BEFORE THE
UNITED STATES DEPARTMENT OF JUSTICE
ANTITRUST DIVISION
Washington, D.C.

In the Matter of:

Antitrust Consent Decree Review – ASCAP and BMI 2019

PUBLIC COMMENTS OF THE NATIONAL RELIGIOUS BROADCASTERS MUSIC LICENSE COMMITTEE

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INTRODUCTION

The National Religious Broadcasters Music License Committee ("NRBMLC" or the "Committee") offers this response to the U.S. Department of Justice ("Department"), Antitrust Division's updated June 19, 2019, request for comments ("DOJ Request") concerning the ASCAP and BMI consent decrees (the "Consent Decrees"). The NRBMLC appreciates the opportunity to comment in connection with this important review.

The NRBMLC is a standing committee of the National Religious Broadcasters association. The Committee represents well over 1,000 full-power commercial and noncommercial AM and FM radio stations in their musical licensing litigation and negotiations. The Committee has two Boards of Directors – one representing commercial radio broadcasters and the other focused on non-commercial radio broadcasters.

The Committee has experienced firsthand the importance and protection of the Consent Decrees. The Committee also has been harmed by the anticompetitive market power that even smaller performing rights organizations ("PROs") such as SESAC, Inc. ("SESAC") and Global Music Rights ("GMR") have been able to exercise when they are not subject to a consent decree.

The Committee was originally formed in 1979 to represent the music licensing interests of religious-formatted stations that performed relatively little copyrighted music. They performed enough music, however, effectively to disqualify them from using the all-talk, incidental music-only focused, per-program licenses from ASCAP and BMI that had been negotiated at that time by the All-Industry Radio Music License Committee (since re-organized as the Radio Music License Committee—"RMLC").

ASCAP's and BMI's persistent resistance to a meaningful per-program alternative to their preferred "blanket" and "talk only" per program licenses forced the Committee into litigation against ASCAP in the Southern District of New York, which ultimately resulted in a more useful license.[1] Since that time, the Committee has continued to seek reasonable licenses from ASCAP, BMI, SESAC, and GMR in its negotiations. The Committee also filed an amicus brief in *Broadcast Music, Inc. v. DMX, Inc.*, 683 F.3d 32 (2nd Cir. 2012), supporting the pro-competitive adjustable rate blanket license alternative.

The NRBMLC and its represented stations have strong and direct interests in the Consent Decree and other competitive issues raised by the DOJ Request and, indeed, filed comments in response to the Department's earlier Antitrust Consent Decree Reviews in 2014 and 2015 considering similar competitive issues.[2] As was true in each of those inquiries, the competitive and music licensing issues raised by the Department will have significant ramifications for the public and for both commercial and non-commercial NRBMLC-represented radio broadcasters.

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[1] *United States v. ASCAP (Application of Salem Media)*, 981 F. Supp. 199 (S.D.N.Y. 1997).
[2] https://www.justice.gov/sites/default/files/atr/legacy/2014/08/14/307806.pdf; https://www.justice.gov/atr/public/ascapbmi2015/ascapbmi19.pdf

1. THE ASCAP AND BMI CONSENT DECREES MUST BE PRESERVED.

The DOJ Request asks: "*Do the Consent Decrees continue to serve important competitive purposes today? Why or why not?*"

The NRBMLC respectfully submits that the answer to this question remains the same as the answers provided by this Committee when the DOJ asked similar questions about the Consent Decrees in 2014 and 2015. The answer now, as well as then, is that the Consent Decrees remain essential to foster competitive market pricing for music performance rights for the reasons discussed below.

1.1 The Market for Music Performance Rights Is Not Competitive.

Copyright law principles and market structure create an environment in which competition in the marketplace for music performance rights is greatly reduced. These combined factors give the PROs enormous market power and insulate them from competitive forces. There are several reasons why this is true.

First, ASCAP, BMI, SESAC, and GMR have aggregated extremely large numbers of musical works, which are collectively owned by a large number of copyright owners who otherwise would, in a competitive market, compete for market share. It is estimated that these four PROs alone control more than 95% of all musical works that are now performed on broadcast radio.

