BEFORE THE DEPARTMENT OF JUSTICE

In re: Antitrust Consent Decree Review (2019)	*United States v. ASCAP*, 41-cv-1395 (S.D.N.Y.) *United States v. BMI*, 64-cv-3787 (S.D.N.Y.)

Comments by the Motion Picture Association of America and Independent Film and Television Alliance

August 9, 2019

On behalf of their members, the Motion Picture Association of America, Inc. (MPAA)[1] and the Independent Film & Television Alliance (IFTA)[2] respectfully submit these comments in response to the Department of Justice's review of the ASCAP and BMI consent decrees. MPAA and IFTA members rely on the consent decrees, both directly and indirectly, to ensure that the content that they produce and distribute will be available to consumers on fair and competitive terms. For example, in 2018 alone, MPAA members produced over 460 audiovisual works (movies and television shows), almost all of which had embedded music and thus involved the commissioning and/or licensing of thousands of musical compositions.[3] During the production process, it is custom and practice for MPAA and IFTA members to secure the synchronization rights for the pre-existing musical works embodied in their content. With one limited exception—theatrical (i.e., cinema) distribution in the United States—the obligation to obtain the public performance rights for such music has always been passed onto the distributor of the content, for example, a broadcaster or an operator of an on-demand streaming service. The MPAA and IFTA support the ability of musical composers and producers to license their content on a competitive basis and on terms that they find advantageous. Further, the MPAA and IFTA believe that the consent decrees continue to serve a critical function in protecting the music licensing ecosystem—and, ultimately, consumers of content produced and distributed by MPAA and IFTA members—

[1] The MPAA is a trade association representing the major film studios in the United States—Walt Disney Studios Motion Pictures, Netflix Studios, LLC, Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Universal City Studios LLC, and Warner Bros. Entertainment Inc.

[2] The IFTA is a trade association for the independent motion picture and television industry worldwide and is dedicated to protecting and strengthening its members' ability to finance, produce, market and distribute independent films and television programs in an ever-changing and challenging global marketplace. IFTA represents more than 140 companies in 22 countries, the majority of which are small to medium-sized U.S.-based businesses which have financed, produced, and distributed many of the world's most prominent films

[3] While the producer will generally control the public performance rights to a composition that is commissioned for the film ("work-made-for-hire"), such as a film score, in the U.S., the writer often retains the ability to collect his/her share of public performance rights revenues from his/her PRO, such as ASCAP or BMI.

from anticompetitive practices by the two largest major performing rights organizations ("PROs"), ASCAP and BMI.

For the past seven decades, MPAA and IFTA members have relied on the existence of the decrees in developing content, designing their commercial practices, and formulating forward-looking business strategies. Terminating the decrees would place the music licensing ecosystem into upheaval and remove important safeguards against anticompetitive conduct by ASCAP and BMI, which together control public performance rights to more than 90% of all copyrighted songs in the United States. This would have a direct impact on MPAA and IFTA members in their roles as producers of audiovisual programming that rely on the decrees to facilitate the public performance of music contained therein. It would also directly impact MPAA members when they act as distributors[4] that require such public performance rights in order to exhibit the content through their cable networks or streaming services. While MPAA and IFTA members are committed to ensuring that composers and publishers are fairly remunerated for their work, they do not believe that vacating the ASCAP and BMI consent decrees is justified. The resulting harm to competition will vastly outweigh any potential benefits to termination. Accordingly, the MPAA and IFTA strongly support leaving the ASCAP and BMI decrees in place.

A. MPAA and IFTA Rely on the Decrees

The incorporation of and eventual playing of music embedded in a film, television program, or other audiovisual content requires "clearing" many different intellectual property rights. Under long standing industry practice, the producer of such content represents and warrants to downstream distributors that all necessary copyrights have been fully cleared "at the source" of production—with the sole exception of the right to publicly perform the musical compositions embodied in the licensed film or program. Composers and publishers do not ordinarily license their public performance rights "at the source." This means that any downstream distributor of films or television programs, including cable networks, Netflix, and other direct-to-consumer streaming services (that are in development or may in the future be offered by MPAA members) must secure public performance rights for compositions embedded in the finished (i.e., "in the can") content that they wish to exhibit separately, when such distributors have no ability to alter the music and thus little or no leverage to negotiate a fair license fee without the protections of the consent decrees.

