

Before the  
U.S. DEPARTMENT OF JUSTICE  
ANTITRUST DIVISION  
Washington, D.C.

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In the Matter of )  
Antitrust Consent Decree Review: )  
ASCAP & BMI Consent Decrees )

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**COMMENTS OF NATIONAL PUBLIC RADIO, INC.**

**Introduction & Summary**

On behalf of National Public Radio, Inc. (“NPR”), its Member licensees, and public radio stations and producers generally (collectively, “Public Radio”), the following comments are offered in response to the request for comment in the above-referenced matter concerning the ASCAP and BMI Consent Decrees and in support of expanded licensing of music through compulsory licensing. The Consent Decrees remain essential to the functioning of the music marketplace in general and Public Radio in particular and therefore continue to serve the public interest and should be retained.

Compulsory licensing, whether through the Consent Decrees or the Copyright Act, performs a critical function for public broadcasting by facilitating the licensing and use of musical works in a relatively efficient and cost-effective manner. The Consent Decrees’ requirements for a mandatory license for all works in the ASCAP and BMI repertoires upon mere request, with rates and terms subsequently determined through negotiation (or judicial resolution), is especially significant for Public Radio. Blanket licenses that permit immediate use of covered musical works, without the delay of individual negotiations, facilitate Public Radio program production so that programming decisions are not slowed or constrained by the uncertainties of licensing negotiations.

ASCAP and BMI remain the two dominant Performance Rights Organizations (“PROs”). While the ability to collectively license their vast repertoires brings tremendous efficiencies in licensing musical works, at the same time, their immense market power brings risks of anti-competitive conduct if left unchecked. Put simply, the Consent Decrees serve as a critical backstop to ensure the marketplace works fairly and efficiently.

As explained further below, the Consent Decrees serve an important purpose in making music more accessible for Americans and should not be eliminated, substantially modified, nor sunset, absent Copyright Act reform legislation that supplants the need for the Consent Decrees and addresses gaps in existing compulsory music licensing.

## **I. Interest of NPR and Local Public Radio Stations**

Public radio has a substantial interest in this Consent Decree review and in music licensing generally. NPR is a non-profit membership corporation that produces and distributes noncommercial educational (“NCE”) news and informational programming, including All Things Considered® and Morning Edition®, as well as music and other cultural programming, through local public radio stations nationwide. Public radio stations are themselves noncommercial, not-for-profit community-based cultural hubs and significant program producers. More than 700 local public radio stations feature music as a primary or significant part of their programming, reaching a collective 20.5 million listeners weekly. These local public radio stations are based in markets of all sizes, serving all 50 states plus the District of Columbia, Puerto Rico, and Guam. *See generally* noncomMUSIC Alliance, *Connecting Through Music: Public Radio Music Stations Serve Audiences, Artists & Communities Across America*, at 2 (Spring 2019), available at <https://noncommusic.org/report/>.

Public Radio plays an essential and nearly singular role in boosting and sustaining the vitality of music and performers, and educating and enriching communities. The hallmark of Public Radio since its earliest days has been thoughtful curation and music discovery of new or underappreciated music selections, artists and genres that receive little or no play on commercial outlets. Public radio music programming enriches the nation’s culture and has introduced non-mainstream artists and genres, such as folk, bluegrass, Celtic, and World, to new audiences. Public radio also provides access to more traditional music genres, such as classical and jazz, that otherwise have very few commercial outlets. Indeed, 97% of classical radio in America is broadcast by local public radio stations. *Id.* at 4. In addition to making these music genres more accessible, Public Radio provides significant editorial contributions in doing so. Public Radio also contributes music industry news and reporting, information about local performances, and music-oriented educational initiatives.

Public Radio reaches listeners across traditional and digital platforms – on air, online, on-the-go, on video, and on stage. By embracing a full range of available media and creating innovative music programming, from broadcast to podcast, Public Radio provides an incomparable breadth and variety of audience engagement. *Id.* at 5-8. The comments offered below therefore reflect a unique and important perspective on the Consent Decrees and on music licensing generally.

