Before the
UNITED STATES DEPARTMENT OF JUSTICE
ANTITRUST DIVISION
Washington, D.C.

U.S. DEPARTMENT OF JUSTICE 2019 REVIEW OF THE ASCAP AND BMI ANTITRUST CONSENT DECREES

COMMENTS OF MOOD MEDIA AND THE INTERNATIONAL PLANNED MUSIC ASSOCIATION

Mood Media Corporation ("Mood") and the International Planned Music Association ("IPMA"), an association of Mood franchise affiliates, jointly submit these comments in response to the request of the Antitrust Division of the United States Department of Justice ("DOJ" or the "Division") for public comments in connection with the Division's ongoing review of the antitrust consent decrees in *United States v. ASCAP*, 41 Civ. 1395 (S.D.N.Y.) (the "ASCAP Consent Decree"), and in *United States v. BMI*, 64 Civ. 3787 (S.D.N.Y.) (the "BMI Consent Decree") (collectively, the "Consent Decrees"). *See* Antitrust Consent Decree Review – ASCAP and BMI, *available at* http://www.justice.gov/atr/antitrust-consent-decree-review-ascap-and-bmi-2019. Mood and the IPMA appreciate this opportunity to comment on the Consent Decrees, why they remain necessary to mitigate the anticompetitive effects of collective licensing of music performance rights, and how they might be improved to enhance consumer welfare and better serve the public interest.

While the original versions of the Consent Decrees date back to 1941, they have been reviewed on numerous occasions since then, including as recently as 2016. As the Division is of course aware, the most recent review entailed a multi-year investigation, two rounds of public comments with hundreds of responses, and meetings with dozens of industry stakeholders. *See* Statement of the Department of Justice on the Closing of the Review of the ASCAP and BMI Consent Decrees at 2, 8-9, dated August 4, 2016, (the "2016 DOJ Statement"), *available at*

https://www.justice.gov/atr/file/882101/download. Following that review, DOJ reached the following conclusions: (1) the collective licensing practices of ASCAP and BMI continue to raise significant antitrust concerns; (2) relaxation of the Consent Decrees restrictions' on ASCAP's and BMI's conduct is not in the public interest; and (3) permitting ASCAP and BMI to engage in licensing of fractional interests in musical works, rather than licensing of full works, undermines the procompetitive benefits associated with blanket licenses that distinguish ASCAP's and BMI's activities from other agreements among competitors that present serious issues under the antitrust laws. *See id.* at 2-3, 13-17, 22. The Division should reach the same conclusions now, just three years later.

I. Mood, the IPMA, and Their Licensing of Music Performance Rights

Mood is the world's leading in-store media solutions company. Mood is dedicated to elevating the consumer experience for its clients, and to creating greater emotional connections between brands and consumers, through the right combination of sight, sound, scent, social, mobile, and systems solutions. Mood markets its services to clients both directly and through franchise affiliates, including the members of the IPMA. Mood reaches more than 150 million consumers each day through more than 500,000 subscriber locations around the globe. In the United States alone, Mood serves more than 340,000 subscriber locations each day.

While Mood also offers a variety of non-music products, providing background and foreground music to subscribers to play for their customers is at the core of Mood's business. Mood offers a suite of music solutions to meet the widely varying needs of its subscriber base. Mood's "Core Music" offering is the leading choice for small businesses and regional brands. Core Music consists of a catalog of approximately 160 professionally designed music programs that provides an array of options to suit every audience and industry. "Mood Mix" is a streaming

music solution designed for small businesses that provides online access to Mood's full programming catalog and permits businesses to personalize their mix of songs through Mood's online interface and mobile application. "Mood Mix Pro," like Mood Mix, is a streaming music solution that provides access to Mood's full programming catalog and the ability to customize the playlists, but it comes with additional hardware, higher-grade streaming technology, and social and interactive features to enhance the connection between businesses and their customers. Mood also offers completely customized music solutions in which brands work with dedicated music design experts to build custom playlists, track-by-track, that are exclusive to that brand.

In addition to the expert music curation for which Mood is known, a key aspect of Mood's music services is that they are fully licensed through to the end user. Mood not only selects and curates the music but also, together with its franchisees, Mood secures all of the copyrights needed for its subscribers to perform music to their consumers.[1] To utilize one of Mood's music services, subscribers do not need separately to obtain licenses from ASCAP, BMI, or any other performing rights organizations ("PROs"). Relationships between Mood's predecessor, Muzak, and ASCAP and BMI date back as far as the Consent Decrees themselves. More recently, Mood has entered into license agreements with SESAC and GMR, two additional U.S. PROs that remain unregulated by antitrust consent decrees. On occasion, and as discussed in greater detail in Section II.A below, Mood has secured public performance rights for a significant portion of the musical works transmitted through its services directly from the copyright owners of those works.