Second, the large music publishers have been allowed to merge to the point that the publishing industry is now highly concentrated. Four major publishers (Sony/ATV, Universal Music Publishing Group, Kobalt, and Warner/Chappell Music) now control the vast majority of musical works.[3]

Third, copyright law allows rights to be licensed separately. When programs or commercials that are intended for public performance are produced, the producers obtain only reproduction and distribution rights and need not obtain public performance rights. Indeed, the PROs typically will not grant public performance rights to program producers because they do not actually perform the programs they produce. Thus, it falls to the entity making the performance (which, in the Committee's case, is the radio broadcaster) to obtain all necessary performance rights.

Unfortunately, once a program or ad is produced, or "in the can," the entity making the performance is unable to invite competition among possible suppliers of the performance right and thereby drive down pricing. As the performing entity, the radio broadcaster must take the program as is and cannot alter it. This gives the PROs, as licensors of the performance right, the ability to exercise "hold up" power. The licensor can seek to charge up to the full value of the entire program or ad, unconstrained by the actual value contributed to that program or ad by the licensor's music.

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[3] *Publisher's Quarterly: Sony/ATV reigns Again as Concord Breaks Into Top 10*, Billboard (May 9, 2019), https://www.billboard.com/articles/business/8510805/music-publishers-quarterly-q1-sonyatv-hot-100-radio

Fourth, licensing has been further subjected to the potential for anticompetitive misconduct from the PROs and their members by Judge Stanton's decision, affirmed by the Second Circuit, that the BMI Consent Decree permits a practice called "fractional licensing."[4] Under such a practice, even a single right to exploit a single work may require multiple licenses if the work was authored by more than one person. This allows the last PRO or copyright owner holding an interest in the work to exercise enormous "hold up" power by threatening to decline consent to perform the work, which enables that holdout to demand license fees that are far higher than the value of the fractional right granted – a practice that further harms competition in the music licensing market.

Fifth, the PROs typically only offer licenses to their entire repertory. Thus, they effectively eliminate any competition that may exist among their members, among the PROs, between the PROs and their members, or, for that matter, between the use of music and other programming matter. The NRBMLC's own experience, discussed in Part 1.2, below, demonstrates the consistent resistance of the PROs to any license in which the price of the license varies meaningfully with the amount of licensed music that is used or that varies with the amount of music that is licensed through competing sources other than the PRO. As a Committee primarily representing radio broadcasters whose programming formats do not come close to taking advantage of a "whole repertory or nothing" license, this anticompetitive PRO practice is particularly harmful to our constituents.

Sixth, these problems are compounded by the near-impossibility of identifying the potential licensors of any particular performance right. Although the PROs offer on-line searches of their databases, those databases do not provide a reliable or effective means of identifying the content of each PRO's repertory. ASCAP's online search tool contains a significant disclaimer, stating that:

> ASCAP makes no guarantees, warranties or representations of any kind with regard to and cannot ensure the accuracy, completeness, timeliness, quality or reliability of any information made available on and through ACE. ASCAP specifically disclaims any and all liability for any loss or damage of any kind that you may incur, directly or indirectly, in connection with or arising from, your access to, use of or reliance upon ACE, including any errors or omissions in the information contained therein.[5]

SESAC also posts a disclaimer on its online search function. A Magistrate Judge has concluded that SESAC's online search tool "does not provide a reliable means for determining what is SESAC's repertory."[6] The court noted that the tool "expressly disclaims that it is accurate, advises stations that it could change on a daily basis, and limits the user to 100 searches per

[4] *See United States v. BMI*, 207 F. Supp. 3d 374 (S.D.N.Y. 2016), *aff'd*, 720 F. App'x 14 (2d Cir. 2017).
[5] https://www.ascap.com/help/legal/ace-terms-of-use
[6] *Radio Music License Committee, Inc. v. SESAC Inc.*, No. 12-cv-5807, 2013 WL 12114098, at *11 (E.D. Pa. Dec. 23, 2013).

