musicanswers

A non-profit organization representing America's songwriters, composers, performers, and producers

August 8, 2019

Department of Justice
Antitrust Division
Washington, D.C. 20530
via email

RE: **ANTITRUST CONSENT DECREE REVIEW - ASCAP AND BMI 2019**

Ladies and gentlemen,

Music Answers is a non-profit advocacy organization dedicated to preserving and protecting the rights of songwriters, composers, performers, and music producers in the digital age. On behalf of the more than 3500 music creators who have signed our Declaration of Principles[1], we provide the following comments on the Department of Justice's review of the Consent Decrees governing the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI).

In principle.

As an over-arching principle, we support freedom in the marketplace: the freedom for music creators to choose the organizations that represent us, the freedom for those organizations to fully protect our rights in the marketplace, and the freedom for music creators and our publishing partners to participate fully in the financial rewards generated by our work.

We note that the origins of both consent decrees at issue harken back to a very different time in America, and were designed to address anti-competitive behavior and concerns that simply no longer exist. Currently, neither ASCAP nor BMI ("performing rights organizations" or "PROs") possesses overwhelming market share and both have proven over time their ability and desire to work on behalf of their members ("affiliates," in the case of BMI) to craft licensing solutions that work well in the marketplace. Those solutions serve the public interest by balancing the rights and needs of music *creators*, who provide the fundamental fuel of the music business, with the needs of music *users* who provide music delivery services to the public.

[1] http://www.musicanswers.org/declaration-of-principles

We want to be heard.

The driving force for all music creators is our desire for the public to hear and—we hope—love our work. We know that the only way for that to happen, and for us to be financially compensated for our work, is to enter into agreements with music users. Very few music creators have the skills or experience necessary to successfully navigate the world of music licensing on their own. Instead, we depend on our PRO partners to act on our behalf. We expect them to negotiate the very best deal they can and to make sure every music user has full access to our work.

When our PRO partners are constrained from negotiating fair market rates for the use of our music, our only choice is to accept an inferior deal or try to directly license our music. But why would any music user even bother talking to an individual music creator if the user can license the creator's works from a PRO at a lower rate?

If the Department is fearful that in a free market, music creators and their publishing partners will use the PROs to extract from music users above-market rates, we remind the Department that a strong, countervailing factor is the relentless need of music creators to be heard and be paid. We expect our PROs to find workable solutions that allow our music to enter the marketplace quickly, and history suggests that music creators and their business partners will support those that do, and abandon those that don't.

Are the Decrees still useful?

The Department has asked if the Consent Decrees still serve an important purpose. If that purpose is a depression of the fair market value of music rights, then the answer is probably, "Yes." If the purpose is to manipulate the marketplace to provide an artificial growth opportunity for new music licensing entities competing with older, larger organizations handcuffed by the Decrees, then the answer is probably "Yes," again. If the purpose is to disadvantage large American PROs and their music-creator members in an increasingly competitive *worldwide* market, then the answer is certainly, "Yes."

We presume that the Department intends none of these purposes. Nevertheless, all of these are important aspects of the current market, and their root causes can all be traced back to the current Consent Decrees, both of which were conceived and implemented at a time when the music world looked very different than it does today.

As we understand it, the question for the Department is whether or not the Consent Decrees continue to serve a public purpose. In other words, is the public better off with the Decrees in place, or without? Many music users enjoy the so-called benefits of the Decrees and hope they stay in place, as is. After all, the Decrees virtually guarantee the continuation of a constrained marketplace and below-market rates for those using music performances to generate profit. We assume those who do so, will continue to make the argument that since the decrees keep prices low, that is good for consumers.

But does the manipulation of a free market really serve the public interest? If songwriters and composers can't make a living from music and are forced to take other employment to put food on the table, how does the public benefit? If a song *doesn't* get written, or a movie theme *isn't* memorable, if music creators are unable to focus on their work, how is the public interest served? At what point does market manipulation through a consent decree become *de facto* control of music creation that ultimately diminishes our cultural heritage?

In considering changes to the Consent Decrees, we urge the Department to be mindful that ASCAP and BMI are not traditional businesses. They are an essential part of the delivery pipeline for the artistic expression of music creators around the world, playing a key role in an important part of our culture. The decisions of the Department in regard to the Consent Decrees may strongly influence the kind and quality of music people will be listening to for many generations.

It's a new world.

Today's world is all about choice. Consumers do not want to be told when, where, or how they can listen to music. They want full-time access, on whatever device or platform they choose. And (*finally!*), they seem to be OK paying for it.