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[1] Mood obtains licenses from ASCAP and BMI via its operating subsidiaries, Muzak LLC, DMX, LLC, and Mood Media North America, LLC (formerly known as Trusonic). IPMA members enter into their own licenses with ASCAP and BMI on terms negotiated, with their approval, by Mood.

Mood's services utilize approximately 140,000 different musical works in the United States each year—a very large number that is nonetheless a very small fraction of the musical works made available for licensing by ASCAP and BMI. Moreover, unlike some music users, Mood has substantial control over its playlists. Even though it performs substantially fewer compositions and has more control over its playlists than some other music users, such as on-demand streaming services, the protections of the Consent Decrees remain essential to the operation of Mood's business for reasons including but not limited to preserving its ability to secure licenses on a through-to-the-audience basis to cover performances made by its customers and because ASCAP and BMI have interfered with its prior efforts to secure music performance rights directly. *See infra* Points II.A, II.C.

II. The Protections Afforded to Mood and the IPMA by the Consent Decrees Remain Essential to Mitigating the Anticompetitive Effects of Collective Licensing by ASCAP and BMI

A. The Essential Protections of the Consent Decrees Have Provided an Important Check on the Exercise of Monopoly Power by ASCAP and BMI in Their Dealings with Background/Foreground Music Services

Collective licensing of music performance rights is inherently anticompetitive, as it eliminates competition among otherwise competing composers for public performances by Mood and other commercial music users.[2] As the Division is of course aware, courts repeatedly have recognized that ASCAP and BMI, each of which now aggregates the copyrights to more than 11,000,000 musical works and collectively account for more than 90% of the musical works publicly performed by Mood, have—and have exercised—market-distorting power in their

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[2] The memberships of ASCAP, BMI, SESAC, and GMR are exclusive to one another; accordingly, there is no competition between and among the PROs to license a given composer's musical compositions.

dealings with licensees. *See, e.g.*, *ASCAP v. MobiTV, Inc*., 681 F.3d 76, 82 (2d Cir. 2012) ("[T]he rate-setting court must take into account the fact that ASCAP, as a monopolist, exercises market-distorting power in negotiations for the use of its music."); *United States v. BMI, Inc. (In re Application of Music Choice)*, 426 F.3d 91, 96 (2d Cir. 2005) ("[R]ate setting courts must take seriously the fact that they exist as a result of monopolists exercising disproportionate power over the market for music rights."); *see also BMI v CBS*, 441 U.S. 1, 32-33 (1979) (Stevens, J., dissenting) ("[T]he blanket license does not present a new songwriter with any opportunity to try to break into the market by offering his product for sale at an unusually low price. The absence of that opportunity, however unlikely it may be, is characteristic of a cartelized rather than a competitive market."); *ASCAP v. Showtime/The Movie Channel, Inc.*, 912 F.2d. 563 (2d Cir. 1990) ("[I]n the licensing of music rights, songs do not compete against each other on the basis of price.").

The Consent Decrees preserve the transactional efficiencies of collective licensing by ASCAP and BMI while addressing, however imperfectly, the monopoly power such collective licensing creates. Specifically, as they relate to Mood and the IPMA:

(1) The Consent Decrees prevent "gun to the head" licensing tactics by requiring ASCAP and BMI to issue licenses on request and by providing for interim licenses while negotiations are ongoing, thereby preventing threats of copyright infringement litigation if the service is unwilling to accede to the PRO's license fee demands. *See* ASCAP Consent Decree § IX; BMI Consent Decree § XIV.

(2) The Consent Decrees empower the federal court in the Southern District of New York to act as a "Rate Court" in setting "reasonable" license fees in the event of negotiating

impasse. *See* Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (2018); ASCAP Consent Decree § IX; BMI Consent Decree § XIV.

(3) The Consent Decrees prohibit ASCAP and BMI from obtaining exclusive rights to license their affiliated copyright owners' works—thereby preserving the right of users such as Mood to secure performance rights licenses directly from composers and music publishers. *See* ASCAP Consent Decree § IV(A)-(B); BMI Consent Decree § IV(A).

(4) The Consent Decrees mandate that ASCAP and BMI offer economically viable alternatives to the traditional fixed-fee blanket license that take account of the extent to which performances have been licensed directly, thereby enabling users such as Mood to secure public performance rights to at least some of the musical works in the ASCAP and BMI repertories in competitive-market, direct license transactions without having to double pay for the same rights if they wish to license the remainder of those repertories through ASCAP and BMI. *See* ASCAP Consent Decree §§ VII-VIII; BMI Consent Decree § VIII(B); *United States v. BMI (In re AEI Music Network, Inc.)*, 275 F.3d 168 (2d Cir. 2001) ("*AEI*") (construing BMI Consent Decree as requiring BMI to offer blanket license with adjustable fee that reflects direct licensing).

