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## **Comments by League of Minnesota Cities In Response to 2019 Antitrust Consent Decree Review**

The League of Minnesota Cities (“LMC”) submits these comments on behalf of itself, the League of Minnesota Cities Insurance Trust (“LMCIT”) and the 853 cities of Minnesota. The most recent Department of Justice review of the ASCAP and BMI consent decrees poses the question, “would termination of the Consent Decrees serve the public interest?” The League of Minnesota Cities wholeheartedly asserts termination would not serve the public interest, unless they are replaced with similar safeguards for cities and their taxpayers.

LMC is a member organization with a voluntary membership of 833 out of 853 Minnesota cities. It represents the common interests of cities before courts and other governmental bodies and provides a variety of services to its members, including information, education, training, policy-development, risk-management, and advocacy services. The LMC’s mission is to promote excellence in local government through effective advocacy, expert analysis, and trusted guidance for all Minnesota cities.

One function of LMC is management of the LMCIT, a self-insurance pool authorized by state law, created by Minnesota cities and governed by its own Board of Directors of city officials. LMCIT’s fundamental purpose is to cover city risks and to mitigate hazards with efforts including legal compliance education. LMCIT currently provides property and casualty coverage for 820 of the 853 Minnesota cities.

Cities and other municipalities are unique premises for music performances

Cities and other municipalities have a clear need to ensure certain aspects of the consent decrees are preserved for the benefit of the public interest because the taxpayers fund municipal licenses. Cities are heavily reliant on the uniformity and reasonableness of costs provided by the consent decrees because, while ASCAP and BMI licenses are essential for city-owned premises, cities have limited staff and financial resources available to acquire and manage the licenses, not to mention assure the public's use of city facilities comports with these licenses.

Cities and other municipalities provide the public parks, streets and community centers where musical performances occur throughout the year. Cities offer live performances by amateur and professional musicians, sometimes in theaters, bandshells or makeshift stages. As anyone who has grown up in a municipality will attest, these music performances are part of what it means to grow up in the Great American City.

Music performances also occur on city-owned premises where cities have more limited control of whose music is performed. Music may be played through the radio at municipally owned liquor stores. The city office's third-party provided phone system may play "hold music" selected by the provider. And any member of the community could rent a park space and play music from a Bluetooth speaker connected to a phone at a private gathering. These are all musical performances that potentially open cities up to liability unless they have licenses.

In Minnesota, a premises owner can be vicariously liable for copyright infringement due to unauthorized musical performances occurring on their premises. See e.g., *Pinkham v Sara Lee Corp.*, 983 F2d 824 (8<sup>th</sup> Cir. 1992). As the trustees of property on behalf of the public interest, cities are the "owners" of the city property where these performances occur. As demonstrated

elsewhere, the “non-profit” nature of a premises owner does not diminish the exclusive rights of the copyright owners. See e.g., *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110 (9<sup>th</sup> Cir. 2000).

Through parks, trails, streets and other public spaces, cities and other municipalities have countless potential venues for spontaneous, unauthorized musical performances. These spaces cannot all be constantly watched. As a result, cities can either attempt to prohibit music where they can’t reasonably monitor it, or they must be able to acquire musical performance licenses that cover all public spaces.

The consent decrees perform an important role in allowing music in cities

The consent decrees ensure that the musical performance licenses cover all artists in the ASCAP and BMI catalogs and at a price that is uniform and reasonable for similarly situated cities. Regardless of any other modifications to, or reformation of, the consent decrees or regulation to replace them, it is critical that these safeguards remain in place for cities and the taxpaying public.

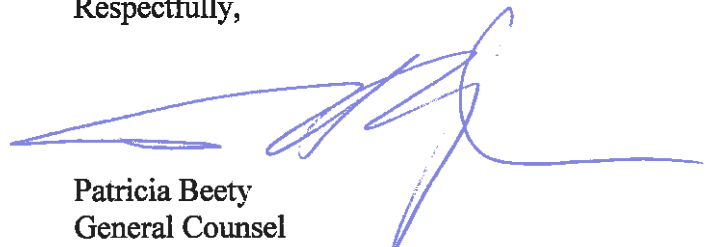
Cities have limited resources, drawing their revenue principally from property taxes and state aid. More than 80% of the cities in Minnesota have fewer than 500 residents, and many of those cities have only one full- or part-time employee because they cannot afford staff. Apart from addressing other behaviors inherent to a monopoly, the consent decrees were intended to keep costs down. If the requirement of the consent decrees for a reasonable rate was removed (with the backstop protection of a rate-setting court), the cost to cities and their taxpayers could unreasonably spike. If the price increases substantially, cities considering ASCAP and BMI licenses may be forced to weigh local tax rate changes against a reduction in city programs. Either

way, the result would likely be more risks of liability as well as fewer authorized musical performances in that Great American City.

One may suggest that, without the consent decree's requirement of a license covering the entire catalog, cities would be able to obtain cheaper licenses that cover only a subset of artists or specific performances. But again, because of the extent of public spaces in any city where a private citizen could stream any type of music from their phone, cities must be able to economically and efficiently acquire licensing for as many artists as they possibly can. Additionally, given the minimal staff resources of most cities, a license that covers the entire catalog of ASCAP or BMI is critical in keeping the management of the licenses and available music catalogs to a manageable level.

LMC acknowledges there are many interests involved with the consent decrees and musicians should be justly compensated for their work. There may be reason to modify or replace the consent decrees to address the new ways music is distributed. But when it comes to deciding what best serves the public interest, the Cities of Minnesota have long standing experience in making those sorts of decisions. On behalf of those cities, we respectfully submit that the public interest is best served by the uniformity and economy afforded by either not terminating the consent decrees or replacing them with similar protections for taxpayers.

Respectfully,



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League of Minnesota Cities