The music world is trying to catch up to this new consumer-driven market. Our music licensing systems were built for a linear, hierarchical world, not a fragmented, multi-choice one where every user wants (and gets) something different. As music creators, we understood how mechanical rights, performance rights, synchronization rights and lyric rights functioned in the music marketplace of old, and they made sense to us. They make no sense to the new generation of music users or consumers.

Innovation in digital delivery systems is exciting to us because it increases our opportunities to connect with consumers. We want to support these new platforms and we fully expect our PROs to find new licensing paradigms that service this growing industry. We note that some of these new platforms require only performance rights. Others require mechanical rights, as well. Some may need lyric rights or synch rights. As music creators trying to reach our audience, we want music users to be able to obtain those rights with the greatest possible ease.

Section IV (A) of the ASCAP decree[2], which prohibits ASCAP from acquiring any rights in a musical composition other than performance rights, is outdated and no longer serves any useful purpose we can perceive. Not only does this provision unreasonably restrict the ability of ASCAP and BMI to meet the demands of a rapidly changing market, but other, competing rights organizations are bound by no such limitations. The Decrees thus artificially manipulate the market, giving advantage to one entity over another; it creates confusion and adds unnecessary

[2] Although we understand that the Department is examining the decrees of both ASCAP and BMI, for the sake of clarity and simplicity we will discuss only the Second Amended Final Judgment in United States v. ASCAP, Civil Action 41-1395, with the understanding that where applicable, our comments apply to both decrees.

layers of licensing with their attendant costs and inefficiencies. MusicAnswers strongly supports the elimination of this restriction.

Section IV (B) prohibits ASCAP from accepting an exclusive assignment of rights. We fully support this concept, although, we believe its inclusion in a consent decree is unnecessary. Just as consumers want choice, so do music creators. There are many opportunities for music creators to license works outside of the PRO system, and those options should always be open to us. MusicAnswers (and, we assume, most other writer organizations and individuals) would strongly oppose any effort by the PROs to lock music creators into exclusive contracts.

Section IV (C) requires ASCAP to treat similarly-situated licensees equally. While this sounds reasonable as a concept, in practice, we have seen this provision unfairly employed by licensees who establish sham businesses in order to qualify for lower rates. The fact is that no two businesses are the same, especially in the digital world, where platform distinction is driving innovation and investment. Our PROs need the freedom to be able to accommodate new market entrants with licenses that fit their needs, and we believe a free, willing buyer/willing seller environment without interference from the government will help music creators and users to find common ground in rates and conditions satisfactory to both parties.

Section IV (D) prohibits ASCAP from entering into any licensing agreement for longer than five years. Again, this intrusion by the government into the negotiations between buyers and sellers of music rights seems unnecessary and unwise. In this rapidly changing world, it's unlikely that either PRO would be inclined to enter into licenses for longer than 60 months, but they—and we—should have the ability to enter into a longer license if the result would be beneficial to us.

Section IV (E) should have been eliminated many years ago. It is unjustifiable, in our view, that modern motion picture theater owners should be excused from paying score composers *anything* for the public performance of their music in the movies that theaters show. We believe that the long-ago decision in Alden-Rochelle was intended to punish ASCAP for bad behavior—to teach it a lesson.[3] We don't argue that ASCAP's behavior at that time wasn't offensive: by demanding a 1500% increase in licensing fees, under threat of copyright infringement, ASCAP *was* using its market power unfairly. However, the solution imposed by the court—that composers of music in films shown in America could never be paid for those performances through their chosen PRO—has deprived composers the world over of their rights and royalties. The "solution" of having composers negotiate performance fees well in advance of a movie's release, and receiving only a small percentage of the fees they might legitimately receive from those performances, has not worked to the benefit of music creators. Again, we believe that, whenever possible, it is efficient and beneficial to allow PROs to represent their members in a free market.

Section IV (F) prohibits ASCAP from restricting the public performance of any individual work in an effort to extract additional payment for that work. This would seem like the kind of

[3] Alden-Rochelle, Inc. v. AMERICAN SOC. OF C., A. AND P., 80 F. Supp. 888 (S.D.N.Y. 1948)

condition more properly reserved for license negotiations between buyers and sellers of music rights. Users could certainly insist on this kind of warranty in any blanket license agreement, making its inclusion here unnecessary.

Section IV (G) follows on from section (E) regarding the performance of music by motion picture theater operators. We stand by our previous comments that this provision is unfair, unreasonable, and no longer necessary.

Subsequent sections of the ASCAP Consent Decree concern various types of licenses that ASCAP may offer to users. It is our understanding that both ASCAP and BMI have agreed to continue to offer exactly the kinds of licenses currently available, although they may also enter into different types of licenses if requested by users. Accordingly, we offer no comment on the types of licenses that ASCAP and BMI may enter into with users.