(5) The ASCAP Consent Decree requires ASCAP to offer "through-to-the-audience" licenses that enable Mood and the IPMA to obtain licenses with a scope of coverage that includes public performances of musical works made by Mood subscribers in the course of transmitting Mood's music service to their customers. *See* ASCAP Consent Decree § V. BMI has followed suit.

(6) The Consent Decrees require that ASCAP and BMI license similar users similarly, thereby preventing ASCAP and BMI from discriminating on price within a group of

users in the same business. *See* ASCAP Consent Decree § IV(C); BMI Consent Decree § VIII(A).

The music licensing experience of DMX, Inc. ("DMX")—a background/foreground music service acquired by Mood in 2012—over the past fifteen years illustrates the vital, continuing importance of the Consent Decrees to mitigating the anticompetitive effects of ASCAP's and BMI's collective licensing practices. DMX was formed on June 3, 2005 when DMX Holdings, Inc. purchased assets out of the bankruptcy estate of a former operator of the background/foreground music service operating under the DMX brand name. *See In re THP Capstar Acquisition Corp.*, 756 F. Supp. 2d 516, 521 (S.D.N.Y. 2010) ("*THP Capstar*"), *aff'd sub nom. BMI v. DMX Inc.*, 683 F.3d 32 (2d Cir. 2012) (*"DMX II")*. Its new ownership believed—correctly—that then-prevailing rates charged by ASCAP and BMI to background/foreground music services were substantially above the rates that would be charged in a competitive marketplace for music performance rights. Accordingly, DMX began a campaign to acquire music performance rights to the musical works it was performing via direct license transactions with the individual music publishers that own the copyrights and applied to ASCAP and BMI for adjustable-fee blanket licenses ("AFBLs"), *i.e.*, blanket licenses with fees that would reflect the extent to which the music in their respective repertories had been licensed directly. *See DMX II*, 683 F.2d at 38-42. This initiative sought to build on the theretofore-unfulfilled promise of a case brought by the background music industry some years earlier in which the Second Circuit authoritatively construed the BMI Consent Decree as requiring BMI to offer an AFBL. *See United States v. BMI (In re AEI Music Network, Inc.)*, 275 F.3d 168 (2d Cir. 2001) ("*AEI*").

The rates for PRO licenses for the background/foreground music industry had long been set as an annual "per location" fee, such that total fees paid by licensees would scale depending on the number of aggregate subscriber locations served under the license. At the time that DMX began its direct licensing initiative, ASCAP was charging DMX's competitors annual per-location rates ranging from $41 to $45. *See DMX II*, 683 F.2d at 39. BMI was charging $36.36 per location. *Id.* Thus, to acquire traditional blanket licenses from ASCAP and BMI alone, DMX would have needed to pay more than $77 per location per year.

DMX's direct license experience demonstrated that music performance rights could be acquired at much lower cost. DMX offered individual composers and publishers their pro-rata share of a total royalty pool of $25 per location—less than one-third of the combined price of ASCAP and BMI licenses—with the shares determined based on an easily audited calculation of the percentage of plays on DMX's service. *See id.* at 38. By late 2010, DMX had signed more than 850 direct licenses, covering more than 7,000 separate music catalogs and hundreds of thousands of songs. *Id.* Notwithstanding substantial and mostly successful efforts by both ASCAP and BMI to convince major music publishers not to enter into direct licenses with DMX, *see THP Capstar*, 756 F. Supp. 2d at 535, DMX achieved direct-license coverage for more than 40% of its performances of music. Publishers of every size—from small, specialty publishers to Sony/ATV Music Publishing, one of the largest—signed direct deals, and the directly licensed music covered every conceivable genre and included many of the most famous and most popular compositions in history. *See DMX II*, 683 F.2d at 38; *THP Capstar*, 756 F. Supp. 2d at 532-35.

DMX's efforts to negotiate adjustable-fee blanket licenses with ASCAP and BMI were unsuccessful and both PROs commenced Rate Court proceedings for a determination of reasonable fees. The BMI proceeding was tried first. In the wake of *AEI*, BMI did not dispute

DMX's entitlement to a blanket license with an adjustable fee. DMX and BMI agreed that the AFBL fee should include: (1) a full blanket rate, *i.e.*, the rate that DMX would pay if it did not directly license any of the BMI repertory music it used; (2) a "floor fee," *i.e.*, the fee that DMX would pay to BMI even if it directly licensed all of the BMI music it used during a given reporting period; and (3) a crediting mechanism for calculating the discount off of the full blanket fee for the directly licensed performances. *DMX II*, 683 F.2d at 42.