session."[7] These parts of the Magistrate Judge's recommendation later were adopted by the district judge adjudicating the case.[8]

From a practical standpoint, the ASCAP, [9] BMI, and SESAC[10] PRO search tools limit searches to one work at a time, making searches for numerous works impractical. When adding in the exponentially more complicated task of locating each and every "fractional" right held by a contributor to every musical work, regardless of whether that contributor is represented by a PRO or is independent, the ability to search for reliable work ownership becomes effectively impossible. Moreover, while the recently enacted Music Modernization Act ("MMA") has authorized the creation of a collective that will, among other responsibilities, "establish and maintain a database containing information relating to musical works (and shares of such works)," that database will not be created and made available for some time, and even then, only a song-by-song fragmented search function will be made available to the public at no charge – an as-yet-undetermined fee will be charged for all but a select group of specified entities to have access to it in bulk.[11] As a result, it is necessary for an entity engaging in substantial numbers of public performances, such as a radio broadcaster or a service making streamed performances, to (a) obtain licenses from each of ASCAP, BMI, SESAC, and GMR (and any potential future PROs) and, increasingly, (b) determine whether any fractional contributor to a work may not have PRO representation and, thus, require a direct license to perform such a work. The major publishers, of course, understand the anticompetitive effects of the same behavior. Even where they seek to license their catalogs directly, they strategically withhold information about their content.[12]

For these reasons, the only effective protection that music licensees have against ASCAP's and BMI's monopoly power is the protection provided by the Consent Decrees. Those should be retained and, as discussed below, strengthened.

1.2 The PROs Continue To Resist Competitive Licenses.

The NRBMLC was created in 1979 in response to ASCAP's and BMI's resistance to granting any license with a price that varied based on the amount of the PRO's music that a user performed.

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[7] *Id.* at 11 n.13.

[8] *See Radio Music License Committee v. SESAC Inc.*, No. 12-cv-5807, 2014 WL 12617437, at *1 (E.D. Pa. Feb. 20, 2014).

[9] ASCAP now appears to allow interested users to request a copy of its entire database, but that user must first provide contact information and a reason for the request. https://www.ascap.com/repertory. It is not clear which reasons will be deemed sufficient to justify the download request, nor is it clear how frequently ASCAP, in fact, has provided such a download to those requesting it.

[10] SESAC now permits its repertory to be downloaded, but the output only includes, song title, publisher, and writer and does not include ownership share information or the fractional interest that SESAC represents. https://licensees.sesac.com/pdf/SESACEnhancedSongList.pdf.

[11] *See* 17 U.S.C. § 115(d)(3)(E).

[12] *See In re Pandora Media, Inc.*, 6 F.Supp.3d 317 at 344-46, 357-58, 360 (S.D.N.Y. 2014) (describing significance of publisher refusals to provide Pandora with usable lists of their catalogs).

Although the ASCAP and BMI Consent Decrees required those PROs to offer "per program" licenses that provided a "genuine choice," in the words of the ASCAP Consent Decree, ASCAP and BMI priced those licenses for the radio industry so that they did not offer such a choice but instead were economically meaningful only for news and talk radio stations that made virtually no feature performances of music.[13] ASCAP contended that it had negotiated these licenses with the All-Industry MLC and that the NRBMLC stations – despite their dramatically different, and lower, use of music – were "similarly situated" with stations represented by RMLC's predecessor in the words of the Consent Decree. ASCAP claimed that as a result, it was obligated to offer only its standard licenses to all radio stations regardless of the stations' music use.[14]

At that time, the prevailing ASCAP and BMI per program licenses negotiated with the RMLC's predecessor were priced so that any radio station that made even a single feature performance of the PRO's music in 30% or more of its weighted programming time would be required to pay essentially the same fee that it would pay under the blanket license as if it were a 24/7 rock or country music station. The stations represented by the NRBMLC, many of which used copyrighted music in 30% to 50% of their weighted programming time, and, therefore, would not save any money under those per program licenses, did not believe that this was fair. The PROs were well aware that their pricing system destroyed most of the incentive to seek alternative sources of music or music licenses, or to create competition between the PROs.