## **II. Compulsory Music Licensing Is Essential to Public Radio's Ability to Serve the American People**

Public Radio has provided direct and free access to public media content via the Internet since the mid-1990s. NPR and local public radio stations now stream their broadcast music programming and create and make available original music content through their websites, mobile apps, podcasts, smart speakers, social media, and other technologies. By using existing and emerging digital platforms, Public Radio is expanding the quantity and quality of music-oriented content available to the American public well beyond that traditionally available via the broadcast medium.

Compulsory licensing has long been central to Public Radio’s ability to develop music and other cultural programming, initially for broadcast, and today for distribution via a variety of traditional and digital media platforms.

In enacting the Copyright Act of 1976 (“the Act”), Congress recognized the special role and circumstances of public broadcasters in creating and distributing content that serves to educate and

inform a broad audience. In Section 118 of the Act, in particular, Congress established a compulsory licensing process that enables public broadcasting entities to obtain licenses for “published nondramatic musical works.” 17 U.S.C. § 118. Significantly, Section 118 also contains an exception to the antitrust laws which has allowed the parties to negotiate voluntary licenses in lieu of an administrative process for determining the rates and terms of use for the covered copyrighted works. *See id.* § 118(b).

Section 114 of the Copyright Act provides a statutory license permitting the streaming of sound recordings. In addition, Section 114(b) of the Act allows public broadcasters the right to use sound recordings in “educational television and radio programs” that are “distributed or transmitted by or through public broadcasting entities” without requiring them to obtain a license from the copyright holder to reproduce, prepare derivative works, or distribute copies of the work to the public. *Id.* § 114(b).

Most recently, in the Orrin G. Hatch-Bob Goodlatte Music Modernization Act (“MMA”), Pub. L. No. 115-204, 132 Stat. 3676 (2018), Congress again recognized the unique role and circumstances of public broadcasters in establishing a compulsory blanket mechanical licensing system for digital downloads and interactive streams. The MMA’s blanket mechanical licensing system was adopted to address the downloading and interactive streaming of music by large commercial digital music providers. While public radio stations may avail themselves of this new blanket mechanical licensing system, the MMA also permits public broadcasters to operate outside this blanket licensing scheme and negotiate voluntary license agreements that better reflect the unique nature of Public Radio programming and Public Radio’s needs and resources, without being subject to the reporting and fee requirements of the newly established Mechanical Licensing Collective.<sup>1</sup>

Congress enacted these special provisions of the Copyright Act because public radio stations and producers are non-profit entities committed to a public service mission. *See* 17 U.S.C. §§ 114(b), 118(f) (citing 47 U.S.C. § 397 (11)). As such, public radio stations and producers create educational, cultural, and local programming subject to financial constraints and other circumstances that distinguish public broadcasters from commercial music providers. Accordingly, these provisions were adopted with an understanding of the special nature of public radio programming and the practical difficulty that individual marketplace licensing would impose in many circumstances. *See* H. Rep. No. 1476, 94th Cong. 2d Sess. 117 (1976). The intention was to “assure a fair return to copyright owners without unfairly burdening public broadcasters.” *Id.* at 118. These Copyright Act provisions do not represent a subsidy from copyright owners of musical works and sound recordings, and NPR is committed to fairly compensating the creators and artists involved in producing such works.

The compulsory licensing provisions of the 1976 Copyright Act have played an important part in the growth and development of public broadcasting over the more than 40 years since enactment of the Act and particularly in Public Radio’s use of musical works. As a system of locally licensed, locally owned and governed, locally staffed, and locally programmed stations, Public Radio would face a daunting challenge if forced to clear all music use through individual marketplace negotiations.