While DMX and BMI agreed broadly on the appropriate structure of the license, they diverged significantly with respect to how the value the components of the fee calculation. *DMX II*, 683 F.2d at 42. BMI proposed $41.81 per location as the "full" fee that would serve as the starting point for the calculation, which reflected a substantial premium over the rates charged to DMX's similarly situated competitors and purported to reflect an "option value" of being able to license performances directly. *Id.* DMX instead proposed that rates be determined using the competitive-market benchmark of its hundreds of direct license transactions, adjusted to reflect BMI's share of all of DMX's performances and the value of BMI's role in aggregating rights and administering the license. *Id.* The court rejected BMI's attempt to use the rates it had secured from other licensees as a benchmark and agreed with DMX that the direct licenses were more probative of what fees would be in a competitive market. *Id.* Adopting in broad measure DMX's approach to adjusting that benchmark, the court set a final annual per location fee of $18.91 as the starting point, a floor fee of $8.66, and a crediting mechanism determined each quarter by multiplying the difference between the full fee and the floor fee by the percentage of performances of BMI repertory music that DMX had licensed directly from BMI's affiliates. *Id.*

The ASCAP rate proceeding was tried later that same year. For its part, and notwithstanding the BMI Rate Court decision, ASCAP presented two alternate proposals. In the

first instance, and notwithstanding the *AEI* precedent, ASCAP disputed DMX's entitlement to an adjustable-fee blanket license, contending that a blanket license with a carve-out for direct licensing was not a reasonable fee structure. *See THP Capstar*, 756 F. Supp. 2d at 539-41. Under this first proposal—and notwithstanding the BMI Rate Court's recent determination that a per location fee of $18.91 was a reasonable starting point for the fee calculation for the BMI AFBL—ASCAP sought fees of $41.21 per location for the period from 2005 through 2009 and $49 per location plus annual increases for inflation for the period from 2010 through 2012. *Id.* at 539-40. In the alternative, ASCAP proposed a blanket license with a static credit to reflect the amounts actually paid by DMX to ASCAP-affiliated direct licensors in 2009. *Id.* at 541-42. ASCAP not only sought merely to reimburse DMX for its prior direct-license payments—and thereby crush any economic incentive to license directly—but also proposed to add on an additional administrative fee so that DMX's out-of-pocket costs would be higher than if it had never engaged in direct licensing at all. *Id.* at 542.

The ASCAP Rate Court rejected ASCAP's proposals out of hand and adopted rates derived from DMX's direct license transactions, again adjusted for the costs incurred by ASCAP in aggregating rights and administering the license. *THP Capstar*, 756 F. Supp. 2d at 539-47. The ASCAP fees were set at $13.74 per location, subject to a dynamic credit to reflect the percentage of performances of works in the ASCAP repertory that DMX had licensed directly in a given reporting period. *Id.* at 548-52.

Both BMI and ASCAP appealed to the Second Circuit, which affirmed the Rate Court decisions. *DMX II,* 683 F.2d 32. Thus, DMX was able to establish that the combined reasonable fees for blanket licenses from ASCAP and BMI, even without any credit for direct licensing, were not $78 per location, but $32.65 per location—nearly 60% less than ASCAP and BMI had

been charging to competing services. Because of the availability of the credit mechanism and the scope of its direct licensing activity at $25 per location, DMX was able to lower its actual royalty payments to ASCAP and BMI (and total per location royalty payments) even further. Because ASCAP and BMI were obligated to treat similarly situated licensees comparably, rates were lowered across the industry as the deals with much higher rates expired and other services secured new deals with the benefit of the recent Rate Court guidance on reasonable fees. *See, e.g.*, BMI Consent Decree § XIV(C).

None of this mitigation of the supra-competitive rates charged by ASCAP and BMI to background/foreground music services would have been possible without the protections of the Consent Decrees. DMX needed to be able to license musical works directly from rightsholders, rather than being forced to license solely through ASCAP and BMI; it needed access to a form of license from those PROs that took account of its direct licensing activity; it needed protection against copyright infringement liability while it negotiated and then litigated to obtain reasonable fees; the parties needed access to judicial rate-setting after reaching impasse at the bargaining table; and DMX's competitors needed the protections afforded to similarly situated licensees to obtain lower rates for themselves in the wake of the decisions.