ASCAP's intransigence forced the NRBMLC to seek relief in the Southern District of New York in 1996. Although the Court found that ASCAP was not required to offer a more usable per program license, it held that the NRBMLC stations were not "similarly situated" to those represented by the RMLC, and it ordered ASCAP to reduce the "base" fee under its per program license for incidental uses of music.[15] As a result of the court's decision, and contemporaneous legislative efforts to require ASCAP and BMI to offer more reasonable per program licenses, the NRBMLC was able to negotiate a new set of licenses that allowed stations that featured music in less than 55% of their weighted programming time to reduce their license fees substantially below what they would have paid if they were an all-music station.

While this 1997 decision provided the Committee with the foundation it needed to negotiate an effective license, the Committee continues to face challenges in its current negotiations with the PROs to get them to (a) recognize that NRBMLC stations are not "similarly situated" with RMLC per program licensees and (b) offer competitive rates to those stations that allow them to reduce their license fees by reducing their music use, which is not possible under the blanket licenses applicable to radio. Without the protection of the Consent Decrees bolstering the precedent of prior decisions, securing effective per program licenses for the "not similarly situated" needs of the NRBMLC and its members would be significantly more difficult, if not impossible.

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[13] A "feature performance" is a performance that is the focus of the audience's attention, and does not include background music, advertising jingles, program themes, interstitial music between program segments, or ambient music at public events.

[14] BMI offered an alternative form of license that proved to be difficult to use and provided limited relief.

[15] *See United States v. ASCAP (Application of Salem Media)*, 981 F. Supp. 199, 212, 218, 221 (S.D.N.Y. 1997).

ASCAP and BMI have continued to resist competitive alternatives to their blanket licenses, and the judges overseeing these PROs' Consent Decrees have continued to provide an essential check on the PROs' anticompetitive preferences. For example, when DMX sought a blanket license that included fee reductions for competitive licenses that it obtained directly from publishers, both ASCAP and BMI resisted, arguing that they had no obligation to grant such licenses. The Southern District of New York disagreed, and the Second Circuit affirmed.[16]

Absent the Consent Decrees, and the clarifying rulings of the overseeing courts, ASCAP and BMI would be able to pursue their anticompetitive ambitions unchecked.

1.3 SESAC and GMR's Licensing Practices Provide an Unfortunate Example of what Music Licensing Would Be Without the Consent Decrees.

The Committee's experiences with SESAC and GMR to date provide an unfortunate example of what the marketplace would look like without the ASCAP and BMI Consent Decrees. This marketplace historically has been filled with unconstrained price increases unrelated to the value of the music that is performed, and it contains an intransigent insistence by these PROs on blanket licensing that eliminates any incentive for competition. Even though SESAC's and GMR's market shares are tiny as compared with ASCAP's and BMI's shares, it is exceedingly difficult and fraught with risk for a radio station to "clear" its programming of all works controlled by these PROs, particularly given radio stations' frequent use of syndicated programs as to which they cannot control the musical content included therein. Thus, both SESAC and GMR function as sellers with which almost all radio stations must deal, thereby exercising monopoly power over the licensee community.

This power is not constrained by any regulatory oversight or neutral fee-setting process and is exacerbated by a consistent refusal to offer any license other than a blanket license. Neither SESAC nor GMR offers any license that varies with the amount of their repertory that is used, so there is little to no incentive for music users to develop alternative sources of music rights for songs controlled by these entities.[17] Unless those users remove from their programming – or obtain less expensive direct licenses for – <u>all</u> SESAC or GMR music that they play, they realize no savings given the "all-or-nothing" nature of these PROs' licenses. Simply put, the price competition among musical works that should occur in a well-functioning competitive market simply does not happen.

