any decree termination?

Neither immediate termination of the Consent Decrees nor termination after a sunset period would be in the public interest. We have relied on the Consent Decrees’ protections for decades and they will remain essential to our financial viability.

Immediate termination would harm consumers of classical and other orchestral music because ASCAP and BMI continue to have collective market power and the Consent Decrees deter them from raising our licensing fees above competitive levels or engaging in other anticompetitive conduct. The Division and courts have long recognized that ASCAP and BMI continue to possess collective market power over music licensing and that the industry remains conducive to anticompetitive conduct today. Less than three years ago, after carefully considering the information obtained during its multi-year review, the Division concluded that the Consent Decrees were still necessary to protect the public interest.⁷ It noted that the Consent Decrees “fill important and procompetitive roles in the music licensing industry” through various provisions discussed above, such as granting a license

³ U.S. DEP’T OF JUSTICE, *supra* note 1 at 13.

⁴ *U.S. v. Broadcast Music, Inc.*, 720 Fed. Appx. at 18.

⁵ BMI Consent Decree, § VIII(B); ASCAP Consent Decree, § 5.

⁶ *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 20 (1979). See also, U.S. DEP’T OF JUSTICE, *supra* note 1 at 12.

⁷ U.S. DEP’T OF JUSTICE, *supra* note 1 at 22.

upon request.⁸ The Division also recognized impediments to a fully-functioning market that still exist today.⁹ Nothing has changed in the past three years that could support a contrary conclusion today regarding the public interest.

Terminating the Consent Decrees with a sunset provision would also not be in the public interest. Neither ASCAP's nor BMI's market power has decreased since the Consent Decrees were entered more than 50 years ago. This market power flows not only from the size of their repertoires, but also from the total lack of competition between ASCAP and BMI due to the fact that their repertoires are necessary complements, not substitutes. There is no reasonable prospect that these fundamental market conditions will change in the next 5-10 years in a way that will dissipate their market power.

4. Do differences between the two Consent Decrees adversely affect competition? How?

We do not believe that differences between the Consent Decrees adversely affect competition.

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

Given the crucial procompetitive effects of the Consent Decrees, the very fact that other PROs are not yet subject to similar restrictions, itself, is harmful to competition. We are aware that courts have recently concluded that SESAC has market power and there is evidence that SESAC has engaged in anticompetitive conduct.¹⁰ The fact that SESAC is engaged in anticompetitive conduct, however, could not justify eliminating the restraints on ASCAP's and BMI's market power necessary to protect the public interest. Put another way, even if the lack of Consent Decree oversight allows other PROs to engage in anticompetitive conduct, releasing ASCAP and BMI from such oversight will only increase, not decrease, the overall competitive harm in the market.

⁸ *Id.* at 10, 13 (noting that “immediate access to the works in the organizations’ repertoires” is a “key procompetitive benefit []” of the Consent Decrees).

⁹ *Id.* at 15.

¹⁰ See *Radio Music License Committee, Inc. v. SESAC, Inc.*, 29 F. Supp. 3d 487 (E.D. Pa. 2014); *Meredith Corp. v. SESAC, Inc.*, 1 F. Supp. 3d 180 (S.D.N.Y. 2014).

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We are now experiencing first-hand efforts by BMI to extract supracompetitive royalties. The Consent Decrees are essential to our future financial viability and necessary to deter BMI (and ASCAP) from raising our licensing fees above competitive levels or engaging in other anticompetitive conduct. We thank the Division for this opportunity to provide the unique perspective of American orchestras with respect to these crucial music licensing and competition issues. I look forward to meeting with the Division to further discuss the orchestras' views and experience. In the meantime, if any additional information would be helpful, please do not hesitate to contact me or our outside counsel representing the orchestras in this matter, Paul Fakler of Orrick, Herrington & Sutcliffe LLP, (212) 506-5187, pfakler@orrick.com.

Respectfully submitted,



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President
Cincinnati Symphony Orchestra

Joined by:

Austin Symphony
Boston Symphony Orchestra

Charlotte Symphony Orchestra
Houston Symphony
Indianapolis Symphony Orchestra
Kansas City Symphony
Los Angeles Philharmonic
New Jersey Symphony Orchestra
North Carolina Symphony
Pacific Symphony
San Diego Symphony
Seattle Symphony
Utah Symphony | Utah Opera

Anthony Corroa, Executive Director
Lynn Larsen, Orchestra Manager and
Director of Orchestra Personnel
John Clapp, General Manager
John Mangum, Executive Director/CEO
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