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<sup>1</sup> Congress expressly excluded public broadcasters from the definition of “significant non-blanket licensees,” *i.e.*, entities that operate outside the mechanical licensing system but are required to pay the administrative assessment fee and make monthly usage reports to the Mechanical Licensing Collective. 17 U.S.C. § 115(e)(31)(B).

Congress and music industry stakeholders showed continuing recognition of the need for and value of a blanket licensing in the MMA's recently enacted compulsory blanket mechanical rights system for musical works. There is a similar and continuing need for compulsory blanket licensing legislation to facilitate the licensing and use of musical works across digital platforms in other ways.

As Public Radio seeks to develop and disseminate music and other high-quality educational content through new media platforms, existing and expanded compulsory licensing is even more critical to Public Radio's continued pursuit of its educational mission. As noted above, because Public Radio is embracing a number of different digital platforms beyond traditional over-the-air broadcasting, music licensing is becoming increasingly complicated. With so many platforms, Public Radio must engage in numerous licensing negotiations and proceedings with numerous parties in a variety of fora to clear the rights for over-the-air, online, and live uses of music. This increases the importance of the Consent Decrees to Public Radio for uses not covered by Section 118 or another statutory license. Without the Consent Decrees, the music licensing complexities would increase exponentially and impede stations' ability to more fully exploit digital technologies and platforms for the public's benefit.

### **III. The ASCAP and BMI Consent Decrees Continue to Serve Important Purposes in Facilitating Public Radio's Licensing and Use of Musical Works**

The Consent Decrees parallel Section 118 of the Copyright Act in serving important purposes in the licensing of musical works. Like Section 118, the Decrees make possible the comprehensive licensing of musical works among a large and disparate group of users and rights holders. Concluding individual license negotiations on an industry-wide scale to use or continue using music would otherwise occur only at great cost and with great uncertainty. In addition, and like Section 118, the Consent Decrees provide a mechanism for determining the rates and terms of use in the event the parties are unable to reach a negotiated resolution. In both cases, the user is also able to obtain a "through to the audience" license. Finally, both Section 118 and the Consent Decrees preserve the ability of users to secure direct licenses from individual ASCAP/BMI members outside of the PRO blanket licenses.

While Section 118 and the Consent Decrees share these important features, the existence of Section 118 does not obviate public broadcasters' continuing need for the ASCAP and BMI Consent Decrees. One important difference between the two is the express Consent Decree requirement that ASCAP and BMI grant a license to use musical works in their respective repertoires upon mere request, with the rates and terms determined either through negotiation or judicial resolution. Section 118 does not contain the same feature. Although public broadcasters and ASCAP and BMI have heretofore resolved licensing issues without gaps in licensing affecting the broadcast use of music, the "license upon request" feature of the Consent Decrees has filled the gap in negotiations with respect to certain other types of music uses.<sup>2</sup>

More fundamentally, Section 118 was originally enacted when Public Radio was largely limited to traditional over-the-air broadcasting, while the Consent Decrees, despite their age,

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<sup>2</sup> Indeed, one important consequence of the Consent Decrees is, in fact, to encourage parties to resolve licensing matters through negotiation. While resort to the rate court remains an important backstop, parties have a financial incentive to avoid such proceedings because of the significant cost involved. The relatively few rate court proceedings that have occurred is a testament to the deterrence value of such costs and to the incentive of such a process to resolving licensing matters through voluntary blanket license negotiations.

accommodate any distribution technology that enables the performance of musical works. That is significant because, to the extent Section 118 may be limited by its historical context, the Consent Decrees help ensure the continued evolution of Public Radio's service to the public. The Consent Decrees therefore serve an essential function in assuring Public Radio's ability to serve the public via new media and in non-traditional ways.

In this respect, Public Radio has common interests with other users of musical works. While Public Radio already licenses music for uses not addressed by Section 118 or the Consent Decrees to some extent, terminating or substantially limiting the scope and terms of the Consent Decrees would make the process of clearing music for public media use substantially more burdensome administratively and financially than it already is. Given Public Radio's distinctive noncommercial, not-for-profit public service model and the limited resources with which Public Radio operates, increased reliance on direct marketplace licensing would likely have significant adverse consequences for Public Radio and, in turn, its listening audience and the songwriters and performers who have come to depend upon Public Radio.