The overstated market power of SESAC can be seen by simply looking at the history of SESAC's license fee increases. During the period from 1999 to 2003, SESAC more than doubled its license fees unilaterally. SESAC again increased its fees from 2004 to 2008. The changes made by SESAC during that period had the effect of again approximately re-doubling SESAC's fees. SESAC again increased its fee schedules by roughly 50% between 2008 and 2013. SESAC has consistently failed to demonstrate any justification for the past large increases. In the past five years, these rates have been reduced, but only as a result of an arbitration and settlement involving the RMLC and only for the specific radio stations involved

[16] The NRBMLC filed an amicus brief in support of the more competitive adjustable fee licenses. *Broadcast Music, Inc. v. DMX, Inc.*, 683 F.3d 32 (2d Cir. 2012).

[17] As discussed below, SESAC does offer limited variations in its blanket license pricing for all-talk and certain mixed format stations that are licensed under the ASCAP and BMI per program licenses.

in that lawsuit that timely opted in to the fees that resulted from that settlement and ensuing arbitration. Unfortunately, that reduction resulted from a voluntary settlement that creates no useful judicial precedent that may be invoked in the future. It also came at an enormous price that the lion's share of music licensees would not be able to pay – arbitrator hourly rates are notoriously expensive (whereas courts are funded by taxpayers) – and the settlement requires no fewer than four additional expensive arbitrations to continue to set SESAC rates for consecutive four-year periods if the parties are unable to agree to those rates.[18] Thus, while helpful, the SESAC litigation, settlement, and future potential periodic arbitration proceedings are a vastly inferior competitive constraint on SESAC's practices than judicial oversight. GMR also has demanded effective rates that are significantly higher than its market share and has refused to consider any license other than an overpriced flat-fee "one size fits all" license in negotiations with the NRBMLC.

As a result of SESAC's and GMR's anticompetitive behavior, both were sued for antitrust violations (SESAC was sued by both the Television Music License Committee and the RMLC while GMR was sued by the RMLC). The lawsuits against SESAC have been settled, but the lawsuit against GMR remains pending.

Due to the enormous costs and burdens of private antitrust litigation, it took years of market power abuse by SESAC to provoke these suits. Those costs and burdens make it impractical and cost-prohibitive for most music users, and even for a committee such as the NRBMLC, to challenge SESAC's and GMR's unlawful conduct. DOJ action is needed to protect competition and the public. As a result, SESAC and GMR should also be subject to effective antitrust regulation comparable to that imposed on ASCAP and BMI.

1.4 Direct Licensing and Lawsuits Cannot Replace the Consent Decrees.

The DOJ Notice asks: "*Are existing antitrust statutes and applicable case law sufficient to protect competition in the absence of the Consent Decrees?"*

The NRBMLC respectfully submits that current statutes and case law do not come close to addressing the lack of competition (and thereby the lack of available licensing options afforded to licensees) among the major music publishers.

As the Southern District of New York found in the *DMX* cases, direct licensing, particularly by smaller independent publishers, provides an important check on the PROs' market power and offers some competition. Unfortunately, however, the major publishers have been allowed to merge under the cover of the Consent Decrees to the point that the industry is highly concentrated.

Moreover, due to this consolidation in the industry, the major publishers offer catalogs that every user must license, so they are no longer substitutes. Thus, the major publishers do not compete with each other. Rather, as the Southern District of New York found in the *Pandora* case, the major publishers exercise extraordinary non-competitive market power and are willing

[18] *See* RMLC-SESAC Settlement Agreement at 5 (July 2015), *available at* http://dehayf5mhw1h7.cloudfront.net/wp-content/uploads/sites/893/2017/09/22194517/Final-SESAC-RMLC-Settlement-Agreement.pdf.

to abuse that market power to extract license fees well in excess of the value of the licenses they are offering. In other words, direct licensing is an important alternative to the PRO blanket licenses under the Consent Decrees that helps to protect music users against supra-competitive fees; direct licensing is not a substitute for the Consent Decrees.