The consent decrees establish the legal framework under which ASCAP and BMI—the two largest PROs—must license such public performance rights. Among other things, the consent decrees provide that ASCAP and BMI must issue licenses on request; must offer blanket licenses, as well as meaningful (competitive) alternatives to blanket licenses; be subject to rate-court proceedings whereby the parties can litigate disputes over rates; limit ASCAP and BMI from obtaining exclusive licenses; and prohibit ASCAP and BMI from discriminating between customers. These provisions serve to overcome the lack of transparency in a landscape marked by tens of thousands of dispersed (and sometimes not easily identifiable) individual copyright holders, and guard against economic hold-up that could be easily exercised by the PROs. If the consent decrees were rescinded, the disappearance of this framework would reverberate throughout the entire content production and distribution chain.

[4] As used herein, "distributor" refers to any exhibitor of content with the exception of cinema operators.

In particular, distributors—such as cable networks and streaming services—rely on the consent decrees to ensure that they pay competitive prices for the public performance rights for the music embedded in the audiovisual content they wish to exhibit. And producers rely on distributors to get their content onto screens for viewing by the ultimate consumers. At the time of production, content producers will negotiate and obtain licenses for the right to reproduce the music as part of their audiovisual content in synchronization with the action (a "synch right"), but not for the public performance of such music. Those rights must be negotiated and cleared with the PROs later—for example, by the cable network or streaming service that wants to display the content.

Under the consent decrees, such distributors can obtain public performance rights on a blanket basis, which allows them to avoid the need to engage in a second round of licensing with every copyright holder of every embedded composition within a given audiovisual work, for every work they perform. They can obtain the rights immediately, upon demand before rate terms are finalized, and negotiate against the backdrop of the rate-court, which provides assurance that the rates will be reasonable (i.e., competitive). And if they do not want a blanket license, licensees can secure meaningful alternative forms of licensing through the PROs, such as an adjustable fee blanket license or a per-program license, or they can obtain at least some of their performance rights directly from the copyright holder, due to the non-exclusivity provisions of the consent decrees. This stable, predictable licensing environment allows the entertainment ecosystem to function. As the Supreme Court recognized long ago, "[a] middleman with a blanket license [i]s an obvious necessity if the thousands of individual negotiations, a virtual impossibility, [a]re to be avoided." *BMI v. CBS*, 441 U.S. 1, 20 (1979). Producers of audiovisual content negotiate for and obtain the sync rights needed to reproduce music on their programming's soundtrack, knowing that the distributors that need the public performance rights necessary to stream or broadcast that content will be able to easily and fairly obtain them.

B. Terminating the Decrees Will Not Promote Competition

Absent the consent decrees, distributors and other licensees would be left completely vulnerable to hold-up scenarios enabled by the market power enjoyed by the largest PROs, thus interfering with the distributor's ability to distribute audiovisual content. This would have a cascading negative effect on the producers of such content as well. A number of outcomes could result, none of which is good for competition or consumers of film, television, and other audiovisual programming.

The threat of "hold-up" and refusal to issue blanket licenses to distributors on competitive terms, or at all. As explained above, given the structure of licensing in the entertainment ecosystem, PROs such as ASCAP and BMI are well-positioned to extract monopoly rents. By the time that a distributor such as a cable network or streaming service receives audiovisual content, it has no control over the music that is embedded therein. The distributor must negotiate for public performance rights of such music, but do so with limited leverage—its only option if it does not obtain the rights is to forgo displaying the content and so lose the investment it has made in that content, to the detriment of its business. In other words, the PRO—as the last rights holder in line—can leverage its potential ability to prevent the distributor from showing the audiovisual content, at a time at which the distributor has no other alternatives given the "in the can" nature of the content, and thereby extract a supra-competitive fee. The risk of

such hold-up will be particularly acute in the short- to medium-term if the consent decrees are lifted, because licensees will have to renegotiate terms for large swaths of content that they wish to continue exhibiting. Without the availability of licenses upon application, as provided for by the consent decree, ASCAP and BMI will have the ability to stop audiovisual content from streaming or playing until an agreement is reached.