The Consent Decrees serve as a crucial moderating force in licensing musical works and an important check on anti-competitive conduct. Because ASCAP and BMI collectively license about 90 percent of American musical compositions<sup>3</sup> and therefore continue to exercise tremendous market power, the Consent Decrees continue to serve as a critical safeguard for Public Radio and the music industry at large. Without the Consent Decrees, these PROs could hold up licensing or hold out for unreasonable rates or terms. Moreover, ASCAP's and BMI's business has flourished notwithstanding the Consent Decrees. Both ASCAP and BMI recently reported record-breaking revenues and royalty distributions to songwriters, composers and music publishers for fiscal year 2018.<sup>4</sup>

#### **IV. The Consent Decrees Remain Essential To Public Radio And The Public Interest, and Should Not Be Terminated or Substantially Modified Unless and Until Congress Legislates More Comprehensive Compulsory Licensing Of Music**

Blanket access to musical works through the PROs, with the option to negotiate directly with the underlying rights holder, has played an important part in the proliferation and variety of music content available to the public. Rather than limiting the blanket licensing of musical works, additional licensing of such works and related musical components would benefit performers, creators, musicians and lovers of music brought together by Public Radio music.

In short, the current music licensing regime should better reflect the special educational goals and resource limitations of public radio broadcasters and facilitate the licensing of all music elements necessary to distribute music programming across all Public Radio platforms. The current music licensing system, while helpful in some aspects, is still costly and inefficient. Public Radio content producers require ready access to materials so programming decisions can be made quickly and efficiently with an eye toward distributing content across multiple platforms. Rights holders do not

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<sup>3</sup> E.g., *U.S. Justice Department to review 1941 ASCAP, BMI consent decrees*, Reuters, June 5, 2019, <https://www.reuters.com/article/us-usa-antitrust-ascap-bmi-idUSKCN1T62GP>.

<sup>4</sup> *ASCAP Distributes a Record \$1.1 Billion in Royalties*, Variety, May 1, 2019, <https://variety.com/2019/music/news/ascap-distributes-a-record-1-1-billion-in-royalties-1203202183/>; Ed Christman, *BMI Revenue Growth Accelerates as Collections and Royalty Distributions Reach New Highs*, Billboard, Sept. 12, 2018, <https://www.billboard.com/articles/business/8474665/bmi-2018-annual-collections-revenue-royalty-distributions>.

always value educational programming sufficiently to offer less costly licenses or they may limit the scope or duration of content use. As a result, the program production process can encounter long delays as rights are cleared and programming choices often must be revised due to rights clearance issues.

Repealing the Consent Decrees, without a replacement, would be a step in the wrong direction, and would leave a huge vacuum in the music licensing marketplace. Public Radio (and other music industry participants) have developed ongoing programs and services with musical content in reliance on the Consent Decrees' provisions. There should not be any attempt to terminate, weaken, or sunset the Consent Decrees unless and until Congress adopts comprehensive copyright law reform that regulates compulsory licensing of performance rights for musical works in their stead. The ultimate goal of any regulatory or legislative change ought to be streamlining the licensing required for creation and dissemination of musical content, so Public Radio can more efficiently fulfill its indispensable educational, cultural, and public service mission and better serve audiences, artists and music creators.

### **Conclusion**

For the foregoing reasons and as set forth more fully above, Public Radio respectfully urges the Department of Justice to retain the Consent Decrees, which continue to serve Public Radio and the public interest without need for modification. Elimination or sunseting of the Consent Decrees, absent comprehensive copyright law reform, would significantly disrupt Public Radio operations and the music industry at large, and adversely affect the American music audience.

Respectfully submitted,

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