In the 2014 Pandora case, the Southern District of New York found in no uncertain terms that "Sony and UMPG each exercised their considerable market power to extract supra-competitive prices" in their negotiations with Pandora.[19] The court found that the negotiations were conducted in a manner that left Pandora with no alternative: "it could shut down its service, infringe Sony's rights, or execute an agreement with Sony on Sony's terms."[20] According to the court:

> ASCAP, Sony, and UMPG did not act as if they were competitors with each other in their negotiations with Pandora. Because their interests were aligned against Pandora, and they coordinated their activities with respect to Pandora, the very considerable market power that each of them holds individually was magnified.[21]

As further evidence of the flaws in a direct-license only regime, when the major publishers tried to withdraw their digital rights from ASCAP and BMI and license them directly, they found it virtually impossible to administer their own rights. Instead, they reverted to ASCAP and BMI to administer the withdrawn rights for the vast majority of users.[22] This showed the withdrawal for what it was: an effort by the major publishers to exercise enormous market power free from the constraints of the Consent Decrees. They should not be allowed to do so.

2. KEY PROTECTIONS OF THE CONSENT DECREES SHOULD BE EXPANDED.

The DOJ Notice asks: "*Would termination of the Consent Decrees serve the public interest*? It also asks: "*What, if any, modifications to the Consent Decrees would enhance competition and efficiency?*"

For the reasons set forth below, termination of the Consent Decrees most emphatically would not serve the public interest. To the contrary, the Consent Decrees contain numerous provisions that protect users from the potential for abuse of the market power of the PROs. These protections should be not only maintained but expanded to:

(a) apply to SESAC, GMR, and any other PRO that is formed; and

(b) require genuine transparency regarding ownership and PRO administration of musical works.

[19] *Pandora Media*, 6 F. Supp. 3d at 357.
[20] *Id*.
[21] *Id.* at 357-58.
[22] *See id.* at 338.

2.1 The Consent Decrees Should Continue To Include Essential Procedural and Rate-Setting Protections.

The rate-setting and procedural protections provided to music users are at the heart of the Consent Decrees. They should be retained.

The existence of the judicial court mechanism for determining reasonable fees is the most important of the protections provided by the Consent Decrees. As described above, recent cases decided by the Southern District of New York have shown how the PROs, absent rate regulation, would abuse their market power, and how the courts have constrained that market power. The Committee cannot overstate the importance of federal judges that understand their role in protecting the public from otherwise unconstrained collective market power.

Also important is the provision in each Consent Decree that ensures that a licensee can be licensed simply by asking for a license, which prevents PROs from exercising "hold up" power. At least one PRO, however, is known to take the position that requests cannot be made to cover performances made prior to the request. That position appears to be an attempt to obtain added leverage over unwary music users. There is no reason not to allow a music user to request a license from the start of its performances, at least when it does so voluntarily and not under threat of an infringement suit.

The requirement that the PROs offer through-to-the-audience licenses also is important, particularly for transmission media that rely on intermediaries, such as Internet transmissions. Competition is best fostered by licenses that are granted as far upstream as possible. Downstream providers should not require duplicative licenses.

The Consent Decree prohibitions on discrimination among similarly situated users also are important to protect users that may not have the wherewithal to engage in costly and lengthy litigation. Conversely, the Consent Decrees should make clear that the non-discrimination provisions are not a sword to be wielded by the PROs against users after the PRO has negotiated an agreement it views as favorable. Rather, the provisions should be clearly established as shields to be invoked by users where appropriate.

2.2 The Consent Decrees Should Continue To Require Economically Significant Alternatives to the PROs' Blanket Licenses.

The Consent Decrees contain numerous provisions designed to ensure that the PROs offer competitively significant alternatives to blanket licenses, with fees that vary based on music use or alternative licensing arrangements. These provisions are essential to limit PRO market power and to foster license fees that approximate those that would prevail in an effectively competitive market. They should be retained and, where possible, strengthened. These provisions include the following:

(a) the prohibition on PROs obtaining exclusive or effectively exclusive licenses (*e.g.*, ASCAP Section IV(A));

(b) the prohibition on interference with direct licensing where a blanket license exists (*e.g.*, ASCAP Section IV(B)); and

(c) the provisions mandating per-program licenses that offer a genuine choice (*e.g.*, ASCAP Sections VII(A)(1) and VIII(A)).