Competition between PROs will not solve the hold-up problem. The aggregated collection of public performance rights that ASCAP, BMI, and other PROs such as SESAC and GMR hold are complements, not substitutes. The DOJ has previously recognized this fact, noting that "BMI does not compete with ASCAP in the sense that users will purchase licenses from one or the other; since their repertories are different, most bulk users take licenses from both."[5] Thus, in the face of unreasonable demands or hold-up by one PRO, a prospective licensee cannot turn to another PRO.

If PROs do not offer blanket licenses on competitive terms, this will necessitate an inefficient second round of licensing negotiations by the distributors. At a minimum, this will increase transaction costs substantially, given the inefficiencies that will result from the massive disruption flowing from the loss of the consent decree structure. It may also have the effect of depressing distributors' demand for content and increasing the ultimate cost to consumers.

Potential licensees cannot realistically engage in "hold-out" to deny composers and publishers their fees. Further, this is not a case where the risk and potential costs of "hold-up" by the PROs must be balanced against the potential risk of "hold-out" by licensees.[6] As the Court noted in *BMI v. CBS*, "[t]hose who would use copyrighted music in public performances must secure consent from the copyright owner or be liable at least for the statutory damages for each infringement . . . ." 441 U.S. at 18. Statutory damages for willful infringement of public performance rights under the copyright laws can reach up to $150,000 per work infringed. This means that a distributor who is unable to secure applicable copyrights could be subject to millions of dollars of damages in a short amount of time. The availability of such statutory damages alone makes this situation distinct from other cases in which licensing hold-out may come into play, such as with standard essential patents, where the licensor must sue the standard implementer that infringes its patents and refuses to take a license, and go through the sometimes difficult process of proving such infringement before the licensee is forced to stop infringing and/or pay. Likewise, this is not the case where the right holder can seek an injunction only against an "unwilling licensee;" indeed, a copyright holder can seek an injunction against any alleged infringer.

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[5] Br. for the United States, *United States v. BMI (In re Application of AEI Music Network*), Case No. 00-6123 (2d Cir. June 26, 2000) at 25.

[6] *See*, *e.g.*, Assistant Attorney General Makan Delrahim, "Antitrust Law and Patent Licensing in the New Wild West," Remarks as Prepared for IAM's Patent Licensing Conference, Sept. 18, 2018, available at https://www.justice.gov/opa/speech/file/1095011/download; Assistant Attorney General Makan Delrahim, "Take It to the Limit: Respecting Innovation Incentives in the Application of Antitrust Law," Remarks as Prepared for Delivery at USC Gould School of Law, Nov. 10, 2017, available at https://www.justice.gov/opa/speech/file/1010746/download; Douglas H. Ginsburg, Koren W. Wong-Ervin, and Joshua D. Wright, "The Troubling Use of Antitrust to Regulate FRAND Licensing," CPI Antitrust Chronicle (Oct. 2015), available at https://www.competitionpolicyinternational.com/assets/Uploads/GinsburgetalOct-151.pdf.

If the burden of clearing performing rights shifts to the content producers, inefficiency and increased costs will result. Hypothetically, in an attempt to avoid the hold-up problem, distributors could insist that public performance rights are cleared by the content producers at the same time they clear other rights. As an initial matter, however, there is no reason to think that composers and music producers would do so—they have historically refused to license the synch right and the public performance right in one transaction. Even if composers and music producers did decide to allow simultaneous licensing of synch rights and public performance rights, this would lead to increased transaction costs and efficiency—at least in the immediate to medium term—as a result of the departure from a long-standing business practice.

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For the last seventy-five years, the consent decrees have been effective in establishing a predictable, efficient means of licensing the public performance rights that are a necessary, key ingredient in making audiovisual content available for viewing by consumers. If the ASCAP and BMI decrees were terminated, this system would be thrown into upheaval and consumers would suffer due to increased costs and prices and/or reduced supply, inefficient processes, and uncertainty. The MPAA and IFTA therefore strongly support leaving the decrees in place.

Respectfully submitted,

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