B. Numerous Other Music Users Have Been Able to Obtain Reasonable License Terms Only By Virtue of the Protections of the Consent Decrees

The background/foreground music industry has not been alone in significantly benefiting from judicial supervision over the rates to be charged to users by ASCAP and BMI. While the ASCAP and BMI Rate Courts on occasion have found those PROs' fee proposals to be reasonable, they have time and again spurned ASCAP and BMI rate proposals in favor of significantly lower fees more reflective of rates that would be found in a competitive market for music performance rights. These outcomes reflect the results of full trial records following

extensive discovery and issue joinder between leading law firms and economic experts, followed in many cases by review by the United States Court of Appeals for the Second Circuit. Some of the more salient examples include:

- *ASCAP v. MobiTV Inc*, 681 F.3d 76 (2d Cir. 2012) – rejecting ASCAP's $15.8 million fee proposal for content aggregator, and instead setting fees at $405,000 – some 2.5% of the fee sought by ASCAP.
- *ASCAP v. Showtime/The Movie Channel, Inc.*, 912 F.2d. 563 (2d Cir. 1990) – setting fees for cable television program services at 60% of those sought by ASCAP.
- *In re Petition of Pandora Media Inc.*, 6 F. Supp. 3d 317 (S.D.N.Y. 2014) – rejecting ASCAP's proposal of fee increases of more than 60% over a five year license term.
- Memorandum Opinion and Order, *In re Application for the Determination of Interim License Fees for Cromwell Group, Inc., and Affiliates,* , Civ. No. 10-0167 (DLC) (MHD) (S.D.N.Y. May 13, 2010) – setting interim fes for the commercial radio broadcast industry at $40 million less than those sought by ASCAP.

Nor has the background/foreground music industry been alone in obtaining judicial relief under the Consent Decrees in order to secure access to competition-enhancing forms of license that ASCAP and BMI refused to provide voluntarily. For example, until a historic 1993 ruling in its rate proceeding with ASCAP, *see United States v. ASCAP (In re Application of Buffalo Broad. Co.)*, Civ. No. 13-95 (WCC) (MHD), 1993 WL 60687 (S.D.N.Y. Mar. 1, 1993) ("*Buffalo Broadcasting*"), *aff'd in part, vacated in part*, 157 F.R.D. 173 (S.D.N.Y. 1994), the local broadcast television industry, with very limited exceptions, paid only blanket license fees to both ASCAP and BMI. For decades, the only viable form of license offered to local stations by ASCAP and BMI was a traditional blanket license. Although both Consent Decrees contained provisions requiring that they offer stations the alternative of a per program (or, in BMI's case, per programming period) license, neither ASCAP nor BMI did so voluntarily, viewing a

meaningful per program license as undermining the monopoly pricing power they maintained through offers limited to traditional blanket licenses. [3]

The *Buffalo Broadcasting* decision established the parameters of a per program license that was designed, for the first time, to offer the "genuine choice" between per program and blanket licenses guaranteed to broadcasters under the ASCAP Consent Decree. ASCAP Consent Decree § VIII. BMI, whose own Consent Decree contemplates similar access to a per program license, *see* BMI Consent Decree § VIII(B), thereafter generally conformed its licensing practices to *Buffalo Broadcasting* in its dealings with local television stations. The availability of this competition-inducing alternative to the all-or-nothing pricing structure of the blanket license has enabled hundreds of local television stations to take at least some advantage of the workings of a more competitive marketplace and collectively save tens of millions of dollars annually in music performance rights fees. *See, e.g.*, Brief of the Television Music License Committee as *Amicus Curiae* in Support of the United States of America and Reversal of the District Court at 17, *U.S. v. BMI*, Case No. 16-3830 (2d Cir. May 25, 2017) (Dkt. 58) (*available at* https://tvmlc.com/wp-content/uploads/2017/01/USA-v.-BMI-58-Amicus-Brief.pdf). Local television broadcasters also have litigated to secure access to an AFBL. Despite the Second Circuit's decision in *AEI* interpreting the BMI Consent Decree as requiring BMI to offer an AFBL to the background/foreground industry, BMI refused to voluntarily provide an AFBL to the local broadcast television industry, forcing broadcasters to litigate over, and prevail on, what

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[3] A "per program" license is an alternative license form to the blanket license that also provides full access to the PRO's repertory but enables the licensee to reduce the overall license fee it pays to that PRO by "clearing" one or more of its programs of music from that PRO either (i) by obtaining the public performance rights to the music from that PRO embedded in specific programs through a direct or source license, or (ii) by eliminating that PRO's music from specific programs.

should have been a settled issue. *See WPIX, Inc. v. Broadcast Music, Inc.*, No. 09 Civ. 10366 (LLS), 2011 WL 1630996, at *4 (S.D.N.Y. Apr. 27, 2011) (holding that "the 'carve-out' blanket license, being no more than the traditional and common blanket license despite its particular pricing mechanism, is required by long tradition and by Section XIV of the [BMI] Decree to be issued to any applicant, without regard to whether the applicant is a broadcaster or non-broadcaster").