The Committee's experience with SESAC and GMR demonstrates the importance of fostering competitive alternatives. It also demonstrates that licenses that are "non-exclusive" in name, can be exclusive in effect. The Consent Decrees should prohibit the PROs from taking steps that interfere with direct licenses or create *de facto* exclusive licenses. For example, when a PRO member grants a direct license, that member should lose only the payments that the PRO would make to that member from the directly licensed user.

Moreover, the obligation to offer per-program and per-segment licenses should be part of ASCAP's and BMI's cost of doing business. Licensees should not be required to bear the costs of administering those licenses. Thus, Section VII(B) of the ASCAP Consent Decree should be removed.

2.3 The Competitive Restraints of the Consent Decrees Should Be Expanded To Encompass SESAC and GMR.

The competitive protections of the Consent Decrees should not only be maintained and enhanced vis-à-vis ASCAP and BMI, but they should be applied to SESAC and GMR as well. While these PROs are much smaller than ASCAP and BMI, they each have succeeded in aggregating a large enough critical mass of copyrighted works that they have "must have" catalogs for the vast majority of radio stations, who often cannot control the music that they perform in, for example, the syndicated programming that they air. As such, these PROs, like ASCAP and BMI, exercise monopoly power over their catalogs, each of which is a complement – not a substitute – for the catalogs licensed by the other PROs.

As described in Part 1.3 above, SESAC and GMR each have been able to abuse their market power to seek supracompetitive fees from licensees for their catalogs and threaten infringement actions if these hapless users do not accede to their overpriced demands. Although certain radio stations finally were able to obtain limited fee relief from SESAC, that relief (a) applies only to specific radio stations that timely opted in to be eligible to pay the reduced fees; (b) is temporary and non-precedential; and (c) came at a massive price from protracted litigation and serial potential arbitration proceedings (where arbitrators typically charge high hourly rates) that would be cost-prohibitive for most licensees.

To restore competition with respect to the licensing behavior of these PROs, SESAC's and GMR's outsized market power should be subject to the same competitive restraints that apply to ASCAP and BMI. The Committee respectfully urges the Department to examine the practices of these PROs and consider ways to create a more competitive landscape with respect to all musical works public performance licensing and not merely the catalogs licensed by ASCAP and BMI.

2.4 The Consent Decrees Should Be Amended To Increase PRO Transparency.

One issue on which the Consent Decrees fail is in the requirements for disclosure by the PROs of their membership and repertories. The online databases made available by the PROs

are difficult to use and are unreliable. The PROs themselves disclaim the accuracy of their databases.

The Consent Decrees should require the PROs to offer databases that allow users to submit lists of compositions that can be matched. While a musical works database eventually will be created pursuant to the MMA, it does not yet exist, it only will offer a song-by-song search function to the public at no charge, and it is unclear how costly it will be to purchase the complete database other than for the handful of specified entities who will be able to access it at no additional charge. The PROs should be required to stand behind their databases. If a composition is included in the database, it should be deemed to be within the PRO's repertory. If it is not included in the database, the PRO should not be permitted to pay its members for performances of that composition. The Consent Decrees should also require the PROs to provide publicly accessible databases of their writer and publisher members to foster potential direct deals.

3. MORE TIME AND STUDY ARE MANDATED BY THE MMA AND PRIOR HISTORY.

The DOJ Request asks: "*Would termination of the Consent Decrees serve the public interest? If so, should termination be immediate or should there instead be a sunset period? What, if any, modifications to the Consent Decrees would provide an efficient transitionary period before any decree termination?*"

As reflected above, the NRBMLC strongly believes that the Consent Decrees should not only remain in place, but should in some instances be strengthened and expanded. With regard to a potential sunsetting of these critical documents or an effective transition from a Consent Decree structure to some other regime offering parallel competitive protections, the Committee offers the following thoughts and concerns.

