



## **Public Comments of the MIC Coalition Submitted in Response to the U.S. Department of Justice’s Request for Comment on the Future of the ASCAP and BMI Consent Decrees**

August 9, 2019

### **Introduction**

The Music Innovation Consumers (“MIC”) Coalition is pleased to submit the following comments on behalf of the millions of businesses, both large and small, we represent. MIC members include restaurants, bars, hotels, wineries, local radio and television broadcasters, digital music services, retailers and numerous other venues that operate in every state, region and congressional district throughout the country.<sup>1</sup>

The diversity in products and services MIC members currently offer is only matched by the diversity in geographical communities we represent. The common thread that unites us is the fact that we *all* pay for the right to publicly perform music. Indeed, MIC members are responsible for the vast majority of the \$2.4 billion in combined revenues that ASCAP and BMI collected in 2018.

Our members are also united by a profound concern over the future of the consent decrees governing ASCAP and BMI. In particular, any effort aimed at sunseting, terminating or diminishing the protections contained in either decree.

In their current form, the consent decrees provide music licensees with important pro-competitive benefits that ensure that music can be licensed at a fair and reasonable price. The absence of the decrees would undoubtedly encourage ASCAP and BMI to leverage their must-have repertoires, which collectively represent approximately 90 percent of public performance rights in musical works and incentivize them to engage in monopolistic pricing.

Such an outcome would be bad for music licensees everywhere. It would force many of the small businesses we represent to either stop playing music altogether or to acquiesce to substantially higher prices that would threaten the financial solvency of such businesses – many of which often serve as the primary place of employment for local communities.

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<sup>1</sup> For more information regarding the MIC Coalition, please visit: <https://mic-coalition.org>.

It for these reasons, as well as those described below, that we strongly urge the Department to oppose any effort to sunset, terminate or diminish the protections contained in the ASCAP or BMI consent decrees.

**I. The ASCAP and BMI Consent Decrees Provide Critical Guardrails that Protect Licensees and Consumers from Anticompetitive Behavior Without Impeding Record-Breaking ASCAP and BMI Revenues.**

The genius of the ASCAP and BMI consent decrees rests in their ability to promote competition, while also advancing other relevant public policy interests. For music licensees, in particular, the consent decrees have been instrumental in helping to identify and remedy alleged acts of anticompetitive behavior.

In 2013, for example, the consent decrees helped shed light on acts undertaken by ASCAP and BMI to secretly coordinate with music publishers in an effort to allegedly limit access to their catalogues for certain licensees.<sup>2</sup> Less than one year later, in 2014, it was revealed that ASCAP had engaged in acts of “troubling coordination” with a couple of major music publishers in a manner that implicated a core antitrust concern underlying its decree.<sup>3</sup> Finally, in 2016, it was discovered that ASCAP had been including exclusivity requirements in its contractual agreements with affiliates in clear violation of the terms of their decree.<sup>4</sup> As a result of the latter conduct, ASCAP ended up being fined by the Justice Department and agreed to reform its licensing practices.<sup>5</sup>

While opponents of the consent decrees often suggest that the voluntary settlement agreements applicable to the two largest performance rights organizations (“PROs”) are outdated and have outlived their usefulness, the aforementioned events clearly demonstrate that they continue to play an important role in policing acts of alleged anticompetitive behavior.

Terminating, sunseting, or lessening the protections afforded music users in the decrees in any way, would not lead to more competition in the marketplace. It would only make it more difficult for licensees, particularly those with limited financial resources, to negotiate for reasonable license fees and to seek redress for abuses of market power.

Rash changes could also disrupt the consistently strong financial performance that ASCAP and BMI have enjoyed under the current system. Last year, for example, ASCAP and BMI both reported receiving record high revenues of \$1.22 billion and \$1.19 billion, respectively.<sup>6</sup> At first glance, such glowing figures might appear to be uncommon. However, on

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<sup>2</sup> *In re Petition of Pandora Media, Inc.*, 2013 WL 5211927 (S.D.N.Y. Sept. 17, 2013); *Broadcast Music, Inc. v Pandora Media Inc.*, 2013 WL 6697788 (S.D.N.Y. Dec. 18, 2013).

<sup>3</sup> *In re Petition of Pandora Media, Inc.*, 2014 WL 1088101 (S.D.N.Y. Mar. 18, 2014).