In other instances, license applicants have relied on the protections of the Consent Decrees when ASCAP and BMI have exercised their monopoly power to dictate the scope of licenses they would offer to users. For example, ASCAP and BMI initially refused to issue licenses to cable television programming services that would cover the public performances made by cable system operators of the music embedded in the programming of the services they carried. The PROs preferred to extract separate licensing fees at the cable system operator level, even though the cable systems had no say in what music was selected and often did not even know what music the programming contained. The cable program suppliers sought judicial relief in the ASCAP Rate Court, seeking a determination that ASCAP was obligated by its Consent Decree to offer a license to them that would cover not only their own performances, but those made by their authorized distributors as well. *See United States v. ASCAP(In re Application of Turner Broad. Sys., Inc.)*, 782 F. Supp. 778 (S.D.N.Y. 1991) ("*Turner Broadcasting*"), *aff'd per curiam*, 956 F.2d 21 (2d Cir. 1992). The cable program suppliers also sought a determination that they were entitled to a per program license, which ASCAP had refused to offer. *Id.* at 781. The ASCAP Rate Court decided both issues in favor of the license applicants, and the Second Circuit affirmed. *See Turner Broadcasting*, 956 F.2d 21. In the wake of that guidance, BMI also began offering licenses to cable programming services that covered

not only their own content transmissions, but also covered performances made by cable system operators when transmitting those services to their subscribers.

C. The Protections of the Consent Decrees Remain as Critically Important as Ever

While there have been many changes since the mid-20th Century in the ways that consumers access and enjoy performances of music, there have been no changes to the music licensing marketplace that would warrant termination of the Consent Decrees or any material diminishment of the scope of protection they offer to music users. ASCAP and BMI continue to aggregate massive repertories that account for almost all of the music available in the marketplace; they continue to enjoy monopoly power over their respective repertoires; they continue to possess and exercise market power in their negotiations with licensees; they continue to resist new license forms that would promote a more competitive marketplace; and most (if not all) significant music users continue to lack marketplace options that would enable them to avoid taking licenses from both organizations. Indeed, both PROs have engaged in anticompetitive conduct in recent years that violates the Consent Decrees. *See e.g.,* Mem. in Supp. of United States' Unopposed Mot. to Enter Proposed Settlement Agreement and Order, *United States v. ASCAP*, Case 1:41-cv-01395-DLC-MHD (S.D.N.Y. May 12, 2016) (Dkt. 750) (describing "contemptuous conduct" by ASCAP to prevent direct licensing by members in violation of decree and additional concerns raised during DOJ investigation); *Broadcast Music, Inc. v. Pandora Media, Inc.*, Nos. 13 Civ. 4037 (LLS), 64 Civ. 3787 (LLS), 2013 WL 6697788 (S.D.N.Y. Dec. 19, 2013) (BMI scheme to permit affiliates to withhold license authority from BMI with respect to particular license applicants violated BMI Consent Decree.); *In re Pandora Media, Inc.*, Nos. 12 Civ. 8035 (DLC), 41 Civ. 1395 (DLC), 2013 WL 5211927 (S.D.N.Y. Sept. 17 , 2013) (ASCAP scheme to permit partial withdrawals of license authority violated ASCAP Consent Decree), *aff'd sub nom. Pandora Media, Inc. v. ASCAP*, 785 F.3d 73 (2d Cir. 2015); *see*

also In re Pandora Media, Inc., 6 F. Supp. 3d 317, 357-58 (S.D.N.Y. 2014) (finding that "ASCAP, Sony, and UMPG did not act as if they were competitors with each other in their negotiations with Pandora" and by "coordinat[ing] their activities," ASCAP's "very considerable market power . . . was magnified."), *aff'd sub nom. Pandora Media, Inc. v. ASCAP*, 785 F.3d 73 (2d Cir. 2015); *THP Capstar*, 756 F. Supp. 2d at 535 ("The PROs have tried their best to prevent the major music publishers from entering into direct licenses with DMX."). So long as ASCAP and BMI are permitted to exist, they must continue to be subject to constraints of the types contained in the Consent Decrees.

Given the longstanding and ongoing need for the protections of the Consent Decrees, there is no reason to modify them to include an automatic sunset provision. The Division regularly has undertaken periodic reviews of the Consent Decrees, including most recently an exhaustive, multi-year investigation that only concluded three years ago, to ensure that they continue to serve the public interest. There is no reason to discard this practice in favor of an arbitrary deadline for termination of the Consent Decrees.

III. Modifications to the Consent Decrees Would Further Mitigate the Anticompetitive Effects of Collective Licensing and Promote Efficiency

There are at least several modifications to the Consent Decrees that would further mitigate the anticompetitive effects of collective licensing by ASCAP and BMI, promote efficiency in music licensing, and serve the public interest.

