1201 F Street NW, Suite 200
Washington, DC 20004

July 31, 2019

The Honorable William P. Barr
Attorney General of the United States
Attn: Antitrust Division, Dept. of Justice
950 Pennsylvania Ave. NW
Washington, DC 20530-0001

Dear Mr. Attorney General:

The National Federation of Independent Business (NFIB) submits these comments in response to the Antitrust Division notice[1] of a review of consent decrees obtained by the United States against ASCAP[2] and BMI[3] to enforce section 1 of the Sherman Antitrust Act (15 U.S.C. 1). The notice states the U.S. sued "to address competitive concerns arising from the market power each organization acquired through the aggregation of public performance rights held by their member songwriters and music publishers."

NFIB is an incorporated nonprofit association with about 300,000 small and independent business members across America. NFIB protects and advances the ability of Americans to own, operate, and grow their businesses and, in particular, ensures that the governments of the United States and the fifty states hear the voice of small business as they formulate public policies. Many small and independent businesses secure ASCAP and BMI licenses to play music that helps create a pleasant, attractive ambience for customers. For such small and independent businesses, the cost of ASCAP and BMI licenses for their facilities constitutes a significant expense.

When the court initially issued the consent decrees in 1941, the court forestalled monopolistic price-gouging of small and independent businesses that sought to play for their customers songs like those of Glenn Miller, Billie Holiday, or Roy Acuff. Likewise, such businesses today should not face such gouging to play for their customers songs like those of Billie Eilish, Khalid, or Lauren Daigle. Turning loose ASCAP and BMI in today's marketplace, still with massive market power, would create a grave, unreasonable restraint of trade. The consent decrees should remain in force.

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[1] https://www.justice.gov/atr/antitrust-consent-decree-review-ascap-and-bmi-2019 (visited July 30, 2019).

[2] *U.S. v. American Society of Composers, Authors and Publishers*, Civ. Action No. 41-1395, 2001 WL 1589999 (S.D.N.Y. June 11, 2001) (second amended final judgment/consent decree).

[3] *U.S. v. Broadcast Music Inc. et al.*, No. 64-Civ-3787 (S.D.N.Y. December 29, 1966) (consent decree) (available at https://www.justice.gov/atr/case-document/file/489866/download), 1994 WL 901652 (S.D.N.Y. November 19, 1994) (amendment to consent decree).

Those who create or own music need a convenient mechanism by which they can identify market participants who wish to purchase the right to use their music. Market participants, such as small and independent businesses, need a convenient mechanism to seek and pay for the legal right to play in their facilities music customers like. In the perfect world of economic theory, the music creators/owners and the music users would find each other in the marketplace and settle on appropriate prices for a trade of music for money. In the modern world, with its extraordinarily complex means of creating, distributing, and buying and selling rights in music, intermediary mechanisms serve to connect music creators/owners and music users. ASCAP and BMI perform a useful market function of connecting music creators/owners and music users, with the music of the creators/owners flowing through ASCAP and BMI to licensed users and compensation for use of that music flowing from the users back through ASCAP and BMI to the creators/owners.

Unfortunately, ASCAP and BMI aggregation of rights to the music of very large numbers of creators/owners brings not only business-making convenience but monopolistic market power, which, if left unregulated, leads to prices and conditions that unreasonably restrain trade. There was one way to get the convenience of ASCAP and BMI without the unreasonable restraint of trade -- the consent decrees under the Sherman Antitrust Act.

When the United States, ASCAP, and BMI gave their consent to the decrees and to the modifications of them over time, the court approving the decrees and modifications struck a proper balance among the interests concerned -- music creators/owners seeking compensation for use of their music, businesses seeking rights to play music in their facilities, and ASCAP and BMI, who made a profitable business of connecting those sellers and buyers. The restrictions in the consent decrees prevented monopoly price-gouging by ASCAP and BMI, so that the prices and conditions of licenses approximated the prices and conditions that would have resulted in a market free of combinations in unreasonable restraint of trade.

As the Antitrust Division reviews the consent decrees, it should bear in mind that sticking with the decrees "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."[4] Everyone involved -- creators and owners of music, ASCAP and BMI, and music users, including small and independent businesses -- structured their businesses in reliance on the stability of the arrangements established by the consent decrees. The Antitrust Division should give great weight to reliance interests in the consent decrees common to all who have a stake in the creation and dissemination of music.

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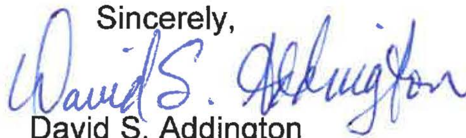
[4] *Gamble v. United States*, 139 S. Ct. 1960, 1969 (June 17, 2019) ("*Stare decisis* 'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)).

It may occur to the Antitrust Division in its review that, as a general proposition, any decisions by government to intervene in or regulate markets (here, the market for music) should come preferably from the politically-accountable branches of the government in the form of statutes, rather than from decisions of less-accountable courts. Consider, however, that the consent decrees themselves implement a statute enacted by the Fifty-First Congress and signed into law by President Benjamin Harrison: section 1 of the Sherman Act. To be sure, the Sherman Act addresses markets generally rather than the music market specifically, and the Sherman Act is 129 years old, but neither undercuts the key fact: what underpins the consent decrees is the Sherman Antitrust Act, duly enacted as a statute by the politically-accountable branches of the government.

As the Antitrust Division completes its review of the ASCAP and BMI consent decrees, NFIB asks the Department of Justice to bear uppermost in mind the importance of the open and competitive market, in music as in all things, that the antitrust laws promise. With that in mind, the Department should keep the ASCAP and BMI consent decrees in force.

Sincerely,



David S. Addington
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