<sup>4</sup> Department of Justice, Office of Public Affairs. (May 12, 2016). *Justice Department Settles Civil Contempt Claim against ASCAP for Entering into 150 Exclusive Contracts with Songwriters and Music Publishers* [Press release]. Retrieved from <https://www.justice.gov/opa/pr/justice-department-settles-civil-contempt-claim-against-ascap-entering-150-exclusive>

<sup>5</sup> *Id.*

<sup>6</sup> ASCAP. (May 1, 2019). *ASCAP Annual Revenue and Distributions Continue to Break Records: 2018 Revenue Tops \$1.227 Billion* [Press release]. Retrieved from <https://www.ascap.com/press/2019/05/05-01-financials-release>; Christman, Ed (Sep. 12, 2018). *BMI Revenue Growth Accelerates as Collections and Royalty Distributions Reach*

closer inspection, the repeated receipt of record-breaking royalty payments appears to be more of a trend.<sup>7</sup>

In fact, over the course of the past decade or so, ASCAP and BMI have both witnessed their revenues surge by approximately 50 percent. This tremendous growth has occurred at the same time that most Americans have seen their annual household incomes stagnate; and thousands of brick-and-mortar businesses, located throughout the country, have struggled to turn a profit.

## II. Embodied in the Consent Decrees are a Series of Fundamental Principles that Help Mitigate Anticompetitive Behavior.

At the heart of the consent decrees are several critical features that protect licensees from unwanted acts of anticompetitive behavior. Some of the key elements include:

- ***License on application***: Both decrees currently require ASCAP and BMI to provide a license to any potential licensee that applies for one, even if the parties cannot agree on a rate prior to the license grant. This prevents the threat of statutory damages for copyright infringement from being leveraged by ASCAP and BMI to extract monopoly rates.
- ***Rate-setting oversight with meaningful procedural safeguards and evidentiary burdens***: Under the consent decrees, the federal district court in the Southern District of New York provides a forum to determine license fees and terms if ASCAP or BMI cannot agree with a licensee. Because the rates are set through litigation in federal district court, the Federal Rules of Evidence and Federal Rules of Civil Procedure apply to the proceedings. Moreover, under this requirement, the courts must set a “reasonable” fee and have interpreted reasonable fees to be those that would exist in a competitive market, without the market power wielded by ASCAP and BMI over prospective licensees, many of whom have no or little control over whether they publicly perform the works in those PROs’ repertoires. In rate-setting proceedings, ASCAP and BMI bear the burden of proving that their requested fees are reasonable.
- ***Prohibition on exclusive licensing / Alternatives to blanket license***: The consent decrees prohibit ASCAP and BMI from being the exclusive licensor for any of the works in their respective catalogs. Songwriters must have the ability to directly license their songs to a licensee, ensuring that a blanket license to ASCAP’s and BMI’s entire catalog is not the only license available. At the same time, ASCAP and BMI are required to provide more flexible alternatives to their favored fixed-fee blanket license, allowing users to reduce their fee obligations to those PROs by securing at least some of the performance rights they need in their direct licensing transactions. These licensing alternatives and the ability to engage in direct licensing are important to a wide range of music users and have

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*New Highs*. Billboard. Retrieved from <https://www.billboard.com/articles/business/8474665/bmi-2018-annual-collections-revenue-royalty-distributions>.

<sup>7</sup> ASCAP. (Apr 19, 2018). *ASCAP Delivers for the First Time More than \$1 Billion to Songwriter, Composer and Music Publisher Members* [Press release]. Retrieved from <https://www.ascap.com/press/2018/04/04-19-financials-2017>; BMI. (Sep. 7, 2017). *BMI Tops Revenue Records for Third Straight Year with \$1.13 Billion* [Press release]. Retrieved from <https://www.bmi.com/news/entry/bmi-tops-revenue-records-for-third-straight-year-with-1.130-billion>.

served to allow for some actual competitive transactions between users and composers, where composers compete with each other to have their music performed.

- ***Nondiscrimination***: Both decrees prohibit discrimination with the result that ASCAP and BMI must offer similar licenses to similarly situated licensees. This requirement prevents ASCAP and BMI from arbitrarily picking winners and losers among competing local, regional or national businesses.
- ***Requires rights holders to be either “all-in” or “all-out” regarding collective licensing***: Both decrees require rights holders to allow their catalog to be licensed by the PROs to any category of licensee. Otherwise, a publisher could choose to withdraw rights for only certain licensees and then leverage market power to extort higher fees from those licensees, while maintaining the infrastructural advantages of the PRO system to administer rights for more diffuse licensees. This sort of manipulation would distort market prices, which is why just two years ago the Department of Justice denied ASCAP and BMI member publishers the right of partial withdrawals. Rights holders should be free to leave the collective licensing system entirely, but they should not be able to “game the system” by having one foot in and one foot out.

