



**Comments from**

**Bart Herbison**

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**on**

***“Antitrust Consent Decree Review – ASCAP and BMI 2019”***

**before the**

**United States Department of Justice Antitrust Division**

**August 9, 2019**

Thank you for the opportunity to comment regarding the U.S. Department of Justice (DOJ) review of the ASCAP and BMI Consent Decrees. We appreciate the Department's attention on behalf of American songwriters and the efforts to ensure that the performance licensing ecosystem is functioning appropriately.

**1. NSAI has a uniquely independent advocacy position.**

The Nashville Songwriters Association International (NSAI) is a member-driven trade association with one constituency – songwriters. It is important to note that NSAI does not participate in the royalty streams of our members. We are a voluntary dues-based songwriter trade association. Our independence in this regard has given NSAI an important unconflicted standing as we consider advocacy positions. Above all the most important guide NSAI would offer is that DOJ actions should serve to ensure fair compensation for songwriter copyrights and create no harm.

**2. The Music Modernization Act has had a profound impact on our views regarding consent decree changes.**

For years, and in previously submitted comments, NSAI has encouraged DOJ to effect consent decree reform. Our primary motive for those requests was always to address the depressed digital performance rates that songwriters received under restrictions imposed by the ASCAP and BMI decrees, rates we believe also guided those that private performing rights societies not operating under DOJ decrees could achieve. Last year, however, NSAI helped bring about such changes with adoption of the Orrin G. Hatch-Bob Goodlatte Music Modernization Act (MMA), legislation containing provisions that updated the ASCAP and BMI rate processes. Now their rate court judges will be randomly assigned, and ASCAP and BMI will be allowed to introduce marketplace-based evidence for their consideration when determining certain performance royalty rates. Since the MMA became law in October 2018, neither ASCAP nor BMI have engaged in a single rate court proceeding. Therefore, NSAI believes changes would now be premature and advocates a slow, cautious and measured approach before making any modifications to the decrees or sunsetting them.

**3. Major changes by DOJ WILL trigger political action by stakeholders. Some consent decree changes could inspire powerful groups, whose goal is lower songwriter/composer royalties, to enlist Congress to pass laws that would weaken the ability of songwriters to obtain fair market value for their work.**

NSAI proposes allowing time to analyze the effects of the MMA on the licensee/licensor ecosystem before considering broader consent decree reforms. Without an understanding of how the statutory changes just made could impact the market, that can only come with time and processes, it is difficult to know with any degree of certainty precisely what, if any, consent decree reforms are necessary.

Rather than an expedient review that creates confusion and potential chaos, we advocate an opportunity to continue working with licensees, as we did in the development of the Music Modernization Act, to find compromise solutions that meet the needs of the entire marketplace. Whether those solutions include consent decree reform to any extent, great or small, will take time to determine. In anticipation of a possible consent decree sunset, trade associations representing licensees such as broadcasters, bars and restaurants and digital companies have already proposed to Members of Congress a specific set of criteria they would like to see enacted to create a compulsory performance license and other Congressional mandates that would be devastating for songwriters and erase important gains achieved through the MMA. Without a measured and informed process, things could be made worse for all parties.

For now, again we suggest letting the new MMA performance royalty standards evolve in the marketplace. Every important stakeholder involved in the consent decree debate was also part of the landmark legislation and the industry agreements that forged the bill. Wouldn't those same groups and their respective constituencies and customers along with DOJ be much better informed and equipped to consider whether consent decree changes are necessary after first being able to understand the impact of those already made in the MMA?

**4. If the DOJ *DOES* intend to make consent decree changes, we strongly request the opportunity to present the songwriter's perspective before any final action is taken.**

Prior to adoption of the MMA NSAI has periodically commented at length about proposed consent decree reforms. But things have changed. Depending on the course of action taken by DOJ, we strongly request the opportunity to offer more specific feedback and personally meet with DOJ prior to any final determinations. While NSAI generally agrees with the four principles ASCAP and BMI are encouraging DOJ to consider when it comes to evolving the decrees and the concept of a single consistent decree, most importantly we don't want songwriters'

ability to earn a fair living to regress, nor actions by DOJ, to precipitate a rush by licensees to Capitol Hill seeking to replace modified or eliminated decrees with harmful new statutes. When it comes to a post-consent decree world there are as many questions as answers and context is critical. If necessary, NSAI will offer very specific policy comments in response to any changes DOJ suggests including possible modifications to our own previously supported positions.

NSAI is a grassroots organization directly connected to thousands of songwriters each year. They come to our building, utilize our programs and services, attend our award presentations and shows, perform at The Bluebird Café which we own and interact with us in a way and at a volume unique in America. When DOJ asked for comments on proposed decree changes in 2015 NSAI offered what we considered a very accurate assessment of how those changes would impact the songwriter community and the marketplace. If you look at what we predicted then, our call for caution, and the devastation that ensued over the next few months when DOJ required ASCAP and BMI to offer 100% licenses (which we still vehemently oppose) you might say our forecast was prophetic. We reiterate our strong request to DOJ to utilize our unique viewpoint on the impact of any proposed changes.

Thank you for the opportunity to offer input on this important matter.

## THE NASHVILLE SONGWRITERS ASSOCIATION INTERNATIONAL

### ABOUT NSAI

The Nashville Songwriters Association International (NSAI) is the world's largest not-for-profit trade association for songwriters. NSAI was founded in 1967 by 42 songwriters including Eddie Miller, Marijohn Wilkin, Kris Kristofferson, Felice and Boudleaux Bryant and Liz and Casey Anderson as an advocacy organization for songwriters and composers. NSAI has around 5,000 members and 100 chapters in the United States and abroad.

The Nashville Songwriters Association International is dedicated to protecting the rights of songwriters in all genres of music and addressing needs unique to the songwriting profession. The organization recently created the first "group" copyright infringement insurance policy for songwriters and formed a partnership for affordable health care for its members.

The association, governed by a Board of Directors composed entirely of professional songwriters, features a number of programs and services designed to provide education and career opportunities for songwriters at every level.

NSAI owns The Bluebird Café, a legendary songwriter performance venue in Nashville, Tennessee. The Music Mill, at 1710 Roy Acuff Place in Nashville, where the careers of Alabama, Reba McEntire, Toby Keith, Shania Twain and Billy Ray Cyrus were launched, serves as headquarters for the Nashville Songwriters Association International.