A. Universal, Convenient Access to Relevant Repertory Information

A major impediment to creating a more efficient and more competitive marketplace has been the historical lack of transparency concerning the contents of PRO repertories and the relevant rightsholders. While ASCAP and BMI both offer on their websites to search on a song-by-song basis for whether a work is in their respective repertories, these search functions are of

limited utility to large scale music users such as Mood if they want to perform music from less than all PROs. As required by Section X of the ASCAP Consent Decree, ASCAP now makes an electronic copy of its repertory available for download; [4] BMI continues to withhold access to comparable information. BMI, no differently than ASCAP, maintains an electronic database of its complete repertory, including information about the relevant rightsowners, and, in the case of co-owned works, the specific shares that are owned by its affiliates—it just chooses to withhold it from licensees and any music user who might wish to avoid using BMI repertory music. There is no valid reason why BMI (or any other PRO) cannot make an electronic, searchable, and up-to-date copy of its repertory readily available to music users and offer assurance that music users will not be sued for copyright infringement for performances of works not disclosed in the database at the time of performance.

Access to complete, transparent, and reliable repertory information across the PROs will increase the efficiency and competitiveness of the music performing rights marketplace in at least three ways. First, it will enhance the ability of a music user to elect to rely on the repertory of a single PRO, or at least less than the repertories of all PROs, by providing repertory information in a convenient, usable form. For licensees that use tens or hundreds of thousands of musical works, searching a web site on a title-by-title basis is not viable for this purpose. Second, by disclosing the ownership of the works in the repertory—again in a more usable form

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[4] GMR also makes such a database available for its repertory and provides updated versions on a regular basis. *See* https://globalmusicrights.com/CatalogRequest. GMR also assures prospective licensees (or music users that wish to avoid taking a GMR license) that "Global Music Rights will not sue anyone for copyright infringement for performances of these compositions unless they appear in this catalog at the time of performance." *Id.* In addition, the International Confederation of Societies of Authors and Composers ("CISAC"), funded in part by U.S. PROs, maintains an international database of composer and publisher PRO affiliations.

than title-by-title searches provide—licensees will have access to information that could help facilitate direct licensing transactions, both by identifying who actually owns the works and, where applicable, the number of co-owners. Third, music users will have the ability to evaluate more precisely the extent of their use of a given PRO's repertory and adjust their license offers accordingly. When music users are reliant on PROs to self-report their shares of the user's performances, the combined number often exceeds 100%.

B. A Requirement to Protect the Value of "Licenses in Effect"

ASCAP currently protects the reasonable expectations of music users who negotiate licenses for the right to perform the music in ASCAP's repertory against the risk that composers and music publishers will withdraw their works from ASCAP during the term of a license. Under the current Compendium of ASCAP Rules and Regulations and Policies Supplemental to the Articles of Association ("ASCAP Compendium"),[5] any resignation from membership in ASCAP is subject to "Licenses-in-Effect," which are defined to include (i) any written, final fee agreements between ASCAP and music users granting the rights to publicly perform the works in ASCAP's repertory, and (ii) any final orders or judgments entered in any judicial, administrative or governmental proceeding, including ASCAP Rate Court proceedings, in effect as of the member's resignation. *See* ASCAP Compendium §1.11.3. Licensees are thus permitted to continue to publicly perform the musical works that were in the ASCAP repertory when they entered into a final license agreement with ASCAP (or the terms were set by the ASCAP Rate Court) for the duration of the license term, without the need to secure additional license rights from the withdrawing rightsholder. In other words, while the ASCAP repertory

[5] The current ASCAP Compendium is effective as of September 19, 2014 and is available on ASCAP's website. *See* https://www.ascap.com/about-us/governingDocuments.

available with respect to any particular licensee may—and almost certainly will—grow as ASCAP registers new members and as existing members create new musical works, there is no present risk (assuming that all ASCAP membership agreements are subject to the ASCAP Compendium) that the value of the repertory will significantly diminish over the course of the license as a result of resignations by members.

In contrast, as BMI's President and Chief Executive Officer explained to the BMI Rate Court in a recent proceeding, at least some BMI affiliates have the ability to withdraw the right to publicly perform their works immediately from BMI's licensees when they resign from BMI. *See* Trial Tr. at 27-28, *Broadcast Music, Inc. v. Pandora Media, Inc.*, Case 1:13-cv-04037-LLS (S.D.N.Y. Feb. 11, 2015) (Dkt. 196). Music users are not notified of resignations from BMI, and they may not even know that a prominent BMI's affiliate's works are no longer subject to the license. The absence of license-in-effect protection, the lack of access to perfect information about the scope of the BMI repertory, and the inability of Mood and other music users to eliminate a departing affiliate's works from their services on a moment's notice significantly enhance the risk of copyright infringement and thus undermine one of the key rationales for permitting BMI to engage in blanket licensing in the first place. *See BMI v. CBS*, 441 U.S. at 21-22; *see also* 2016 DOJ Statement at 13 (describing "protection from unintended copyright infringement liability" as one of the "key procompetitive benefits of the PROs preserved by the consent decrees"). The risk of infringement that results from a lack of license-in-effect protection would be enhanced for music users that tried to operate with licenses from only some but not all PROs, and it cannot be eliminated given the potential emergence of new PROs and the possibility that a former BMI affiliate might choose to license her works without joining another PRO at all. This risk, moreover, has been significantly exacerbated by the switch to PRO

licensing of "fractional rights" in works in their repertories, rather than licensing the full right to perform any work in the repertory.