The principles outlined above are responsible, in large part, for the success of the consent decrees and should be preserved by the Department without modification. Indeed, if policymakers are interested in making any changes to the current regime, they should use the above-mentioned principles as the key building blocks to help construct a more robust pro-competitive system. Along those lines, policymakers could address such issues as:

- ***Transparency***: Licensors should be required to provide accurate and comprehensive copyright ownership and licensing information, ideally in a public, centralized and easily accessible database. Licensees should know precisely which songs they are licensing in exchange for payment and be protected under the terms of their licenses for reliance on a licensor’s representations of what is contained in its catalog. The database should include the works of all PROs and have the ability to calculate the share of each PRO within various media e.g. radio – both terrestrial and digital, TV, restaurant venues, etc. Over a year ago ASCAP and BMI promised that they were moving forward with a combined database, but we have seen no evidence that progress is being made.
- ***Applicability to all licensing collectives***: The current decrees apply only to ASCAP and BMI. This has led to the emergence of newer PROs engaging in questionable licensing practices and leaving licensees with little recourse outside of expensive private antitrust enforcement actions. Any alternative framework must be broadly applicable to other PROs and licensors not currently operating under consent decrees to ensure a level playing field.
- ***Prohibition on engaging in abusive, coercive or other unfair or deceptive practices***: In recent years, states including Nebraska, Colorado, Oregon, Washington, and Virginia have enacted laws at the state level that are designed to reign in abusive, coercive or other forms of troubling behavior carried out by PROs. To prevent such behavior from occurring in the future, any new framework should require all PROs to abide by a predetermined “code of conduct” that would be subject to enforcement by the Federal Trade Commission.
- ***Remedies for small and medium sized businesses that are not “take it or leave it”***: Although some licensees have successfully obtained alternatives to blanket licensing,

businesses that play music in their establishments occasionally do not have the option to pay based on use and must agree to licenses that cover more substantial music usage. The lack of options tailored for each business often forces proprietors to stop providing music for the enjoyment of their customers.

- ***Unified rate setting***: Litigating fee disputes with ASCAP and BMI (and additional PROs, including SESAC and GMR) in different proceedings leaves licensees paying for more than 100 percent of the value of the music they play. The cases often center around respective market share of each PRO and each fact-finder must evaluate each PRO's claim of their share. Moreover, the license periods and litigation with each PRO do not always match up. Having a unified proceeding to allow a single factfinder to, at a minimum, identify relevant market share of each PRO, and ideally, set an industry-wide rate for licensees would greatly improve efficiency and fairness. Given the complexity of music licensing, it is useful to have a factfinder who becomes knowledgeable of the issues over time.
- ***Full work licensing***: Licenses from PROs must grant the right to immediately play all songs in the PRO's catalog with corresponding indemnification from copyright infringement claims. In its most recent review of the consent decrees, the Department of Justice concluded, from an antitrust and public policy perspective, the PROs should only be permitted to license works on a full-work basis. Under full-work licensing, a PRO license includes the right to play any song in its catalog, even if only some of the ownership interests of a song are represented in that catalog. The Second Circuit, based not on an assessment of antitrust or public policy, but purely based on the express language of the BMI decree, rejected that conclusion, allowing at least BMI to license works on a so-called "fractional" basis, upending decades of settled licensing practices. Permitting fractional licensing leaves licensees: (1) paying different rates for different fractions of the same songs; (2) uncertain about whether they have fully cleared any given song for performance (even if they have licenses from the major PROs); (3) dealing with the near-impossible prospect, given the lack of transparency in the industry, of having to track down fractional owners of works that are either affiliated with an unregulated PRO or not affiliated with an PRO; and (4) facing exposure to potential statutory damages for copyright infringement.

### **III. The Justice Department Should Allow Congress to Act, Prior to Taking Any Steps to Sunset, Terminate or Lessen the Protections Contained in the ASCAP or BMI Consent Decree.**

Members of Congress have demonstrated a keen awareness of the harms that could result from a rush to judgment regarding the future of the consent decrees. Last year, Congress enacted the *Music Modernization Act*, which not only contains a section detailing Congressional oversight of DOJ's review of the decrees but also demonstrates the importance of clear rules for the proper functioning of the music licensing marketplace.<sup>8</sup>

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<sup>8</sup> Orrin G. Hatch-Bob Goodlatte Music Modernization Act. Public Law No. 115-264 (MMA).