3.1 Section 105 of the MMA Requires a Thorough Study and Comment Period.

As part of the adoption of the MMA, and at the request of the licensee community in general, Congress agreed to limit the DOJ's authority to terminate the Consent Decrees unilaterally. Specifically, Section 105 of the MMA provides that "[b]efore filing . . . a motion to terminate" or sunset the ASCAP or BMI Consent Decree, "the Department of Justice shall … notify" the House and Senate Judiciary Committees and provide them with a written impact report.[23] That report must include "information regarding the impact of the proposed termination on the market for licensing the public performance of musical works" as well as "an explanation of the process used by the Department of Justice to review the consent decree" and "a summary of public comments received by the Department of Justice during the review by the Department."[24]

Although the MMA does not include a specific process for preparing this impact report, it is imperative that the report include a thoughtful and reasoned analysis of the consequences that

[23] Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3,676, 3,727, § 105(c)(1) (2018).
[24] *Id.*

inevitably would arise as a result of the elimination of a system of competitive protections embodied by the Consent Decrees that have been in place for nearly a century. For this reason, the NRBMLC urges the DOJ to take a measured and careful approach to ensure that the DOJ's ultimate impact report to lawmakers is supported by a considered legislative process that Congress has approved.

Public input on what this new regime might look like is also a critical ingredient of any orderly transition away from the current Consent Decree environment. As indicated below, the present 65-day window for public input sought by this DOJ Request is wholly inadequate to address the details of an unnecessary – and, at this point, completely unknown – new licensing regime.

3.2 The 65-Day Comment Period Granted by the DOJ Is Insufficient To Assess the Impact of Cataclysmic Changes to the Competitive Music Licensing Landscape that Would Result from Abolition of the Decrees.

The DOJ has established a period of only 65 days for the submission of voluntary comments to the DOJ Notice. This time period was extended from an original comment period of only 35 days after several music licensee representatives submitted requests for additional time.[25]

The time period offered is not nearly sufficient for impacted parties to (a) analyze the effects of such a significant change in the music licensing industry or (b) use such an analysis in public comments. The 65-day comment period also is inconsistent with the process implemented by the federal government when dealing with other complex regulatory areas.[26]

One key flaw with the DOJ Notice's inadequate comment period is that it precludes impacted parties from (a) meaningfully researching and analyzing the impact of the possible removal of the Consent Decrees and (b) evaluating the nature and function of the as-yet unknown new licensing regime. In other words, the NRBMLC and all other music licensees are effectively being forced by the DOJ to book passage today on an *unseen* ship that is heading to an *undisclosed* location without any information about whether another ship (or possibly even an "airplane" taking the form of a ready to board, comprehensive legislative replacement to the Consent Decrees) will be available for more effective and competitively priced travel in the future.

CONCLUSION

The Consent Decrees play vital roles in regulating the competitive landscape in licensing the public performance of musical compositions and have been relied upon by decades by stakeholders. Key protections – including immediate licensing upon request, judicial resolution

[25] "The period for public comment ends August 9, 2019 . . . . The original 35 day comment period is now extended to 65 days." *See* https://www.justice.gov/atr/antitrust-consent-decree-review-ascap-and-bmi-2019.
[26] Federal Trade Commission, Timing is Everything: The Model Timing Agreement (Aug. 7, 2018), https://www.ftc.gov/news-events/blogs/competition-matters/2018/08/timing-everything-model-timing-agreement (FTC merger approvals – 90 days after substantial compliance); https://www.fcc.gov/document/fcc-releases-restoring-internet-freedom-order (FCC broadband matter – 120 days).

of fee disputes under a "competitive market" standard, the guarantee of alternative forms of license that enable licensees to reduce their fees by direct licensing or reducing their music use – should be maintained and strengthened. In addition, parallel competitive protections should be imposed on SESAC and GMR, which, despite their much smaller size, have "must have" catalogs for the vast majority of radio stations and repeatedly have abused their market power by demanding fees that are far higher than their market shares would warrant and by threatening lawsuits when music users do not accede to their anticompetitive demands. The Department should proceed slowly and with great caution in changing the status quo and should ensure that comparable competitive protections – through legislation or otherwise – are first in place before materially modifying or terminating the Consent Decrees. Piecemeal antitrust litigation and settlements simply are insufficient to ensure competition in this highly concentrated industry.

The NRBMLC appreciates the Justice Department's consideration of these comments and looks forward to working with the Department on these important issues.

Respectfully submitted,

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