Mood is not aware of any recourse for a BMI licensee if BMI affiliates that own a material portion of the works in the BMI repertory were to resign in the first year of a multi-year license, and trying to contract around such contingencies would be daunting even if BMI were willing to do so. At present, if confronted with one or more significant departures, the music user would have to pay BMI the same amount for whatever repertory remains *and* enter into new agreements at additional expense to continue performing the works of departed members (assuming the rightsholders were willing to re-license the works). This situation only enhances the enormous leverage BMI affiliates obtain by licensing their works collectively through BMI, and it merits governmental constraint. Moreover, while ASCAP's current practices protect music users from this situation, ASCAP is not required by its Consent Decree to do so. Accordingly, the Consent Decrees would benefit from modification to require license-in-effect protection as a condition of collective licensing.

C. A Prohibition Against Licensing of Fractional Rights

At the conclusion of its 2014-2016 review of the Consent Decrees, DOJ concluded that they do not permit ASCAP and BMI to license on the basis of fractional interests, rather than full works. *See* 2016 DOJ Statement at 11-13. When BMI challenged this conclusion, the Second Circuit determined, as a matter of decree construction, that the BMI Consent Decree does not presently prohibit fractional licensing, but it did not endorse the practice—rather, it observed that DOJ is free to move to amend the Consent Decrees or sue under the Sherman Act in a separate proceeding to address the competitive concerns raised by fractional licensing. *See U.S. v. BMI*, 720 F. App'x. 14, 18 (2d Cir. 2017).

Because fractional licensing erodes the procompetitive benefits of the Consent Decrees, and accordingly erodes the rationale for permitting ASCAP and BMI to engage in blanket licensing in the first place, the Consent Decrees should be modified to prohibit fractional licensing and to restore the longstanding practice of licensing all of the rights needed to publicly perform any work in the PRO's repertory. As the Division has observed, "[i]n the decades since the ASCAP and BMI Consent Decrees were entered, industry participants have benefited from the 'unplanned, rapid and indemnified access' to the vast repertories of songs that each PRO[] . . . makes available." 2016 DOJ Statement at 2 (quoting *BMI v. CBS*, 441 U.S. 1, 20 (1979)). As the Division correctly recognized after its recent, extensive and thorough investigation, "only full-work licensing can yield the substantial pro[-]competitive benefits associated with blanket licenses that distinguish ASCAP's and BMI's activities from other agreements among competitors that present serious issues under the antitrust laws." *Id.* at 3.

As part of the justification for allowing PRO blanket licensing practices to survive an antitrust challenge, the U.S. Supreme Court observed that the ASCAP and BMI blanket licenses "allow[] . . . immediate use of covered compositions, without the delay of prior individual negotiations and great flexibility in the choice of musical material." *BMI v. CBS*, 441 U.S. at 22. But fractional licenses do not provide immediate use of compositions; they do not avoid the delay of additional negotiations; they significantly reduce the protection afforded against unintended copyright infringement liability; and, accordingly, they significantly limit licensees' choices with respect to musical material. As a result of ASCAP's and BMI's repositioning of their licenses as limited to fractional rights, music users are caught between the Scylla of meticulously tracking song ownership prior to performances and the Charybdis of increased risk

of inadvertent copyright infringement.[6] In addition to significantly eroding the pro-competitive benefits of blanket licenses, fractional licenses significantly enhance the negotiating leverage afforded to owners of fractional interests and create incentives to divide copyright interests further, withhold some but not all interests from ASCAP and BMI, and further fracture the market for music performing rights. Fractional licensing gives owners not affiliated with ASCAP or BMI veto power over the lawful public performance of a work, even if a music user has already paid for 99% of the interests in the work through ASCAP and BMI. The Division has already recognized that permitting fractional licensing by ASCAP and BMI is not in the public interest, *see* 2016 DOJ Statement at 13-16, and the Consent Decrees should be modified accordingly.

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[6] As the Division has noted, there is no reliable, comprehensive source of data concerning song ownership readily available to music users and, for new releases, songwriting credits for, and PRO affiliation of, each fractional interest may not be fully established until after release. 2016 DOJ Statement at 15.

We thank the Division for considering these comments and stand ready to supplement them as requested.

Respectfully submitted,

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