The MMA was passed unanimously by Congress and requires the DOJ to notify Members of Congress prior to moving to sunset or terminate either decree.<sup>9</sup> Moreover, DOJ is required to provide a report to Congress analyzing the impact that such actions would have on businesses that license the right of publicly perform musical works.<sup>10</sup>

The purpose of those provisions is echoed in a series of letters from leaders in both the House and Senate expressing concern with any potential changes by DOJ that would bring about chaos in the marketplace.<sup>11</sup> Each letter urges DOJ to exercise restraint and commit to work with Members of Congress to establish an alternative licensing framework *before* DOJ takes action to sunset or terminate the decrees.<sup>12</sup>

More broadly, passage of the MMA—which reflected years of work by stakeholders involved in every part of the music industry and carefully accounted for the state of today’s music licensing marketplace—highlights the negative impact that market chaos can have on all parts of the industry. The bulk of the MMA addressed a broken system for licensing other rights in musical works not covered by the PROs’ public performance licenses and created a blanket statutory license for these rights. The MMA was needed to remedy the existing licensing system that had ceased working. In sharp contrast, the system for licensing public performance rights that is enabled by the decrees, while perhaps not perfect, is not broken.

Significantly modifying the decrees, or worse sunseting or terminating them, would bring about exactly the kind of chaos that required the passage of the MMA to fix. DOJ action along those lines would be disastrous for the millions of main street business that regularly rely on the consent decrees to license music at a fair and reasonable price and would make it harder, not easier, for Congress to develop a suitable alternative framework.

## **Conclusion**

Five short years ago, the Justice Department launched a review of the ASCAP and BMI consent decrees that is quite similar to the one currently underway today. After careful consideration, including multiple rounds of comments and meetings with Department attorneys and economists, DOJ closed its investigation in August 2016 without seeking any modification

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<sup>9</sup> Id. at §105. As then-Senator Hatch made clear in a statement on the Senate floor, Congress intended to require the DOJ to notify Congress at least 90 days before filing a motion to terminate. *See* 164 Cong. Rec. S6335 (daily ed., Sept. 26, 2018) (statement of Sen. Hatch).

<sup>10</sup> MMA at §105.

<sup>11</sup> Graham, L. “*Letter to Assistant Attorney General Makan Delrahim Inquiring about the Status of the Division’s Termination Program*”. (Feb. 12, 2019) (“Graham Letter”); Grassley, C., Goodlatte B., etc. “*Letter to Assistant Attorney General Makan Delrahim regarding the Antitrust Division’s Judgment Termination Program*”. (Jun. 8, 2018) (“Grassley-Goodlatte Letter”); Leahy, P., Klobuchar, A., etc. “*Letter to Assistant Attorney General Makan Delrahim regarding the Antitrust Division’s Recently Announced Initiative to Terminate Outdated Antitrust Judgments*.” (Jun. 7, 2018) (“Leahy-Klobuchar Letter”).

<sup>12</sup> *See* Graham Letter “...moving to terminate or even sunset the ASCAP & BMI consent decrees, without first working with my committee and the Congress as a whole to establish an alternative licensing framework, could severely disrupt the entire music licensing marketplace.”; *Also see* Grassley-Goodlatte Letter “Terminating [the consent decrees] without a clear alternative framework in place would result in serious disruption in the marketplace, harming creators, copyright owners, licensees, and consumers.”; *Also see* Leahy-Klobuchar Letter “...we urge the Division to allow consumers, industry representatives, and Members of Congress to negotiate and develop an alternative solution...before the Division takes any action to weaken or terminate these judgments.”

to the existing decrees. In explaining its decision to preserve the current agreements, the Department noted that the “industry has developed in the context of, and in reliance on, these consent decrees and that they therefore should *remain* in place”.<sup>13</sup> (emphasis added)

Members of the MIC Coalition strongly support this outcome and respectfully request that the Department, as part of its current review, reaffirm its previous decision.

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<sup>13</sup> Department of Justice. *Statement of the Department of Justice on the Closing of the Antitrust Division’s Review of the ASCAP and BMI Consent Decrees* (Aug. 4, 2016) at 22. Retrieved from <https://www.justice.gov/atr/file/882101/download>.