Determining reasonable fees in a reasonable time.

Any child with a lemonade stand knows you don't give the product away and then discuss its price. But the Consent Decrees mandates that ASCAP and BMI immediately give a license to anyone who asks for one, in many cases long before the user has fully explained how he intends to use the music, and before these PROs understands the economics of the user's business. Recently, digital music companies have been exploiting this provision by asking for a license and then delaying for months or years negotiations with ASCAP about the basis for a reasonable fee.

The impact of this provision is to deprive music creators of fair compensation for their work, while newly established music users are able to use the popularity of our music to rapidly build and expand their businesses. We urge the Department to end this current practice by establishing a reasonable and workable "fast-track" solution.

The additional burden placed on ASCAP and BMI to prove the "reasonableness" of its proposed license fee is also anachronistic, harkening back to days when everyone knew how broadcasting and other types of public performance functioned. Today, new businesses are innovative, complex, and secretive about their plans. In many instances, these are cases of "first impression" where no similar business exists, and where there is no case law or previous license to look to for guidance. In these instances, a willing buyer/willing seller standard should apply, rather than placing the burden of proving reasonableness solely on one party.

We strongly support the request of the PROs for a more efficient, less costly, and automatic mechanism for the payment of interim fees for new licensees.

Public lists.

We applaud ASCAP and BMI for their efforts to make the ownership of copyrights more transparent to users, and we sympathize with music users who suddenly discover just how

complex copyright ownership can be. We believe that our PROs are best-suited to develop and maintain comprehensive, authoritative lists of works, and we are heartened to know that ASCAP and BMI are now working together to synchronize registration and ownership data. It's important to note that this is not being done because of any government demand, but because of appropriate commercial pressure from all sides.

However, cooperation at this level, by itself, will not solve the data problem. Music creators themselves must share some of the blame for incomplete or inaccurate data regarding ownership. It is a fact of life in our business that music creators do not always agree on who did what and to what level each contributing writer deserves to be compensated. This is a problem which music creators cause, and which we can and must fix.

We have suggested to the PROs that they withhold all payments for writers and publishers of any work for which data is missing or inconsistent, and if disputes have not been settled within a reasonable amount of time, those royalties be forfeited. We believe these steps would help correct the problem of missing or inaccurate data.

We believe that Section X of the ASCAP Consent Decree, and the corresponding language in BMI decree, can be eliminated without impact.

Membership.

As professional music creators, we are troubled by Section XI of the decree, which requires ASCAP to accept into membership anyone who meets some very basic requirements. We are unsure what problem this section seeks to solve, but we are very aware of the problems it creates.

The requirement to accept virtually anyone who applies burdens ASCAP with an unparalleled administrative cost. History proves that only a small percentage of those who join will ever obtain performances of their music in venues licensed by ASCAP. The vast majority will simply be members in name only, with tens of millions of registrations being processed and tens of thousands of new members contacting ASCAP for help with various kinds of music industry or career problems, many of which are beyond ASCAP's control. The actual (and significant) cost of maintaining and servicing this vast network of un-performed music creators falls on those who *do* earn royalties, reducing their royalty checks incrementally.

Moreover, this requirement places ASCAP at a distinctly unfair competitive disadvantage, as smaller PROs, like GMR and SESAC, operate on an invitation-only basis. We believe and recommend that all PROs need the ability to set standards for membership, and to require such proof of eligibility as they may establish.

Sunsetting the Decrees.

We agree with ASCAP and BMI that the Decrees should expire within a few years. Perhaps, the provision of guardrails within a new, temporary decree could help both PROs and licensees gradually adapt to an "almost free market" within certain parameters, while protecting the rights of all parties. We encourage the Department to work with the parties to develop such guardrails—noting the issues we have described herein—and to set a date certain for the removal of the government from its role in the licensing of public performances of music.

In conclusion.

In summary, the music licensing environment of the 1940s, which produced the consent decrees under which ASCAP and BMI operate, has long since faded from view. Therefore, the rationale for government intervention in the business of music licensing is less compelling now than ever before. That said, we have noted and described a nuanced approach we believe will effectively address current outstanding issues.

The absence of a consent decree will not eliminate the right of any licensee who feels abused by the market power of the PROs to bring an action against them. This threat of potential litigation is one more reason why pre-emptive federal intervention is unnecessary.

We salute the Department for conducting a thoughtful and serious review of the Consent Decrees, and we appreciate this opportunity to provide comments.

Sincerely,

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